XXVI

Conversion From Hinduism, Khojas, Cutchi Memons And Some Others

§ 582. KHOJAS AND CUTCHI MEMONS (THE WHOLE OF THIS SECTION IS SUBJECT TO THE PROVISIONS OF THE SHARIAT ACT 1937)[1]

(1) In the absence of proof of special usage to the contrary, Khojas and Cutchi Memons in the Bombay state are governed, in matters of inheritance and succession, by Hindu law; in other matters, they are governed by the Mohammedan law.[2]

The only special usage opposed to the Hindu law of succession hitherto recognised, is the usage of the Khojas, according to which the mother is entitled to management of property and letters of administration in preference to the childless widow or sister of the deceased.[3]

(2) It is now well-established, that the theory of joint Hindu family does not apply at all to Khojas and Cutchi Memons and that neither a Khoja,[4] nor a Cutchi Memon son,[5] acquires any interest by birth in property inherited by his father from his ancestors.

1 See *Mulla's Mahomedan Law*.

2 *Khoja's and Memon's* case (1847) Perry OC 119; *Shivji Hasam v Datu Mavji* (1875) 12 Bom HC 281 (Khojas); *Ashabai v Haji Tveb* (1885) 9 Bom 115 (Cutchi Memons); *Mahomed Sidick v Haji Ahmed* (1886) 10 Bom 1 (Cutchi Memons); *Adv-Gen v Kannali* (1905) 29 Bom 133, 148; *Jan Mahomed v Datu* (1914) 38 Bom 449, 22 IC 195, AIR 1914 Bom 59; *Abdurahim v Halimabai* (1916) 43 IA 35, 18 Bom LR 635, 32 IC 413, AIR 1915 PC 86; *Mangaldas v Abdul* (1914) 16 Bom LR 224, 23 IC 565, AIR 1914 Bom 17; *Advocate-General v Jimbabai* (1917) 41 Bom 181, 31 IC 108, AIR 1915 Bom 151. Reference may also be made to *Abdul Hameed v Provident Investment Co Ltd* (1954) Mad 939, AIR 1954 Mad 961 (FB).

3 *Re Rahimbhai* (1875) 12 Bom HC 294 (Khojas).

4 *Jan Mohomed v Datu* (1914) 38 Bom 449, 22 IC 195, AIR 1914 Bom 59.

5 *Mangaldas v Abdul* (1914) 16 Bom LR 224, 23 IC 565, AIR 1914 Bom 17; *Advocate-*

continued on the next page

As regards the joint family system among Khojas and Cutchi Memons, the decisions were not quite clear.[6]

The Khojas and Cutchi Memons were originally Hindus. They became converts to Mohammedanism about 500 years ago, but retained the Hindu law of inheritance and succession. Hence, the Hindu law of inheritance and succession is applied to them in the Bombay state on the ground of custom. Note that customs overriding Mohammedan law are recognised by 37 Geo III, c 142, s 13, read with 4 Geo IV, c 71, s 9 (for Bombay) and by Bombay Regulation IV of 1827, s 26 (for the Mufassal of Bombay).

The following is a synopsis of decided cases:

1. Khoja Cases

(i) The daughters of a deceased coparcener are entitled against the surviving coparceners to no more than maintenance until marriage, and to marriage expenses, as among Hindus.[7]

(ii) A bequest in favour of *dharam* is void. However, the word 'charity' in a Khoja will, be made in the English does not necessarily mean '*dharam*'.[8]

(iii) By the custom of Khojas when a widow dies intestate and without issue, property acquired by her deceased husband does not descend to her blood relations, but to the relations of her deceased husband.[9]

Note.—The same was the rule of Hindu law in cases where the marriage is in an approved form.

(iv) *Shivji v Datu* is cited in sub-§ (2).[10]

(v) *Re goods of Rahimbhai*: This case is cited in sub-§ (1).[11]

(vi) There is no special usage prevailing among Khojas entitling a sister to succeed in preference to a widow.[12]

(vii) *Ahmedbhoy v Cassumbhoy*, is cited in sub-§ (2).[13]

General v Jimbabai (1917) 41 Bom 181, 31 IC 108, AIR 1915 Bom 151; *Haji Oosman v Haroon* (1923) 47 Bom 369, 68 IC 862, AIR 1923 Bom 148.

6 *Ahmedbhoy v Cassumbhoy* (1889) 13 Bom 534 (Khojas), (1885) 9 Bom 115 (Cutchi Memons); *Mahomed Sidick v Haji Ahmed* (1886) 10 Bom 1 (Cutchi Memons); *Re Haroon Mahomed* (1890) 14 Bom 189, 194 (Cutchi Memons); *Shivji v Datu* (1875) 12 Bom HC 281.

7 *Khojas and Memon's* case (1847) Perry OC 110.

8 *Gangabai v Thavar Mullas* (1863) 1 Bom HC 71.

9 *Re goods of Mulbai* (1866) 2 Bom HC 292.

10 (1875) 12 Bom HC 281.

11 (1875) 12 Bom HC 294.

12 *Rahimbatbai v Hirbai* (1879) 3 Bom 34.

13 (1889) 13 Bom 534.

(viii) The widow of a deceased Khoja is entitled to maintenance out of his property.[14] In this case, the court applied Mayukha, in determining the rights of the parties.

(ix) In *Advocate-General v Karmali*,[15] it was said that the will of a Khoja is to be construed on the basis of the testator having the testamentary powers of a Hindu. However, the matter is not free from doubt.[16]

(x) A Khoja is not a Hindu within the meaning of the Hindu Wills Act 1870.[17]

(xi) A gift to a class, some of whom are not in existence at the death of the testator, is not void in its entirety. The gift in such a case ensures for the benefit of those members of the class who were in existence at the testator's death.[18]

(xii) Khojas who had migrated to the former State of Hyderabad are governed by Mohammedan law.[19]

2. Cutchi Memon Cases

(i) A Cutchi Memon is not a Hindu within the meaning of the Hindu Wills Act 1870.[20]

(ii) *Ashabai v Haji Tyeb* is cited in sub-§ (2).[21]

(iia) In *Abdul Hameed v Provident Investment Co Ltd*, the parties claimed to be governed by Hindu law and the case was considered on that basis.[22]

(iii) A bequest in favour of an unborn person is void.[23]

(iv) *Mahomed Sidick v Haji Ahmed* is cited in sub-§ (2).[24]

(v) *Re Haroon Mahomed* is cited in sub-§ (2).[25]

(vi) When a Cutchi Memon testator bequeathed the residue of his property to his heirs, to be divided among them 'according to Mohammedan law', it was held that the heirs including the

14 *Rashid v Sherbanoo.* (1905) 29 Bom 85.
15 (1905) 29 Bom 133, 148–49; *Sallay Mahomed v Lady Janbai* (1901) 3 Bom LR 785.
16 *Hassonally v Popatlal* (1913) 37 Bom 211, 214–15, 17 IC 17; *Mangaldas v Abdul* (1914) 16 Bom LR 224, 231, 23 IC 565, AIR 1914 Bom 17; *Advocate-General v Jimbabai* (1917) 41 Bom 181, 31 IC 108, AIR 1915 Bom 151 (a Khoja case).
17 *Abdul Karim v Karmali* (1920) 22 Bom LR 708, 58 IC 270, AIR 1920 Bom 140.
18 *Advocate-General v Karmali* (1905) 29 Bom 133.
19 *Noorbanu v Dep Cust General* AIR 1965 SC 1937.
20 *Haji Ismail, Re will of* (1882) 6 Bom 452.
21 (1885) 9 Bom 115.
22 (1954) Mad 939, AIR 1954 Mad 961 (FB).
23 *Abdul Cadur v Turner.* (1885) 9 Bom 158.
24 (1886) 10 Bom 1.
25 (1890) 14 Bom 189.

testator's widow, took their respective share absolutely, and that she did not take merely a Hindu widow's estate in the property that came to her share.[26]

(vii) For the purposes of succession to the *stridhana* of a Cutchi Memon woman, her marriage, though performed according to the Mohammedan rites, is deemed to be in the approved form. In this case, the court applied Mayukha.[27]

(viii) A Cutchi Memon widow is entitled to maintenance out of the estate of her deceased husband, and a Cutchi Memon daughter is entitled to maintenance and marriage expenses out of the estate of her father, though he might have left a will which is silent about maintenance and marriage expense.[28]

(ix) As among Hindus, so among Cutchi Memons, an heir who gets into possession of the estate is not bound to pay the creditors rateably as under s 323. Indian Succession Act 1928.[29]

(x) As regards maintenance, Cutchi Memons are governed by the Mohammedan law.[30]

(xi) A Cutchi Memon son does not acquire by birth an interest in property inherited by his father from his ancestors.[31]

(xii) A Cutchi Memon in Bombay may dispose of the whole of his property by will. A Cutchi Memon will is to be interpreted according to Mohammedan law.[32] However, see xiv.

(xiii) Hindu law of joint family property is not applicable to Cutchi Memons. Same ruling as in xi.[33]

(xiv) The will of a Cutchi Memon is to be construed according to the rules of Hindu law.[34]

3. Other Cases

Memons of Mombasa

Where Memons migrate from India and settle among Mohammedan (eg in Mombasa), the presumption that they have adopted the Mohammedan custom of succession should be readily made. The analogy in such a case is rather a proof of a change of domicile than a change of custom.[35]

26 *Hoorbai v Sooleman* (1901) 3 Bom LR 790.
27 *Moosa v Haji Abdul* (1906) 30 Bom 197.
28 *Haji Saboo Sidick v Ayeshabai* (1903) 27 Bom 485, 30 IA 127.
29 *Haji Saboo Sidick v Ally Mahomed* (1906) 30 Bom 270.
30 *Mahomed Jusab v Haji Adam* (1913) 37 Bom 71, 15 IC 520.
31 *Mangaldas v Abdul* (1914) 16 Bom LR 224, 23 IC 565, AIR 1914 Bom 17.
32 *Advocate-General v Jimbabai* (1917) 41 Bom 181, 283, 31 IC 108, AIR 1915 Bom 151.
33 *Haji Oosman v Haroon* (1923) 47 Bom 369, 68 IC 862, AIR 1923 Bom 148.
34 *Abdulsakur v Abubakkar* (1930) 54 Bom 358, 127 IC 401, AIR 1930 Bom 191; *Abdulsattar Ismail v Abdul Hamid Sait* (1945) ILR Mad 276.
35 *Abdurahim v Halimabai* (1916) 43 IA 35, 18 Bom LR 635, 32 IC 413, AIR 1915 PC 86.

Halai Memons of Porbandar in Kathiawar

Halai Memons of Porbanbar in Kathiawar follow Hindu law in matters of succession and inheritance, and not Mohammedan law, differing in that respect from Halai Memons of Bombay:[36]

Halai Memons of Morvi in Kathiawar

Halai Memons of Morvi in Kathiawar, who have settled at Nadiad in the Kaira district, are governed by Hindu law and not Mohammedan law, in matters of inheritance, succession and wills.[37]

Sunni Bohras of Gujarat and Molesalam Girasias of Broach

Sunni Bohras of Gujarat & Molesalam Girasias of Broach are governed by the Hindu law in matters of succession and inheritance. These communities were originally Hindus, and became subsequently converts to Mohammedanism.[38]

Sunni Bohras of Borsad

Sunni Bohras of Borsad cannot be differentiated from Sunni Bohras of Gujarat. The presumption is that they are governed by the Hindu law of inheritance and succession as applicable to a separated person. There is no presumption that the law relating to joint family is applicable to them.[39]

Most of the cases cited above were reviewed by Beaman J in *Jan Mahomed v Datu*.[40]

§ 583. THE CUTCHI MEMONS ACT 1920

It is now provided by the Cutchi Memons Act 1920, and the Cutchi Memons (Amendment) Act 1923, that any person who satisfies the prescribed authority:

(a) that he is a Cutchi Memon and is the person whom he represents himself to be;

(b) that he is competent to contract within the meaning of s 11 of the Indian Contract Act 1872; and

36 *Khatubai v Mahomed* (1923) 50 IA 108, 47 Bom 146, 72 IC 202, AIR 1922 PC 414 affirming *Mahomed Haji Abu v Khatubai* (1919) 43 Bom 647, 51 IC 513, AIR 1918 Bom 39 (Porbandar); *Aisha Bee v Noor Mohamed* (1932) 10 Rang 416, 140 IC 143, AIR 1932 Rang 179 (Gondal).

37 *Adambhai v Allarakhia* (1935) 37 Bom LR 686, AIR 1935 Bom 417.

38 *Bai Baiji v Bai Santok* (1896) 20 Bom 53; *Fatesangji v Harisangji* (1896) 20 Bom 181; *Hajarkhan v Kesarkhan* AIR 1968 Guj 229.

39 *Bai Sakar v Vora Ismail* (1936) 60 Bom 919, 38 Bom LR 1034, 167 IC 380, AIR 1937 Bom 65.

40 (1914) 38 Bom 449, 22 IC 195, AIR 1914 Bom 59.

(c) that he is resident in India;

may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of this Act, and thereafter, the declarant and all his minor children and their descendants shall in matters of succession and inheritance be governed by the Mohammedan law.

A similar Act known as the Shariat Act has been passed with reference to all Muslims in India providing for the application of the personal law of Muslims instead of customary law (Act 26 of 1937).[41]

41 See *Mulla's Mohammedan Law*.

XXVII
IMPARTIBLE PROPERTY

LAW PRIOR TO THE HINDU SUCCESSION ACT 1956

Note.—The Hindu Succession Act 1956, has brought about radical changes in the rules of Hindu law relating to impartible property. Only estates which descend to a single heir by the terms of any covenant or agreement, entered into by the ruler of any Indian state with the Government of India, or by the terms of any enactment passed before the commencement of the Act, are exempted from the operation of the general law relating to succession and inheritance. In §§ 584–95, the law has been stated as it stood prior to the coming into force of the Hindu Succession Act 1956, under the decided cases.

§ 584. IMPARTIBLE PROPERTY

(1) Property, although partible by nature, may, by custom, or by the terms of a grant by the government, be impartible, in the sense, that it always devolves on a single member of the family to the exclusion of the other members.

(2) An impartible estate may be ancestral, or it may by self-acquired. The following are instances of impartible properties:

(1) ancient *zamindaries*, which partake of the nature of a *raj* or sovereignty;

(2) *zamindaries* which descend to a single member by special family custom;[1]

(3) palayams in the Madras state;[2]

1 *Baijnath v Tej Bali Singh* (1921) 48 IA 195, 43 All 228, 60 IC 534, AIR 1921 PC 62.

2 *Kachi v Kachi* (1905) 28 Mad 508, 32 IA 261.

(4) royal grants of revenue for services, such as *jagirs*[3] and *saranjams*[4] in Bombay;

(5) service tenures such as *Digwari* tenure,[5] and tenures attached to village offices in Madras.[6]

The discontinuance of services attached to an impartible *watan* does not make it partible.[7] See also Bengal Regulations 11 of 1793 and 10 of 1800.

The government has power in India by a grant of lands, to limit their descent in any way it pleases, but a subject has no power to impose upon lands, or other property any limitation of descent at variance with the ordinary law applicable.[8]

When such an estate is acquired by the government, and compensation is paid, the compensation received, retains the incident of impartibility.[9]

A grant of *jagir* is impartible and is governed by the role of primogeniture, where the succession is governed by lineal decendency and the rule of coparcenary would not be applicable.[10] The rule of primogeniture applies to an Indian ruler's estate and the decendency is lineal. This rule applies to all properties except properties held by such ruler in his capacity otherwise than that of a ruler, this has however got to be asserted and proved.[11] There was some legislation in relation to impartible estates in Madras (see Madras Impartible Estates Act 1904. Now see s 5 Hindu Succession Act 1956).

§ 585. PROPERTY IMPARTIBLE BY CUSTOM

When there is a dispute with respect to an estate being impartible or otherwise, the onus of proof lies on the party, who alleges the existence of a custom different from the ordinary law of inheritance, according to which the estate is to be held by one member and as such not liable to partition.[12] The custom must be ancient and invariable, and established by clear and unambiguous evidence.

3 See *Raghojirao v Lakshmanrao* (1912) 36 Bom 639, 39 IA 202, 16 IC 239, *Dattatraya v Krishna Rao* AIR 1991 SC 1972.

4 *Ramchandra v Venkatrao* (1882) 6 Bom 598; *Narayan v Vasudeo* (1891) 15 Bom 247.

5 *Durga Prasad Singh v Braja Nath Bose* (1912) 39 Cal 696, 39 IA 133, 15 IC 219.

6 *Bada v Hussu Bhai* (1884) 7 Mad 236.

7 *Radhabai v Anantrav* (1885) 9 Bom 198 (service *vatan*); *Mahatabsingh v Badansingh* (1921) 48 IA 446, 461, 48 Cal 997, 64 IC 194, AIR 1922 PC 146.

8 *Rajindra v Raghubans* (1918) 45 IA 134, 40 All 470, 48 IC 213, AIR 1918 PC 25; *Ramrao v Yeshwantrao* (1886) 10 Bom 327 (Deshpande *vatan*).

9 *Rangarao v State of Madras* (1953) Mad 479, AIR 1953 Mad 185.

10 *Dattatraya v Krishna Rao* AIR 1991 SC 1972.

11 *Pratap Singh v Sarojini Devi* 1994 (Supp) 1 SCC 734.

12 *Chattar Singh v Roshan Singh* (1946) Nag 159.

Only an estate of considerable age can be considered as being governed by an ancient and invariable custom; it is doubtful, whether an estate of which the origin dated back only to 1796 could be regarded as the settlement in 1863 as being so governed.[13] As to custom, family custom and proof of custom see §§ 16–20.

A settlement or re-grant by the British government, of an estate which existed before the British rule, must be presumed, in the absence of evidence to the contrary, to continue previously existing incidents of impartibility and descendibility to a single heir.[14]

§ 586. ACCRETIONS TO IMPARTIBLE PROPERTY

It is open to the holder of an impartible estate to incorporate any self-acquired property of his with the estate, but an intention to do so either expressed or implied, must be established,[15] and whereas in the case of a lunatic, he is incapable of expressing his intention, the court has to consider what is beneficial to him.[16] The income of an ancestral impartible joint estate is not so affected by its origin that it should be assumed to accrete to the estate.[17]

The income, when received, is the absolute property of the holder of the estate. It differs in no way from property which he might have gained by his own effort, or acquired in circumstances entirely dissociated from the ownership of the estate. Therefore, the principle applicable to ordinary joint family estate that self-acquired moneys are to be regarded as joint property, if mixed with the money of the joint family, does not necessarily apply to the property acquired by the holder of an impartible estate out of the income.[17]

The right of enjoyment, which is an ordinary incident of coparcenary property, where the joint estate is partible, is excluded by the rule of primogeniture and impartibility. The income of an impartible estate and its accumulations are the absolute property of the holder.[18]

13 *Martand Rao v Malhar Rao* (1928) 55 IA 45, 55 Cal 403, 107 IC 7, AIR 1928 PC 10.

14 See above.

15 Also see *Mahendrasingbji v Iswarshingh* (1952) Bom 615, AIR 1952 Bom 243, (1952) 54 Bom LR 99.

16 *Someshwari Prasad v Maheshwari Prasad* (1936) 63 IA 441, 16 Pat 1, 165 IC 347, AIR 1936 PC 332.

17 *Jagadamba Kumari v Narain Singh* (1923) 50 IA 1, 2 Pat 319, 77 IC 1041, AIR 1923 PC 59; *Janki Prasad v Dwarka Prasad* (1913) 40 IA 170, 181, 35 All 391, 401, 20 IC 73; *Murtaza Khan v Muhomed Yasin* (1916) 43 IA 269, 281, 38 All 552, 567, 36 IC 299, AIR 1916 PC 89; *Srimati Parbati v Jagadish Chunder* (1902) 29 Cal 433, 453; 29 IA 82, 98; *Raja of Vizianagram v Visbweshwar* AIR 1955 Mad 219; *Jitendra Pratap v Bhagwati Prasad* AIR 1956 Punj 457; *Hargovind Singh v Collector of Etah* (1937) All 292, 169 IC 744, AIR 1937 All 377; *Aparna v Sree Shiba Prasad* AIR 1924 Pat 451 (arrears of rent); *Dattatraya v Krishna Rao* AIR 1991 SC 1972.

18 *Dattatraya v Krishna Rao* AIR 1991 SC 1972.

Whether any immovable property acquired out of the income has been incorporated with the impartible estate, depends on the intention of the holder, but movable property such as the income of the impartible estate, cannot be so incorporated.[19] This, however, does not mean that by a family custom, family property cannot be treated as impartible. If a family custom is proved that certain category of movable property is treated by the family as impartible (eg jewels worn on ceremonial occasions), that custom would be recognised.[20] As to the doctrine of incorporation, reference may by made to the decision of the Supreme Court in *Pushpavathi v Vijayaram* infra.

§ 587. IMPARTIBLE PROPERTY: WHETHER COPARCENARY PROPERTY

The incidents of impartible estate were stated by the Privy Council in *Rani Prayag Kumari Devi*'s case,[21] and as the Supreme Court observed in *Thyagasundardoss v Sevuga Pandia*[22] a full statement of the law on the subject is to be found there. The law as there stated, was reaffirmed in subsequent decisions of the Privy Council. Some of the rules relating to the nature and incidents of an impartible estate and the right of survivorship were summarised by the Supreme Court in *Krishna v Sarvagna Krishna*.[23] An impartible estate is not held in coparcenary, though it may be joint family property.[24]

However, at times, it is referred to as coparcenary and a distinction is drawn between present rights, ie, the right to demand a partition and the right to joint enjoyment, and future rights. In the case of an impartible estate, the right to partition and the right of joint enjoyment are from the very nature of the property incapable of existence, and there is no coparcenary to this extent. No coparcener, therefore, can prevent alienations of the estate by the holder for the time being either by gift or by will (§ 588), nor is he entitled to maintenance out of the estate (§ 589). However, as regards future rights, ie, the right to survivorship, the property is to be treated as coparcenary property, so that on the death intestate of the last holder, it will devolve by survivorship according to the rules

19 *Shibaprasad Singh v Prayag Kumari Debee* (1932) 59 Cal 1399, 59 IA 331, 138 IC 861, AIR 1932 PC 216; *Dattatraya v Krishna Rao* AIR 1991 SC 1972.

20 *Pushpavathi Vijayaram v Pushpavathi Visweswar* AIR 1964 SC 118; *Thakur Hari Singh v IT Comm* AIR 1968 Raj 5 (crown grant—Marwar Land Revenue Act).

21 *Shibaprasad Singh v Prayag Kumari Debee* AIR 1932 PC 216.

22 AIR 1965 SC 1730; *Pushpavathi v P Vishweswar* AIR 1964 SC 118. Also see *Nagesh Bisto v Khando Tirmal* AIR 1982 SC 887, 894–95.

23 AIR 1970 SC 1795. Reference may also be made to *State of Uttar Pradesh v Rukmini Raman* AIR 1971 SC 1687 (maintenance and survivorship).

24 *Anant Bhikappa Patil v Shankar Ramchandra Patil* (1943) 70 IA 232.

stated in § 591.[25] The rights of a junior member to succeed to the estate by survivorship is not a mere *spes successionis*, but a right of property which can be transferred.[26]

The right of survivorship is not affected by the impartible nature of the property, so that if the families were joint and the last holder died intestate, the estate would devolve by survivorship according to the rules stated in § 591. A member of such impartible joint estate may renounce his rights of succession, but such renunciation must be in favour of all the members or of the head of the family as representing all the members.[27] In *Chinnathaji*'s case,[28] it was reiterated, that to establish that an impartible estate has ceased to be joint family property for purposes of succession, it is necessary to prove an intention express or implied, on the part of the junior members of the family to give up their chance of succession to the estate. The test to be applied is whether the facts show a clear intention to renounce or surrender any interest in the impartible estate or a relinquishment, if the right of succession and intention to impress upon the estate (*zamindari*) the character of separate property.

The right to bring about a partition cannot be inferred from the power of alienation that the holder of the impartible estate may possess. From the existence of the one power, the other cannot be deduced, as it is destructive of the very nature and character of the estate.

It is a trite proposition, that property though impartible, may be ancestral property of the joint family. The impartibility of the property does not per se destroy its nature as joint family property, or render it the separate property of the last holder, so as to destroy the right of survivorship; hence, the estate retains its character of joint family property and devolves by the general law, upon the person who being in fact and in law joint in respect of that estate is also the senior member in the senior line.[29] It is not a correct proposition to say that the junior member of a joint family in the case of an ancient impartible joint estate takes no right in the property by birth and therefore has no right of partition having regard to the very character of the estate that it is impartible.[30]

25 *Baijnath v Tej Bali Singh* (1921) 48 IA 195, 211–13, 43 All 228, 60 IC 534; *Konammal v Annadana* (1928) 55 IA 114, 51 Mad 189, AIR 1928 PC 68. Also see *Naraganti v Venkatachalapati* (1882) 4 Mad 250, 266; approved in *Kachi Kalitana v Kachi Yuva* (1905) 32 IA 261, 28 Mad 508; and *Baijnath v Tej Bali Singh* (1921) 48 IA 195, 43 All 228, 60 IC 534, AIR 1921 PC 62.

26 *Sellapa v Suppan* (1937) Mad 906, 171 IC 216, AIR 1937 Mad 496.

27 *Chinnathayi v Kulasekarapandia* (1946) Mad 599.

28 *Chinnathayi v Kulasekara Pandiya Naicker* [1952] SCR 241, (1952) SC 29. Also see *Dattatraya v Krishna Rao* AIR 1991 SC 1972.

29 *Nagesh Bisto v Khando Tirmal* AIR 1982 SC 887, 875 (per A P Sen J).

30 See above. This was a case of watan lands and some provisions of Bombay Pargana and Kulkarni *Watans* Abolition Act (60 of 1950) and allied acts came up for consideration.

§ 588. ALIENATION OF IMPARTIBLE PROPERTY

The impartibility of an estate, does not as a matter of law, make it inalienable. The holder of an impartible estate has power to alienate the estate, though ancestral, by gift or by will, unless the power of alienation is excluded by special family custom or by the nature of the tenure.[31] In *Thakare Shri Vinayasinghji v Kumar Shri Natwarsinhji*, the Supreme Court has also held that the holder of an impartible estate has the power of alienation not only by transfer, inter vivos, but also by a will, even though the disposition by will may altogether defeat the right of survivorship of the joint members of the family. The absence of any instance, in which a previous holder has alienated the estate by gift of will, is not by itself sufficient evidence to establish such a custom.[32] The whole concept of impartibility, it may be noted, is a creature of custom.[33]

Where the estate is by custom inalienable, the holder cannot alienate it except for legal necessity (§ 528).[34]

Soon after some of the Privy Council decisions referred to above, the Madras legislature stepped in, because they rudely disturbed the view held in Madras on the subject of alienations and passed the Madras Impartible Estate Acts of 1902, 1903 and 1904 and the Arni Jagir Act 1909. The result of those Acts is that the question of alienability of impartible estates does not depend in Madras on family custom but is governed by those statutes. Reference may be made to decisions under those Acts. Reference may also be made to the Madras Impartible Estate (Abolition and Conversion into Ryotwari) Act, 26 of 1948.[35]

§ 589. RIGHT TO MAINTENANCE OUT OF IMPARTIBLE PROPERTY

(1) No coparcener has any present rights in an impartible estate (§ 587). Apart, therefore, from custom and relationship to the holder, the junior members of the family have no right to maintenance out of such estate.[36]

31 *Sartaj Kuari v Deoraj Kuari* (1888) 15 IA 51, 10 All 272 (gift); *Sri Raja Rao Venkata Surya v Court of Wards* (1899) 26 IA 83, 22 Mad 383; *Protap Chandra v Jagadish Chandra* (1927) 54 IA 289, 54 Cal 955, 102 IC 599, AIR 1927 PC 159; *Raja Madhusudan v Kheshtabasi* (1929) 8 Pat 932, 121 IC 462, AIR 1930 Pat 137, where it was held dissenting from *Gopal Prasad v Raghunath* (1905) 32 Cal 158, that the Killajat Mahal of Orissa known as Patia Killah was alienable, *Rao Bhim Singh v Fakir Chand* (1947) Nag 649. Also see *Thyagsundardoss v Seruga Pandia* AIR 1965 SC 1730 (will—on construction held to be absolute estate)

32 *Protap Chandra v Jagadish Chandra* AIR 1927 PC 159; *Thakare Shri Vinayasinhji v Kumar Shri Natwarsinhji* 1988 (Supp) SCC 133.

33 *Thakare Shri Vinayasinhji v Kumar Shri Natwarsinhji* supra.

34 *Gopal v Raghunath* (1905) 32 Cal 158.

35 *Pushpavathi v P Visweswar* AIR 1964 SC 118.

36 *Raja Rama Rao v Raja of Pittapur* (1918) 45 IA 148, 41 Mad 778, 47 IC 354, AIR 1918 PC 81; affirming *Sri Rajah Row v Rajah of Pittapur* (1916) 39 Mad 396, 29 IC 356, AIR 1916 Mad 27; *Protap Chandra v Jagadish Chandra* (1927) 54 IA 289, 54 Cal 955, 102 IC 599, AIR 1927 PC 159.

The judicial committee has held that the illegitimate sons of a junior member are not, under the law, entitled to maintenance.[37]

In the above case, it was also held that the words '*purusha santhathi*' either by way of *aurasa*, or by way of adoption' in a deed of maintenance do not include an illegitimate son.

(2) Where an impartible estate is held as ancestral or joint family property, the sons of the holder thereof are entitled, by custom, to maintenance out of the estate. This custom has so often been judicially recognised, that it is not necessary to prove it in each case.[38] However, where the impartible property is the self-acquired property of the holder, his son is not entitled to maintenance out of it.[39] As regards maintenance of wife, see *Chandrakunverba v Randhirsinhji*.[40]

(3) There is no invariable custom by which any member of the family beyond the first generation from the last holder (eg, the last holder's grandsons, can claim maintenance as of right.[41]

Grants made out of the revenues of an impartible estate for the maintenance of the junior members of the family and their direct male line, revert, on the death of the last male heir of the grantee, to the estate.[42]

Succession to Impartible Estate

§ 590. GENERAL PRINCIPLES

(1) The general principles in regard to succession to an impartible estate are well established. The first principle is that the succession is governed by the rules, which govern the succession to partible property, subject to such modifications only as flow from the character of the property as an impartible estate. The second principle is that the only modification

37 *Raja Velugoti Sarvagna Kumara Krishna Yachendra Bahadur Varu v Raja Rajeswara Rao and ors* (1942) Mad 419, 198 IC 166, 68 IA 181, AIR 1942 PC 3; *Chelladorai v Chinnathambar* (1960) Mad 880, AIR 1961 Mad 42 (custom).

38 *Sri Rama Rao v Raja of Pittapur* (1921) 45 IA 148, 41 Mad 778, 47 IC 354, AIR 1918 PC 81; *Sartaj Kuari v Deoraj Kuari* (1888) 15 IA 51, 10 All 272; *Raja Yarlagadda v Yarlagadda* (1900) 27 IA 151, 24 Mad 147; *Kachi Kalitana v Kachi Yuva* (1905) 32 IA 261, 28 Mad 508.

39 *Subbayya Thevar v Marudappa Pandian* (1937) Mad 42, AIR 1936 Mad 828; *Hargovind Singh v Collector of Etah* (1937) All 292, 169 IC 744, AIR 1937 All 377.

40 *Chandrakunverba v Randhirsinhji* AIR 1965 Guj 270.

41 *Raja Rama Rao v Raja of Pittapur* 45 IA 148, 41 Mad 778, 47 IC 354, AIR 1918 PC 81; *Nilmony v Hingoo Lall* (1880) 5 Cal 256, 259. In Madras, the rule is now modified by the Madras Act XI of 1934.

42 See *Durgadut v Rameshwar* (1909) 36 IA 176, 36 Cal 943, 4 IC 2 (*babuana* grant; *Ekradeshwar v Janeshwari* (1914) 41 IA 275, 42 Cal 582, 25 IC 417, AIR 1914 PC 76 (*sohag* grant); *Someshwari Prasad v Mahaeshwari Prasad* (1936) 63 IA 441, 16 Pat 1, 165 IC 347, AIR 1936 PC 332.

which impartibility suggests in regard to the right of succession is the existence of a special rule for the selection of a single heir when there are several heirs of the same class, who would be entitled to succeed to the property if it were partible under the general Hindu law. The third principle is that, in the absence of a special custom, the rule of primogeniture furnishes a ground of preference. In determining the single heir, we have first to ascertain the class of heirs, who would be entitled to succeed to the property if it were partible, regard being had to its nature as joint or separate property, and we have next to select the single heir, applying the special rule.[43] These principles were reiterated in *Dayaram v Dawlatshah*, a decision of the Supreme Court.[44]

(2) *Sons.*—According to the rule of primogeniture, if the last owner dies leaving sons, the eldest son is entitled to succeed. The eldest son is the son who was born first, not the first born son of the senior wife,[45] unless there is a family custom that the sons take rank according to the seniority of their mothers.[46] Therefore, the son of a junior wife succeeds in preference to the later born son of a senior wife, or of the first married wife.

So long as the line of the eldest son continues in possession, the estate will pass in that line. This is to say, on the death of the eldest son, leaving sons, it will pass to his eldest son and not to his brother.[47] As to the effect of adoption in families owing impartible estate on other branches, see §§ 472 and 506.

If an *aurasa* son is born after the adoption, the former alone succeeds to the impartible estate.[48]

(3) *Illegitimate son of a Sudra.*—If the holder of an impartible estate, belonging to the Sudra caste, dies leaving a legitimate son and also an illegitimate son, the legitimate son would be preferred to the illegitimate son; this seems to follow from the fact that on a partition the legitimate son is so largely preferred.[49] If there has been no partition, between the sons, and the legitimate son dies without leaving a male issue, but

43 *Subramanya v Siva Subramanya* (1894) 17 Mad 316, 325, cited with approval in *Parbati Kunwar v Chandarpal Kunwar* (1909) 36 IA 125, 31 All 457, 475–76, 4 IC 25; *Katama Natchiar v Rajah of Shivagunga* (1863) 9 MIA 539, 2 WRPC 31; *Baijnath v Tej Bali Singh* (1921) 48 IA 195, 212, 43 All 228, 224, 60 IC 534, AIR 1921 PC 62; *Muttuvaduganadha Tevar v Periasami* (1896) 23 IA 128, 137, 19 Mad 451, 457; *Raja Jogendra v Nitayanund* (1891) 17 IA 128, 131, 18 Cal 151, 154.

44 AIR 1971 SC 681.

45 *Ramalakshmi v Sivanantha* (1872) 14 MIA 570, 17 WR 553; *Jagdish Bahadur v Sheo Partab* (1901) 28 IA 100, 23 All 369.

46 *Ramasami v Sundaralingasami* (1894) 17 Mad 422; affirmed in *Sundaralingasami v Ramasami* (1899) 26 IA 55, 22 Mad 515.

47 (1894) 17 Mad 422, 434. See illustration § 591.

48 *Shebgouda v Shiddangouda* (1939) Bom 314.

49 *Ramasami v Sundaralingasami* (1894) 17 Mad 422, 434–35.

leaving a widow and daughters, the illegitimate son would, as in the case of partible property, succeed by survivorship in preference to the widow and daughters of the legitimate son.[50] It has been held by the Madras High Court, that in the case of an impartible estate descendible to a single heir, the widow excludes the illegitimate son from inheritance.[51]

(4) *Whole and half-blood.*—Nearness of blood is no ground for preference under the Mitakshara law in case of disputed succession to coparcenary property, which is partible, and it is likewise no ground of preference when such property is impartible. Therefore, in a joint family, an elder brother of the half-blood is entitled to succeed to an impartible ancestral estate in preference to a younger brother of the whole blood. However, the latter would succeed in preference to the former, if the estate was separate or self-acquired property of the last holder,[52] or if the case was governed by the Dayabhaga.[53]

(5) *Fresh stock of descent.*—As in the case of succession to partible property, so in the case of impartible property, each male owner becomes a fresh stock of descent.[54]

§ 591. WHERE ESTATE ANCESTRAL, AND LAST OWNER UNDIVIDED

(1) Where the impartible estate is ancestral, the successor to the estate in a joint family governed by the Mitakshara is designated by survivorship. The estate passes by survivorship from one line to another according to primogeniture, and devolves not on the member nearest in blood, but on the eldest member of the senior branch.[55]

(2) In the absence of custom, a female cannot inherit an impartible ancestral estate belonging to a joint family governed by the Mitakshara, where there are any male members of the family, who are qualified to succeed to the estate.[56] However, where she is the widow of the last

50 See § 312. *Raja Jogendra v Nityanund* (1891) 17 IA 128, 131, 18 Cal 151, 154.

51 *Thangavelu v The Court of Wards, Madras* (1947) Mad 334.

52 *Subramanya v Siva Subramanya* (1894) 17 Mad 316; 17 Mad 422.

53 *Neelkisto Deb v Beer Chunder* (1869) 12 MIA 523, 12 WRPC 21 (*The Tipperah* Raj case).

54 *Muttuvaduganadha Tevar v Periasami* (1896) 23 IA 128, 19 Mad 451.

55 *Baijnath v Tej Bali Singh* (1921) 48 IA 195, 43 All 228, 60 IC 534, AIR 1921 PC 62 affirming 38 All 590, 38 IC 894; *Kachi Kalitana v Kachi Yuva* (1905) 32 IA 261, 28 Mad 508; *Naraganti v Nayanivaru* (1882) 4 Mad 250; *Sahebgouda v Basangouda* (1931) 33 Bom LR 580, 133 IC 847, AIR 1931 Bom 378; *Shibaprasad Singh v Prayagkumari Debee* (1932) 59 Cal 1399, 59 IA 331, 138 IC 861, AIR 1932 PC 216; *Rao Bhimsingh v Fakirchand* (1947) Nag 649.

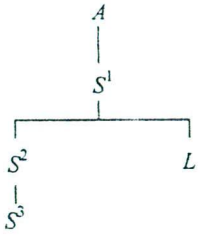
56 *Hiranath Koer v Baboo Ram* (1872) 9 Beng LR 274; *Chowdry Chintamun v Mussmut Nowlukho* (1875) 2 IA 263, 1 Cal 153.

survivor, the law of succession to separate property applies, and she can succeed as in the case of partible property (§ 592).[57]

Illustration

In the accompanying diagram, *A* stands for the last holder; S^1 is his son, S^2 and *L* are two sons of S^1, *L* being the younger of the two; S^3 is the son of S^2. *A* dies leaving S^3 and *L*. S^3, being the surviving member of the senior line, is entitled to succeed in preference to *L*, though *L* is one degree nearer to the common ancestor (*A*) than S^3.[58]

Table XXVII.1



§ 592. WHERE ESTATE ANCESTRAL, BUT LAST OWNER DIVIDED

(1) Where the impartible estate is ancestral, but the last holder was separated, the estate in cases governed by Mitakshara will descend according to the ordinary rules of succession applicable to partible property.[59] Thus, if the last holder dies without leaving a male issue, but leaving a widow, the estate will pass, in the absence of any custom to the contrary, to the widow,[60] and, if there be no widow, to his daughter.[61] If there be none of these, the estate will, if there be no indication to the contrary, descend according to the rule of primogeniture. In that case, if there are more persons than one standing in the same degree of relationship to the last holder, the eldest, if all belong to the same line,

57 See *Sri Rajah Yenumula v Sri Rajah Yenumula* (1870) 6 Mad HC 93, 109.

58 *Baijnath v Tej Bali Singh* (1921) 48 IA 195, 43 All 228, 60 IC 534, AIR 1921 PC 62.

59 *Chuni Lal, Official Receiver v Jai Gopal* (1936) 17 Lah 378, 163 IC 103, AIR 1936 Lah 55.

60 *Thakurani Tara Kumari v Chatturbhuj* (1915) 42 IA 192, 42 Cal 1179, 30 IC 833, AIR 1951 PC 30. See also *Sri Rajya Lakshmi Devi v Sri Raja Surya* (1897) 24 IA 118, 20 Mad 256.

61 See *Mst Parbati Kunwar v Chandrapal Kunwar* (1909) 36 IA 125, 31 All 457, 4 IC 25 (custom applicable both to partible and impartible estates).

and the eldest in the senior branch, if there are more branches than one, will be the preferable heir (§ 43).

The onus of proving a custom excluding females from succession to a separate impartible estate rests upon the person who sets up the custom.[62] Such a custom may not be valid after the Constitution of India came into force in 1950, as arts 14 and 15 thereof guarantee equality before law and non-discrimination on account of sex.

In some cases, another rule of selection and not primogeniture may be the governing rule of the family.[63]

§ 593. PROOF OF SEPARATION WHERE ESTATE ANCESTRAL

In order to establish that an impartible estate has ceased to be joint property for the purpose of succession, it is necessary to prove an intention, express or implied; on the part of the junior members of the family, to give up their chance of succeeding to the estate. A mere separation in general status is not sufficient.[64] The test to be applied is whether the facts show a clear intention to renounce or surrender any interest in the estate or a relinquishment of the right of succession and an intention to impress upon the estate, the character of separate property.[65] Also, see *Dattatraya v Krishna Rao*, a decision of the Supreme Court.[66]

§ 594. WHERE ESTATE SELF-ACQUIRED

Where an impartible estate is self-acquired property, the estate in cases governed by Mitakshara follows the course of succession as to separate property (§ 592), though the last holder was undivided at the time of his death (§ 43).[67]

62 *Amarendra v Banamali* (1931) Pat 1, 123 IC 770, AIR 1930 Pat 417; *Chattar Singh v Roshan Singh* (1946) Nag 159.

63 *Ishri Singh v Baldeo Singh* (1884) 11 IA 135, 10 Cal 792; *Achal Ram v Udai Partab* (1884) 11 IA 51, 10 Cal 511; *Mohesh Chunder v Satrughan* (1902) 29 IA 62, 29 Cal 343.

64 *Konammal v Annadana* (1928) IA 114, 51 Mad 189, 108 IC 354, AIR 1928 PC 68; *Jagadamba Kumari v Narain Singh* (1923) 50 IA 1, 2 Pat 319, 77 IC 1041, AIR 1923 PC 59; *Ram Sundar v Collector of Gorakhpur* (1930) 52 All 793, 126 IC 237, AIR 1930 All 797; affirmed by Privy Council in *Collector of Gorakhpur v Ram Sundar Mal* (1934) 56 All 468, 61 IA 286, 150 IC 545, AIR 1934 PC 157; *Lingappa alias Rayappa v Kadappa Bapurao* (1940) Bom 721, 191 IC 504, AIR 1941 Bom 345.

65 *Chinnathayi v Kulasekara Pandiya Naicker* [1952] SCR 241, (1952) SC 29; *Jitendra Pratap v Bhagwati Prasad* AIR 1956 PC 457; *Gangadhar v Dindayal* (1954) Orissa 57, AIR 1954 Ori 142. Reference may also be made to *Bhaiya Ramanji v Lalu* AIR 1981 SC 1937.

66 AIR 1991 SC 1972.

67 *Katama Natchiar v Rajah of Shivagunga* (1863) 9 MIA 539, 2 WRPC 31; *Periasami v Periasami* (1878) 5 IA 61, 1 Mad 312; *Rao Bhimsbingh v Fakircband* (1947) Nag 649.

Illustration

The holder of an impartible *zamindari* dies leaving a widow and undivided nephews. It is proved that the *zamindari* was his self-acquired property. The widow is entitled to succeed in preference to the nephews.[68]

A Hindu governed by Mitakshara law, who took a vested interest in an ancestral impartible estate under a deed of settlement executed by his father while his elder brother was alive, and before the coming into force of the Madras Impartible Estates Act, took the estate as self-acquired property. His widow succeeds to him as heir in preference to his half-brother.[69]

§ 594A. EXECUTION OF DECREE AGAINST SUCCESSOR

A decree was passed against the holder of an impartible estate for compensation, in lieu of specific performance of a contract, to transfer a part of the estate. It was held that as the decree was passed against the defendant in a representative capacity, it could be executed against his son and successor.[70]

§ 595. DAYABHAGA SCHOOL

In cases governed by Dayabhaga, the heir will be the eldest member of the class of persons which is nearer of kin to the last owner than any other class (§ 88).

68 *Re Shivagenga* (1863) 9 MIA 539.

69 *Ulagalum, Perumal Sethurayar v Rani Subbalakshimi Nachiar* (1939) Mad 443.

70 *Rao Bhimsbingh v Gangaram* (1941) Nag 632, 193 IC 598, AIR 1940 Nag 278 affirmed by the Privy Council in *Rao Bhimsbing v Shersbingh* (1947) Nag 830 (PC).

XXVIII
THE LAW OF *DAMDUPAT*

§ 596. THE RULE OF *DAMDUPAT*

The rule of *damdupat* is a branch of the Hindu law of debts. According to this rule, the amount of interest recoverable, at any one time cannot exceed the principal.[1] See § 600 below for the places in which the rule of *damdupat* applies. In a decision of the High Court of Rajasthan[2] the opinion was expressed that the rule is hit by art 14 of the Constitution. The operation of the rule does not appear to have been questioned in any other state, and it continues to effect places, where it was applied prior to the coming into force of the Constitution. In some states, recent legislation affecting transactions of money-lenders, prohibits recovery of interest in excess of the principal amount.

Illustration

A lends Rs 1,000 to *B* at an interest of 15 per cent per annum. *A* allows the interest to run into arrears, until it amounts to Rs 1,200, ie, until it exceeds the principal (Rs 1,000). *A* then sues *B* to recover Rs 2,200, ie, Rs 1,000 for principal and Rs 1200 for interest. *A* is not entitled to more than Rs 1000 for interest, as that is the amount of the principal. However, if *B* pays *A* Rs 400 for interest before suit, and *A* then sues *B* to recover Rs 1,800, ie, Rs 1,000, for principal and Rs 800 for interest, *A* is entitled to Rs 800 for interest, for it does not exceed the principal Rs 1,000 though he will thereby be getting Rs 1,200 in all for interest. The reason is that the payment of Rs 400 and the payment of Rs 800 would be payments at different times, and all that the rule of *damdupat* says, is that a creditor is not entitled at any one time

1 *Dhondu v Narayan* (1863) 1 Bom HC 47; *Hariram v Madan Gopal* (1928) 33 CWN 493, 497, 114 IC 565, AIR 1929 PC 77. For reason of the rule, see *Gajadhar v Jagannath* AIR 1924 All 551 (FB); *Bapurao v Kasbinath* (1946) Nag 407.

2 *Sheokaranshingh v Daularam* AIR 1955 Raj 201. Also see (1963) ILR Raj 385.

to recover interest exceeding the amount of the principal. The rule of *damdupat* does not say that a creditor shall not in any case be entitled to interest exceeding the principal. The result is that part payments of interest made before a suit cannot be added to the amount of interest claimed in the suit, so as to attract the application of the rule of *damdupat*.

The rule cannot apply to a case of a trustee, who has utilised funds of a temple in his business.[3] A trustee is under a pecuniary liability to make good of trust funds, of which he may personally have made use (breach of trust), but he is not a debtor and cannot benefit by the rule of *damdupat*.[4]

§ 597. WHERE PART OF THE PRINCIPAL HAS BEEN PAID

Where a loan is repayable by instalments, and some of the instalments have been paid, or even where it is not payable by instalments, but a part thereof has been paid, the principal for the purpose of the rule of *damdupat* is the balance of principal remaining due, when the interest claimed in the suit accrued.[5]

Illustration

A lends Rs 200 to *B* at interest at the rate of 10 per cent per annum. The loan is payable by four instalments of Rs 50 each. *B* pays the first three instalments and all interest due thereon. *A* then sues *B* to recover the last instalment of Rs 50 and interest thereon amounting to Rs 65. *A* is not entitled to more than Rs 50 for interest, that being the amount of principal remaining due when the interest accrued. It does not matter that the original principal was Rs 200.

§ 598. CAPITALISATION OF INTEREST BY SUBSEQUENT AGREEMENT

The rule of *damdupat* does not forbid the conversion, by subsequent agreement between the debtor and the creditor, of the interest in arrears into capital. Therefore, when a fresh bond is passed by the debtor for the aggregate amount of the principal and interest due under the old bond, the principal for the purpose of the rule of *damdupat* is the amount of the fresh bond.[6]

3 *Phulchand v Hukumchand* AIR 1960 Bom 438.
4 *Hukum Chand v Fulchand* AIR 1965 SC 1692.
5 *Dagdusa v Ramchandra* (1896) 20 Bom 611; *Nusserwanji v Laxman* (1906) 30 Bom 452, 454, 62 Bom LR 308.
6 *Sukalal v Bapu* (1900) 24 Bom 305; *Nawaneetdas v Gordhandas* AIR 1955 MB 113.

Illustration

B borrows Rs 500 from *A* on interest at the rate of 10 per cent per annum and passes a promissory note to *A* for that amount. No interest is paid by *B* for two years. At the end of the second year, the interest due to *A* is Rs 100. *A* demands Rs 500 plus Rs 100 from *B*. *B* is unable to pay the amount, and he passes a fresh promissory note to *A* for Rs 600, ie, Rs 500 (principal) plus Rs 100 (interest in arrears), promising to pay interest on Rs 600 at the same rate as before. *A* subsequently files a suit against *B* to recover Rs 600, the principal amount secured by the second promissory note, and Rs 550, the interest in arrear on that amount. It was quite competent to *A* and *B* at any time after the date of the first promissory note, to agree that the sum of Rs 100, which represented the interest in arrear, should be treated as capital, so as to carry interest on it. However, if *A* and *B* had agreed, when the original loan of Rs 500 was made, that all interest in arrear should be capitalised and should carry interest on it as if it was a principal sum, the agreement could not affect the operation of the rule of *damdupat*, and *A* would not be entitled to more than Rs 500 for interest.

§ 599. THE RULE OF *DAMDUPAT* DOES NOT APPLY AFTER A SUIT

Where a suit has been instituted to recover a loan, the rule of *damdupat* ceases to operate. The result is that though the court is bound to apply the rule of *damdupat* up to the date of the suit, it is free to award interest to the creditor at such rate, as it thinks proper from the date of the suit, up to the date of decree or payment upon the total amount, that may be found due to him after applying that rule.[7]

The rule of *damdupat* does not apply to interest recoverable in execution of a decree. The reason is that the rule ceases to operate after the suit.[8]

The principle of this section applies not only to a suit brought by a creditor, but to a suit for redemption brought by a mortgagor (debtor).

In a mortgage suit, the relation of creditor and debtor subsists between parties till the date of payment is fixed under the preliminary decree. The

7 Section 34, Code of Civil Procedure 1908, *Dhondshet v Ratji* (1898) 22 Bom 86; *Majmundar Hiralal v Narsilal* (1913) 37 Bom 326, 40 IA 68, 73, 18 IC 909; *Achyut v Ramchandra* (1925) 27 Bom LR 492, 87 IC 719, AIR 1925 Bom 362; *Re Hari Lall* (1906) 33 Cal 1269, 1276; *Nanda Lal v Dhirendra Nath* (1913) 40 Cal 710, 21 IC 974.

8 *Balkrishna v Gopal* (1875) 1 Bom 73; *Lall Bebary v Thacomoney* (1896) 23 Cal 899.

operation of *damdupat* consequently is from the date of mortgage to the date fixed for payment in the preliminary decree. If, on any intermediate date, the limit imposed by the rule of *damdupat* is reached, no further interest can be granted under O 34 r 11, because, the interest cannot be said to be legally recoverable within the meaning of the rule.[9]

§ 600. PLACES IN WHICH THE RULE OF *DAMDUPAT* APPLIES

The rule of *damdupat* applies in Bombay state.[10] It applies also in the town of Calcutta,[11] but not in any other part of Bengal.[12] The rule is not given effect to in the State of Rajasthan;[13] or in any part of the Madras state;[14] or the Uttar Pradesh[15] . The rule is applied by s 6 of the Sonthal Parganas Settlement Regulation to money debts in the Sonthal Parganas.[16] It applies to Berar, when the creditor and the debtor are Hindus.[17]

§ 601. PERSONS ENTITLED TO CLAIM BENEFIT OF THE RULE

(1) According to the Calcutta High Court, the rule of *damdupat* applies only where both the original contracting parties are Hindus.[18]

(2) According to the Bombay High Court, all that is necessary for the application of the rule is that the original debtor should be a Hindu. The result is that the rule does not apply, if the original debtor was a Mohammedan, though the debt might be subsequently be a Hindu.[19]

Also, the rule does not apply if the original debtor was a Mohammedan, though the creditor might be a Hindu.[20] However, the rule does not apply if the original debtor was a Hindu, though subsequent-debtor purchasing the former Hindu debtors interest is a Mohammedan.[21]

Where there are two debtors, a Hindu and non-Hindu, the rule applies so far as the Hindu debtor is concerned. However, this does not prevent

9 *Bapurao v Anant* (1946) Nag 407.
10 *Narayan v Satvaji* (1872) 9 Bom HC 83, 85.
11 *Nobin Chunder v Romesh Chunder* (1887) 14 Cal 781.
12 *Het Narain v Ram Dein* (1883) 9 Cal 871.
13 *Sheokaransingh v Daulatram* AIR 1955 Raj 201 (FB).
14 *Annaji v Ragubai* (1871) 6 Mad HC 400.
15 *Kamto Prasad v Parbati* (1958) 56 All LJ 920.
16 *Kunja Behari v Tarapada* (1919) 4 Pat LJ 49, 49 IC 374, AIR 1919 Pat 324.
17 *Bapurao v Anant* (1946) Nag 407.
18 *Vooma v Srebarinath* (1897) 1 CWN 178, page cixxviii, Cf (1887) 14 Cal 781.
19 *Harilal v Nagar* (1897) 21 Bom 38.
20 *Nanchand v Bapusaheb* (1879) 3 Bom 131. See *Dawood v Vuillubhdas* (1894) 18 Bom 227.
21 *Ali Saheb v Shabji* (1897) 21 Bom 85.

the non-Hindu debtor from claiming contribution from the former on the basis of the actual payment made by him to the creditor.[22]

When the original debtor is a Hindu, and the interest is allowed to accumulate, so that it exceeds the principal, and the debt is then transferred to a Mohammedan, the rule of *damdupat* will apply, so long as the debtor was a Hindu, but it will cease to operate from the date the debt was assigned to the Mohammedan.[23]

Illustrations

(a) A Mohammedan, *M*, borrows Rs 61 at interest from a Hindu, *X*, and mortgages his property to *X* as a security for the loan. *M* then sells his equity of redemption to a Hindu, *H*. *X* sues *H* to recover Rs 270, Rs 61 being principal and Rs 209 for interest. *H* contends that he and *X* being Hindus, the rule of *damdupat* applies, and that *X* is not entitled to more that Rs 61 for interest. The rule of *damdupat* does not apply, for the original debtor was a Mohammedan, and *X* is entitled to a decree for Rs 270.[24]

(b) A Hindu, *H*, borrows Rs 150 at interest at the rate of 12 per cent per annum from a Mohammedan, *X*, on a mortgage of his immovable property. *H* then sells his equity of redemption to a Mohammedan, M. *X* sues *M* to recover Rs 750. Rs 150 being principal and Rs 600 for interest from the date of mortgage up to the date of the suit. *X* is entitled to Rs 300 (ie double the principal Rs 150) and the interest thereon at the aforesaid rate from the date of the sale to *M*. If *H* had not sold his equity of redemption to *M*, and the suit had been brought against *H*, *X* would not have been entitled to more than Rs 300.[25]

§ 602. TO WHAT TRANSACTION THE RULE APPLIES

The rule of *damdupat* applies not only to unsecured loans, but to loans secured by a pledge of movable property and those secured by a mortgage of immovable property.[26]

In the case of a mortgage with possession, a distinction has to be made between two classes of cases, namely:

(a) where the amount of the annual rents and profits is fixed beforehand by the parties, and it is agreed between the parties

22 *Maha Maya Dasee v Abdur Rahim* (1937) 1 Cal 450, 172 IC 731, AIR 1937 Cal 752.
23 See Illust (2). See *Ali Saheb v Shabji* (1897) 21 Bom 85.
24 *Harilal v Nagar* (1897) 21 Bom 38.
25 *Ali Saheb v Shabji* (1897) 21 Bom 85.
26 *Nathubbai v Mulchand* (1868) 5 Bom HCAC 196, 198; *Narayan v Satvaji* (1872) 9 Bom HC 83.

that the mortgagee is to receive that amount in lieu of interest or a part thereof, irrespective of the actual amount of rents that may be recovered by the mortgage;

(b) where no such amount is fixed, and there is no such agreement between the parties, so that the mortgagee is under a liability to account to the mortgagor for the rents and profits received by him from the mortgaged property.

In the first case, no account is to be taken of the rents and profits, and all that has to be done is to ascertain what amount is due to the mortgagee for principal and interest as in the case of a simple loan. To such a case, the rule of *damdupat* applies, as it does in the case of an ordinary loan.[27]

In the second case, the mortgagee is under a liability to account for the rent and the profits received by him from the mortgaged property, and the rule of *damdupat* does not apply.[28] 'As the mortgagee is to be charged with rents and profits, it would not be just to stop his interest and consequently the rule of (*damdupat*) cannot be applied'.[29] The rule does not apply to loans advanced by Life Insurance Corporation in view of a notification by Delhi Administration.[30]

Illustrations

(1) *A* borrows Rs 1,000 from *B* at interest at the rate of 20 per cent per annum. As a security for the loan, *A* mortgages his house to *B* and puts *B* in possession of the house. At the date of the mortgage, the house is occupied by *A*'s tenants. It is agreed between *A* and *B*, that *B* should receive the rents from the tenants, that the yearly rents should be taken at Rs 150, and that *A* should pay to *B* every year Rs 50, being the balance of interest on Rs 1,000 (Rs 200 interest Rs 150 rent = Rs 50). *B* sues *A* to recover Rs 2,200 being Rs 1,000 for principal and Rs 1,200 for interest. Is *B* entitled to recover Rs 1200 for interest? No, for as no accounts are to be rendered by *B*, the rule of *damdupat* applies, and *B* is therefore entitled to Rs 1000 only for interest. The decree will therefore be for Rs 1,000 + Rs 1,000 = Rs 2,000.

(2) The facts are the same as in ill (1), except that there is no agreement between *A* and *B* that *B* should take the rents in lieu

27 *Sundarabai v Jayavant* (1900) 24 Bom 114; *Natbubbai v Mulchand* (1868) 5 Bom HCAC 196; *Vithal v Daud* (1869), 6 Bom HCAC 90; *Narayan v Satyaji* (1872) 9 Bom HC 83; *Ali Sabeb v Shabji* (1897) 21 Bom 85, 87; *Ganpat v Adarji* (1879) 3 Bom 312.

28 *Gopal v Gangaram* (1896) 20 Bom 72 (FB); *Dbondshet v Ravji* (1898) 22 Bom 86.

29 Per Couch CJ in *Natbubbai v Mulchand* (1868) 5 Bom HCAC 196, 199.

30 *Life Insurance Corpn v Sham Surat Singh* AIR 1986 Del 202.

of interest. In such a case, if *B* sued *A* on the mortgage, *B* would be liable to account for the rents received by him and the rule of *damdupat* would not therefore apply. The result is that, if it be found in the taking of accounts, that the amount due to B, after giving credit to *A* for the rents, is Rs 23,000, *B* will be entitled to a decree for Rs 23,000, and not merely for Rs 2,000 as in Illust (1).

§ 603. MORTGAGES EXECUTED AFTER THE PASSING OF THE TRANSFER OF PROPERTY ACT 1882

It has been held by the High Court of Madras, that the rule of *damdupat* does not apply to mortgages executed after the Transfer of Property Act 1882 came into force.[31] A different view has been taken by the High Courts of Bombay,[32] Calcutta[33] and Nagpur.[34] In any case, the effect of the rule is exhausted when the matter passes into the domain of judgment. Hence, in a suit on mortgage, the court can allow interest after the date is fixed for redemption, even though the amount which the plaintiff may ultimately recover in execution may exceed *damdupat*.[35]

31 *Madhwa v Venkatramanjulu* (1903) 26 Mad 662.
32 *Jeewanbai v Manordas* (1911) 35 Bom 199, 8 IC 649.
33 *Kunja Lal v Narsamba* (1915) 42 Cal 826, 31 IC 6, AIR 1916 Cal 542.
34 *Bapurao v Anant* (1946) Nag 407.
35 *Devidas v Yeotmal Central Bank* AIR 1956 Nag 239.

XXIX
BENAMI TRANSACTIONS

§ 603A. THE NEW ACT

The Act is a very recent legislation by the Parliament. The Benami Transactions (Prohibition) Act 1988, has radically altered and affected the law relating to *benami* transactions, as previously applied. Prior to the Act, the government promulgated an ordinance substantially to the same effect: the principal provisions of it had come into operation from 19 May 1988. The Act is given as Appendix VI at the end of this book.

The Act defines '*benami* transaction' as any transaction in which property is transferred to one person for a consideration paid or provided by another person, and 'property' means property of any kind, whether movable or immovable, tangible or intangible and includes any right or interest in such property.

Section 3, which is a vital clause, inter alia enacts:

> (1) No person shall enter into any benami transaction
>
> (2) Nothing in sub-section (1) shall apply to purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the married daughter.
>
> (3) Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

Section 5 enacts that all property held *benami* shall be subject to acquisition by such authority, is such manner and after following such procedure, as may be prescribed, and that the amount shall be payable for any such acquisition.

Section 4 enacts:

> (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section applies to—

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity. Section 8 confers rule making power.

Sections 3, 5 and 8 came into force on the 19 May 1988, ie, the date of operation of the ordinance.

Some difficult and complicated questions are likely to arise, but most cases would turn on their facts and the provisions of the Act as may be interpreted by the court.

§§ 604–11 state the law as was applied till the ordinance, and the Act respectively came into force

§ 604. BENAMI TRANSACTIONS

Where a person buys property with his own money, but in the name of another person, or buys property in his own name, but subsequently transfers it into the name of another person, without any intention in either case to benefit such other person, the transaction is called *benami*, and the person in whose name the transaction is effected is called *benamidar*.

The *benami* system in India is not a speciality of Hindu law. Within its legitimate scope, it accords with the ideas and habits of the people, and the court recognises and gives effect to *benami* transactions on the principle that recognition should be given to the real and not the nominal title to property, unless, to do so would be contrary to any provisions or policy of law. *Benami* transactions among Mohammedan are more commonly know as *furzee*. The word '*benami*' is a Persian compound word, made up of '*be*', which means without and '*nam*', which means name. It means literally without name and denotes a transaction effected by a person without using his own name, but in the name of another. The practice of putting property into a false name, ie, the name of a person other than real owner, is not uncommon. This practice has arisen partly from superstition—some persons and some names being considered

lucky, and others unlucky. Partly also, the practice is due to a desire to conceal family affairs from public observations. However, many transactions originate in fraud; and many of them which did not so originate, are made use of for a fraudulent purpose; more especially for the purpose of keeping out creditors, who are told when they come to execute a decree, that the property belongs to the fictitious owner, and cannot be seized.[1]

Benami transactions are not confined solely to purchases by one person in the name of another. Thus, a person may take a lease of property in the name of another, or he may buy property in his own name and subsequently convey or mortgage it to another for a fictitious consideration. Section 2(a) gives a wide and comprehensive meaning to '*benami* transactions'.

Transactions

§ 605. EFFECT GIVEN TO REAL TITLE

Where a transaction is once made out to be *benami*, effect will be given to the real and not to the nominal title unless the result of doing so would be:

(i) to violate the provisions of a statute (§ 606); or
(ii) to defeat the rights of innocent transferees for value from the *benamidar* (§ 607); or
(iii) the object of the *benami* transaction was to defraud the creditors of the real owner, and that object has been accomplished (§ 608); or
(iv) the transaction is against public policy (§ 609).

Effect Given to Real Title

There is no law, which prohibits *benami* transactions; in other words, it is not an offence or a crime for *A* to buy property in the name of *B*. Therefore, where *A* has bought property in the name of *B*, and *B* subsequently chooses to say that he is the real owner, it is quite competent to *A* to bring a suit against *B* to establish his title and to recover possession of the property from *B*, and if it is proved that the purchase-money came out of *A*'s funds, the court will pass a decree declaring that *A* is the real owner, and direct *B* to deliver possession of the property to *A*.[2] Similarly, if property is bought by *A* in *B*'s name, and *C*, a creditor of *A*, subsequently obtains a decree against *A*, it is competent to *C* to show that the property really belongs to *A*, and if this fact is proved, the

1 *Markby's Hindu and Mahomedan Law*, p 103.
2 *Thukrain v Government* (1871) MIA 112.

property may be attached and sold to satisfy *C*'s decree.[3] However, now after the recent legislation, no such suit can be brought or no such defence can be taken.

Resulting Trusts and Advancement of Wife and Children

It is important to note that the law of *benami* is in no sense a branch of Hindu law. It is merely an application of the equitable rule, that where there is a purchase by *A* in the name of *B*, there is a resulting trust of the whole to *A*. In this respect, the general rule of the Indian law, which is laid down in s 82, Indian Trusts Act 1882, differs, but little, if at all, from the general rule of English law on the subject. In both systems of law, the fact to be first determined is from what source the money came with which the purchase-money was paid. However, in England, there is an exception, when a purchase is made by a person in the name of his child or wife, though with his own money. In such a case, the transaction is presumed to have been made by way of advancement or gift to the child or wife, and the burden lies on the person who so alleges it. However, this exception is not recognised in India. In this country, where a purchase is made by a person with his own money, it is prima facie assumed to be for his benefit, whether it is made in the name of a child,[4] wife,[5] or a stranger, and there is no presumption in favour of an advancement or gift, such as there is in English law. The burden therefore of proving an advancement or gift lies on the person alleging that there was an advancement or gift. In *Gopeekrist v Gungapersaud*,[6] their Lordships of the Privy Council said: 'Benami purchases in the names of children, without any intention of advancement, are frequent in India.'

However, this rule of Indian law does not apply to transactions where both parties are English, not even if they were born in India,[7] though the transactions may have taken place in India and the property may be situated in India.[8] The general rule in India, in the absence of all other

3 *Musadee Mahomed v Meerza Ally* (1854) 6 MIA 27; *Gopi Wasudev v Markande* (1879) 3 Bom 30; *Abdul Hye v Mir Mahommed* (1884) 10 Cal 616, 11 IA 10.

4 *Johnston v Gopal Singh* (1931) 12 Lah 546, 557, 133 IC 628, AIR 1931 Lah 419; *Gopal v Kesheosa* (1936) Nag 65, 165 IC 350, AIR 1936 Nag 185; *Jetharam v Hazarimal* AIR 1952 Raj 28.

5 *Dharani Kant v Kristo Kumari* (1886) 13 Cal 181; *Mst Thakro v Ganga Pershad* (1888) 15 IA 29, 10 All 197.

6 (1854) 6 MIA 53; *Moulvi Sayyued v Mst Bebee* (1869) 13 MIA 232, 247; *Rissesur v Luchmessur* (1880) 5 Cal LR 477, 6 IA 233, (1886) 13 Cal 181, 13 IA 70 (purchase in wife's name), *Chunder Nath v Kristo Komul* (1871) 15 WR 357.

7 *Kerwich v Kerwick* (1920) 47 IA 275, 48 Cal 260, 57 IC 834, AIR 1921 PC 56 (purchase by husband of land in Rangoon and transferred into wife's name—advancement disapproved).

8 *Panton v Administrator-General* (1926) 28 Bom LR 11, 93 IC 161, AIR 1926 ALJ 158 (no advancement).

relevant circumstances, is thus stated by Lord Campbell in *Dhurm Das Pandey v Mst Shama Soondri Dibiah*:[9] 'The criterion in these cases in India is to consider from what source the money came with which the purchase-money is paid'.

In cases of this kind, it is material to enquire who enjoyed the income of the property, whether the real owner or the person in whose name the property was bought. Thus, where property was purchased by *A* with his money in the name of *B*, and the question arose whether the purchase was *benami*, as alleged by *A* or intended to be a gift for *B* in return for his services as alleged by *B*, their Lordships of the Privy Council held that evidence of *B*'s possession for nine and a half years without being called on by *A* to account for the rents, and of *B*'s performance of valuable services sufficient to establish a claim on *A*'s generosity, was decisive in favour of a gift.[10] It is also material in cases of this kind, to inquire into the position of the parties and their relation to one another and the motives, which could govern their actions. Thus, where property was purchased by a Mohammedan lady in her daughter's name and the transfer was impeached by her son after death as benami, their Lordships held that the resulting inference that it was a benami transaction was rebutted by the evidence of gift, and by the proved intention of the mother to exclude the son, with whom she was on hostile terms from inheritance.[11]

Deposit by Husband of His Own Money in Bank in the Name of Himself and His Wife

The deposit by a Hindu of his own money in a bank in the joint names of himself and wife, and on the terms, that it is to be payable to either or the survivor, does not on his death constitute a gift by him to his wife. There is a resulting trust in his favour in the absence of proof of a contrary intention, there being in India no presumption of an intended advancement in favour of a wife.[12]

Deposit by Father in the Name of Himself and His Son

See *Indranarayan v Roop Narayan*.[13]

9 (1843) 3 MIA 299; *Ram Narain v Muhammad* (1899) 26 IA 38, 39, 26 Cal 227, 230; *De Silva v De Silva* (1903) 5 Bom LR 784; *Motivabu v Purshotum* (1904) 6 Bom LR 975.

10 (1899) 26 IA 38, 26 Cal 227.

11 *Ismail v Hafiz Boo* (1906) 33 IA 86, 33 Cal 773.

12 *Guran Ditta v Ram Ditta* (1928) 55 IA 235, 55 Cal 944, 109 IC 723, AIR 1928 PC 172; *Shambhunath Shivpuri v Pushkaranath* 71 IA 197; *Shiv Kumari v Udya Pratap* (1947) All 642; *Nagarajamma v State Bank of India* AIR 1962 AP 260; *Padmanabhan v Govindan* AIR 1975 Ker 83.

13 *Indranarayan v Roop Narayan* AIR 1971 SC 1962.

Burden of Proof

Where *A* purchases property in the name of *B*, and subsequently sues *B* for a declaration that he is the real owner of the property, the burden lies heavily on him to show that he is the real owner. The reason is that what *A* really has to do in such a case is to show that the apparent state of things is not the real state of things. In other words, that the person who appears as the owner on the face of the deed is not the real owner. The court should view *benami* transactions with circumspection, and they should require from him a strict proof of his title before holding that *B* is merely a *benamidar*. Although, there may be with respect to *benami* transactions, circumstances, which might create suspicion and doubt as to the truth of the case of the *benamidar*, yet the courts should not decide upon mere suspicion, but upon legal grounds established by evidence.[14] When evidence on neither side is wholly convincing, and when the evidence given and withheld is open to adverse criticism, the courts must rely on the surrounding circumstances, the position of the parties and their relation to one another, the motive which could govern their actions, and their subsequent conduct.[15]

Ante-nuptial Agreement

When it is alleged that a purchase of property in India by an Indian out of his own money, but in the name of his wife, was made in pursuance of an ante-nuptial agreement, and that consequently, it is not to be regarded as a *benami* transaction, the alleged ante-nuptial agreement, if oral, must be proved by the clearest and most satisfactory evidence of credible witnesses, it would be unwise to act upon oral evidence, unless there was contemporaneous written evidence to corroborate it.[16]

§ 606. *EXCEPTION I*: SALE UNDER A DECREE OF COURT OR FOR ARREARS OF REVENUE

Where a property is sold under a decree of court or for arrears of revenue, and it is purchased *benami*, and the *benamidar* is certified to

14 *Sreemanchunder v Gopaulchunder* (1866) 11 MIA 28; *Nawab Azimut v Hurdwaree Mul* (1870) 13 MIA 395; *Faez Buksh v Fukeerooden* (1871) 14 MIA 234; *Unan Prasbad v Gandharp* (1888) 15 Cal 20, 14 IA 127; *Prince Suleiman v Nawab Mehndi* (1898) 25 IA 15, 25 Cal 473; *Nirmal Chunder v Mahommed* (1899) 26 Cal 11, 25 IA 225. Also see *Radha Govinda Roy v Durgarani Dassi* (1955) 1 Cal 207; *Naicker v Naicker* AIR 1977 Mad 38 (husband and wife); *Amit Mukherjee v Bibhuti Dasi* AIR 1979 Cal 344.

15 *Dalip Singh v Chaudhrain* (1908) 35 IA 104, 30 All 258; *Sitamma v Sitapathirao* (1938) Mad 220, 176 IC 535, AIR 1938 Mad 8.

16 *Sura Lakshmiah Chetty v Kothandarama Pillai* (1925) 52 IA 286, 48 Mad 605, 88 IC 327, AIR 1925 PC 181.

be the purchaser, the real purchaser cannot maintain a suit against the *benamidar* to establish his title to the property or to recover possession thereof from him. It is so provided by several statutes.

Illustration

> *A* obtains a decree against *B* for Rs 5,000. In execution of the decree, *B*'s property is sold and it is purchased by *C* in *D*'s name. *D* then obtains a certificate of sale from the court. *C* cannot sue *D* for a declaration that he was the real purchaser at the sale. The law is the same, where property held by *B* is sold for arrears of revenue payable to the government, and it is bought by *C* in *D*'s name.

See s 66, Code of Civil Procedure 1908;[17] s 36, Bengal and Revenue Sale Act 1859 s 178, United Provinces Land Revenue Act 1901, s 38, Madras Revenue Recovery Act 1864.

The Provisions of the above Acts do not affect the rights of third parties. Therefore, in the case put above, it is open to a creditor of *C* to sue *C* and *D* for a declaration that the property belongs to *C*, and that it is liable to satisfy his (*C*'s) creditor's claims.[18] Nor does the purchase made by a member of a joint Hindu family in his name, but with funds belonging to the family, come within the meaning of those Acts. Therefore, it is open to the other members of the family to maintain a suit against him for a declaration that the purchase was made on behalf of the family.[19]

A Hindu son taking assignment of a decree against his father to safeguard his own interest is not a *benamidar*.[20]

§ 607. *EXCEPTION II*: TRANSFER BY BENAMIDAR FOR VALUE

Where a *benamidar* sells, mortgages or otherwise transfers for value, property held *benami* by him without the knowledge of the real owner,[21] the real owner is not entitled to have the transfer set aside, unless the transferee had notice, actual or constructive, that the transferor was merely a *benamidar*.[22]

17 See *Ganga Sahai v Kesri* (1915) 42 IA 177, 182, 37 All 545, 30 IC 265, AIR 1915 PC 81.

18 *Kanizak v Monobur* (1886) 12 Cal 204; *Subba Bibi v Hara Lal* (1894) 21 Cal 519.

19 *Bodh Singh v Gunesh Chunder* (1874) 12 Beng LR 317, PC.

20 *Sangameswara v Krishna* AIR 1960 Ker 108.

21 *Sarju Parshad v Bir Bhaddar* (1893) 20 IA 108.

22 *Ramcoomar Koondoo v Macqueen* (1873) 11 Beng LR 46, 18 IA Sup Vol 40; *Mahomed Mozuffer v Kisbori Mobun* (1895) 22 Cal 909, 22 IA 129.

A buys certain property in the name of *B*. *B* then sells the property to *C*, and misappropriates the purchase-money. *A* sues *B* and *C* to have the sale set aside, alleging that he is the real owner of the property. The sale will not be set aside unless *A* shows that *C* has notice, actual or constructive, that *B* was not the real owner.

Constructive Notice

It is the duty of a purchaser not merely to ascertain in whose name the property stands, but also to ascertain who is in actual possession of the property at the time of the sale to him. If he fails to do so, and it turns out that the real owner, and not the *benamidar*, was in possession and receipt of the rents of the property, he will be deemed to have constructive notice of the fact that the *benamidar* was not the real owner. Thus, if in the case put above, *A* was in possession, and *C* omitted to enquire as to who was in possession, *A* would be entitled to have the sale set aside.[23] (Note in this connection the provisions of s 41, Transfer of Property Act 1882).

§ 608. *EXCEPTION III*: FRAUD UPON CREDITORS

Where property has been placed in a false name for the express purpose of defrauding creditors, and that purpose has actually been effected, the real owner is not entitled to recover back the property from the *benamidar*.[24] However, if the contemplated fraud is not effected, the real owner is entitled to get back the property from the *benamidar*.[25]

Illustration

> *A*, who is indebted to several persons, executes a deed purporting to be a conveyance of his property to *B* for Rs 30,000. No purchase-money is paid by *B* to *A*, and the object of the transaction is to defraud *A*'s creditors. After some time, *A* compounds with his creditors and pays them a composition of four annas in the rupee. *A* then sues *B* to recover back the property from *B*. Here, the object of the fraud is effected, and the maxim applies, *in pari delicto potior est conditio possedentis*, ie, 'in equal fault the condition of the possessor is the more favourable'. Both *A* and

23 *Manchanji v Kongseoo* (1869) 6 Bom HCOC 59; *Vyankapacharya v Yamanasami* (1911) 35 Bom 269, 10 IC 817; *Imambandi v Kamleswari* (1887) 14 Cal 109, 117, 13 IA 160, 165.

24 *Nawab Singh v Daljit Singh* (1936) 58 All 842, 162 IC 958, AIR 1936 All 401.

25 *Petherpermal v Muniandi* (1908) 35 IA 98; *Honapa v Narsapa* (1899) 23 Bom 406; *Raghavalu v Adinarayana* (1909) 32 Mad 323, 2 IC 616; *Jadu Nath v Rup Lal* (1906) 33 Cal 967; *Girdharlal v Manikamma* (1914) 38 Bom 10, 20 IC 50, AIR 1914 Bom 283.

B are equally guilty of a confederacy to defraud *A*'s creditors; but the possession being in *B*, the court will not disturb him in his possession. In such a case the court will say 'let the estate lie where it falls'. However, if *A* sues *B* to recover the property before the contemplated fraud is committed, the court will not punish *A* merely because he at one time intended to defraud his creditors, and it will direct B to deliver the property to *A*. Where the purpose of the fraud is not effected, there is nothing to prevent the real owner from repudiating the entire transaction, removing all authority of his confederate to carry out the fraudulent scheme and recovering possession of the property.[26]

Note in this connection, the provisions of s 84, Indian Trusts Act 1882.

Collusive Decree

Where a collusive decree is obtained by a *benamidar* against the real owner, with the object of defrauding the latter's creditors, the decree is binding on the real owner, even if no creditor has been defrauded. The reason is that where a person has suffered judgment to pass against him, the matter is then placed beyond his control.

Illustration

A buys a house in *B*'s name, with the object of protecting the property against the claims of his creditors, and occupies it as *B*'s tenant. Subsequently, *B* in collusion with *A*, sues *A* to recover possession of the house from him, and obtains a decree ex-parte against *A*. *A* cannot impeach the decree on the ground that, the object of the decree, was to defraud his creditors. The result is that if *B* applies for execution of the decree the court will order *A* to deliver possession of the property to *B*.[27] However, the decree may be challenged by *A*'s creditors.[28]

§ 609. *EXCEPTION IV*: TRANSACTION AGAINST PUBLIC POLICY

Where a purchase of property, which if made by a person in his own name, would be illegal, as being opposed to public policy, is made by him in the name of another person, the real purchaser is not entitled to recover the property from the *benamidar*.[29]

26 (1908) 35 IA 98, 103.
27 *Chenvirappa v Puttappa* (1887) 11 Bom. 708 *Venkatramanna v Viramma* (1887) 10 Mad 12.
28 *Gopi v Markande* (1879) 3 Bom 30.
29 *Sheo Narain v Mata Prasad* (1905) 27 All 73.

In the case cited above, the Kanungo of a district, who was prohibited on penalty of dismissal from office from acquiring property in his own district, purchased property in the name of his brother's son. After the Kanungo's death, his heirs sued his brother's son for recovery of the property. It was held that they were not entitled to recover the property.

§ 610. DECREE AGAINST *BENAMIDAR*

In the absence of any evidence to the contrary, it is to be presumed that a suit instituted by the *benamidar* has been instituted by him with the full authority of the real owner, and any decision in the suit is as much binding upon the real owner, as if the suit had been brought by the real owner himself.[30]

§ 611. RIGHT OF *BENAMIDAR* TO SUE

A *benamidar* fully represents the true owner, and so far as the outside world is concerned, and can maintain all suits whether arising out of contract or out of title to immovable property.[31]

Suits Arising Out of Contract

A *benamidar* can maintain a suit on a contract entered into in his name. Thus, if *A* lends money to *B* on a mortgage of *B*'s property and the mortgage is taken in *C*'s name, *C* may sue *B* on the mortgage in his own name.[32] Similarly, if *A* lends money to *B* on a promissory note, but the note is taken in *C*'s name, *C* is the proper person to sue upon it.[33] *A* can sue *B*, only if he ensures that *B* is protected from further liability to *C*. This object is attained, if *C* is made a party to the suit, appears in the court and states that he does not claim on the note.[34]

30 *Gopi Nath v Bhugwat* (1884) 10 Cal 697, 705; *Shangard v Krishnan* (1892) 15 Mad 267; *Baroda Kanta v Chunder Kanta* (1902) 29 Cal 682; *Kaniz v Wali Ullah* (1908) 30 All 30; *Ravji v Mahadev* (1898) 22 Bom 672. Reference may also be made to *Ragho Prasad v Shri Krishna* (1969) SC 316.

31 *Gur Narayan v Sheo Lal Singh* (1919) 46 IA 1, 46 Cal 566, 49 IC 1, AIR 1918 PC 140 (*benami* purchase); *Vaitheewara v Srinivasa* (1919) 42 Mad 348, 50 IC 309, AIR 1919 Mad 524 (FB) (benami mortgage); *Ramasamy Chettiar v Adaikammai* AIR 1960 Mad 341.

32 *Bhola v Ram Lall* (1897) 24 Cal 34; *Sachitananda v Baloram* (1897) 24 Cal 644 (suit for foreclosure); *Yad Ram v Umrao Singh* (1899) 21 All 380; *Kamta Prasad v Indomati* (1915) 37 All 414, 417–18, 29 IC 593, AIR 1915 All 264.

33 *Ramanuja v Sadogopa* (1905) 28 Mad 205; *Subba Narayana v Ramaswami* (1907) 30 Mad 88, on app from 28 Mad 244.

34 *Sree Krishna Jana v Seeta Nath Bera* (1938) 1 Cal 450, AIR 1937 Cal 753.

As regards suits for recovery of and upon title, there was a conflict of decisions,[35] till the Judicial Committee held that a *benamidar* can sue in his own name to recover immovable property vested in him as *benamidar*. He has the title and right of possession, which the real owner has given him, enough to support the suit.[36]

Illustration

A purchases a house *benami* in *B*'s name. At the date of the purchase, *C* is in possession of the house. *B* sues *C* for possession of the house. The defence is that *B* is not the real owner. *B*, though a mere *benamidar*, is entitled to maintain the suit. It is open to *A* to apply to be joined in the suit. It is also open to *C* to apply to have *A* joined in the suit.

The Benami Transactions (Prohibition) Act came into force from 19 May 1988. After the coming into force of the Act, a question of considerable importance arose before the Supreme Court as regards the operation of the Act, namely, whether the provisions of the Act would be attracted to pending proceedings or not. The court, while interpreting the provisions of the Act, and more particularly ss 4(1) and 4(2), held that once it was found that property was held *benami*, no suit or claim would lie at the behest of a person who claimed to be the real owner of the property in question. It was held, that past transactions were also covered and no suit or claim could lie as regards those transactions. It was held that s 3 of the Act which prohibited any *benami* transaction, was not retrospective in operation. As regards the provisions of s 4, it was held that the enactment was declaratory in nature and would not operate retrospectively and would only apply to any future (stages) suits or claims. The court also held, that an appeal arising from such a suit, which was pending, would be within the purview of the Act. The appellate court could take note of the provisions of the Act, since according to the court, the enactment, and more particularly the section, was retroactive in nature and that the section would cover such past transactions also, thus depriving the real owner of any such defence.[37]

The above view taken by the court came up before a larger bench of three learned judges of the Supreme Court on a reference by another

35 *Hari Gobind v Akhoy Kumar* (1889) 16 Cal 364; *Issur Chandra v Gopal Chandra* (1898) 25 Cal 98; *Baroda Sundari v Dino Bandhu* (1898) 25 Cal 874; *Mohendra Nath v Kali Proshad* (1903) 30 Cal 265; *Atrabannesa v Safatullah* (1916) 43 Cal 504, 31 IC 189, AIR 1916 Cal 645 (suit for partition); *Kuthaperumal v Secretary of State for India* (1907) 30 Mad 245; *Nand Kishore v Ahmad Ata* (1896) 18 All 69, (1899) 21 All 380; *Bachcha v Gajadhar Lal* (1906) 28 All 44; *Ravji v Mahadev* (1898) 22 Bom 672; *Dagdu v Balvant* (1898) 22 Bom 820.

36 *Gur Narain v Sheo Lal Singh* (1919) 46 IA 1, 46 Cal 566, 49 IC 1, AIR 1918 PC 140.

37 *Mithilesh Kumar v Prem Behari Khare* AIR 1989 SC 1247.

bench of two learned judges. That bench, on an overall analysis of the provisions of the Act, overruled the earlier decision and held that though, as had been decided by the earlier bench, that the provisions of s 3 were not retrospectively applicable. So far as s 4(1) was concerned, it was held that existing rights of real owners would not get extinguished, as the words used in the section were to the effect that 'no such claim, suit or action shall lie' would convey the meaning that no action for relief would lie after the said provision came into force. The court interpreted the provision in the light of the above words in the context of 'fresh or new proceedings' only and held that the view taken by the division bench as above was incorrect to that extent only. The reasoning of the division bench as regards the applicability of the provision to suits or proceedings pending on the date of the commencement of the section, was however upheld as not being applicable to past benami transactions. As regards the provisions of s 4(2), it was held that the section did not have the effect of nullifying the defences already taken in a pending proceeding. However, if such defence was not taken at the time when the section came into force, the defence would not be allowed in such a case, if it was taken after the commencement of the said provision. On an overall analysis, it was held that the act was not a 'declaratory' piece of legislation, but was one in which substantive rights of parties were involved as substantive rights are created qua '*benamidar's*' and rights of real owners were effaced.[38]

The bar imposed by ss 4(1) and (2) is not attracted in a suit filed or a defence taken in respect of a transaction involving the purchase of any property in the name of his wife or unmarried daughter, subject however to the rider that it must be proved that the purchase was not for the benefit of his wife or unmarried daughter.[39] This decision is based on the interpretation of s 3(1) and (2) of the Act.

38 *R Ragopal Reddy v Padmini Chandrasekharan* AIR 1996 SC 238; overruling *Mithilesh Kumar* AIR 1989 SC 1247.

39 *Nandkishore Mehra v Sushila Mehra* (1995) 4 SCC 572.

XXX
JAINS

I. JAIN TENETS AND JAIN LAW

§ 612. JAINS AND THEIR TENETS

Jainism flourished several centuries before Christ. The Jain religion refers to a number of *Tirthankars*, the last of whom was Maha Veera, who was a contemporary of Buddha and died in about 527 BC. Jainism rejects the authority of the Vedas, which form the bedrock of Hinduism and denies the efficacy of various ceremonies, which Hindus consider essential. The Jains are numerous in the Southern Parts of India and Canara, and especially in Gujarat, Mewar and Marwar.

Amongst them, there is no belief that a son, either by birth or adoption, confers spiritual benefit on the father. They also differ from the Brahminical Hindus in their conduct towards the dead, omitting all obsequies after the corpse is burnt or buried.[1] There are, however, among them castes, that still observe Hindu customs, and perform the monthly, six-monthly and anniversary ceremonies of the dead. In cases such as these, the right to perform the ceremonies is governed by the ordinary Hindu law, ie, the son of the deceased has the preferential right to perform the ceremonies, and if there be no son (which term includes grandson and great-grandson), it is duty of the widow to get them performed, provided the husband was divided at his death and the widow succeeds to his estate as his heir.[2]

The Jains agree with the Hindus on other aspects such as division into castes. This exists in full force in the South and West of India, and can only be said to be dormant in the North-East. A Jain converted into orthodox faith returns to the caste from which he traced his first descent.[3]

1 *Bhagvandas v Rajmal* (1873) 10 Bom HC 241, 246–49.
2 *Sundarji v Dahibai* (1905) 29 Bom 316.
3 *Ambabai v Govind* (1899) 23 Bom 257.

Jains are mostly of Vaisya origin, and they themselves have numerous divisions of their own of which the principal ones are: (1) Porward; (2) Oswal; (3) Agarwal; and (4) Khandewal.[4]

§ 613. LAW APPLICABLE TO JAINS

It is too late in the day to contend that Jains are not included in the term 'Hindus'. The Jains are governed by all the incidents relating to the Hindu joint family, as was held by the Supreme Court.[5] The ordinary Hindu law is to be applied to Jains, in the absence of proof of special customs and usage varying that law. Those customs and usage must be proved by evidence, as other special customs and usage varying the general law should be proved (§§ 16–20), and in the absence of proof, the ordinary law must prevail.[6] There is, however, nothing to limit the scope of the inquiry to the particular locality in which the persons setting up the custom, reside. Judicial decisions recognising the existence of a disputed custom among the Jains of one place are relevant as evidence of the existence of the same custom amongst the Jains of another place, unless it is shown that the customs are different; and oral evidence of the same kind are equally admissible.[7] Where, however, a custom is negatived by a judicial decision in one place, like Madras, the fact that among Jains in the other states, such a custom has been upheld by courts, does not warrant a general presumption of the prevalence of the custom in the Madras state.[8]

§ 614. JAINS IN BOMBAY STATE

In *Bhagwandas v Rajmal*,[9] Westroppe CJ said: 'Hitherto, so far as we can discover, none but ordinary Hindu law has been ever administered either in this Island or in this Presidency to persons of the Jain sect.'

4 Ibid.

5 *Commissioner of Wealth Tax v Champa Kumari* AIR 1972 SC 2119, (1972) 1 SCC 508.

6 *Munnalal v Rajkumar* AIR 1962 SC 1493, 1497; *Chotay Lall v Chunnoo Lall* (1879) 6 IA 15, 22 WR 496; *Sheo Singh Rai v Mst Dakho* (1878) 5 IA 87 All 688; *Lala Rup Chand v Jambu Prasad* (1910) 37 IA 93, 103–104, 32 All 247, 6 IC 272; *Bulagan v Rattan Lal* (1928) 26 ALJ 1196, 110 IC 546, AIR 1928 All 656, *Peria Ammani v Krishnasami* (1927) 50 Mad 228, 99 IC 503, AIR 1927 Mad 228; *Jaiwanti v Anandi Devi* (1938) All 196, 173 IC 356, AIR 1938 All 62; *Pemraj v Chand Kunwar* (1947) 74 IA 254, (1947) All 748, AIR 1948 PC 60; *Milapchand v Gulabchand* AIR 1957 MB 19.

7 *Harnabh Pershad v Mandil Dass* (1900) 27 Cal 379, 391.

8 *Geetappa v Eramma* (1927) 50 Mad 228, 237–38, 99 IC 503, AIR 1927 Mad 228.

9 (1873) 10 Bom HC 241, 256; *Amava v Mahadgauda* (1898) 22 Bom 416.

II. Succession

§ 615. LAW OF SUCCESSION

(1) Until a special custom to the contrary is established, the ordinary Hindu law governs succession amongst the Jains. The ordinary Hindu law is that of the three superior castes.[10]

(2) The Hindu Women's Rights to Property Act 1937 applied to the Jains as well as all the Hindus.[11]

(3) The Hindu Succession Act 1956 applies to all 'Hindus' which expression includes Jains.

§ 616. INTEREST TAKEN BY JAIN WIDOW IN HER HUSBAND'S ESTATE

In the absence of a custom to the contrary, a Jain widow takes a limited interest in her husband's estate similar to the 'widow's estate'. A custom, however, to the contrary has been proved in several cases, and it has been held in cases from Meerut,[12] Saharanpur,[13] and Arrah, in the district of Shahabad,[14] that amongst Agarwala Jains, the widow takes an absolute estate in the self-acquired property of her husband, and that she has full power of alienation in respect of such property. However, there is no custom, which entitles her to an absolute estate in ancestral property left by her husband. In the latter case, she takes only a widow's estate.[15]

The Hindu Women's Rights to Property Act 1937, applied to Jain widows although in some provinces, where Jain widows held absolute interest in husband's property by special custom, it operated to their detriment by recognising in their favour only a limited interest.

In Bombay, it has been held that there is no custom among the Dasha Shrimali Shwetambar Jains of Khandesh, under which a widow takes an absolute interest in her husband's estate or a mother in her son's estate.[16] These females in that community take only a 'woman's estate'.

10 *Ambabai v Govind* (1898) 23 Bom 257; *Mt Lado v Banari Das* (1933) 14 Lah 95, 139 IC 721, AIR 1932 Lah 546 (case from Delhi).

11 *Panalal v Sitabai* AIR 1953 Nag 70, (1954) Nag 30.

12 *Sheo Singh Rai v Mussumut Dakho* (1878) 5 IA 87, 1 All 688.

13 *Shimbhu Nath v Goyen Chand* (1894) 16 All 319.

14 *Hernabh Pershad v Mandil Dass* (1900) 27 Cal 379.

15 *Phool Chand v Gopal Lal* AIR 1967 SC 1470; *Pabar Singh v Shamsher Jang* (1931) 29 ALJ 314, 133 IC 785, AIR 1931 All 695; *Nekram Singh v Srinivas* (1926) 24 ALJ 751, 96 IC 639, AIR 1926 All 586.

16 *Bhikabai v Manilal* (1930) 54 Bom 780, 128 IC 628, AIR 1930 Bom 517.

§ 616A. SUCCESSION TO *STRIDHANA*

(1) According to the custom and usage of the Agarwala community, the son is entitled to succeed to his mother's *stridhana*.[17]

(2) In matters of succession and inheritance, Jains are now governed by the Hindu Succession Act 1956.

III. ADOPTION

Note.— The law on the subject of adoption has now been modified and amended by the Hindu Adoptions and Maintenance Act 1956, which applies also to Jains.

§ 617. ADOPTION SECULAR IN CHARACTER

The Agarwala Jains do not believe that a son whether by birth or adoption, confers any spiritual benefit on the father; the adoption, therefore, is entirely secular in character.[18]

§ 618. ADOPTION BY WIDOW

The custom prevails among all Jains, except in Madras and Punjab, that a sonless widow can adopt a son to her husband without his authority or the consent of his *sapindas*, and the onus now lies upon those who deny the custom.[19] In *Munnalal v Rajkumar*,[20] the Supreme Court pointed out that this custom has become a part of the law applicable to Jains in India (except in Madras and Punjab), by a long and uninterrupted course of acceptance, and held that it governed Digambar Jains of the Porwal sect residing in Madhya Pradesh.

There is no such custom in Madras state.[21] In Punjab, the law of adoption is complicated by the local customs of the province.[22]

17 *Hariram v Madan Gopal* (1928) 33 CWN 493, 114 IC 565, AIR 1929 PC 77.

18 *Dhanraj v Soni Bai* (1925) 52 IA 231, 242, 52 Cal 482, 87 IC 357, AIR 1925 PC 118 (a case from Amraoti in the Central Province). Also see *Shugancband v Prakash Chand* AIR 1967 SC 506; *Mst Gulab v Devilal* AIR 1951 Raj 136. Reference may also be made to *Suraj Mal v Balu Lal* AIR 1985 Del 95 (no restriction as to age of marriage).

19 *Permaj v Chand Kunwar* (1947) 74 IA 254, (1947) All 748, AIR 1948 PC 60; *Mst Gigi v Mst Panna* AIR 1956 Assam 100; *Lamibai v Pushpabai* AIR 1953 MB 193.

20 AIR 1962 SC 1493, 1497.

21 *Peria Ammani v Krishanasami* (1893) 16 Mad 182; *Gateppa v Eramma* (1927) 50 Mad 228, 99 IC 503, AIR 1927 Mad 228.

22 *Pemraj v Chand Kunwar* AIR 1948 PC 60.

A Jain widow in Bombay can adopt without her husband's authority.[23] Amongst the Agarwala Banias of the Sarogi sect, a sonless widow may by custom, adopt without the permission of her husband or the consent of her husband's *sapindas*.[24] If the family is joint, he becomes a coparcener (§ 472).[25]

§ 619. SECOND ADOPTION BY WIDOW

As under the Hindu law, so among Jains, a Jain widow has power after the death of an adopted son to make a second adoption.[26]

§ 620. AGE OF BOY TO BE ADOPTED: ADOPTION OF MARRIED MAN

The Agarwala Jains belong to the twice-born classes, and by the general Hindu law applicable thereto, a boy cannot be adopted after his marriage, except in the case of persons governed by special custom duly proved. In a case from Saharanpur, it was held by the courts in India, that according to the custom of which evidence was given in the case, there was no restriction of age or marriage, and that a married man could be adopted. This decision was confirmed by the Privy Council on appeal, but their Lordships observed that having regard to the fact that the custom alleged was very wide, and the evidence was limited to a comparatively small number of centers of Jain population, the case should not be taken as a satisfactory precedent if in any future instance or further evidence regarding the alleged custom should be forthcoming.[27] In a later case,[28] it was held by the Privy Council that in the Sitambari sect of Jains, the adopted son may at the time of his adoption be a grown- up and married man. The High Court of Allahabad has also held that among Jains, a married man may lawfully be adopted.[29] In *Dhanraj v Soni Bai*,[30] the parties belonged to the caste or sect of Agarwalas, who,

23 *Yamashetti Bhaushetti v Ashok Bhomshetti* (1940) Bom 819, 191 IC 488, AIR 1940 Bom 391; *Suganchand Bhikamchand v Mangibai Gulabchand* (1942) Bom 467, 201 IC 759, AIR 1942 Bom 185.

24 *Sheo Singh Rai v Mst Dakho* (1878) 5 IA 87, 1 All 688; *Manik Chand v Jagat Settani* All 319; *Harnabh Pershad v Mandil Dass* (1900) 27 Cal 379; *Manohar Lal v Banarasi Das* (1890) 17 Cal 518; *Lakshmi Chand v Gatto* (1886) 8 All 319; *Asharfi v Rup Chand* (1908) 30 All 197; *Banarasi Das v Sumat Prasad* (1936) 58 All 1019, 164 I C 1047, AIR 1936) All 641.

25 *Sundar Lal v Baldeo Singh* (1933) 14 Lah 78, 138 IC 151, AIR 1932 Lah 426

26 (1886) 8 All 319.

27 *Lala Rup Chand v Jambu Prasad* (1910) 37 IA 93, 32 All 247, 6 IC 272.

28 *Sheokuarbai v Jeoraj* (1920) 25 CWN 273, PC, 61 IC 481, AIR 1920 PC 77.

29 *Manohar Lal v Banarsi Das* (1907) 29 All 495.

30 *Dhanjraj v Soni Bai* (1925) 52 IA 231, 242, 52 Cal 482, 87 IC 357, AIR 1925 PC 118.

as their Lordships of the Privy Council observed, generally adhere to Jainism and repudiate the Brahminical doctrines as to obsequial ceremonies, *sraddhas* and offerings of oblations for the salvation of the soul of the deceased, and do not believe that a son either by birth or by adoption, confers spiritual benefit on the father. Their Lordships further observed that among these people, the qualifying age of adoption extends to the 32nd year.

§ 621. ADOPTION OF ORPHAN

Under the Hindu law, it is essential to the validity of an adoption that the child should be 'given' to the adopter by the father, or if he be dead, by the mother. No other person has the right; nor can such right be delegated to any other person. Consequently, a boy who has lost both his parents cannot be adopted. This rule applies also to the Agarwala Banias of the Sarogi sect.[31]

In a Bombay case, where the question arose whether there was a custom of adopting an orphan among Jains in Western India, it was held that the evidence given in the case was sufficient as between the parties to the suit and those claiming through and under them, to entitle the court to say that there was such a custom.[32]

§ 622. ADOPTION OF DAUGHTER'S SON

A daughter's son may be adopted amongst the Agarwala Banias of the Sarogi sect.[33]

§ 623. ADOPTION OF SISTER'S SON

Under Jain law, the adoption of a sister's son is valid.[34]

§ 624. CEREMONIES INCIDENTAL TO ADOPTION

Among Agarwala Jains, the only ceremony necessary for an adoption is the giving and receiving of the boy in adoption. It is not necessary that the boy should be placed on the lap of the widow.[35]

31 See above; *Bhagwandas v Rajmal* (1873) 10 Bom HC 241.
32 *Parshottam v Venichand* (1921) 45 Bom 754, 61 IC 492, AIR 1921 Bom 147.
33 *Sheo Singh Rai v Mst Dakho* (1878) 5 IA 87, 1 All 688.
34 *Hussan Ali v Naga Mal* (1876) 1 All 288.
35 *Sheo Kvarbai v Jeoraj* (1920) 25 CWN 273, 61 IC 481, AIR 1921 PC 77. *Dhanjraj v Soni Bai* (1925) 52 IA 231, 52 Cal 482, 87 IC 357, AIR 1925 PC 118 supra. Also, see *Ranjit Kumar v Kamal Kumar* AIR 1982 Cal 493.

XXXI
SHUDRAS

Note.— The rules now laid down in the Hindu Succession Act 1956, the Hindu Marriage Act 1955, the Hindu Minority and Guardianship Act 1956, and the Hindu Adoptions and Maintenance Act 1956, do not draw any distinction between the regenerate castes and the Shudras. The effect of the changes in the law are, so far as they affect the law previously applied in case of Shudras, has been pointed out in the Notes under those enactments. The rules stated in this Chapter relate to the law before those enactments under decided cases.

§ 626. WHO ARE SHUDRAS

The Hindus are divided into two main divisions, namely; (1) the regenerate castes; and (2) the Shudras. Legally, Shudras merely denotes one of the two main genera among Hindus. The *Smritis* divide Hindus into two large classes, the twice-born or the regenerate and the Shudras. According to the *Smritis*, every person is by birth, a Shudra, and only become regenerate (twice-born) by studying the sacred literature. In the undermentioned case, Madgavkar J observed:[1]

> The Sanskrit texts which lay down certain functions and duties of the four main castes in Hindu society as it might have existed many centuries ago, are not applicable to the present day when function and legal caste do not coincide... The origin of caste is likewise not very relevant. It is generally agreed that castes arose, partly from the division of classes and functions and partly from the contest between the fairer Aryan with the darker Dravidian, as is sufficiently proved by the Sanskrit word '*varna*' or colour for caste. However, colour, no more than function, is a test of caste, the Shudra of the North being often fairer that the Brahmin of the South. The tendency of occupations

1 *Subrao v Radha* (1928) 52 Bom 497, 501, AIR 1928 Bom 295.

to be hereditary in a society which ceased to progress and the crystallisation of the idea of caste and its abnormal growth over a large area such as India, are matters of sociological interest, but throw little legal light on the question in issue. Even at the present day, the principle that caste springs from birth and cannot be changed, is challenged by ethnologists, who point out that the absorption of the aboriginal inhabitants into Hinduism have existed for centuries and have not stopped. This process has also been recognised by the courts. It suffices to refer to cases such as *Sahdeo Narain Deo v Kusum Kumari*,[2] where such a process of absorption including the custom of adoption barely a century old was recognised by their Lordships of the Privy Council.

In a Calcutta case,[3] the question was whether Kayesthas were of the Shudra caste and the court applied four tests: (1) wearing the sacred thread; (2) ability to perform the *homa*; (3) the rule as to the period of impurity; and (4) the rules as to the incompetence of illegitimate sons to the inheritance. By the application of these tests, the court came to the conclusion that the Kayesthas were Hindus of the Shudra caste. In a Patna case,[4] on the other hand, it was held that the mere non-observance of the orthodox practices could not take away the rights of a Kayestha in matters of inheritance, marriage and adoption and that the Kayesthas of Bihar belonged to the twice-born classes.

In *Maharaja of Kolhapur v Sundaram Ayyar*,[5] the court accepted the principal that the consciousness of a community is a good test of caste. This accords with the view of Dr Sarvadhikari:[6]

> The only safe rule to follow in all cases where the determination of the caste of a person is in question, is to ascertain the customs and usage by which the social conduct of the person given is regulated. The remarriage of widows, and equal rights and privileges of legitimate and illegitimate sons, and similar customs and usage, are marks by which a Shudra can be distinguished.

In the Bombay case referred to above, Madgavkar J said:

> ...the courts, it seems to me have at present necessarily to fall back upon the only possible test remaining, namely, the test of custom—a test not inconsistent either with the spirit of Hindu Jurisprudence,

2 (1932) 50 IA 58, 2 Pat 230, 71 IC 769, AIR 1923 PC 21.
3 *Raj Coomar Lall v Bissessur Dyal* (1884) 10 Cal 688, 695.
4 *Ishwari Prasad v Rai Hari Prashad* (1927) 6 Pat 506, 106 IC 620, AIR 1927 Pat 145.
5 (1925) 48 Mad 1, 52, 93 IC 705, AIR 1925 Mad 497.
6 *Tagore Law Lectures* 2nd edn, (1880) p 830.

which itself lays down that custom is even more powerful than the *Shastras* or with the view of the British courts on important matters such as succession, primogeniture and impartibility.[7]

§ 627. LINGAYATS

The Lingayats, who are originally Hindus, are a body of dissenters and the founder of their religion was one Basava who was born about 1100 AD. They acknowledge only one God, Shiva, and reject the other two of the Hindu triad. They revere the *Vedas*, but disregard the later commentaries, on which the Brahmans rely. Their faith purports to be the primitive Hindu faith, cleared of all priestly mysticisms.

They deny the supremacy of Brahmans, and pretend to be free from caste distinctions, though at the present day, caste is in fact observed amongst them. They declare that there is no need for sacrifices, penances, pilgrimages, or fasts. The cardinal principles of the faith are an unquestioning belief in the efficacy of the Lingam, the image that has always been regarded as symbolical of God Siva. Mysore, the Southern Mahratta country, and the Bellary district contain most of these Lingayats. Though, the sacred thread is not worn by the Lingayats, a ceremony called *deeksha*, ought to be performed about their eighth year, but as in the case of *upanayanam*, it is often performed much later. The sacred *mantra* is whispered in the ear by their *guru*, and this ceremony corresponds to *upanayanam* among the Brahmans. Lingayats whose only God is Shiva, and who acknowledge the authority of the *Vedas*, are bound by Hindu law, except in so far as it is modified by custom.[8]

In the Madras case cited above, the Lingayats of Madras were apparently not regarded as Shudras. In Bombay, however, it has been held that the Lingayats of the Bombay state are Shudras, and not Vaisyas.[9] As to Lingayats in Mysore, see *Sengamagouda v Kalkangouda*.[10]

§ 628. KAYESTHAS

The Kayesthas of Bengal are Shudras.[11] As regards Kayesthas of Bihar, it has been held that they belong to the three regenerate classes, and are

7 *Subrao v Radha* (1928) 52 Bom 497, 502, 113 IC 497, AIR 1928 Bom 295.

8 *Somasekhara v Mahadeva* (1930) 53 Mad 297, 303–305, 130 IC 744, AIR 1930 Mad 496.

9 *Gopal v Hanumant* (1879) 3 Bom 273; *Fakirgauda v Gangi* (1898) 22 Bom 277.

10 AIR 1960 Mys 147.

11 *Asita Mohan v Nirode Mohan* (1916) 20 CWN 901, 904, 35 IC 127, AIR 1917 Cal 292; *Biswanath v Shorashibala* (1921) 48 Cal 926, 934, 66 IC 590, AIR 1921 Cal 48; *Bholanath Emperor* (1924) 51 Cal 488, 492–93, 81 IC 709, AIR 1924 Cal 616.

not Shudras.[12] Kayesthas—Karans in Orissa belong to the regenerate classes.[13]

§ 629. RAJAS OF TANJORE

The Tanjore branch of the Marathas descended from Shivaji are Shudras, and not Kshatriyas.[14]

§ 630. MARATHAS OF BOMBAY STATE

There are three classes among the Marathas in the Bombay state namely: (1) the five families; (2) the 96 families; and (3) the rest. Of these, the first two classes are Kshatriyas, the last class consists of Shudras.[15]

§ 631. CONVERTS TO HINDUISM

Converts to Hinduism are regarded as Shudras.[16]

§ 632. WHETHER A SHUDRA CAN BE A SANYASI

A Shudra, it has now been held by the Supreme Court,[17] can become a *sanyasi* (ascetic). In some earlier decisions, it had been held that a Shudra couldn't enter the Order of *yati* or *sanyasi* (ascetic). Hence, a Shudra, though he has renounced the world and purports to lead the life of an ascetic, is entitled to inherit to his relations, and on his death, his estate will pass to his natural (as distinguished from religious) heirs.[18] In case of a Shudra, who dedicates property to a religious order, the ordinary rule of succession would be inapplicable qua such properties. It is his religious heirs as opposed to his secular (natural) heirs, who will succeed to such dedicated properties.[19]

According to the orthodox writers, a Shudra cannot legitimately enter into a religious order. Although, that strict view does not sanction or tolerate ascetic life of the Shudras, it cannot be denied that the existing practice all over India is quite contrary to such orthodox view. In cases,

12 *Ishwari Prashad v Rai Hari Prashad* (1927) 6 Pat 506, 106 IC 620, AIR 1927 Pat 145; *Rajendra v Gopal* (1928) 7 Pat 245, 108 IC 545, AIR 1929 Pat 51.
13 *Priyanath v Indumati* AIR 1971 Ori 211.
14 *Maharaja of Kolhapur v Sundaram* (1925) 48 Mad 1, 93 IC 705, AIR 1925 Mad 497.
15 *Subrao v Radha* (1928) 52 Bom 497, 113 IC 497, AIR 1928 Bom 295.
16 *Muthusami v Masilamani* (1910) 33 Mad 342, 5 IC 42.
17 *Krishna Singh v Mathura Ahir* AIR 1980 SC affirming AIR 1972 All 273.
18 *Dharmapuram v Virapandiyam* (1899) 22 Mad 302; *Harish Chandra v Atir Mahomed* (1913) 40 Cal 545, 18 IC 474; *Samasundaram v Vaithilinga* (1917) 40 Mad 846, 41 IC 546, AIR 1918 Mad 794.
19 *Samit Pani Brahmachari v Mayapur Chaitanya Math* AIR 1999 Cal 132.

therefore, where the usage is established, according to which a Shudra can enter into a religious order in the same way as in the case of the twice-born classes, such usage would be given effect to.

CEREMONIES INCIDENTAL TO ADOPTION

§ 633. CEREMONIES INCIDENTAL TO ADOPTION

Adoption amongst Shudras is a purely secular transaction, and no ceremonies are necessary in addition to the giving and taking the boy in adoption. The giving and taking ceremony, however, is necessary for the validity of an adoption.[20]

§ 634. WHO MAY ADOPT

(1) *Adoption by Leper.*—No ceremonies being necessary for an adoption among Shudras, even a leper may adopt.[21]

(2) *Adoption by Shudra woman and adoption by unchaste woman.*—No ceremonies being necessary for an adoption among Shudras, a Shudra woman may adopt.[22] So also an unchaste woman.[23]

§ 635. WHO MAY BE ADOPTED

(1) Adoption of daughter's son, sister's son, sister's grandson, and mother's sister's son.—Among Shudras, the adoption of a daughter's son, sister's son,[24] sister's grandson,[25] and mother's sister's son,[26] is valid.

(2) Adoption of boy of different gotra.—There is nothing to prevent a Shudra from adopting a boy from a different *gotra*.[27]

(3) Adoption of married man.—In Western India, where Mayukha is the prevailing authority, a Shudra may be adopted even after his marriage.[28]

20 *Indromoni v Behari Lal* (1880) 7 IA 24, 5 Cal 770; *Mahashoya v Srimati Krishna* (1880) 7 IA 250, 6 Cal 381; *Asita Mohan v Nirode Mohan* (1916) 20 CWN 901, 35 IC 127, AIR 1917 Cal 292; *Bhala v Parbhu Hari* (1878) 2 Bom 67; *Sahadeb v Lingaraj* AIR 1975 Ori 55.

21 *Sukumari v Ananta* (1901) 28 Cal 168.

22 *Thangathanni v Ramu* (1882) 5 Mad 358.

23 *Basvant v Mallappa* (1921) 45 Bom 459, 59 IC 800, AIR 1921 Bom 301.

24 *Raj Coomar v Bissesur* (1884) 10 Cal 688; *Lakshmappa v Ramava* (1875) 12 Bom HC 364; *Kahandas v Jivan* (1923) 25 Bom LR 510, 73 IC 1023, AIR 1923 Bom 427; *Subrao v Radha* (1928) 52 Bom 497, 113 IC 497, AIR 1928 Bom 295.

25 *Maharaja of Kolhapur v Sundaram* (1925) 48 Mad 1, 93 IC 705, AIR 1925 Mad 497.

26 *Chinna v Pedda* (1876) 1 Mad 62.

27 *Rungama v Atchama* (1846) 4 MIA 1.

28 *Nathaji v Hari* (1871) 8 Bom HCAC 67; *Lakshmappa v Ramava* (1875) 12 Bom HC 364.

In other parts of India, however, where the authority of the *Dattaka Chandrika* is supreme, such an adoption is invalid.[29]

§ 636. SECOND ADOPTION DURING LIFETIME OF FIRST ADOPTED SON

A second adoption of a son, the first adopted son being alive, and retaining the character of a son, is illegal.[30]

§ 637. SON BORN AFTER ADOPTION

In the case of Shudra in the Madras State[31] and Bengal[32], an adopted son on partition of the family property, shares equally with a son or sons of the adoptive father born after the adoption.[33]

Marriage

§ 638. MARRIAGE AS A SAMSKARA

Among Shudras, marriage is as much *samaskara* as among the twice-born classes. Therefore, a debt contracted for the marriage of a member of a joint Shudra family is debt contracted for a family purpose and is binding on the joint family property.[34]

The daughter of a Shudra is entitled to be paid her marriage expenses out of the father's estate in the hands of her stepmother, in the same way as she is entitled to be paid her maintenance; this rule applies as much to Shudras as to the twice-born class.[35]

§ 639. IDENTITY OF CASTE

It is a general principal of Hindu law, that a marriage between persons who do not belong to the same caste is invalid, unless it is sanctioned by custom. Therefore, a marriage between a Thakur (Shudra) and a

29 *Lingayya Chetty v Chengalammal* (1925) 48 Mad 407, 89 IC 923, AIR 1925 Mad 272; *Somasekhara v Mahadeva* (1930) 53 Mad 279, 133 IC 744, AIR 1930 Mad 496; *Damodarji v Collector of Banda* (1910) 7 ALJ 927, 7 IC 418; *Nangegowda v Channamma* AIR 1952 Mys 40.

30 *Rungama v Atchama* (1846) 4 MIA 1 supra.

31 *Perrazu v Subbarayadu* (1921) 48 IA 280, 44 Mad 656, 61 IC 690, AIR 1922 PC 71.

32 *Asita Mohan v Nirode Mohan* (1916) 20 CWN 901, 35 IC 127, AIR 1917 Cal 292.

33 This question was considered in a very decision of the Supreme Court— *Guramma v Mallappa* AIR 1964 SC 510.

34 *Sundrabai v Shivnarayana* (1908) 32 Bom 81; *Kameswara v Veeracharlu* (1911) 34 Mad 422, 8 IC 195.

35 *Bapayya v Rukhamma* (1909) 19 MLJ 666, 4 IC 1069.

Brahmin woman is invalid.[36] So also, a marriage between a Shudra and a Vaisya woman. The offsprings of such marriages are illegitimate.[37] Marriages, however, between a Vaisya and a Kayestha (Shudra) woman are recognised by local custom in the District of Tipperah, and are therefore valid.[38]

However, a marriage between persons belonging to different sub-divisions of the same caste is valid. It has accordingly been held, that the following marriages are valid, they being marriages between persons belonging to different sub-divisions of the Shudra caste:

(a) a marriage between a *zamindar* of Malava caste with a woman of the Vellala class of Shudras;[39]
(b) a marriage between a Kayestha of Bengal and a Dom woman;[40]
(c) a marriage between a Kayestha of Bengal and a Tanti woman;[41]
(d) a marriage between a Shudra, and a Christian woman converted to Hinduism.[42]

In the last mentioned case,[43] it was held that such marriages were valid, as they were common among and recognised as valid by the custom of the caste to which the man belonged. At the same time, the opinion was expressed that such marriages were valid even under the Hindu law.

Lingayats of Bombay State

According to the Lingayat religion, as well as according to Hindu law; marriages between members of different classes of Lingayats are not illegal.[44]

§ 640. *ANULOMA* MARRIAGE

Under the Hindu law, as administrated in the Bombay state, a marriage between a Vaisya male and a Shudra female is an *anuloma* marriage and is valid.[45] So also the marriage of a Brahman male with a Shudra female.[46]

36 *Sespuri v Dwarka Prasad* (1912) 10 ALJ 181, 16 IC 222.
37 *Munni Lal v Shiama* (1926) 48 All 670, 97 IC 347, AIR 1926 All 656.
38 *Ram Lal v Akbey* (1903) 7 CWN 619.
39 *Ramamani Ammal v Kulanthai* (1871) 14 MIA 347; *Inderun v Ramaswamy* (1869) 13 MIA 141; *Upoma v Bholaram* (1888) 15 Cal 708.
40 *Bhola Nath v Emperor* (1924) 51 Cal 488, 81 IC 709, AIR 1924 Cal 616.
41 *Bisuvanath Das v Shorashibala* (1921) 48 Cal 926, 66 IC 590, AIR 1921 Cal 48.
42 *Muthusami v Masilamani* (1910) 33 Mad 342, 5 IC 42; *Rajammalv Mariyammal* AIR 1954 Mys 38.
43 *Muthusami v Masilamani* (1910) 33 Mad 342, 5 IC 42 supra.
44 *Fakirgauda v Gangi* (1898) 22 Bom 277.
45 *Bai Gulab v Jivanlal* (1922) 46 Bom 871, 65 IC 602, AIR 1922 Bom 32.
46 *Natha v Mehta Chotalal* (1931) 55 Bom 1, 130 IC 17, AIR 1931 Bom 89.

§ 641. PRESUMPTION AS TO FORM OF MARRIAGE

It has been held in Bombay, that even among Shudras, the law will presume that marriage has been according to the approved form, if the parties belonged to a respectable family.[47]

Inheritance and Partition

§ 642. INHERITANCE AND PARTITION

The text of Mitakshara bearing on the subject are contained in Chapter I, s 12, paras 1 and 2:

> (1). The author next delivers a special rule concerning the partition of Shudra's goods. Even a son begotten by a Shudra on a female slave, may take a share by the father's choice. But if the father be dead, the brethren should make him partaker of the moiety of a share, and one, who has no brothers, may inherit the whole property, in default of daughter's sons.[48]
>
> (2). The son, begotten by a Shudra on a female slave, obtains a share by the father's choice, or at his pleasure. However, after (the demise of) the father, if there be a son of a wedded wife, let these brothers allow the son of the female slave to participate for half a share; that is, let them give him (as much as is the amount of one brother's) allotment. However, should there be no sons of wedded wife, the son of the female slave takes the whole estate, provided, there be neither daughters of a wife nor sons of daughters. But if, there be such, the son of the female slave participates for half a share only.

Reference may be made to § 43 nos. 1-3, note (v). Also, see under § 312 for partition.

Reference may also be made to *Mongal Chandra v Dhirendra Nath*,[49] as regards the illegitimate son of a Shudra by a Brahmin concubine.

Maintenance

§ 643. MAINTENANCE OF ILLEGITIMATE SONS

The whole law on the subject of maintenance of the illegitimate sons of a Shudra by a *dasi* is dealt with in § 551.

47 *Jagannath v Narayan* (1910) 34 Bom 553, 7 IC 459.
48 *Yajnyavalkya*, Ch 2, 134–35.
49 *Mongal Chandra v Dhirendra Nath* AIR 1976 Cal 129.

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