WIDOW'S ESTATE

(Anomalous and peculiar estate.) Under Mitakshara school the widow is entitled to inherit only in the exceptional circumstances of the husband being separate i.e. when he was neither joint nor re-united with any co-heir. But under Dayabhaga she inherits in default of sons but her right is curtailed. The author of the Dayabhaga maintains that the widow inheriting her husband's estate is entitled only to enjoy it with *moderation,* but not to alienate the same by gift, sale, mortgage etc. In support of this position he cites the following text of *Katyayana :*

"অপুত্রা শয়নং ভর্ত্তুঃ পালয়ন্তী গুরৌ স্থিতা।
ভুঞ্জিতামরণাৎ ক্ষান্তা দায়াদা ঊর্দ্ধম্ আপ্নুয়ুঃ।।

— কাত্যায়নঃ —

Meaning—A sonless (widow) keeping unsullied the bed of her lord and abiding by her venerable protector, shall, *being moderate,* enjoy until death ; afterwards the heirs shall take.

— Katyayana —

The language of the above text applies to the *widow* only. But the author of the Dayabhaga applies it in cases of (i) daughter and the daughter's son, (ii) mother and the (iii) paternal grand-mother and curtails their rights also. Afterwards he artfully says that the term *widow* in the text being merely *illustrative* means *female heirs only* and it does not apply to the daughter's son.

This view is now accepted as the doctrine of Dayabhaga school. The author of *Viramitrodaya* puts his own gloss on the above text and disapproves the above view. Moreover, the text of *Katyayana* lays down two conditions (i) *chastity* and (ii) *residence with the husband's kinsmen or relations* but the author of the

Dayabhaga has not himself drawn any such conclusion from that text. it has been held by the Courts that the widow inheriting her husband's estate, is not bound to live with her husband's kinsmen and that subsequent unchastity will not divest her of the husband's estate already vested in her. *(Cossinath V. Hurrosundari* 2. Morley's Digest 198 note).[99]

From the above, it is clear that the Hindu widow's estate has become an *anomalous* and *peculiar* one.

Incidents of the widow's estate :

It has already been discussed under head ``Stridhanam and widow's estate'' supra.

Liability and alienations : The widow or other limited heir takes only a *limited interest* in the estate, inherited by her. But she alone is competent to alienate the property *absolutely* for the following purposes :

(i) Religious and charitable purposes. (ii) Legal necessity and for the benefit of the estate.

Let us now discuss these in the light of the judicial decisions :

1. Religious or charitable purposes : Religious or charitable purposes which are supposed to conduce to the *spiritual welfare* of the deceased husband, give the widow larger power of alienation than for worldly purposes, over the husband's estate. *(Khub V. Ajodhya.* 42Cal.574).[100] It is very difficult to enumerate exhaustively the purposes which are *strictly religious and charitable.* Upon a review of Hindu law in conjunction with the decided cases it may be concluded that there are *two sets* of religious acts. One is in connection of the obsequies of the deceased and the periodical performances of the obsequial rites, which

99. *(Cossinath V. Hurrosundari* 2. Morley's Digest 198 note).

100. *(Khub V. Ajodhya.* 42Cal.574).

are considered *essential* for the *salvation of the soul* of the deceased. The other relates to acts which are *not essential or obligatory* but regarded as *pious observances,* conducive to the welfare of the deceased's soul. With reference to the *first set* of acts the power of the Hindu female is wider and if the *income of the property* is not *sufficient* to cover the expenses, she is entitled to sell the *whole of it.* In the other case she can alienate a *small portion* of the property for the *pious or charitable* purposes, she may have in view. She may also alienate a small portion of the property for the *contnuous* benefit of the soul of the deceased owner. *(Sardar Singh V. Kunja* (1922) 44.All.503=49.I.A.383).[101] The following acts are *essential* and *obligatory* and the widow is entitled to sell the *whole estate,* if the income of the property is not sufficient, for performing such acts :-

1. Payment of debts of the deceased owner, even *though barred by limitation* whether during his lifetime or after his death. *(Ashutosh V. Chidam* (1930) 57.Cal. 904).[102] The widow or other limited heir is bound to pay the *interest only* and not the principal out of the income of the property, as the *whole income* belongs to her. (*Debi Dayal V. Bhan Pratap* (1904) 31.Cal.433).[103] But if the proportion of the interest, to the whole of the principal amount of the debt is small, say one-fifth, alienation of the *corpus* of the property for such interest along with the principal is valid. (1932.55.Mad.216=134.I.C.810).[104] She is not entitled to pay a time barred debt which was *repudiated* by her husband. (1915.39. Bom. 113 = 27. I.C. 346).[105] A daughter-in-law succeeding to the

101. *(Sardar Singh V. Kunja* (1922) 44.All.503=49.I.A.383).
102. *(Ashutosh V. Chidam* (1930) 57.Cal. 904).
103. (*Debi Dayal V. Bhan Pratap* (1904) 31.Cal.433).
104. (1932.55.Mad.216=134.I.C.810).
105. (1915.39. Bom. 113 = 27. I.C. 346).

estate of her father-in-law, is entitled to alienate the property for payment of his time barred debt (1887. 11.Bom.325),[106] but a mother succeding to her son's estate is not entitled to pay the time barred debt of her husband, though the estate originally belonged to her husband. (1921.43.All. 604=63.I.C.279).[107] A widow is not entitled to pay off her husband's debt, incurred by him during his *minority* so as to bind the reversioners. (1936.11.Luck.11=154. I.C.841).[108] Payment of her husband's debts during his lifetime by a wife with her own money is deemed to be a *voluntary* payment, in the absence of evidence to the contarary, and will not support an alienation made after his death. (1911. 33. All. 342 = 10. I.C.274 [P.C.]).[109] Nor can she borow, in the absence of any proof on necessity, *at a high rate of interest.* (6.C.L.J.462).[110]

2. Performance of the exequial (funeral) rites and the *sraddha* ceremonies of the deceased owner. (1898. 22.Bom.818 ; *Srimohan V. Brijbehari* (1909) 36.Cal.753).[111]

A daughter succeeding to the property of her father may alienate it for performing similar ceremonies of the father. (*Raj Chunder V. Sheeshoo* (1865) 7.W.R.146).[112] But this principle applies only to a widow or other limited owner or a doncee from her *in lawful possession. (Nandrani V. Krishna Sahai* (1935)57.All.997).[113]

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106. (1887. 11.Bom.325),
107. (1921.43.All. 604=63.I.C.279).
108. (1936.11.Luck.11=154. I.C.841).
109. (1911.33.All.342=10.I.C.274 [P.C.]).
110. (6.C.L.J.462).
111.(1898. 22.Bom.818 ; *Srimohan V. Brijbehari* (1909) 36.Cal.753).
112. (*Raj Chunder V. Sheeshoo* (1865) 7.W.R.146).
113. *(Nandrani V. Krishna Sahai* (1935)57.All.997).

The following acts and ceremonies are not essential or obligatory and the widow or other limited heir can alienate *a small portion* only of the property for these pious or charitable purposes. These acts are *optional,* but these are spiritually beneficial to the deceased's soul.

(a) Performance of religious ceremonies of persons whose ceremonies the deceased owner was bound to perform. For example, the *sraddha* of the deceased husband's mother and the like. *(Chowdry Junmejoy V. Russomoyee* (1868) 11.Beng.L.R.418 ; 1882.8Cal.36).[114] Where the daughter inherits her father, performance of her mother's *sraddha* falls under this class. (1909.36.Cal. 753 supra).[115]

(b) Besides those mentioned in (a) above, there are some other religious or charitable acts which conduce to the spiritual welfare of the deceased and for which the widow or other limited heir is entitled to alienate *a small portion* only of the property as laid down in *Sardar Singh's* case and in other cases like *Ram Kawal V. Ram Kishore* (1895.22.Cal.506), *Pana Chand V. Manoharal* (1918.42.Bom.136=43.I.C.729).[116]

The following are *instances* of such acts :

1. Pilgrimage to *Gaya* for performing her husband's *sraddha. (Muteeram V. Gopal* (1873) 11.Beng.L.R.416; 1924.46.All 822 =80.I.C.31).[117]

2. Pilgrimage to *Pandharpur* (1912.36.Bom.88),[118] *but not pilgrimage to Benares (Hari V. Bajrand* (1909) 13.C.W.N.544).[119]

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114. *(Chowdry Junmejoy V. Russomoyee* (1868) 11.Beng.L.R.418 ; 1882.8Cal.36).
115. (1909.36.Cal. 753 supra).
116. (1895.22.Cal.506), *Pana Chand V. Manoharal* (1918. 42. Bom.136=43.I.C.729).
117. *(Muteeram V. Gopal* (1873) 11.Beng.L.R.416; 1924.46.All 822 = 80.I.C.31).
118. (1912.36.Bom.88),
119. *(Hari V. Bajrand* (1909) 13.C.W.N.544).

3. A gift for *bhoog* to *Deity* at the temple of *Jagannath* at *puri* and for maintenance of the priests there "*for the salvation of my husband **** and my own salvation.*" (1922.44.All.503 supra).[120]

4. A gift made by the daughter at the time of her father's *sraddha* on the occasion of *Pushkaram.* (1911. 34. Mad. 288 = 6. I.C.240).[121]

5. A gift for erecting and maintaining a temple *for the benefit of her husband's soul* and a gift for excavation and maintenance of a tank to be attached to a temple erected by her husband. (1927.2.Luck.713 = 104.I.C,676 ; *Khub Lal V. Ajodhya* (1916) 43. Cal.574).[122]

6. A gift to her husband's *purohit* (priest) on the occasion of her visit to *Gaya.* (1921.43.All.515 =63.I.C.221).

7. A gift to a family *Diety. (Madan Mohan V. Rakhal Chandra* (1930) 57.Cal.570).[123]

The circumstances that the widow has *sufficient income* for meeting such expenses without alienation of the estate is immeterial, for *the whole income is her property.* (1922.44.All.503 supra).[124]

But the widow is not competent to alienate any portion of her husband's property *for her sole spiritual benefit.* Hence the following gifts have been held to be invalid :

1. A gift to a favoured idol, sixteen months after her husband's death, *without any reference to him or his funeral ceremonies.* (1882.4.All.482).[125]

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120. (1922.44.All.503 supra).
121. (1911. 34. Mad. 288 = 6. I.C.240).
122. (1927.2.Luck.713 = 104.I.C,676 ; *Khub Lal V. Ajodhya* (1916) 43. Cal.574).
123. *(Madan Mohan V. Rakhal Chandra* (1930) 57.Cal.570).
124. (1922.44.All.503 supra).
125. (1882.4.All.482).

2. A feast given by the widow on her return from the pilgrimage. (1911.33.All.255=9.I.C.199).[126]

3. A gift for erecting a *dharamshala,* sixteen years after husband's death, *without any reference to her deceased husband.* (1921.43.All.463=62.I.C.432).[127]

4. A gift for construction of a temple and installation of *idols for her own welfare and salvation.* (1918. Pat. 323-48.I.C.746).[128]

5. A gift to her own *Guru,* nine years after her husband's death. (1928). 3.Luck.645=110.I.C.618).etc.[129]

It should be borne in mind that the widow is entitled to alienate *a small portion only of property* for the acts and ceremonies which are considered *conducive to the spiritual welfare of her husband's soul.* Hence any expenditure, considered *out of all proportion* to the estate was held not to be binding on the reversioners. (1943). 18. Luck. 501 = 204. I.C.68).

(Widow not in possession) A widow or other limited heir, who is entitled to maintenance only, not being in possession of the esate, cannot burden the estate with any expense for religious or charitable purposes. (1931.33.Bom.L.R.1244=135.I.C.491).[130]

2. Legal necessity and benefit of the estate :

(Extent of widow or other limited heir's power.) The power of a widow or other limited heir to alienate the estate *for purposes other than religious or charitable* is analogous to that of a manager of an infant's estate as defined by the Judicial Committee in *Hunooman Persaud V. Babooee.* (1856) 6.M.I.A 393).[131] It can only be exercised in *case of need or for the benefit of the esate.* ``The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded''. (1856. 6.M.I.A.393 supra).[132]

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126. (1911.33.All.255=9.I.C.199).
127. (1921.43.All.463=62.I.C.432).
128. (1918. Pat. 323-48.I.C.746).
129. (1928). 3.Luck.645=110.I.C.618).etc.
130. (1931.33.Bom.L.R.1244=135.I.C.491).
131. *Hunooman Persaud V. Babooee.* (1856) 6.M.I.A 393).
132. (1856. 6.M.I.A.393 supra).

"The *touchstone* of the authority is *necessity.*" *(Sham Sunder V. Achhan* (1898) 25.I.A.183, 192).[133] It does not mean *actual compulsion,* but the kind of pressure which the law recognises as *serious* and *sufficient.* (1922.49.I.A. 342, 346).[134] If there is no pressure on the esate, sale even on full value, is not justified. *(Nabakishore V. Upendra* (1923) 37.Cal.L.J.319=74.I.C.612).[135]

The following purposes have been recognised as amounting to legal necessity for which an alienation may be made : —

1. Maintenance of the widow or other limited heir herself *(Ram Sumran Prasad V. Shyam Kumari* (1922) 49.I.A.342, 346),[136] and of the persons who are entitled to be maintained by the estate, such as deceased's mother, unmarried daughter and the like (1924.46.All. 822) or for paying off *family debts.* (1934.57.Mad. 772 = 155. I.C. 79).[137]

2. Marriages of the relations of the deceased owner, such as his daughter, son's daughter, grand son's daughter *(Ramcoomar V. Ichamoyee* (1880) 6.Cal.36),[138] paternal uncle's son's daughter (1926.5.Pat.350=90.I.C.732)[139] and the like, which are *a burden on the estate.* Marriage of relations such as these is conducive to the *spiritual welfare* of the deceased.

3. Gift of a portion of the property to the son in law on the occasion of the daughter's marriage (1926.5.Pat.646=99.I.C.789) or a gift of immoveable property to her daughter at her *gawna or dwiragamana* ceremony *(Churamon V. Gopi Sahu* (1910) 37.Cal.1 =13.C.W.N.994)[140] and the like *provided it is within reasonable limit.*

133. *(Sham Sunder V. Achhan* (1898) 25.I.A.183, 192).
134. (1922.49.I.A. 342, 346).
135. *(Nabakishore V. Upendra* (1923) 37.Cal.L.J.319=74.I.C.612).
136. *(Ram Sumran Prasad V. Shyam Kumari* (1922) 49.I.A.342, 346),
137. (1934.57.Mad. 772 = 155. I.C. 79).
138. *(Ramcoomar V. Ichamoyee* (1880) 6.Cal.36),
139. (1926.5.Pat.350=90.I.C.732)
140. *(Churamon V. Gopi Sahu* (1910) 37.Cal.1 =13.C.W.N.994)

4. Payment of Govt. revenue and the like. But a sale of the *corpus* for such purpose is not binding on the estate unless it can be shown that there was *no other means of satisfying it* and the mortgage or sale was *absolutely necessary* for the *benefit of the estate.* (1929.4.Luck.279=114.I.C.783 ; *Jiban V. Brajo Lal* (1903) 30.Cal 550).[141] In case of actual necessity, the circumstances that the necessity was brought about by the mismanagement of the widow does not vitiate the sale or mortgage unless it is shown that the purchaser or the mortgagee himself *contributed to such mismanagement. (Rajeswar Bali V. Har Kishen Bali.* (1933) 8. Luck. 538 =150.I.C.346).[142]

5. Cost of litigation necessary for preserving the estate and an alienation for the purpose is *for the benefit of the estate.* (*Debi Dayal V. Bhan Pertap* (1904) 31.Cal. 433),[143] An alienation for necessary repairs to the properties, but not for developing and improving the same, is one regarded as *for the benefit of the estate. Hurry V. Ganesh* (1884) 10.Cal.823).[144] But if she wrongfully commits an act of trespass, the estate will not be liable. *(Lalji V. Goberdhone.* 15.C.W.N.859).[145]

6. Cost of taking out probate or letters of administration or a succession certificate in respect of the estate of the deceased owner. *(Srimohan V. Brijbehari* (1909) 36.Cal.753).[146]

(Reversioner according to Hindu Law.) In Hindu Law the term *reversioner* bears a special meaning. A Hindu reversioner has no *present interest* in the property, the actual reversioner may be a *different person* from the *presumptive rerversioner* and his heirs. It actually means *the next heir of the last full owner.*

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141. (1929.4.Luck.279=114.I.C.783 ; *Jiban V. Brajo Lal* (1903) 30. Cal 550).
142. *(Rajeswar Bali V. Har Kishen Bali.* (1933) 8. Luck. 538 = 150. I.C. 346).
143. (*Debi Dayal V. Bhan Pertap* (1904) 31.Cal. 433),
144. *Hurry V. Ganesh* (1884) 10.Cal.823).
145. *(Lalji V. Goberdhone.* 15.C.W.N.859).
146. *(Srimohan V. Brijbehari* (1909) 36.Cal.753).

The succession of the presumptive reversionery heir to the estate of the widow is mere *spes succession* or chance of succession. He is not an heir while the widow lives. Hence it is not transferable and a conveyance executed by the reversionery heir during widow's lifetime must be inoperative. Though a transfer of his interest by a reversioner is void, he may, by becoming a party to a compromise, be *estopped* from claiming as reversioner. But by an agreement of *surrender* from the nearest reversioner, the widow cannot enlarge her life estate into an absolute estate.

(Co-widows.) Co-widows are *joint tenants* and if they act together they can alienate the *corpus* of the property for *legal necessity.* One of them cannot alienate even for legal necessity except with the consent of the other provided such consent has not been *unreasonably withheld.* (1932. All.708=203.I.C.97).[147]

(Mortgage.) In case of legal necessity a widow or other limited heir may raise money by selling the property or mortgaging the same. ``A widow, like a manager of a family must be allowed a reasonable latitude in the exercise of her powers, provided, *she acts fairly* to her expectant heirs.'' *(Venkji V. Vishnu* (1894) 18.Bom.534, 536 ; *Niamat Rai V. Din Dayal* (1927) 54.I.A.211).[148]

(Reversioner's remedy.) If the property is sold for legal necessity, the reversioner cannot recover it, even by refunding the money to the purchaser. But in case of excessive sale, he is competent to have it set aside by paying the amount which *The widow sas entitled to raise ;* and he must offer to pay the same, otherwise his suit would fail. *(Pramatha V. Bhuban.* (1922.49.Cal.45).[149]

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147. (1932. All.708=203.I.C.97).
148. *(Venkji V. Vishnu* (1894) 18.Bom.534, 536 ; *Niamat Rai V. Din Dayal* (1927) 54.I.A.211).
149. *(Pramatha V. Bhuban.* (1922.49.Cal.45).

(Duties of purchaser.) A lender or a purchaser, dealing with a Hindu widow, is bound to enquire into the necessities for the loan or the sale. The *onus* to prove that there was necessity for sale or mortgage *lies on him.* If he proves that there was a necessity in fact, the alienation would be upheld, even though the necessity was brought about by the mismanagement of the limited heir unless he himsef *contributed* to such mismanagement. *(Rai Rajeswar Bali V. Har Kissen Bali* (1933) 8.Luck.538).[150]

In no case, however, he is bound to see that the money paid by him is applied to meet the necessity. *(Hunooman Persaud V. Babooee).*[151]

If the purchaser is satisfied that there were legal necessities for selling property, that is quite sufficient. It is not the concern of the purchaser to keep a watch and to prove as to how that money was spent after payment. (1960) 12.D.L.R.142.[152]

Legal necessity, transfer of the debutter property-Valid when it is for protection and preservation of the *deity* and for its proper *sheba puja.* (1958) 10.D.L.R.271.[153]

Legal necessity-alienation of property for-Recitals in the *Kabal* as regards legal necessity are not by them selves evidence of the fact of legal necessity, exceptions have been made in respect of *old documents* containing such recitals when orther evidence become non-available, (1958) 10.D.L.R.641.[154]

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150. *(Rai Rajeswar Bali V. Har Kissen Bali* (1933) 8.Luck.538).
151. *(Hunooman Persaud V. Babooee).*
152. (1960) 12.D.L.R.142.
153. (1958) 10.D.L.R.271.
154. (1958) 10.D.L.R.641.

(Interest.) Even in case of legal necessity the limited owner can borrow "upon reasonable commercial ra'es" and in case of high rate, the creditor is bound to show that there was *necessity* to borrow at such a high rate, other-wise it may be reduced by the Court. *(Durgaprasad V. Jewdhari Sing* (1935) 62.Cal.733).[155]

(Alienation made with-out legal necessity.) An alienation by a widow without legal necessity does not become *void* on her death. It is *voidable* at the option of the reversioner only. A stranger cannot question the validity of alienation made by the holder of limited estate. (1931.6.Luck.710=139.I.C.631).[156]

(Is widow's interest absolute?) Even in the absence of any reversioner the widow does not get an *absolute estate.* If she alienates it without legal necessity, then, if there be no reversioners, the alienations may be set aside by the Crown or the State taking by escheat. *(Kundan V. Secretary of State.* (1926) 7.Lah.543=96.I.C.865).[157]

ACCUMULATIONS AND SAVINGS FROM INCOME

(Widow's standard of life.) As per *Sastras,* the widow is to live a life of *austerity* and to enjoy with *moderation* the husband's estate inherited by her. It follows, therefore, by necessary implication, that she must accumulate the surplus income for the benefit of the reversioner.

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155. *(Durgaprasad V. Jewdhari Sing* (1935) 62.Cal.733).
156. (1931.6.Luck.710=139.I.C.631).
157. *(Kundan V. Secretary of State.* (1926) 7.Lah.543=96.I.C.865).

(View of the Courts.) The Courts felt a difficulty in determining what is intended by *moderate enjoyment* as there is no restriction on her liberty to alienate the estate for religious and charitable purposes. Accordingly it was held that when the estate is large and the income thereof is sufficient, she has absolute power of the disposal of the income of the property inherited by her. She is not bound to save the income. *She may spend the whole income upon herself or give it away as she likes during her life. (Hurrydoss V. Uppoornah* (1856) 6.M.I.A.433).[158] But if she saves and makes no attempt to dispose of the savings or accumulations in her lifetime, they will follow the *corpus* of the estate and go to her husband's heirs after her death *and not to her own heirs. (Isri Dut V. Hansbutty* (1883) 10.Cal.324).[159]

The right of a widow or other limited heir to accumulations of the income of the estate may be discussed under the following heads : —

(Accumulations during husband's lifetime.) Accumulations accrued during husband's lifetime form part of the *corpus* and the widow has no power to alienate it without legal necessity. *(Chandrabulee V. Brody* (1868) 9.W.R.584).[160]

(Accumulations bet-ween death of husband and delivery of the estate to the widow.) Since these accumulations accrue after husband's death, the widow does not take them *by succession* and she may spend them as she chooses. But if she keeps these accumulations distinct for sometime can she dispose them of at her pleasure? This question should be determined by the intention of the widow to treat the accumulations *as accretions to the estate or as her own absolute property.* If she does nothing to indicate an intention to make the fund part of her husband's estate, the fund is her *stridhana* which she may dispose of by deed or will. But if she does indicate such an intention, she takes only a *widow's estate* in the fund and she cannot dispose of it without *legal necessity,* and on her death it passes to the reversioners. *(Saodamini Dasi V. Administrator General of Bengal* (1892) 20.I.A.12=20.Cal.433).[161]

158. *(Hurrydoss V. Uppoornah* (1856) 6.M.I.A.433).
159. *(Isri Dut V. Hansbutty* (1883) 10.Cal.324).
160. *(Chandrabulee V. Brody* (1868) 9.W.R.584).
161. *(Saodamini Dasi V. Administrator General of Bengal* (1892) 20.I.A.12=20.Cal.433).

(Accumulations made by the widow.) A widow may spend her whole income either upon herself or by giving it away as she likes, during her lifetime. She is not bound to save. But if she saves the question arises whether she has the same power of disposal of the *savings* as she has of the *income* or whether the savings should be treated as accretions to the estate, so as to be subject to the same restraint on alienation as the *corpus* itself. It depends on the intention of the widow. If she does nothing to indicate an intention to make the savings part of her husband's estate or to justify the inference that she wished them to revert to her husband's heirs, the savings are her *stridhana* which she may dispose of by deed or will. *(Prabhakar V. Sarubhai* (1943) Nag.779).[162] But if she indicates such an intention or does anything to justify any such inference she takes only a *widow's estate* in them and she cannot dispose of them without *legal necessity* and on her death they will pass to her husband's heirs.

(Income held in suspense.) The widow or a limited heir may not recover rents of the estate inherited by her or realise the money in respect of decree obtained by her or she may have recovered the arrears of rents and realised the decrees but may not have invested the amount. Then the question arises whether these income constitute her *stridhana* or passes to the reversioners. It depends upon her intention. If she treats it as her personal property she can dispose it of by a deed or will. But when there is no will and the income is unrealised it will pass to the reversioners and not to her *stridhana* heirs. *(Surendra Nath V. Radharani* (1940) 2.Cal.415 = 187. I.C. 108).[163]

(Income granted to the widow by the husband.) If the husband grants the *income of the property* to wife by deed or will and the *corpus* is given to others, the savings from such income and property purchased out of the savings constitute her *stridhana* ; and on her death it passes to the *stridhana heirs. (Sreemati Krishna V. Bhiya Rajendra* (1927) 2.Luck.43, 82-89=104.I.C.15).[164]

162. *(Prabhakar V. Sarubhai* (1943) Nag.779).
163. *(Surendra Nath V. Radharani* (1940) 2.Cal.415 = 187. I.C. 108).
164. *(Sreemati Krishna V. Bhiya Rajendra* (1927) 2.Luck.43, 82-89=104.I.C.15).

(Enlargement of estate.) If the estate of the widow is enlarged by the action of the Government or by compromise or otherwise, the enlarged estate is still a *widow's estate.* The enlargement being no more than accretion to her husband's estate does not constitute her *stridhana.* (1906.28Mad.13 ; 1926. 1. Luck. 98 = 92.I.C.637 ; *Nabakishore V. Upendra* (1923) 37. Cal. L.J. 319 = 74.I.C.612).[165]

ALIENATION WITH REVERSIONER'S CONSENT.

(Dayabhaga school.) Dayabhaga lays down that the widow may, with the consent of the husband's kinsmen deal with his estate in any way she likes. It is based on the following text of Narada ;

"মৃতে ভর্ত্তর্য্যপুত্রায়াঃ পতিপক্ষঃ প্রভুঃ স্ত্রিয়াঃ।
বিনিয়োগেহ্ র্থরক্ষাসু ভরণে চ স ঈশ্বরঃ।।
পরিক্ষীণে পতিকুলে নির্মনুষ্যে নিরাশ্রয়ে।
তৎ সপিণ্ডেষু চাসৎসু পিতৃপক্ষঃ প্রভুঃ স্ত্রিয়াঃ।।"

— নারদঃ —

meaning—''When the husband is dead, husband's kinsmen are the guardians of his sonless wife ; in the disposal and care of the property, as well as in (the matter of) maintenance, they have full power. But if the husband's family be extinct or contain no male or be helpless, or there be no sapinda of his, then the kin of her own parents are the guardians of the widow.''

— Narada —

Courts differed widely on the point and the views of the different Courts regarding alienation with reversioner's consent may be summarised as follows : —

165. (1906.28Mad.13 ; 1926. 1. Luck. 98 = 92.I.C.637 ; *Nabakishore V. Upendra* (1923) 37. Cal. L.J. 319 = 74.I.C.612).

(Mere consent does not validiate an alienation.) Mere consent of the next reversioner is of evedential value only. Since it is not the conclusive proof of legal necessity it does not validate an alienation. After the death of the widow, the actual reversioner may question such an alienation but the burden lies on him to show that there was no legal necessity for the alienation. *(Rangasami V. Nachiappa.* (1919) 46.I.A.72).[166] But the consenting reversioner cannot question such an alienation unless he shows that his consent was obtained by misrepresentation. *(Harendra Nath Mukherjee V. Haripada Mukherjee* (1938) 2.Cal.492).[167]

(Quantum of consent.) Consent of all the next reversioners is preferred. But it depends on the fact and circumstances of each particular case. Mere attestation of a deed does not necessarily import consent to an alienation effected by it. *(Hari Kishen V. Kashi Persad* (1914) 42.Cal.876=27.I.C.674).[168]

If the next reversioner is a female consent both of the female reversioner and the immediate male reversioner is necessary to validate the alienation. (1881.5.Bom.563). the reversioner's consent need not be given at the time of the alienation by the widow. It may have prospective as well as retrospective effect. (1907.30.All.1.=35.I.A.1).[169]

(Alienation may be of the whole estate or part.) A widow or a limited heir may alienate the whole of the estate or part of it with the consent of the reversioners. A valid alienation may be made even of a portion of the property. (1919) 46.I.A.72, 81.84 supra.[170]

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166. *(Rangasami V. Nachiappa.* (1919) 46.I.A.72).
167. *(Harendra Nath Mukherjee V. Haripada Mukherjee* (1938) 2.Cal.492).
168. *(Hari Kishen V. Kashi Persad* (1914) 42.Cal.876=27.I.C.674).
169. (1907.30.All.1.=35.I.A.1).
170. (1919) 46.I.A.72, 81.84 supra.

(Consideration.) The alienation by a widow such as a sale, mortgage or a lease must be made for consideration. An alienation without any consideration is not binding on the reversioners. *(Bijoy Gopal V. Girindra Nath* (1914) 41. Cal.793.[P.C.]).[171]

(Gift) Gift by a widow or other limited heir of the entire estate or part thereof to a third person even with consent of the next reversioner is not binding on the actual reversioner. (1919.46.I.A.72, 81-84 supra).[172] A gift by a widow for religious and charitable purposes, is valid provided it is conductive to the spiritual welfare of the husband or husband and other members his family including the widow and not for her sole spiritual benifit.

Illustrations.

(a) **W,** a widow goes to Puri and makes a gift to the temple of Jagannath for offering *bhog* (food offerings) regularly to the deity and for the maintenance of the priests there for salvation of her husband and his family members and for her own salvation. The gift is valid. *(Sardar Singh V. Kunja* (1922) 44.All.503).[173]

(b) **W,** a widow makes a gift for construction of a temple and installation of idols for her own welfare and salvation in the next world.

The gift is invalid. (1918.Pat,323=48.I.C.746).[174]

A gift of the entire estate to the next reversioner or reversioners is valid. According to the High Court of Calcutta a gift of the entire estate by a widow to a third person, with the consent of the whole body of the next reversioners is valid as it is in effect a surrender. *(Nabokishore V. Harinath.* (1884) 10.Cal.1102).[175] But according to Bombay High Court such a gift is not valid though it may be binding on the widow and the consenting reversioner and not on the actual reversioner or on a son subsequently adopted by her. *(Tukaram V. Yesu* (1931) 55.Bom.46).[176]

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171. *(Bijoy Gopal V. Girindra Nath* (1914) 41. Cal.793.[P.C.]).
172. (1919.46.I.A.72, 81-84 supra).
173. *(Sardar Singh V. Kunja* (1922) 44.All.503).
174. (1918.Pat,323=48.I.C.746).
175. *(Nabokishore V. Harinath.* (1884) 10.Cal.1102).
176. *(Tukaram V. Yesu* (1931) 55.Bom.46).

(Alienation without legal necessity or with-out reversioner's consent.) It the widow alienates any property without legal necessity or without the consent of the reversioners, it binds the widow only and not the reversioners. (1920.I.Lah.48=58.I.C.847).[177]

Such an alienation is not *void ab initio* but *voidable* at the option of the reversioners and if there be no reversioner at the option of the Crown or State taking by escheat. *(Kundan V. Secretary of State* 96. I.C.865).[178]

LEASE, DEBTS ETC.

(Lease by widow.) A widow or other limited heir has no power to grant permanent lease or a lease for a long term so as to bind the reversioner unless it is done for legal necessity or for the benefit of the estate or with the consent of the reversioners (1923.37.Cal.L.J.319 ; 1914.41.Cal.793).[179] The term for the benefit of the estate means preservation and protection of the estate and not its improvement. *(Dayamani V. Srinibash*(1906) 33.Cal.842).[180] Such a lease is not void but voidable at the option of the reversioners.

(Alienation with leave of Court.) Where a widow alienates the property with leave of the Court she can confer on the alienee an absolute title irrespective of the necessity or of the consent of reversioners. (*Ananda V. Atul* (1919) 23.C.W.N.1045).[181]

(Compromise) If a widow or a limited heir enters into family arrangements or compromise and alienates a property, a reversioner who has been a party to and benefited by the transaction is debarred from questioning the alienation ; and so are his descendants. (1927.54.I.A.396=52.Bom.1).[182]

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177. (1920.I.Lah.48=58.I.C.847).
178. *(Kundan V. Secretary of State* 96. I.C.865).
179. (1923.37.Cal.L.J.319 ; 1914.41.Cal.793).
180. *(Dayamani V. Srinibash*(1906) 33.Cal.842).
181. (*Ananda V. Atul* (1919) 23.C.W.N.1045).
182. (1927.54.I.A.396=52.Bom.1).

If the widow enters into such a compromise for *bona fide* settlement of the disputes or for the benefit of the estate, it binds the reversioners though they may not be parties to the transaction. *(Upendra V. Bindesri* (1915) 20.C.W.N.210).[183]

Where a widow enters into a compromise of a claim made by the next reversioner it is binding on the whole body of reversioners, provided it is prudent and reasonable. *(Mata Prasad V. Nageshar Sahai* (1925) 52.I.A.398=47.All.883).[184]

(Trade debts.) A widow may alienate the estate for payment of debts of the family business. (1898.21.All.71)[185] If the business involves purchase and sale of immoveable property, she may in the course of business sell properties so purchased by her irrespective of any legal necessity. *(Pahlwan Singh V. Jiwan Das* (1920) 42. All.109).[186]

According to Madras and Allahabad High Courts the estate is not liable for the unsecured debts contracted by the widow or other limited heirs though the purpose of contracting such debts amounts to a legal necessity i.e. for marriage of grand-daughter etc. (1882.4 Mad. 375 ; 1897.19.All.300).[187]

But According to Calcutta, Bombay and Nagpur High Courts the estate is liable for such debts. (1884. 10.Cal.823 ; 1936.60.Bom.311 ; 1939.Nag.347).[188]

Acknowledgement of debts by the widow or other limited heirs is binding on the reversioners. (See.Sec. 3 of Limitation (Amendment) Act, 1927).

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183. *(Upendra V. Bindesri* (1915) 20.C.W.N.210).
184. *(Mata Prasad V. Nageshar Sahai* (1925) 52. I.A. 398 = 47. All.883).
185. (1898.21.All.71)
186. *(Pahlwan Singh V. Jiwan Das* (1920) 42. All.109).
187. (1882.4 Mad. 375 ; 1897.19.All.300).
188. (1884. 10.Cal.823 ; 1936.60.Bom.311 ; 1939.Nag.347).

WASTE

(The widow may be restrained when she commits waste.) The presumptive reversioners may restrain the widow by a suit for injunction if she commits waste of does any act which is injurious to the property. But the Court may not grant such an injunction unless the act complained of constitutes danger to the property. (1856.6M.I.A.433 ; 1915.37.All.177).[189]

SURRENDER AND RECONVEYANCE.

(What is surrender?) When a widow or other limited heir surrenders, she withdraws her life estate and destroys her right in the property. By this act she accelerates succession and the whole estate vests in the next heir, in the same way as if she were dead at that time.

(How it is done?) All that the widow should do by the deed of surrender, is to declare that she feels no desire for exercising rithts of ownership over her husband's estate, and she gives up her rights therein and possession thereof. She is required to declare further that her interest being thus withdrawn and destroyed, the immediate reversioner becomes entitled to the estate *by the operation of law of-inheritance,* and not by *any act of transfer by herself.*

(Essentials or prere-quisites of a valid surrender.)

(i) Surrender must be of whole estate in favour of the nearest reversioner. (1943.Mad.1; 69.I.A.110).[190] If there be more than one reversioners surrender must be in favour of the whole body of reversioners. (1925.49.Bom.187).[191] If the surrender is *bona fide* and not a device to divide the estate with the reversioner, it is valid irrespective of the legal necessity. *(Sureshwar V. Mashesh Rani* (1920) 48.Cal.100).[192] If there be more than one widow surrender must be by all of them. (*Dulhin V. Baijnath* (1935) 14.Pat.518).[193]

189. (1856.6M.I.A.433 ; 1915.37.All.177).
190. (1943.Mad.1; 69.I.A.110).
191. (1925.49.Bom.187).
192. *(Sureshwar V. Mashesh Rani* (1920) 48.Cal.100).
193. (*Dulhin V. Baijnath* (1935) 14.Pat.518).

In case of dispute between the widow and the next reversioner as to the title to her husband's property the widow may enter into a compromise by relinquishing her rights in lieu of a small portion of the property for her maintenance for life. Such a compromise would be a *bona fide* surrender. (1920.48.Cal.100).[194]

(ii) A surrender may be made in favour of a female reversioner. (1934.57Mad.749).[195] But in such a case the estate vests in her as a *limited owner* and on her death it does not revert to the widow but passes to the next reversioner. (1924.46.All.59).[196]

(iii) A surrender may be made to a male reversioner with the consent of an intermediate female reversioner. But in such a case if the intermediate reversioner reserves for herself any benefit, regarded more than necessary for the maintenance, the surrender is invalid and not binding on the actual reversioner. *(Janak Nath V. Jyotish* (1941) Cal.234).[197]

(iv) Gift of the whole property to a stranger with the consent of the next reversioner or with the consent of the whole body of reversioners is valid according to the Calcutta High Court (*Nabakishore V. Harinath* (1884) 10.Cal.1102),[198] but not according to Bombay High Court. (*Tukaram V. Yesu* (1931) 55.Bom.46).[199]

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194. (1920.48.Cal.100).
195. (1934.57Mad.749).
196. (1924.46.All.59).
197. *(Janak Nath V. Jyotish* (1941) Cal.234).
198. (*Nabakishore V. Harinath* (1884) 10.Cal.1102),
199. (*Tukaram V. Yesu* (1931) 55.Bom.46).

(v) Where the widow alienates a portion of the property for legal necessity and subsequently surrenders the remaining portion to the next reversioner it is valid. (1937) mad.248). If the widow alienates a portion without legal necessity and surrenders the remaining portion in favour of the next reversioner, he is not entitled to immediate possession of the portion so alienated. But he may sue for possession after the death of the widow. *(Prafulla V. Bhabani* (1925) 52.Cal.1018).[100]

(vi) If the widow makes a gift of the whole property to a third person, she cannot surrender the whole estate to the next reversioner afterwards. (1927.51.Bom.1019 =107.I.C. 265).[101]

(vii) A valid surrender once made by a widow, cannot be defeated by a subsequent adoption to her husband. (1934. 58. Bom. 521).[102]

MANAGEMENT

A widow is entitled to manage the estate inherited by her, if she acts fairly to the expectant heirs. *(Hunooman Persaud V. Mussamat Babooee).*[103] She is also entitled to sell or mortgage the estate for payment of debts left by her husband. The Court cannot interfere in her management unless it is proved that the interference of the Court is necessary to prevent a possible danger. *(Biswanath V. Khantomoni* (1870) 6. Beng. L.R. 747 - 751 ; *Hurrydoss V. Sreemutty Uppoornah* (1856) 6.M.I.A.433).[104]

(Lapse of widow's estate.) A widow forfeits her rights to her husbands estate by remarriage. There cannot be any difference between a re-marriage under the Act or under a custom or otherwise.

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100. *(Prafulla V. Bhabani* (1925) 52.Cal.1018).
101. (1927.51.Bom.1019 =107.I.C. 265).
102. (1934. 58. Bom. 521).
103. *(Hunooman Persaud V. Mussamat Babooee).*
104. *(Biswanath V. Khantomoni* (1870) 6. Beng. L.R. 747 - 751 ; *Hurrydoss V. Sreemutty Uppoornah* (1856) 6.M.I.A.433).

JUDICIAL PROCEEDINGS

(Widow represents the whole estate) The widow represents the whole estate of her husband; no one else has any interest in it so long she is alive. To a suit respecting the husband's estate, she alone is entitled to be a party as representing the estate and a decree fairly and properly obtained against her will bind the reversioners. The Privy Council observed in *Shivagunga case,* "It is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow." (1863) 9.M.I.A. 539, 543).[105] The widow is also entitled to compromise the suit, provided the compromise was entered into by her *bona fide* for the benefit of the estate and not for her personal advantage. *(Mahendra Nath V. Shamsunnessa* (1915) 19. C.W.N. 1280 = 27.I.C.954).[106]

(Reversioner's suit against widow and res judicata.) If a reversioner files a suit against the widow in connection with her husband's estate and the issue is finally determined it operates as *res judicata* in any subsequent suit by another reversioner. It is immaterial whether the plaintiff in the second suit claims through the plaintiff of the first suit or not. *(Mata Prasad V. Nageshar Sahai* (1925) 52.I.A.398=91.I.C.370).[107]

(Adverse possession against the widow) The next reversioner is not affected by the adverse possession against the widow, unless a decree founded upon the adverse possession has been obtained by the party claiming adverse possession against the widow during her lifetime. *(Shivagunga case* (1863) 9.M.I.A.539).[108] The next reversioner is entitled to recover possession of the property, if it is immoveable, within twelve years from the date of the widow's death ; and if it is moveable, within six years from that date. *(Aurobindo V. Manorama* (1928) 55.Cal.903 = 112.I.C.496).[109]

105. (1863) 9.M.I.A. 539, 543).
106. *(Mahendra Nath V. Shamsunnessa* (1915) 19. C.W.N. 1280 = 27.I.C.954).
107. *(Mata Prasad V. Nageshar Sahai* (1925) 52. I.A. 398 = 91. I.C. 370).
108. *(Shivagunga case* (1863) 9.M.I.A.539).
109. *(Aurobindo V. Manorama* (1928) 55.Cal.903 = 112.I.C.496).

REMEDIES AGAINST THE WIDOW.

(Suit by reversioners.) A reversioner has got the right to demand that the estate be kept free from danger during its enjoyment and he may also bring a suit for declaration that an alienation effected by the widow is not binding on him, provided that such alienation is the danger to the inheritance common to all reversioners, presumptive and contingent alike. (1915. 42. I.A. 125).[110] But a reversioner is not entitled to a declaration that he is the next reversioner. (1916.43.I.A.207).[111] The next reversioner may institute a suit for an injunction restraining the widow from committing waste, provided the act complained of constitutes *danger to the property. (Hurrydoss V. Sreemutty Uppornah* (1856) 6.M.I.A.433).[112]

Any will by a widow or other limited heir purporting to dispose of property affords no ground for declaratory suit. (1904. 31. I.A. 67 = 26. All. 233).[113]

(Persons entitled to sue for in-junction.) The next reversioner has a right to sue in the first instance. The reversioner next after him is entitled to sue if the next reversioner refuses to sue or has concurred with the widow in committing wrongful acts or is not in a position to sue due to poverty. (1921.43.All. 534).[114] The mere fact that the next reversioner is a female does not give any right to a remoter reversioner to sue unless it be shown that she is in collusion with the widow. (1918) 40.All.518=46.I.C.186).[115]

110. (1915. 42. I.A. 125).
111. (1916.43.I.A.207).
112. *(Hurrydoss V. Sreemutty Uppornah* (1856) 6.M.I.A.433).
113. (1904. 31. I.A. 67 = 26. All. 233).
114. (1921.43.All. 534).
115. (1918) 40.All.518=46.I.C.186).

(Limitation for declaratory suits.) A suit for declaration that an alienation made by a widow is void must be brought within twelve years from the date of the alienation. If no suit is brought by the reversioners within twelve years, their right to sue including the rights of the after-born reversioners is barred by limitation. But according to Calcutta High Court what bars the next reversioner does not bar the contingent reversioner. *(Abinash V. Harinath* (1905) 32.Cal.62).[116]

(Decree between the next reversioner and the alienee and res judicata') If the next reversioner institutes a suit against the widow and an alienee, any decree fairly and properly passed in such a suit, whether it is for or against the next reversioner, operates as *res judicata* between not only the next reversioner but the whole body of reversioners on the one hand and the alienee and his representatives on the other. *(Pramatha V. Bhuban* (1922) 49.Cal.45). [117]

(Adverse possession by widow.) Property acquired by a Hindu widow by adverse possession in her own right is her *stridhana.* But if such property was claimed by her not in her own right but as a widow, representing her husband's estate, it cannot be her *stridhana.* (1924.51.I.A.171 = 80.I.C.788).[118]

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116. *(Abinash V. Harinath* (1905) 32.Cal.62).
117. *(Pramatha V. Bhuban* (1922) 49.Cal.45).
118. (1924.51.I.A.171 = 80.I.C.788).

CHAPTER IX

JOINT FAMILY AND COPARCENARY MITAKSHARA LAW

(Daya' or heritage.) The Sanskrit word for inheritance is *daya. Da* means to *give* and the word *daya* primarily means a gift. Heritage may be regarded as a gift, which the previous owner intended but omitted to make. The law of inheritance may be traced to the love and affection of the last owner towards the heirs, yet at present, the heir on whom the law confers the right would be entitled to take the estate, if not validly disposed in favour of other persons.

(Characteristics of the joint family.) **Joint family :** The joint family system is a cherished institution of the Hindus and is the peculiar characteristic of their society. Members of the joint family may be males or females. The male members are :-

(1) (Male members.) (i) Those that are lineally connected in the male line such as father, paternal grand-father, son, son's son, etc.

(ii) Collaterals descended in the male line from a common male ancestor such as brother, brother's son, etc.

(iii) Persons who are adopted in the family.

(iv) Poor dependants.

(Female members) The female members are : — (i) The wife or the widowed wife of a male member and his maiden daughters. Married and widowed daughters are not generally members of the father's family. But in cases the married daughter may continue to live in her father's family sometimes together with her husband. Similarly a widowed daughter may come back to her father's family and live as dependant member thereof.

(3) (Poor dependants) The original Sankrit word for poor dependants is দীনাঃ সমাশ্রিতা ঃ- This very word indicates that they are actually getting their subsistence under the protection of the family. The poor and helpless distant relations are also maintained as members of the joint family.

(4) (Female slaves or concubines and illegitimate sons.) Female slaves *(dasi)*, concubines and the illegitimate sons are mentioned in the commentaries as members of the joint family. The following texts form the foundation of the law on the subject : —

১. "অনপতস্য শুশ্রুষুর্গুণবান্ শূদ্রযোনিজঃ।
লভেতাজীবনং শেষং সপিণ্ডাঃ সমবাপ্নুয়ুঃ।।"

— বৃহস্পতিঃ —

meaning-"The virtuous and obedient son, born by a Sudra woman to a man who has no other offspring, should obtain a maintenance, and let the kinsmen take the residue of the estate."

— Vrihaspati —

The author of the Dayabhaga explains that the above text refers to a son of a twice born person by a Sudra woman not married by him.

২. "দাস্যাম্ বা দাসদাস্যাম্ বা যঃ শূদ্রস্য সুতো ভবেৎ।
সোহ্ নুজ্ঞাতো হরেদ্ অংশম্ ইতি ধর্ম্মো অবস্থিতঃ।।"

— মনুঃ —

Meaning -"A son begotten by a Sudra on a female slave or on a female slave of a slave may take a share on partition, if permitted by the father ; this is settled law".

— Manu —

Illegitimate son of a twice born person by a *dasi* (a Hindu concubine in the continuous and exclusive keeping), is entitled to maintenance for life.

The illegitimate son of a Sudra by a *dasi* is entitled to a share in the separate property of his father. If no separate property is left by the father he cannot demand partition and is entitled to maintenance for life.

The illegitimate son of a Hindu by a Hindu woman who is not a *dasi* is entitled to maintenance for life according to Mitakshara and during minority according to Dayabhaga.

The illegitimate son of a Hindu by a non-Hindu woman is entitled to maintenance from his father, (which must be enforced during his lifetime) under Sec.488. of Cr.P.C. [1]

(Illegitimate daughters) The illegitimate daughters can claim maintenance from the putitive father under Sec.488. of Cr.P.C. [2]

A joint Hindu family is joint in estate, food and worship but mere severance in food and worship does not operate as separation.

(Formation) **Coparcenary :** A Hindu coparcenary consists of those persons who acquire by birth, an interest in the joint family property. *(Commissioner of Income Tax V. Luxminarayan* (1935) 59.Bom.618). [3] Hence it consists of the holder of the joint property *and the three generations next to the holder* (i.e. his son, grandson and great-grand-son) *in the unbroken male line.*

A coparcenary is a creature of law and it cannot be created by the act of parties. The only exception to the rule is that if a stranger is taken in the family by adoption he becomes a member of the coparcenary. *(Sudrasanam V. Narasimhulu* (1902) 25.Mad.149). [4] A coparcenary may consist entirely of collateral relations also. If a coparcenary consists of the father and his three sons, after the death of the father the coparcenary may consist of three sons, if they continue joint.

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1. under Sec.488. of Cr.P.C.
2. Sec.488. of Cr.P.C.
3. *(Commissioner of Income Tax V. Luxminarayan* (1935) 59.Bom.618).
4. *(Sudrasanam V. Narasimhulu* (1902) 25.Mad.149).

(Test of coparcenary.) Coparcenary is limited to four degrees from the *last holder* and not to four degrees from *common ancestor.* The primary test as to whether a person is a member of the coparcenary or not depends on the answer to the question ''*Can he demand a partition?*'' If he can, he is a coparcener but not otherwise. As per Hindu law a member, removed more than four degrees from the last holder cannot demand partition hence he is not a coparcener. (See. Mayne's ''Hindu Law and Usage'' 9th. Ed. Sec.271. ; *Moro Vishvanath V. Ganesh,* (1873) 10.Bom, H.C.444).[5]

(Coparcemary interest.) The essence of coparcenary is the unity of ownership and no person has got a difinite share in the property while he is the member of the coparcenary ; his interest in the property is *undivided coparcenary interest.*

''There is *community of interest and unity of possession* between all the members of the family, and upon the death of any one of them the others may well take by *survivorship* that in which they had during the deceased's life time a common interest and a common possession.'' *(Katama Natchiar V. The Rajah of Shivagunga* (1863) 9.M.I.A.543, 611).[6]

(Females.) Under Mitakshara school no female can be a coparcener ; even wife is not her husband's coparcener nor a mother a coparcener with her sons. (*Punna V. Radha* (1904) 31.Cal.476 ; *Srimathi Sabitri V. F. A. Savi* (1934. 13. Pat. 359 = 145.I.C.1).[7]

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5. *Moro Vishvanath V. Ganesh,* (1873) 10.Bom, H.C.444).
6. *(Katama Natchiar V. The Rajah of Shivagunga* (1863) 9.M.I.A.543, 611).
7. (*Punna V. Radha* (1904) 31.Cal.476 ; *Srimathi Sabitri V. F. A. Savi* (1934. 13. Pat. 359 = 145.I.C.1).

CLASSIFICATION OF COPARCENARY PROPERTY

(Heritage.) Under Mitakshara law heritage may be *apratibandha* or unobstructed and *sapratibandha* or obstructed. (It has already been discussed in the chapter "Succession" supra). Obstructed heritage devolves by *succession* and unobstructed heritage devolves by *survivorship*. There are some cases in which obstructed heritage also passes by survivorship. (See. "General principles of of inheritage", supra).

According to Dayabhaga school all heritage is *obstructed* and it recognises only the right of succession, except in cases of property jointly inherited by *two or more widows or two or more daughters*. (See "General principles of inheritance", supra).

(Classification of property.) Coparcenary property may be divided into (i) ancestral property (ii) separate property of a coparcener thrown into common stock. (iii) separate or self acquired property.

The joint family property devolves by survivorship and not by succession. In this property the male issues of the coparceners acquire an interest by birth.

The self acquired property thrown into common stock may become joint family property if the acquirer voluntarily abandons all separate claims upon it. A clear intention to waive his separate rights must be established *(Rajkishore V. Madan Gopal* (1932) 13. Lah. 491=143.I.C.249).[8]

The separate property exclusively belongs to the acquirer. No other member not even his male issue, acquires any interest in it by birth. He may sell it or alienate it by a deed or will. *(Rao Balwant V. Rani Kishori* (1898) 20.All.267=25.I.A.54).[9]

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8. *(Rajkishore V. Madan Gopal* (1932) 13. Lah. 491=143.I.C.249).
9. *(Rao Balwant V. Rani Kishori* (1898) 20.All.267=25.I.A.54).

The property acquired in the following way may be regarded as ancestal property : —

(i) Property inherited from paternal ancestors :

(Ancestral property.) The property inherited by any male Hindu from his father, father's father and father's father's father is ancestral property and the only persons who are entitled to an interest in it by birth are his son, son's son and son's son's son. If he has no son, son's son or son's son's son it becomes his absolute property. *(Janki V. Nand Ram* (1889) 11.All.194.[F.B]).[10]

(ii) Property inherited from maternal grand father : Privy Council held in *Venkayyamma V. Venkataramanayyamma* (1902) 25.Mad. 578=29.I.A.156) that the property inherited by two brothers from their maternal grand-father was *joint property.* But the Privy Council latter on decided that such property is not ancestral property. *(Muhammad Hussain V. Babu Kishwanandan* (1937) 64.I.A.250).[11] As per decision of Madras High Court the maternal uncle is not an *ancestor* and that property inherited from a maternal uncle is not ancestral property. *(Karuppai V. Sankara Narayanan* (1904) 27.Mad.300).[12]

(iii) Property inherited from females and collaterals :

Property inherited from collaterals i.e. from brother, uncle etc. or property in herited from a female such mother, is not an ancestral property and it must be regarded as separate property. *(Baboo Nund Coomar V. Razeeooddeen* (1873) 10.Beng.L.R.183).[13]

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10. *(Janki V. Nand Ram* (1889) 11.All.194.[F.B]).
11. *(Muhammad Hussain V. Babu Kishwanandan* (1937) 64.I.A.250).
12. *(Karuppai V. Sankara Narayanan* (1904) 27.Mad.300).
13. *(Baboo Nund Coomar V. Razeeooddeen* (1873) 10.Beng.L.R.183).

(iv) Share on partition : Share allotted to a coparcener on partition of ancestral property is ancestral property *as regards his male issue.* If the coparcener dies without any male issue other relations take it as separate property. *(Sri Bijai V. Bhupindar* (1895) 17.All.456 = 22.I.A.139).[14]

(v) Gift or will by paternal ancestors : Where a Hindu makes a gift of his separate or self acquired property to his son or bequeaths it by will, it is ancestral property according to Calcutta High Court. *(Hazari Mall V. Abaninath* (1912) 17.C.W.N.280).[15] But according to the High Courts of Madras, Bombay and Allahabad it depends on the intention of the donor and in the absence of language clearly indicating the testator's intention that the property be ancestral it should be presumed that such property is self-acquired. (1866.3.Mad.H.C.50 ; 1886.10.Bom.528, 579).[16]

(Gift of ancestral property.) A father may make a gift of affection of immoveable property *within reasonable limits* to any one of his sons or to his wife or to his daughter. The other managing member also has power to make a gift *within reasonable limits* for *pious purposes, provided the alienation is intervivos and not be will.* (Mit.1.1.27 ; 1922.49.I.A.168 ; 1927.54.I.A.136).[17]

(vi) Accretions : Accumulations of income of ancestral property and property purchased out of such income is regarded as ancestral property. *(Lal Bahadur V. Kanhaia* (1907) 29.All.244).[18]

(Separate property.) Property acquired in the following ways is the separate property or self acquired property of the acquirer : —

(i) Property acquired without any aid from joint family property. (1904.28Mad.386).[19]

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14. *(Sri Bijai V. Bhupindar* (1895) 17.All.456 = 22.I.A.139).
15. *(Hazari Mall V. Abaninath* (1912) 17.C.W.N.280).
16. (1866.3.Mad.H.C.50 ; 1886.10.Bom.528, 579).
17. (Mit.1.1.27 ; 1922.49.I.A.168 ; 1927.54.I.A.136).
18. *(Lal Bahadur V. Kanhaia* (1907) 29.All.244).
19. (1904.28Mad.386).

(ii) Property inherited by him as *obstructed heritage* according to the rules of succession.

(iii) Gift :— A small portion of ancestral moveables made by the father through affection. (1922.49.I.A.168).[20]

(iv) Corody :— If some property is granted by Government to a member of a joint family, it becomes his separate property. As per texts the gift of land or *Nibandha* is to be made by the King himself and not by his deputies. *Nibandha* can also be created by persons other than Kings. Hence the office of heriditary priest or *yajman vritti* is a *Nibandha.*

(v) Property lost to the family : — Ancestral property lost to the family would become self acquired property of the acquirer if he recovers the same without the aid of joint family property. (For detail see *Bajaba V. Trimbak* (1910) 34.Bom.106=4.I.C.255).[21]

(vi) Income of separate property and purchases made with such income constitute separate property. *(Krishnaji V. Moro Mahadev* (1891) 15.Bom.32).[22]

(vii) In the absence of any male issue, property obtained by a coparcener on partition becomes his separate property.

(viii) Where there is no widow with power to adopt, property held by the *sole surviving coparcener* becomes his separate property.

(ix) All acquisitions made by means of learning are separate property of the acquirer as per provisions of Hindu Gains of Learning Act, 1930.

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20. (1922.49.I.A.168).
21. (For detail see *Bajaba V. Trimbak* (1910) 34. Bom. 106 = 4.I.C.255).
22. *(Krishnaji V. Moro Mahadev* (1891) 15.Bom.32).

JOINT FAMILY TRADE

(Distinction between a partnership and a joint Hindu family business.) Unlike partnership a joint Hindu family business arises not out of a contract but by the *operation of law*. Where a Hindu dies leaving a business it becomes a joint family business in the hands of his male heirs.

(i) A partnership arises out of *contract,* whereas a joint Hindu family business is created by the *operation of law*.

(ii) An ordinary partnership is dissolved by the death of a partner but a joint Hindu family business is not dissolved by the death of a coparcener.

(iii) A coparcener, on severing his connection with family business, is not entitled to ask for accounts of past profits and losses but a partner under similar circumstances can ask for such an account.

(iv) Only the manager of a joint Hindu family business can contract debts for ordinary purposes of family business and such a debt is binding on all the members including a minor member. But in case of a partnership any partner can contract such debts.

(v) In case of a joint Hindu family business the liability of the manager and the consenting member, if any, is unlimited and the liability of other members is limited upto the extent of their interest in the family property. But in case of partnership, partners are *jointly and severally* liable for the bedts of the firm.

(vi) A minor member of a Hindu joint family business is liable for the debts of the firm only upto the extent of his interest in the family property and his separate property is not liable for the debts of the firm. In case of a partnership, a minor can only be admitted *to the benefits of the partnership.*

(New business.) The manager of a joint Hindu family business cannot start a new business. He can, of course, enter into partnership with a stranger but in such a case he and the consenting members only become members of the firm created out of the new contract. *Pichappa V. Chockalingam* (1934) 150.I.C.802).[23]

If a member of a joint family carries on a business, it cannot be presumed that it is a joint Hindu family business. *(Vadilal V. Shah Khuslal* (1903) 27.Bom.157;[24] *Grey V. Walker* (1913) 40, Cal.523).[25]

MANAGEMENT

Rights of coparceners :

(i) No coparcener has got any special right in the joint family property. They have got a *community of interest and unity of possession. (Katama Natchiar V. Rajah of Shivagunga* (1863) 9.M.I.A.543, 611).[26]

(ii) No member has got any definite share in the property unless partition takes place. Till partition all members must enjoy it as *members of an undivided family.*

The manager may allot a portion of the property to a particular member for his maintenance. All savings from income of such property become his separate property. *(Bengal Insurance V. Velayammal.* (1937) Mad.990).[27]

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23. *Pichappa V. Chockalingam* (1934) 150.I.C.802).
24. *(Vadilal V. Shah Khuslal* (1903) 27.Bom.157
25. *Grey V. Walker* (1913) 40, Cal.523).
26. *(Katama Natchiar V. Rajah of Shivagunga* (1863) 9.M.I.A.543, 611).
27 *(Bengal Insurance V. Velayammal.* (1937) Mad.990).

(iii) Each member is entitled to joint possession and enjoyment of the family property. If any coparcener is excluded from possession he may enforce his rights by a suit. He is not bound to sue for partition. If the acts of members amount to an ouster of a particular coparcener, the affected one may sue for an injunction to to restrain those members from such acts. *(Soshi V. Ganesh* (1902) 29.Cal.500).[28]

(iv) Every coparcener has got the right to be maintained out of the family estate. *(Cherutty V. Hangamparambil* (1940) Mad.830).[29]

(v) A coparcener has got no right, except with the consent of the manager, to enter into a contract regarding family property. He has no right to erect a building in the family property or to alter materially the condition of the family property. *(Guru Das V. Bijaya* (1868) 1. Beng.L.R.A.C.108).[30]

(vi) Every coparcener has right to enforce partition of the family property.

(vii) No coparcener can alienate his undivided interest in the family property by gift or even for value except in Bombay.

(viii) On the death of a coparcener his interest in the family property devolves *not by succession* but *by survivorship. (Katama Natchiar V. Rajah of Shivagunga,* supra).[31]

(ix) The manager of the coparcenary property has got certain special powers of disposition over family property.

(x) A father-manager has got greater powers than other managers of a coparcenary property in some respects.

(xi) The manager is not entitled to any remuneration for managing the joint family property.

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28. *(Soshi V. Ganesh* (1902) 29.Cal.500).
29. *(Cherutty V. Hangamparambil* (1940) Mad.830).
30. *(Guru Das V. Bijaya* (1868) 1. Beng.L.R.A.C.108).
31. *(Katama Natchiar V. Rajah of Shivagunga,* supra).

POWERS OF THE MANAGER

The father is generally the manager of the joint family property. If the sons are minors, the father is necessarily the manager of the joint family. *(Suraj Bunsi V. Sheo persad* (1880) 5.Cal.148).[32] In the absence of the father, the eldest brother becomes manager. The manager of the joint family is called *Karta* (14.D.L.R.258).

Under Dayabhaga, the eldest female member also can become *Karta* of the family. (14.D.L.R.258).[33]

(Power over Income) The Manager has got control over joint family property. He has no obligation to economise or save. If other members think that the manager is spendthrift, they can demand partition. (*Bhowani V. Jaggernath* (1909) 13.C.W.N.309).[34] A manager is not an agent within the meaning of the Contract Act. His position is rather akin to a trustee. In the absence of proof of misappropriation the manager is not bound to account for the past dealings at the time of partition. According to Calcutta High Court a coparcener may require the manager to account for his dealings with the joint family property without bringing a suit for partition. *(Benoy Krishna V. Amarendra* (1940) 1.Cal.183, 186).[35]

(Power to contract debt.) The manager can borrow money for family purposes, provided there is *legal necessity* for such a loan. The creditor is bound to inquire *and the onus is on him to show that there was a necessity for the loan. (Mussammat Mauli V. Brijlal* (1942) Lah. 345 = 205. I.C.37).[36]

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32. *(Suraj Bunsi V. Sheo persad* (1880) 5.Cal.148).
33. (14.D.L.R.258).
34. (*Bhowani V. Jaggernath* (1909) 13.C.W.N.309).
35. *(Benoy Krishna V. Amarendra* (1940) 1.Cal.183, 186).
36. *(Mussammat Mauli V. Brijlal* (1942) Lah. 345 = 205. I.C.37).

(Power to contract debt.) The manager can borrow money on a promissory note but the liability of other members (except the consenting members) for such a loan is limited to the extent of his share in the joint family property. *(Raghu Nath V. Sri Narain* (1923) 45 All.434 = 73.I.C. 1018).[37]

(Management of joint family business.) The manager has got the power to manage joint family business, to enter into contracts and discharge claims ordinarily incidental to the business. But he cannot start a new business. He can mortgage or sell family property for legitimate and proper purpose of the business. *(Kishen V. Har Narain* (1911) 3 All. 272 = 38.I.C.45).[38]

(Alienation of joint family property.) The power of the manager to alienate joint Hindu family property is similar to that of a manager of an infant heir. As to the power of the manager for an infant heir, their Lordships of the Privy Council observed in the case of *Hunooman Persad V. Mussammat Babooee,*[39] ``The power of the manager for infant heir to charge an estate not his own, is under the Hindu law, a limited and qualified power. It can only be exercised rightly in case of need or of the benefit of the esate.*** The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance, is to be regarded.''

Hence it follows that the manager can alienate joint family property for legal necessity or for the benefit of the estate and if the legal necessity is established, express consent of the adult coparceners is not necessary. Under Dayabhaga law and in Allahabad a coparcener cannot alienate even his own interest without

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37. *(Raghu Nath V. Sri Narain* (1923) 45 All.434 = 73.I.C. 1018).
38. *(Kishen V. Har Narain* (1911) 3 All. 272 = 38.I.C.45).
39. *Hunooman Persad V. Mussammat Babooee,*

the consent of all other coparceners, hence alienation made by the manager without legal necessity even with the consent of some of the coparceners is not binding on the alienor or on the consenting members. *(Madho V. Merhban* (1891) 18Cal.157).[40] But in Bombay and Madras it is binding on the alienor and on the consenting members, (1920. 44. Bom. 341 ;[41] 1919. 42. Mad. 154).[42] Where the alienation is made with the consent of all members it is binding irrespective of legal necessity. Since a minor is incapable of giving consent it is not binding on him. An alienation without legal necessity is not void but voidable at the option of other coparceners, but not at the option of a creditor. *(Imperial Bank of India V. maya Devi* (1935) 16.Lah.714).[43] If the purchaser can satisfy the Court that there was legal necessity at the time of sale it is enough, he is not bound to see the application of the price. *(Anant Ram V. Collector of Etah* (1918) 40.All.171=44.I.C.290).[44]

(Mortgage.) In case of legal necessity the manager may raise money by mortgaging joint family property. The creditor is bound to make *bona fide inquiry* as to legal necessity, otherwise the Court may grant a decree for the money which was actually necessary. *(Durga Prasad V. Jewdhari Singh* (1935) 62.Cal.733).[45]

(Reference to arbitration.) The father of other manager can refer disputes relating to family property to arbitration and the other members including the minors are bound by the reference and the award made upon it. *(Jagan Nath V. Manu Lal* (1894) 16.All.231 ; *Balaji V. Nana* (1903) 27.Bom.287).[46]

40. *(Madho V. Merhban* (1891) 18Cal.157).
41. (1920. 44. Bom. 341 ;
42. 1919. 42. Mad. 154).
43. *(Imperial Bank of India V. maya Devi* (1935) 16.Lah.714).
44. *(Anant Ram V. Collector of Etah* (1918) 40.All.171=44.I.C.290).
45. *(Durga Prasad V. Jewdhari Singh* (1935) 62.Cal.733).
46. *(Jagan Nath V. Manu Lal* (1894) 16.All.231 ; *Balaji V. Nana* (1903) 27.Bom.287).

(Compromise.) A compromise entered into by the manager *bona fide* for the benefit of the family is binding on other members including minors. *(Dangal Ram V. Jaimangal* (1926)5. Pat.480 = 95.I.C. 1051).[47]

(Discharge of debts.) A valid discharge for a debt given by the manager is binding on other members including the minors. *(Rati Ram V. Nidder* (1919) 41.All.435). Similarly he can acknowledge a debt or pay it. He may also make a part payment or pay interest due on it. But he cannot pay a debt or revive it by a promissory note *if it is barred by limitation.* He has no power to *give up* a debt due to the joint family. *(Dasratharama V. Narah* 1928.) 51.Mad.484 =109. I.C. 329).[48]

(Special powers of father manager.) A father manager has got some special powers. He may make a gift of ancestral *moveable and immoveable property within reasonable limits* to any member, He can also sell or mortgage ancestral moveable and immoveable property for payment of his *own debt,* provided it was an antecedent debt and that it was not incurred for *immoral or illegal* purposes. He may surrender *raiyati* interest in the property, provided the transaction is *bona fide.*

In other respects the father has no greater power than other managers over the coparcenary property.

What is legal necessity?

A manager of a joint Hindu family may alienate joint family property for the following purposes, which have been held to be *legal necessities for the family.*

1. Payment of Govt. revenue and debts contracted for family purposes. (1903.25.All.407).[49]

47. *(Dangal Ram V. Jaimangal* (1926)5. Pat.480 = 95.I.C. 1051).
48. *(Dasratharama V. Narah* 1928.) 51.Mad.484 =109. I.C. 329).
49. (1903.25.All.407).

2. Maintenance of the members and their families, (1884.6All.417).

3. Marriage expenses of members and their daughters. (1887.11.Bom.605).[50]

4. Performance of funeral and other family ceremonies. (1871.16.W.R.52).[51]

5. Cost of litigation for recovering or preserving the estate. *(Miller V. Runganath* (1886) 12.Cal.389).[52]

6. Cost of defendin the head of the family or any other member against a serious criminal charge. (1923. 45. All. 311 = 71. I.C. 749).[53]

7. Payment of debts of family business.

Benefit of the estate :

A transaction of a defensive character calculated to protect the estate from some threatened damages or destruction comes under the term *for the benefit of the estate.* (1917.40.Mad.709, 718 = 44. I.A.147).[54] In another view, it is sufficient if it is such as a prudent owner or a trustee would have carried out with the knowledge then available to him. *(Jagat Narain V. Mathura* (1928) 50.All.969=116.I.C.484).[55]

JUDICIAL PROCEEDINGS

(Representative character of the manager.) The manager acts as the representative of the whole family and his acts bind the whole family when those are for the *benefit or for the necessity* of the whole family. A member, other than the manager, can so act if he is previously authorised or his acts be subsequently ratified by words or by conduct. *(Vithu V. Babaji* 32.Bom.375).[56]

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50. (1887.11.Bom.605).
51. (1871.16.W.R.52).
52. *(Miller V. Runganath* (1886) 12.Cal.389).
53. (1923. 45. All. 311 = 71. I.C. 749).
54. (1917.40.Mad.709, 718 = 44. I.A.147).
55. *(Jagat Narain V. Mathura* (1928) 50.All.969=116.I.C.484).
56. *(Vithu V. Babaji* 32.Bom.375).

(General rule is not followed in Hindu law.) The general rule is that no person can be bound by a decree to which he is not a party. It cannot even be used as an evidence against him ; and that a person cannot be appointed guardian *ad litem* if his interests be adverse to those of the minor. Hence all members must be made parties to a suit relating to a property, trade or business of the family. But this rule is not uniformly followed in Hindu law. *(Ram Sebuk V. Ramlal* (1881) 6.Cal.815).[57] Rules regarding parties to the suit may be summarised as follows : —

(i) Where the manager of a joint family enters into a transaction *in his own name of behalf of the family* he can sue or be sued alone in respect of that transaction. *(Kishen Parshad V. Har Narain Singh* (1911) 38.I.A.45).[58]

(ii) If a transaction is entered into in the name of two or more managers of the joint family, they must all join as paintiffs in the suit. *(Ram Sebuk V. Ram Lal* (1881) 6. Cal.815).[59]

(iii) In case of an unwritten or verbal contract, the manager may sue alone as the representative of the family. *(Bhola Roy V. Jung Bahadur* (1914) 19.Cal L.J. 5= 22.I.C.798).[60]

(iv) There is a conflict of opinion whether a manager can sue alone, without making other members of the family parties to the suit, as regards immoveable property. As per decision of the Privy council in *Lingangawda V. Basangowda* (1927) 54.I.A.122),[61] he is entitled to do so, provided as regards minors he acted in their interest and as regards adults with their consent.

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57. *(Ram Sebuk V. Ramlal* (1881) 6.Cal.815).
58. *(Kishen Parshad V. Har Narain Singh* (1911) 38.I.A.45).
59. *(Ram Sebuk V. Ram Lal* (1881) 6. Cal.815).
60. *(Bhola Roy V. Jung Bahadur* (1914) 19.Cal L.J. 5= 22.I.C.798).
61. *Lingangawda V. Basangowda* (1927) 54.I.A.122),

(v) No other member excepting the manager is entitled to sue alone, representing the family. *(Kishen V. Har Narain* (1911) 38. I.A.45).[62]

(vi) In case of a joint Hindu family business, minors, who are not admitted into the trading firm need not be joined as plaintiffs in a suit to recover money due to the firm. *(Lutchmanen V. Siva* (1899) 26. Cal.349).[63]

(vii) If the manager dies during the pendency of the suit, the next manage may be brought on the record to continue the suit or appeal. *(Atma Ram V. Bankumal* (1930) 11. Lah. 598 = 125. I.C. 369).[64]

(viii) Where the manager borrows money on a promissory note, other members of the family may be sued on the note, though they are not parties to it; but their liability is limited to their share in the joint family property *(Baisnab V. Ramdhan* (1906) 11.C.W.N. 139),[65] unless they can be treated as contracting parties. But in case of a minor it shall not be executed against him personally and that he cannot be arrested under such a decree either before or after attaining mojority. *(Jwala Prasad V. Bhuda Ram* (1931) 10.Pat.503=134.I.C420).[66]

(Res judicata.) A decree passed against the manager, as representing the family operates as *res judicata* and is binding on all the members including the minors. *(Daulat Ram V. Mehr Chand* (1888) 15.Cal.70).[67] If the decree is passed against the manager personally even for a family debt it cannot be executed against the whole coparcenary property. *(Mela Mal V. Gori* (1922) 3.Lah.288= 66. I. C.485).[68]

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62. *(Kishen V. Har Narain* (1911) 38. I.A.45).
63. *(Lutchmanen V. Siva* (1899) 26. Cal.349).
64. *(Atma Ram V. Bankumal* (1930) 11. Lah. 598 = 125. I.C. 369).
65. *(Baisnab V. Ramdhan* (1906) 11.C.W.N. 139),
66. *(Jwala Prasad V. Bhuda Ram* (1931) 10.Pat.503=134.I.C420).
67. *(Daulat Ram V. Mehr Chand* (1888) 15.Cal.70).
68. *(Mela Mal V. Gori* (1922) 3.Lah.288= 66. I. C.485).

A decree against the father-manager operates as *res judicata* against the coparceners including the minors (1937.Mad.880.[F.B] = 171.I.C.101).[69]

RIGHTS OF THE PURCHASER

The interest of a coparcener is liable to variation.His interest may increase or decrease with the new birth or death in the family. According to Mitakshara law as applied in Bombay and Madras, he may alienate his undivided interests in the property. But in no case he can alienate any specific property *as his interest,* for, no coparcener can claim any such property as his own before partition. (1874.8.Mad. H.C.6). According to Mitakshara law as it prevails in the Dayabhaga area and in Uttar Pradesh, no coparcener can alienate even, his own undivided interests without the consent of other coparceners.

Since the law on the subject is different in different areas, the Courts differed widely on determining the rights of the purchaser of coparcenary property. However, these may be summarised as follows : —

(i) At a sale in execution of a decree in Dayabhaga area or in Uttar Pradesh and at a private sale or a sale in execution in Madras, the purchaser does not acquire a right to joint possession. He acquires merely the right to compel partition. (1874.8.Mad.H.C.6 ; *Suraj Bansi V. Sheo Prasad* (1880(5.Cal.148, 174).[70]

(ii) In Bombay the Court may in its discretion award joint possession to the purchaser. (1874.12.Bom. H.C.138).

(iii) According to Bombay High Court the purchaser is not entitled to claim partition of a specific property belonging to the joint family. He can only enforce his rights by a suit for general partition.

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69. (1937.Mad.880.[F.B] = 171.I.C.101).
70. *Suraj Bansi V. Sheo Prasad* (1880(5.Cal.148, 174).

(Ishrappa V. Krishna (1922) 46.Bom.925).[71] But according to Allahabad *(Rammahan V. Mulchand* (1906) 28.All.39)[72] and Calcutta *(Tarini Charan Chakraborty V. Devendra Lal De* (1935) 62.Cal.655)[73] High Courts, the purchaser is entitled to a partition of the specific property without suing for a general partition.

(iv) The alience has, on general partition, an equitable right to have the property purchased. The share of the alienor may also be assigned to him if it could be done without injustice to other coparceners. (*Manjaya V. Shanmuga* (1915) 38.Mad.684 = 22. I. C.555).[74]

(v) The right of the purchaser to enforce partition is not lost by the death of the alienor. He may sue for partition even after the death of the alienor. (1902.25. Mad.690).

(vi) The purchaser is entitled to that share on partition to which the alienor was entitled at the date of alienation. *(Chinun V. Kalimuthu* (1912) 35.Mad.47=9. I.C.596.[F.B.]).[75]

Illustrations.

A, a coparcener with B and C sells his interest to P. After the sale B dies. P is entitled to *one third* and not *one half* of the said property.

(vii) The purchaser is not entitled to *mesne* profit between the date of his purchase and the date of suit for partition. *(Maharajah of Bobbili V. Venkataramanjulu* (1916) 39.Mad.265=25.I.C.585).[76]

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71. *(Ishrappa V. Krishna* (1922) 46.Bom.925).
72. *(Rammahan V. Mulchand* (1906) 28.All.39)
73. *(Tarini Charan Chakraborty V. Devendra Lal De* (1935) 62.Cal.655)
74. (*Manjaya V. Shanmuga* (1915) 38.Mad.684 = 22. I. C.555).
75. *(Chinun V. Kalimuthu* (1912) 35.Mad.47=9. I.C.596.[F.B.]).
76. *(Maharajah of Bobbili V. Venkataramanjulu* (1916) 39. Mad. 265 = 25. I. C. 585).

(viii) The purchaser is entitled to sue for specific performance of the agreement for sale. *(Bhagwan V. Krishnaji* (1920) 44.Bom.967=58.I.C.335).[77]

(ix) The purchaser takes subject to equities and takes the property subject to all charges and incumbrances. Thus if he purchases the undivided interest of a son he takes that interest subject to the liability attaching to that interest to pay his father's personal debts not contracted for immoral purposes. *(Venku Reddi V. Venku Redi* (1927) 50.Mad.535=100.I.C.1018).[78]

For further discussions on the subject the following cases may be referred to :

(i) *Deen Dayal V. Jugdeep Narain* (1877) 3.Cal. 198 = 4. I.A. 247.[79]

(ii) *Suraj Banshi Koer V. Sheo Persad* (1880) 5.Cal.148= 6.I.A.88.[80]

(iii) *Hardi Narain V. Ruder Perkash* 1883) 10.Cal.626=11.I.A.26.[81]

(Mortgage.) The rules regarding purchase apply *mutatis mutandis* to a mortgage of joint family property from a coparcener. (For detail see 1940.Mad.913 ; 1941.Nag.677 ; 1916. 43.Cal. 103 = 30. I.C. 420 ; 1911.34. Mad.175 = 6. I.C. 991).

(Renunciation of share.) A coparcener may renounce his interest in the coparcenary property in favour of *other coparceners as a body* but no in favour of one or more of them. (1888). 11.Mad.406 ; but see 1902.25.Mad.149).

(Gift) According to the Mitakshara law a coparcener cannot make a gift of the coparcenary property. *(Baba V. Timma* (1884) 7.Mad 357.[F.B.]).[82] Such a gift is not valid even up to the extent of his interests in the property, if made without the consent of other coparceners. *(Tagore V. Tagore* (1872) 9.Beng.L.R.377).[83]

77. *(Bhagwan V. Krishnaji* (1920) 44.Bom.967=58.I.C.335).
78. *(Venku Reddi V. Venku Redi* (1927) 50.Mad.535=100.I.C.1018).
79. *Deen Dayal V. Jugdeep Narain* (1877) 3.Cal. 198 = 4. I.A. 247.
80. *Suraj Banshi Koer V. Sheo Persad* (1880) 5.Cal.148= 6.I.A.88.
81. *Hardi Narain V. Ruder Perkash* 1883) 10.Cal.626=11.I.A.26.
82. *(Baba V. Timma* (1884) 7.Mad 357.[F.B.]).
83. *(Tagore V. Tagore* (1872) 9.Beng.L.R.377).

(Insolvency) On the insolvency of any coparcener other than the manager or father, both his separate property and his interests in the joint family property vest in the Official Receiver or Assignee, and all the creditors whether they are his personal creditors or creditors of his father will get equal preference. *(Lakshmanan V. Srinivasa* [84] (1937) Mad.203 = 166.I.C.378).

On the insolvency of the manager :

(i) His separate property and his interest in the joint family property vest in the Official Assignee or Receiver.

(ii) Under Presidency Towns Insolvency Act. all powers of the manager regarding joint family property vest in the Official Assignee/Receiver.

(iii) Under Provincial Insolvency Act such power of the manager does not vest in the Official. Assignee/Receiver. *(Nori V. Teluquntla* (1943) Mad.83=203.I.C. 507). [85]

On the insolvency of the father manager : —

(i) His separate property and his interest in the joint family property vest in the Official Receiver/ Assignee.

(ii) The interest of the son in the joint family property does not vest in the Offical Assignee/Receiver under Provincial Insolvency Act. *(Sat Narain V. Sri Kishen* (1936) 63.I.A.384). [86]

(iii) The father's power to sell son's interest in the joint family property for debts which are not immoral or illegal can be exercised by the official Assignee. *(Sat Narain V. Behari Lal* (1925) 52.I.A.22). [87] The decision was under Presidency Town Insolvency Act. But probably the same principle would also apply in case of Provincial Insolvency Act).

A minor member of a joint family cannot be adjudged an insolvent. *(Sanyasi Charan V. Ashutosh* (1915) 42.Cal.225). [88]

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84. *(Lakshmanan V. Srinivasa*
85. *(Nori V. Teluquntla* (1943) Mad.83=203.I.C. 507).
86. *(Sat Narain V. Sri Kishen* (1936) 63.I.A.384).
87. *(Sat Narain V. Behari Lal* (1925) 52.I.A.22).
88. *(Sanyasi Charan V. Ashutosh* (1915) 42.Cal.225).

SETTING ASIDE ALIENATIONS

(Gift) A coparcener cannot make a gift of his share and this rule cannot be evaded by making a sale at a grossly inadequate price. The above rule does not extend to a father making a gift of ancestral property to one of the coparceners *within reasonable limit.* (Mit. 1.1.27).

(Who is competent to apply for setting aside an alienation?) Invalid alienation of the coparcenary property can be challenged by a son, an adopted son or any other coparcener who is entitled to a share on partition. A person *born and begotten* after the date of alienation or after ratification of the alienation (in case of alienation without legal necessity) by all the coparceners, cannot challenge it. *(Bhola Nath V. Kartick* (1907) 34. Cal. 372).[89] A purchaser at a subsequent valid sale can also contest a previous invalid alienation. *(Muhammad V. Mithu Lal* (1911) 33.All.783 = 11.I.C.220).[90]

In Bombay, Madras and Central Provinces a coparcener can set aside an invalid alienation except the share of the alienor. In Uttar Pradesh and in Dayabhaga area a coparcener cannot alienate his share without the consent of other coparceners. Hence a coparcener there, can set aside the whole alienation. *(Kali Sankar V. Nawab Singh* (1909) 31.All.507;[91] *Madho V. Merhban* (1891) 18.Cal.157).[92]

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89. *(Bhola Nath V. Kartick* (1907) 34. Cal. 372).
90. *(Muhammad V. Mithu Lal* (1911) 33.All.783 = 11.I.C.220).
91. *(Kali Sankar V. Nawab Singh* (1909) 31.All.507;
92. *Madho V. Merhban* (1891) 18.Cal.157).

(Equities on setting aside alienations.) If the alienation is neither for legal necessity nor for payment of antecedent debt the alienee is not entitled to a refund of the proportionate part of the purchase money, when such alienation is set aside at the instance of other coparceners.

In Uttar Pradesh and in the Dayabhaga area such a sale is set aside in its entirety and it has been held by the Judicaial Committeee that the purchaser is not entitled to any equity or charge on the alienors share. *(Narain Prasad V. Sarnam Singh*[93] (1917) 44.I.A.163 ; *Anant Ram V. Collector of Etah*[94] (1918) 40.All.171, 176 = 44.I.C.290).

In view of the decisions in the above cases it seems that the rule in *Mahabeer Persad V. Ramdayal* (1874) 12.Beng.L.R.90)[95] can no longer be applied except in cases where special circumstances, such as an *express representation, exist.*

Where a sale is effected by the father *without legal necessity* or for payment of *antecendent debt* and the suit is brought by the sons during the lifetime of the father, the High Court of Calcutta has held that they are not entitled to a decree without refunding the purchase money. (*Koer Hasmat V. Sunder* (1885) 11.Cal.396).[96] But according to Lahore, Madras and Allahabad High Courts the sons are not under the obligation for refunding such purchase money. (1927. 8. Lah. 678;[97] 1921. 44. Mad. 801;[98] 1917. 39. All. 485).[99]

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93. *Narain Prasad V. Sarnam Singh*
94. *Anant Ram V. Collector of Etah*
95. *Mahabeer Persad V. Ramdayal* (1874) 12.Beng.L.R.90)
96. (*Koer Hasmat V. Sunder* (1885) 11.Cal.396).
97. (1927. 8. Lah. 678
98. 1921. 44. Mad. 801
99. 1917. 39. All. 485).

An alienation which does not bind the share of the alienor himself cannot bind the share of a coparcener consenting thereto. *(Balgovind Das V. Narain Lal* (1893) 20.I.A.116).[100]

The period of limitation for setting aside an alienation by a father, is twelve years from the date when the alienee takes possession of the property. But a minor son can bring a suit to set aside the alienation within three years of his attaining majority. *(Jawahir Singh V. Udai Prakash* (1926) 53.I.A.36).[101] The extension of three years given by Sec. 6 of the Limitation Act cannot be availed of by the sons *not in existence* at the time of alienation. Thus a suit by a Hindu for setting aside an alienation made by his grandfather before his birth must be brought within twelve years from the date of alienation. *(Jivaji Keshav V. Venkatesh* (1940) Bom.109=108. I.C.663).[102]

DAYABHAGA LAW

Under Dayabhaga law sons do not acquire any right in the ancestral property by birth and the father has got absolute power of disposing of both ancestral and self acquired property. The father is the absolute owner of his property and he can manage or dispose it of in any way he likes. Hence a Dayabhaga father can dispose of property both moveable and immoveable by sale, gift, will or otherwise. The sons cannot demand partition of such property from the father nor can they call for an account of management thereof from him. *(Ram Kishore V. bhoobunmoyee* (1859) Beng. S.D.A. 229 ; D.B.1.11-31 ; 2.8).[103]

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100. *(Balgovind Das V. Narain Lal* (1893) 20.I.A.116).
101. *(Jawahir Singh V. Udai Prakash* (1926) 53.I.A.36).
102. *(Jivaji Keshav V. Venkatesh* (1940) Bom.109=108. I.C.663).
103. *(Ram Kishore V. bhoobunmoyee* (1859) Beng. S.D.A. 229 ; D.B.1.11-31 ; 2.8).

(Copareenary aceording to Dayabhaga.) There cae be no coparcenary in the strict sense of the term *between a father and sons* according to Dayabhaga law. According to Dayabhaga law coparcenary is formed between the male issues after the death of the father. The widow or widows and the daughter or daughters of a coparcener may become members of the coparcenary after his death, representing the share of their husband or fahter. Thus under Dayabhaga coparcenery may consist of males of males as well as females, whereas under Mitakshara no female can be a coparcener. But even under Dayabhaga *a coparcenary cannot start with females.*

(Characteristics of a Dayabhag a coparcenary.)

Like Mitakshara ancestral property, joint acquisitions, property thrown into common stock and accretions may constitute joint family property under Dayabhaga law. *(Sreemutty Soorjeemooney V. Denobundoo* (1856) 6.M.I.A.526).[104]

The essence of Dayabhaga coparcenary is *unity of possession and not unity of ownership.* Each coparcener has a defined share in the property and he can alienate it by sale, mortgage, gift, will or in anyway at his pleasure. A purchaser at a Court sale of his share is entitled to be put into *physical possession* of that share. *(Eshan Chunder V. Nund Coomar* (1867) 8.W.R.239).[105]

On the death of a coparcener his share devolves on his heirs *by succession and not by survivorship.*

Every adult Dayabhaga coparcener has a right to call for a partition of the coparcenary property. *(Sreemutty Soorjeemooney V. Denobundoo* (1856) 6.M.I.A.526, supra).[106] He may make any use of his property and may lease out his share and put the lessee in possession. but he cannot do any act which is injurious to the coparcenary property *(Gopee Kishen V. Hem Chunder.* (1870) 13.W.R.322).[107]

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104. *(Sreemutty Soorjeemooney V. Denobundoo* (1856) 6.M.I.A.526).
105. *(Eshan Chunder V. Nund Coomar* (1867) 8.W.R.239).
106. *(Sreemutty Soorjeemooney V. Denobundoo* (1856) 6.M.I.A.526, supra).
107. *(Gopee Kishen V. Hem Chunder.* (1870) 13.W.R.322).

(Presumptions.) Where a son purchases property during the lifetime of the father it cannot be presumed under Dayabhaga law that the property is a joint family property. The onus to prove that it was thrown into common stock or that they also contributed to the acquisition, is on the other sons. *(Hem Chandra Ganguli V. Matilal Ganguli* (1933) 60 Cal.1253).[108]

''Under the Dayabhaga system if two or more sons succeeding to an ancestral property live jointly and acquire properties in the name of any member of the family, the presumption will be that all the properties acquired *during the state of jointness* are joint family properties, but such presumption is rebuttable''. (1952) 4. D. L. R.400.[109]

''Sending of money regularly to meet the requirements of the family does not mean that the property acquired by another member of the family in his own name was purchased with that money''. (1954) 6.D.L.R.394).[110]

Joint property-No presumption in law in respect of –Facts must be established, before such presumption can be made. *(Mahesh Chandra Das Choudhury V. Mukunda Chandra Das* (1962) 14.D.L.R.347).[111]

One of the members of a joint Hindu family purchasing property in the name of his son (who having no fund of his own) ; the property belongs to the joint family. *(Abdur Rahman Bhuiyan V. Prafulla Chandra Majumder* (1961) 13.D.L.R.865).[112]

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108. *(Hem Chandra Ganguli V. Matilal Ganguli* (1933) 60.Cal.1253).
109. (1952) 4. D. L. R.400.
110. (1954) 6.D.L.R.394).
111. *(Mahesh Chandra Das Choudhury V. Mukunda Chandra Das* (1962) 14.D.L.R.347).
112. *(Abdur Rahman Bhuiyan V. Prafulla Chandra Majumder* (1961) 13.D.L.R.865).

DEBTS

MITAKSHARA LAW

Debt may be contracted by manager of the family either for a family purpose or for his own personal benefits. When it is contracted for a family purpose it is payable by the family or by all the members. But the family property is not liable for the personal debts of a member. The Privy Council summarised the law regarding debts in the case of *Brij Narain V. Mangla Prasad* (1924) 28.C.W.N.253 = 51. I. A.129),[113] as follows :

(i) The Managing member of a joint undivided estate cannot alienate or burden the estate *qua* manager except for the purpose of necessity.

(ii) If he is the father and the other members are the sons, he may by incurring debt, so long as it is *not for an immoral purpose,* lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

(iii) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, would not bind more than his own interest.

(iv) Antecedent debt means *antecedent in fact as well as in time,* that is to say that the debt must be truly independent and not the part of the transaction impeached.

(v) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdened the estate is alive or dead.

(Antecedent debt.) The *antecedent debt* more accurately means *old precedent* debt. The expression was first used by the Privy Council in the case of *Hunooman Persaud Pandey.*[114] After reviewing various decisions, the Privy Council explained antecedent debt thus : ``As to matter of antecedency of debts it is clear beyond question that the antecedency is antecedency to the mortgage itself. And it is more than that, it is disconnection with the mortgage in fact as well as in time.'' *(Chet V. Ram* (1922) 49.I.A.228).[115]

113. *Brij Narain V. Mangla Prasad* (1924) 28.C.W.N.253 = 51. I. A.129),
114. *Hunooman Persaud Pandey.*
115. *(Chet V. Ram* (1922) 49.I.A.228).

According to latter decisions, the test is whether the *transaction impeached,* was entered into to pay off an antecedent debt. *(Brij Narain V. Mangla Prasad,* supra).[116] The question whether the mortgage itself was executed to pay of an antecedent debt is not material. *(Anantu V. Ram Prasad* (1924) 46. All. 295 = 78. I. C.619).[117]

In Madhusudan V. Bhagwan[118] (1929) 53.Bom.444=118. I.C.788), the facts were as follows :- The father of a joint family borrowed Tk. 2000/00 and subsequently executed a mortgage of the joint family property to secure the debt. It was not proved that the money was used by the father for immoral purposes. It was decided that the debt was antecedent to the mortgage in fact as well as in time, hence would bind not only the father's but also the sons' interest in the property.

"The antecedence must be *real.* the antecedence would be *unreal* if the father borrowed money on a promissory note with the object *when he borrowed* that it should form part of a mortgage to be subsequently executed by him." *(Ram Sarup V. Bharat Singh* (1921) 43.All.703=64.I.C.763).[119]

(Immoral debt.) Sons, grandsons and great-grandsons are not bound to pay the *avyavaharika* or immoral debts contracted by the father, grand-father or great-grand-father.*(Khalilul V. Govind* (1893) 20.Cal.328).[120] While explaining the text of *Yajnavalkya* the Mitakshara says : that sons are not bound to pay to the *wine seller and the rest"* i.e. to the *winning gambler,* to the *mistress, concubines* and the others. However, as per texts and judicial decisions the following may be enumerated as *immoral debts ;*

116. *(Brij Narain V. Mangla Prasad,* supra).
117. *(Anantu V. Ram Prasad* (1924) 46. All. 295 = 78. I. C.619).
118. *In Madhusudan V. Bhagwan*
119. *(Ram Sarup V. Bharat Singh* (1921) 43.All.703=64.I.C.763).
120. *(Khalilul V. Govind* (1893) 20.Cal.328).

(i) debts due for spirituous liquor ;
(ii) debts for losses at gambling ;
(iii) debts for lust or wrath ;
(iv) debts for promise without consideration.

Since it is the pious duty of the son to pay the debts of the father whether barred or not, a promissory note executed by the father for payment of a time-barred debt is not a promise without considerstion. *(Gajadhar V. Jagannath* (1924) 46.All.775 = 80. I. C.684).[121]

(v) Debts for being surety. *(Tukaram V. Gangaram* (1899) 23. Bom. 454) ;[122]

(vi) unpaid fines *(Nhanee V. Hureeram* (1814) 1. Bor.84. See also *Vivada Ratnakara pages 57-58) ;* [123]

(vii) unpaid tolls ;

(viii) useless gift or promises ;

(ix) any other debt which is *avyavaharika.* As per Colebrooke this means any debt opposed to good morals.

It should be noted that this rule is applicable only in case of *male ancestors in the male line* and not to *collaterals ;* accordingly a fraternal nephew is not bound to pay the debts of his paternal uncle nor is his undivided coparcenary interest liable to be attached and sold in execution of a personal decree against the uncle, though he was the head of the family. *(Ram V. Lachman Das* (1903) 30.All.460).[124] It is for the alienee to prove that the antecedent debt existed or that after due inquiries he, in good faith, believed that it existed. *(Jamsetji V. Kashinath* (1902) 26. Bom. 326. See T.P.Act.Sec.28).[125] The burden is then shifted upon the sons to prove that the debt was contracted for immoral or illegal purposes and the alienee had notice of it. *(Suraj Bunshi V. Sheo Persad,* supra).[126]

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121. *(Gajadhar V. Jagannath* (1924) 46.All.775 = 80. I. C.684).
122. *(Tukaram V. Gangaram* (1899) 23. Bom. 454) ;
123. *(Nhanee V. Hureeram* (1814) 1. Bor.84. See also *Vivada Ratnakara pages 57-58) ;*
124. *(Ram V. Lachman Das* (1903) 30.All.460).
125. *(Jamsetji V. Kashinath* (1902) 26. Bom. 326. See T.P.Act.Sec.28).
126. *(Suraj Bunshi V. Sheo Persad,* supra).

The Mitakshara law of debts contracted for personal benefit may be summarised as follows : —

(i) Where a Hindu contracts debt, his separate property is liable for payment of this debt *in his lifetime as well as after his death.*

(ii) The undivided coparcenary interest of a member is liable for payment of his debt *during his lifetime.* If the coparcenary consists of collaterals, such interest is not liable for payment of his debts *after his death unless it was attached during his lifetime.*

(iii) Where a coparcenary consists of an ancestor and his sons, grandsons, and great-grand-sons, the whole coparcenary property is liable for his debts even after his death, property is liable for his debts even after his death, provided the debts were not contracted for *immoral or illegal purposes.* The liability of the sons, grand-sons or great-grandsons for such a debt is not personal but confined to their interest in the coparcenary property. So a creditor cannot proceed for such debts against the persons or against their separate property. But a creditor of the ancestor is entitled to attach and sell not only the interest of the ancestor but also the interests of the sons, grand-sons, and great-grand-sons in the joint family property in execution of a decree obtained by him against the *ancestor alone.*

(iv) The ancestor can sell or mortgage the whole of joint family property including the interests of sons, grand-sons and great-grandsons therein to pay an *antecedent debt* of his own.

The period of limitation for the suit in case of an unsecured debt is 3 years from the date when the debt becomes due. In case of a secured debt, the period is 12 years from the date when the money, sued for becomes payable. The mortgagee's suit against the son would be barred, according to Madras decision, if brought more than 3 years after the accrual of the cause of action and according to Allahabad and Calcutta decisions, if brought more than six years from such date. *(Periasami V. Seetharama.* (1904) 27. Mad. 243. [F.B.];[127] *Brijnandan V. Bidya Prasad* (1915) 42. Cal. 1068 ;[128] *Chandra Deo V. Mata Prasad* (1909) 31. All. 176).[129]

127. *(Periasami V. Seetharama.* (1904) 27. Mad. 243. [F.B.];
128. *Brijnandan V. Bidya Prasad* (1915) 42. Cal. 1068 ;
129. *Chandra Deo V. Mata Prasad* (1909) 31. All. 176).

DEBTS DAYABHAGA LAW

Dayabhaga law of debt is very simple. Since the father can alienate property, both ancestral and self acquired, at his pleasure, he can sell or mortgage any property for any debt contracted by him and the sons, grandsons or great-grand-sons cannot question such an alienation.

The separate property of a Hindu is liable for payment of his debts in his lifetime as well as after his death. Where the property passes after his death to his heirs, such property is liable for payment of his debts *as assets in the hands of his heirs.*

The heirs however, are not personally liable for the debts of the deceased, not even if they be his sons, grand-sons, or great-grand-sons. *(Abul Rahman V. Gajendralal* (1938) 1.Cal.132).[130]

DAMDUPAT

The rule of *damdupat* is a branch of Hindu law of debts, According to this rule the interest, exceeding the principal, cannot be recovered at a time, This rule applies in (i) The Presidency of Bombay (ii) in the town of Calcutta (iii) in Sonthal Parganas in the Province of Bihar. *The rule is nowhere applicable in Bangladesh.*

According to Calcutta High Court the rule of *damdupat* applies only where both the original contracting parties are Hindus. But according to Bombay High Court it is applicable even in cases where the original debtor is a Hindu. So the rule does not apply where the origina debtor was a Muslim though the debt might subsequently be transferred to a Hindu.

The rule applies to unsecured debts as well as to debts secured by a pledge of *moveable property* and those secured by a *mortgage of immoveable proneny.*

130. *(Abv Rahman V. Gajendralal* (1938) 1.Cal.132).

According to Calcutta and Bombay High Courts the rule of *damdupat* is not affected by the T.P. Act and the Contract Act. *(Kunjalal V. Narsamba* (1915) 42.Cal. 826;[131] *Jeewanbai V. Manordas* (1911) 35.Bom.199).[132] But according to Madras High Court it does not apply to mortgages executed after the T.P. Act coming into force. *(Madhwa V. Venkatramanjula* (1903) 26.Mad.662).[133]

"The rule of damdupat only exists so long as the relation of debtor and creditor exists, but not when the contractual relation has come to an end by reason of a decree." The Court is free to award interest to the creditor at such rates as it thinks proper from the date of the suit upto the date of decree or payment. (C.P.C. Sec. 34; [134] *Nandalal V. Dhirendra Nath* (1913) 4.Cal.710). [135]

PARTITION, MITAKSHARA LAW

(What is partition?) The characteristics of a Mitakshara joint family are *community of interest, unity of possession* and *common enjoyment.* Each coparcener's right extends to the whole of the family property but none has any definite share. Under Mitakshara, partition means the *ascertainment of individual rights* which are never thought of during jointness, and *severance of interest* and consequent *defeasance of survivorship.*

(Antipartition agreement.) Family arragement not to partition is inconsistent with the Hindu law. Restrictions relating to enjoyment of property absolutely transferred, are declared to be void by the T.P.Act, Section 11.On the same principle restrictions against any division for twenty years imposed by a testator on his son to whom he gave all his property, was held void as being a condition repugnant to the gift. *(Mokoondo V. Ganesh* (1876) 1.Cal.104).[136]

131. *(Kunjalal V. Narsamba* (1915) 42.Cal. 826;
132. *Jeewanbai V. Manordas* (1911) 35.Bom.199).
133. *(Madhwa V. Venkatramanjula* (1903) 26.Mad.662).
134. C.P.C. Sec. 34;
135. *Nandalal V. Dhirendra Nath* (1913) 4.Cal.710.
136. *(Mokoondo V. Ganesh* (1876) 1.Cal.104).

According to Bombay High Court an agreement between coparceners never to divide certain joint property is invalid and not binding even on the parties to the same. *(Ramlinga V. Virupakshi* (1883) 7.Bom.538). Agreement or family arragements that one of the coparceners shall get *one-faurth* of the net income of a certain village from the eldest brother, who is to manage the same has been held to be no bar to suit for partition of his *one-fourth* share, brought by that coparcener. According to Calcutta High Court such an agreement is binding on the actual or immediate parties thereto, but not on a purchaser from one of the parties, nor on their heirs, far less on a purchaser from an heir. *(Ram V. Anund 2.* Hyde. 93;[137] *Krishnendra V. Devendra.* (1908) 12.C. W.N.793).[138]

Impartible property : Certain properties, indivisible in nature, are not liable to be partitioned, both in Mitakshara and in Dayabhaga. These May be enumerated as follows :-

(Properties and things not liable to partition.)

1. Idols and places of worship : According to *Manu* family Idols and places of worship are not divisible but these may be held by the members by turns. If these are in possession of the senior member, other members shall have access to them for the purpose of worship. *(Pramatha V. Pradyumna* (1925) 52.Cal.809).[139] A *thakurbari* is not divisible. *(Madan V. Saha* (1930) 57.Cal.570).[140]

According to the High Court of Calcutta a building for worship of the family idol should not be excluded from partition unless it is dedicated to the *Deity.* However, any member may buy it at a valuation and maintain the building as a palce of worship. *(Sachindra V. Hemchandra* (1931) 35.C.W.N.151).[141]

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137. *Ram V. Anund 2.* Hyde. 93;
138. *Krishnendra V. Devendra.* (1908) 12.C. W.N.793).
139. *(Pramatha V. Pradyumna* (1925) 52.Cal.809).
140. *(Madan V. Saha* (1930) 57.Cal.570).
141. *(Sachindra V. Hemchandra* (1931) 35.C.W.N.151).

2. Separate property : These are not subjects of joint rights and cannot be partitioned.

3. Right of way : In the absence of any evidence that it was allotted to a particular member, the right of way will be presumed to have remained joint and will not be subjected to partition. *(Nathubhai V. Bai Hansgavri* (1912) 36.Bom.379).[142]

4. Property which cannot be partitioned without destroying its value :

If the intrinsic value of the property is destroyed on partition it should not be subjected to it. In such a case one coparcener may take the property by paying money compensation to others. A well may be enjoyed by the coparceners jointly or by turns. *(Govind V. Trimbak* (1912) 36.Bom.275).[143] A strip of common passage is not liable to be partitioned. *(Shantaram V. Waman* (1923) 47.Bom.389).[144]

5. Property indivisible in nature : Properties, which are indivisible in nature for instance, animals, furniture etc. are not to be subjected to partition. These may be sold and the value distributed. Similarly, a well, a water reservoir or a common right of way may be used by all members of the family. However, a coparcener holding not less than 50% share (moiety share) may apply to the Court for partition of a property like tank, water reservoir etc. In such a case the Court may order for sale of the property by auction amongst the coparceners and distribution of sale proceeds according to the share of each member. (See Partition Act.).

6. Property impartible by custom : Properties which are impartible by custom such as a *Raj* or a Principality which generally descends on a particular member of the family cannot be partitioned. Other members are entitled to maintenance from such property. *(Chintamun V. Nowluikho* (1876) 1.Cal.153).[145]

142. *(Nathubhai V. Bai Hansgavri* (1912) 36.Bom.379).
143. *(Govind V. Trimbak* (1912) 36.Bom.275).
144. *(Shantaram V. Waman* (1923) 47.Bom.389).
145. *(Chintamun V. Nowluikho* (1876) 1.Cal.153).

7. Father's affectionate gifts : Gifts of moveable or immoveable property by the father to a particular son, wife, daughter and the like *within reasonable limits* will not be subjected to partition.

8. Certain moveables : Certain moveables, used personally by the members, such as wearing apparel or ornaments cannot be partitioned.

Before partition provision must be made for family debts, maintenance of dependant female members and disqualified heirs, and marriage expenses of unmarried daughters. Where a partition takes place amongst the sons, provision must also be made for funeral expenses and exequial ceremonies of the widow and the mother of the last male holder. Since no coparcener is entitled to call upon the manager to account for the past profits, partition must be made of the property *as it exists at the time when partition is demanded.* (*Parmeshwar V. Govind* (1916) 43.Cal.459).[146]

(Who can claim partition?) Under Mitakshsra law every adult coparcener is entitled to demand partition and sue for the same at any time. Since a female cannot be a coparcener, she cannot demand partition though she may claim a share when it takes place. According to Bombay High Court when the father is joint with his own father, brother of other coparceners, a son cannot claim partition without the assent of his father. (*Jvadhai V. V adilal (1905)* 7.Bom. L.R.232).[147] The other High Courts do not recognise any such exception. (*Rameshwar V. Lachmi* (1904.31.Cal.111).[148] A minor can sue for partition only when in the opinion of the Court, it is for his benefit or it may protect him from danger. (*Damoodur V. Senabutty* (1882) 8.Cal.537). Where the partition is effected by an agreement it is binding on the consenting minor *unless it is unfair or prejudicaial to his interests.* *(Balkishen Day V. Ramnarain* (*Balkishen Das V. Ramnarain* (1903) 30.Cal.738).[149]

146. (*Parmeshwar V. Govind* (1916) 43.Cal.459).
147. (*Jvadhai V. V adilal (1905)* 7.Bom. L.R.232).
148. (*Rameshwar V. Lachmi* (1904.31.Cal.111).
149. *(Balkishen Day V. Ramnarain* (*Balkishen Das V. Ramnarain* (1903) 30.Cal.738).

A purchaser at a sale in execution of a decree can demand partition according to all the schools. In Bombay and Madras a purchaser byprivate contract also, can demand partition.

(Partition how affected?) It has already been stated that partition is a severance of joint status and all that is necessary to consitute partition is a *definite and unequivocal indication of his intention* by a member of a joint family to separate himself from the family and to enjoy his share in severalty. Assent of other members is not necessary. The intention of a particular member may be expressed by explicit declaration or by conduct. *(Dnyaneshwar V. Ananta* (1936) 60.Bom.736).[150] Partition may be effected in the following ways : —

1. By suit : Where an adult institutes a suit for partition his severance from the joint status is regarded from the date of the institution of the suit. A decree may be necessary for *working out the results of the severance and for allotting definite shares* but he will be regarded as separater from the date when the suit is instituted. *(Girja Bai. V. Sadashiv* (1916) 43.Cal.1031).[151] But if the suit is withdrawn before trial or if the terms of the decree are not carried out and the members continue to live together, there would be no separation. *(Kedar Nath V. Ratan* (1910) 32. All. 415 = 37. I. A.161).[152] Where a minor institutes a suit for partition the question arises whether the minor becomes separate in status from the date of the institution of the suit. It is dependent on the decision of the issue *whether the partition would be for the benefit of the minor.* Mere institution of a suit for partition by a minor followed by an abatement of the suit by the death of the sole defendant does not effect a severance of the joint status. *(Lalta Prasad V. Sri Mahadeoji* (1920) 42.All.461).[153]

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150. *(Dnyaneshwar V. Ananta* (1936) 60.Bom.736).
151. *(Girja Bai. V. Sadashiv* (1916) 43.Cal.1031).
152. *(Kedar Nath V. Ratan* (1910) 32. All. 415 = 37. I. A.161).
153. *(Lalta Prasad V. Sri Mahadeoji* (1920) 42.All.461).

2. By agreement : A partition may also be effected by an agreement between the parties. *(Girja Bai V. Sadashiv* (1916) 43.I.A.15=43.Cal.1031).[154] ``The true test of partition of property according to Hindu law is the intention of the members of the joint family to become separate owners.'' *(Appovier V. Rama Subba Aiyan* (1866) 11.M.I.A.75, 90).[155]

3. By arbitration : When the dispute is referred to an arbitrator, the award of the arbitrator directing a partition effects a severance of the joint status. *(Syed Kasum V. Jorwar Singh* (1922) 49.I.A.358=50.Cal.84).[156] It should be noted that the severance of the joint status is the matter of *individual decision* and the *de facto* division of the property may be effected by different methods i.e. by private arrangements, arbitration or by institution of a suit for partition. (1916.43.I.A.151=43.Cal.1031, supra).[157]

EVIDENCE OF PARTITION

The evidence of partition may be gathered from the following points : —

(i) If the coparceners divide the joint family property by *metes and bounds* and each member is in separate possession and enjoyment of his share, it shall be regarded as the clearest case of partition.

(ii) If the coparceners agree to hold the joint property in defined shares as separate owners in writing, such a writing operates in law as partition though the property is not physically divided. *(Appovier V. Rama Subba Aiyan* (1866) 11.M.I.A.75).[158] But the parties must declare the intention that they agree to hold the joint family property as separate owners, on the face of the document ; if they do not declare such an intention the document shall not operate as a partition, unless such an intention is evident from subsequent conduct of the parties. *(Doorga Persad V. Kundun* (1873) 13.Beng.L.R.235=1.I.A.55).[159]

154. *(Girja Bai V. Sadashiv* (1916) 43.I.A.15=43.Cal.1031).
155. *(Appovier V. Rama Subba Aiyan* (1866) 11.M.I.A.75, 90).
156. *(Syed Kasum V. Jorwar Singh* (1922) 49.I.A.358=50.Cal.84).
157. (1916.43.I.A.151=43.Cal.1031, supra).
158. *(Appovier V. Rama Subba Aiyan* (1866) 11.M.I.A.75).
159. *(Doorga Persad V. Kundun* (1873) 13.Beng.L.R.235=1.I.A.55).

(iii) In a case where there is no writing at all, the intention of the parties as to separation are to be inferred from their acts. *(Ganesh Dutt V. Jewach* (1904) 31.Cal. 262=31.I.A.10).[160]

Cesser of commensality is not the conclusive proof of partition. (1904.31.Cal.262, supra). The burden however, of proving that the family continued to be joint, in such a case, lies on the person alleging it. *(Beti V. Sikdar Singh* (1928) 50.All.180=108.I.C.721).[161]

(What is partial partition?) **Partial partition :** There may be partial partition in two senses :-

(a) Some members of the family may remain joint notwithstanding the separation of the rest.

(b) Some properties may be partitioned by *metes and bounds* and the rest may not be so divided. *(Ramlinga V. Narayana.* (1922) 49.I.A.168=45.Mad.489).[162]

But there can be no severance of interest as regards *part only of the property* and not as regards the whole. The general rule is that a suit for partial partition of the property is not maintainable. *(Haridas V. Prannath* (1886) 12.Cal.566).[163]

(Partition suit by a purchaser.) A suit will not lie for partition of a portion only of the joint family property even if the purchaser of the rights of a coparcener sues for partition ; the partition must be general. But in equity the purchaser should be allotted the particular parcel purchased, if possible, to his share. *(Narayan V. Nathaji* 28.Bom.201).[164] A suit for partition of *only* the property sold will not lie unless other members agree to it. But if the Court thinks that partial partition will not create much inconvenience it may allow such a suit. *(Duvvada V. Sripada* 34.Mad. 402=5.I.C.491).[165]

160. *(Ganesh Dutt V. Jewach* (1904) 31.Cal. 262=31.I.A.10).
161. *(Beti V. Sikdar Singh* (1928) 50.All.180=108.I.C.721).
162. *(Beti V. Sikdar Singh* (1928) 50.All.180=108.I.C.721).
163. *(Haridas V. Prannath* (1886) 12.Cal.566).
164. *(Narayan V. Nathaji* 28.Bom.201).
165. *(Duvvada V. Sripada* 34.Mad. 402=5.I.C.491).

(Separation f one coparcener.) As per recent decisions, when one coparcener separates himself from the others it will be presumed that the latter remain joint as before. The result of the decisions of the Judicial Committee in this respect may be summarised as follows : —

(i) "There is no presumption when one coparcener separates from the others, that the latter remain united. An agreement amongst the remaining members of the joint family to remain united or to re-unite must be proved like any other fact." *(Balabux V. Rukhmabai* (1903) 30.I.A.130,137=30.Cal.725).[166] In another case it was observed that no express agreement is necessary ; the intention to remain joint may be inferred from the subsequent conduct of the parties *(Ram Pershad Singh V. Lakhpati Koer*[167] (1903) 30.I.A.1=30.Cal.231).

(ii) In case of separation between the members of a joint family, there is no presumption that there was a separation between one member and his descendents. *(Hari Baksh V. Babu Lal* (1924) 51.I.A.163=83.I.C.418).[168]

(iii) The sons may remain joint notwithstanding the fact that the father becomes separated from them. But the intention of the sons to remain joint must be proved like any other fact. (See. *Sengoda V. Muthu* (1924) 47.Mad.567).[169]

(iv) If a decree is passed for partition, the decree alone can be the evidence of what was decreed. *(Palani Ammal V. Muthuvenkatacharla* (1925) 52.I.A.83,87).[170]

(v) If any member renounces his interest in the family property, the other members continue to remain joint as before. *(See Parosotom V. Jagannath* (1919) 41.All.361).[171]

166. *(Balabux V. Rukhmabai* (1903) 30.I.A.130,137=30.Cal.725).
167. *Ram Pershad Singh V. Lakhpati Koer*
168. *(Hari Baksh V. Babu Lal* (1924) 51.I.A.163=83.I.C.418).
169. (See. *Sengoda V. Muthu* (1924) 47.Mad.567).
170. *(Palani Ammal V. Muthuvenkatacharla* (1925) 52.I.A.83,87).
171. *(See Parosotom V. Jagannath* (1919) 41.All.361).

(vi) Partial partition may be effected by mutual agreement of the parties, no coparcener can by suit enforce a partial partition against other coparceners. The suit must be one for a complete partition. *(Narayan V. Pandurang* (1875) 12.Bom.H.C.148).[172]

(Births and deaths pending suit for partition.) Since the institution of a suit for partition effects a severance of the joint status, share of any member is not liable to be diminished by the birth of another member subsequent to the date of the suit, nor it is in creased by the death of any of the members subsequent to the date, as his share will pass to his heirs. *Girja Bai V. Sadashiv,* supra).[173]

According to Madras and Bombay High Courts mere institution of a suit for partition by a minor does not effect a severance of the joint status, but if a decree is passed the minor's share will not increase or decrease by the birth or death in the family subsequent to the date of the suit. But if the Court refuses to decree separation as regards the minor, the minor's share will increase by subsequent deaths. *(Ganapathy V. Subramaniam* (1929) 52.Mad.845).[174] But according to Patna High Court his share is neither diminished by subsequent births nor is it increased by subsequent deaths. *(Krishna Lal V. Nandeshwar* (1919) 4.Pat.L.J.38=44.I.C.146).[175]

(Who may sue for partition?) **Suit for partition :** As a general rule every coparcener and every purchaser of the interest of a coparcener is entitled to institute a suit for partition.

(Parties to the suit.) In a partition suit the plaintiff should implead the following as defendants, otherwise the suit is liable to be dismisssed : —

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172. *(Narayan V. Pandurang* (1875) 12.Bom.H.C.148).
173. *Girja Bai V. Sadashiv,* supra).
174. *(Ganapathy V. Subramaniam* (1929) 52.Mad.845).
175. *(Krishna Lal V. Nandeshwar* (1919) 4.Pat.L.J.38=44.I.C.146).

(i) The heads of all branches. *(Pahaladh V. Luchmunbutty* (1869) 12.W.R.256).[176]

(ii) females who are entitled to a share ;

(iii) the purchser ;

(iv) if the purchaser institutes the suit, the alienor.

In addition to those mentioned above, it is desirable that the following persons should be made parties :-

(i) The mortgagee with possession of the family property. *(Sadu V. Ram* (1892) 16.Bom.608 ; C.P.C., O.1.R.10).[177]

(ii) Simple mortgagees of specific items. *(Sadu V. Ram,* supra).[178]

(iii) Purchaser of the undivided interest of a coparcener. *(Sadu V. Ram,* supra).[179]

(iv) Persons entitled to provision for their maintenance and marriage.

(v) Any other person entitled to maintenance, etc. *(Sadu V. Ram,* supra).[180]

(vi) Mortgagee or a lessee. Such a person may himself apply to be a party.

Hotchpot : In case of a partition suit by one coparcener against the other coparceners, it should embrace the whole family property. (C.P.C.,O.2.R.1-2)[181] excepting where :

(i) a portion of the property is in the possession of a mortgagee. *(Kristayya V. Narasimham* (1900) 23. Mad.608) ;[182]

(ii) it is held jointly by the family with a stranger *(Lachmi V. Janki* (1901) 23.All.216) ;[183]

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176. *(Pahaladh V. Luchmunbutty* (1869) 12.W.R.256).
177. *(Sadu V. Ram* (1892) 16.Bom.608 ; C.P.C., O.1.R.10).
178. *(Sadu V. Ram,* supra).
179. *(Sadu V. Ram,* supra).
180. *(Sadu V. Ram,* supra).
181. (C.P.C.,O.2.R.1-2)
182. *(Kristayya V. Narasimham* (1900) 23. Mad.608) ;
183. *(Lachmi V. Janki* (1901) 23.All.216) ;

(iii) part of the joint property is situated outside the jurisdiction of the Court in which the suit for partition is brought. *(Abdul Karim V. Badrudeen* (1905) 28. Mad.216).[184]

A member, suing his coparceners for partition, must bring all properties into hotchpot. *(Lallject V. Rajcoomar* (1876) 25. W.R .353;[185] (1954) 6.D.L.R.111.[F.C.]).[186]

Where a coparcener sells his undivided interest in *one* of the several properties and a suit is brought by the purchaser against his vendor and other coparceners for partition of the particular parcel purchased or where under similar circumstances a suit for partition is brought by other coparceners against the purchaser :

(i) the alienee of a specific property or of the undivided interest of a coparcener in such property is entitled to a partition of the property purchased without suing for a general partition according to the High Courts of Allahabad and Calcutta. *(Ramohan V. Mulohand* (1906) 28.All.39;[187] *Tarini Charan V. Devendra Lal* (1935) 62. Cal.655).[188]

In Bombay *(Ishrappa V. Krishna* (1922) 46.Bom. 925 = 67. I. C.833)[189] and Madras *(Manjaya V. Shanmuga* (1915) 38. Mad. 684 = 22. I.C.555) such a purchaser is not entitled to a partition of the specific parcel purchased. He can only enforce his rights by a suit for general partition.

(ii) The non-alienating coparceners are entitled, in Bombay, Madras and Allahabad to sue the purchaser for partition of the alienated property without bringing a suit for general partition.

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184. *(Abdul Karim V. Badrudeen* (1905) 28. Mad.216).
185. *Lallject V. Rajcoomar* (1876) 25. W.R .353;
186. (1954) 6.D.L.R.111.[F.C.]).
187. *(Ramohan V. Mulohand* (1906) 28.All.39;
188. *Tarini Charan V. Devendra Lal* (1935) 62. Cal.655).
189. *(Ishrappa V. Krishna* (1922) 46.Bom. 925 = 67. I. C.833)

(Hanmandas V. Valadhdas (1919) 43.Bom. 17;[190] *Iburamsa V. Theruvenkatasami* (1911) 34.Mad.269.[F.B.];[191] *Ram Charan V. Ajudhia* (1906) 28.All.50). But one of the several non-alienating coparceners cannot sue the purchaser for his own share of the alienated property. *(Ram Kishore V. Jainarayan* (1913) 40. Cal. 966).[192]

(iii) Suppose, **A** and **B** are members of a joint family, the property of which consists of three houses **P, Q** and **R. A** sells his interest in house **P** to **C. B** sells his interest in the same house to **D.** In such a case **D** can sue **C** for partition of the house P without asking for partition of houses **Q** and **R.** The real contest in this case is between strangers to the family and there is no reason why such contest should not be determined without reference to the remaining property of the family. *(Ibur amasa V. Thirumalai* (1911) 34.Mad. 269 = 7.I.C.559).[193]

(Conversion) Conversion of a member of a joint family to Islam or Christianity or to any other religion operates as a severance of the joint status as between him and other members of the family, but not as a severance amongst other members *inter se. (Kulada V. Haripada* (1913) 40.Cal.407).[194]

(Re-opening of partition.) An after-born or a validly adopted son by the widow after partition, may re-open it. *(Lakshman V. Gopal* (1899) 23.Bom.385).[195]

It may also be re-opened in case of fraud or mistake. *(Lakshman V. Gopal,* supra).[196]

190. *Hanmandas V. Valadhdas* (1919) 43.Bom. 17;
191. *Iburamsa V. Theruvenkatasami* (1911) 34.Mad.269.[F.B.];
192. *(Ram Kishore V. Jainarayan* (1913) 40. Cal. 966).
193. *(Ibur amasa V. Thirumalai* (1911) 34.Mad. 269 = 7.I.C.559).
194. *(Kulada V. Haripada* (1913) 40.Cal.407).
195. *(Lakshman V. Gopal* (1899) 23.Bom.385).
196. *(Lakshman V. Gopal,* supra).

Mitakshara school-Partition-Partition of the family property by the father ; sons born thereafter connot re-open it. (1956) 8.D.L.R.577).[197]

(Effect of partition.) Partition dissolves the coparcenary with the result that separating members hold their respective shares as separate property and the share of each member will pass on his death to his heirs.

(Re-union.) A re-union can take place *only* between persons who ware parties to the original partition. *(Akshay V. Hari* (1908) 35.Cal.721).[198] But as per Mitakshara, Dayabhaga and Madras schools, a member of the joint family, once separated, can re-unite only with his father, brother or paternal uncle but not with any other relations, such as paternal grand-father, etc.

The re-union remits the re-united members to their former status as members of the joint family. *(Prankishen V. Mothoora* (1865) 10.M.I.A.403).[199] But it should be noted that the mere fact that the members live together after partition does not amount to a re-union. There must be an intention of the parties to *re-unite in estate and interest. (Balkrishen V. Ramnarain* (1903) 30.Cal.738).[200]

(Will) No member, even the head of the family has a right to make a partition of joint family property by will except with the consent of other members. *(Brijraj Singh V. Sheodan* (1913) 35.All.337).[201] Similarly no member of a joint family can dispose of even his own share by will. *(Lakshmichand V. Anandi* (1926) 53.I.A.123).[202]

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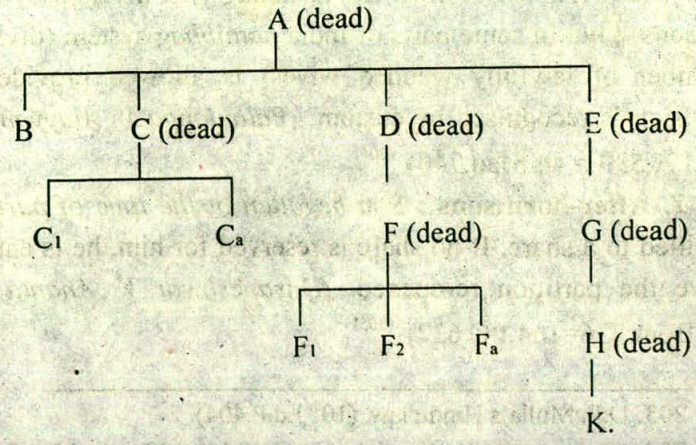
197. (1956) 8.D.L.R.577).
198. *(Akshay V. Hari* (1908) 35.Cal.721).
199. *(Prankishen V. Mothoora* (1865) 10.M.I.A.403).
200. *(Balkrishen V. Ramnarain* (1903) 30.Cal.738).
201. *(Brijraj Singh V. Sheodan* (1913) 35.All.337).
202. *(Lakshmichand V. Anandi* (1926) 53.I.A.123).

Share on partition : Though every coparcener has not an unqualified right to enforce or sue for partition, every coparcener is entitled to a share on partition. As for instance wife, widowed mother (in certain cases) and grand-mother cannot demand a partition under Mitakshara, but they are entitled to a share if partition takes place.

1. Sons, grand-sons, and great-grand-sons : They can demand partition and on a partition between a father and his sons, each son takes a share equal to that of a father. In case of a joint family consisting of brothers they take equal shares on partition. Each branch takes *per stirpes,* and the members of each branch takes *per capita.* This rule is applicable whether the sons are all by the same wife or by different wives. But any member beyond the 4th degree is outside the coparcenary, and is not entitled to any share.

Illustration*

A dies leaving a son **B,** two grand-sons **C1** and **C2,** three great-grand-sons **F1, F2** and **F3** and one great-great-grand-son **K.**



Here, there are four branches of the joint family represented respectively by the four sons of A and their descendants. E's

branch takes nothing as K, the only surviving member of that branch, is outside the limits of the coparcenary being beyond the fourth degree of descent from A, the common ancestor. The joint property will, therefore, be divided *per stirpes* into three parts corresponding to the remaining three branches, each branch taking $\frac{1}{3}$, The result is that B will take $\frac{1}{3}$ C_1 and C_2 will take the $\frac{1}{3}$ share of C equally between them, each taking $\frac{1}{2}$ of $\frac{1}{3}$, i.e. $\frac{1}{6}$, and F_1, F_2 and F_3 will take the $\frac{1}{3}$ share of D equally between them, each taking $\frac{1}{3}$ of $\frac{1}{3}$ i.e. $\frac{1}{9}$.

* Reproduced from D.F. Mulla's Hindu law. (10^{th} Ed.P.404).[203]

[According to Bombay High Court, a son is not entitled to a partition without the assent of his father, if the father is joint with his own father, brother or other coparceners.]

This division is konwn as *putrabhag* (i.e. division by number of sons) ; but in some parts of India *patnibhag* system (division by number of lawfully wedded wives) is allowed provided such division is recognised by custom. *(Palaniappa V. Alayyan* (1921) 48.I.A.539 = 44.Mad.740).[204]

2. After-born sons : Son *begotten at the time of partition* is entitled to a share. If no share is reserved for him, he is entitled to have the partition re-opened. *(Dnyaneshwar V. Ananta* (1936) 60.Bom.736=164.I.C.632).[205]

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203. D.F. Mulla's Hindu law. (10^{th} Ed.P.404).

204. *(Palaniappa V. Alayyan* (1921) 48.I.A.539 = 44.Mad.740).

205. *(Dnyaneshwar V. Ananta* (1936) 60.Bom.736=164.I.C.632).

The rights of a son *begotten as well as born after partition* are determined in two ways. Where the father has reserved a share to himself, such a son is not entitled to re-open the partition. After the death of the father he will inherit the share allotted to the father on partition as well as the whole of the separate property of the father, whether acquired before or after partition, to the entire exclusion of the separated sons. *Kalidas V. Krishan* 1869) 2. Beng. L. R. [F.B].[206] 103, 118-121).

Where the father has not reserved a share to himself such a son is entitled to re-open partition and claim a share not only in the property as it stood at the time of original partition but in the accretions made with the help of that property. *(Chengama V. Munisami* (1897) 20.Mad.75).[207]

3. Illegitimate sons : Illegitimate sons of twice-born persons by a *dasi* are entitled to maintenance only. Illegitimate sons of a Sudra by a *dasi* is entitled to a share of separate property left by the father on partition. The illegitimate sons by a woman who is not a *dasi* are entitled to maintenance only. (The subject has already been discussed in the chapter ``Succession,'' supra).

4. Absent coparcener : An absent coparcener is entitled to a share. His right extends to his descendents also.

5. Purchaser : A purchaser at a sale in execution of a decree can demand partition to have the share purchased by him. Under Dayabhaga law and in United Provinces a purchaser of the interest of a coparcener by private contract can neither claim partition nor entitled to recover the share purchased by him.

6. Wife : A wife cannot demand a partition. But where the partition does take place between her husband and his sons, she is entitled to a share equal to that of a son. *(Dular Koeri V. Dwarkanath* (1905) 32.Cal.234).[208]

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206. *Kalidas V. Krishan* 1869) 2. Beng. L. R. [F.B].
207. *(Chengama V. Munisami* (1897) 20.Mad.75).
208. *(Dular Koeri V. Dwarkanath* (1905) 32.Cal.234).

The value or *stridhana* given to her by her husband or father-in-law would be deducted from her share. *(Jairam V. Nathu* (1907) 31.Bom.54).[209]

7. Widowed mother : Widowed mother cannot compel a partition but she is entitled to a share equal to that of a son if partition takes place between the sons.

The value of *stridhana* received by her from her husband would be deducted from her share. *(Kishori V. Moni Mohun* (1886) 12.Cal.165).[210]

In case of sons by different mothers, the property would be divided into as many shares as there are sons and each mother would get a share equal to that of each of her sons in the aggregate portion allotted to them. *(Kristo V. Ashutosh* (1886) 13.Cal.39).[211]

Suppose **X** dies leaving two widows **Y** and **Z,** and two sons by **Y** and three sons by **Z.** The property would be divided first into 5 shares. **Y** and her two sons would get , $\frac{2}{5}$ and they would get $\frac{2}{15}$ each. Z and her three sons would get $\frac{3}{5}$, and they would get $\frac{3}{20}$ each. Thus Y will take $\frac{2}{15}$ and Z will take $\frac{3}{20}$.

8. Grand-mother : geand-mother (paternal) cannot herself demand a partition, but when partition takes place between her son's sons, her own sons being dead, she is entitled to a share equal to that of a son's son. *(Kanhaiya V. Gaura* (1925) 47.All.127 = 83.I.C.47).[212]

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209. *(Jairam V. Nathu* (1907) 31.Bom.54).
210. *(Kishori V. Moni Mohun* (1886) 12.Cal.165).
211. *(Kristo V. Ashutosh* (1886) 13.Cal.39).
212. *(Kanhaiya V. Gaura* (1925) 47.All.127 = 83.I.C.47).

The daughters, sisters etc. are not entitled to a share on partition. But at the time of partition provision must be made for marriage expenses of unmarried daughters and sisters and for maintenance of disqualified heirs.

PARTITION-DAYABHAGA LAW

The rules of Mitakshara law of partition apply *mutatis mutandis* to cases governed by the Dayabhaga law except as to those points mentioned below : —

(Parition according to Dayabhaga.) Under Mitakshara coparceners are *joint tenants* and no member can say that he has a certain definite share in the property, say, *one-third or one-fourth* until partition takes place. According to Dayabhaga coparceners are *tenants-in-common,* and partition under that law means numerical division of the property by *metes and bounds.* Under Dayabhaga law also, the true test of a partition lies in the intention of the parties to separate.

``Under the Mitakshara law partition is effected when the property is held and enjoyed in defined shares as separate owners without an actual division, whereas under Dayabhaga law there must be a separation of shares and an assignment to each coparcener of specific portion of the property. (1959) 11.D.L.R.419.[213]

Under Dayabhaga law every adult coparcener, whether male or female *(Durga Nath V. Chintamoni* (1904) 31.Cal.214)[214] (Widow or daughter), is entitled to enforce a partition. Since there can be no coparcenary between the father and his sons under Dayabhaga, a son cannot enforce partition against the father. Where the suit for partition is brought on behalf of the minor the Court should not pass the decree unless the partition is likely to be for the benefit of the minor by advancing his interests or protecting them from danger. *(Damoodur V. Senabutty* (1882) 8.Cal.537).[215]

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213. (1959) 11.D.L.R.419.
214. *(Durga Nath V. Chintamoni* (1904) 31.Cal.214)
215. *(Damoodur V. Senabutty* (1882) 8.Cal.537).

(Persons entitled to partition.)

1. Sons, grand-sons and great-grand-sons : Sons, grandsons and great-grand-sons cannot enforce partition against the father, grand-father or great-grand-father.

2. Illegitimate sons : Illegitimate sons of three regenerate classes are entitled to maintenance only upto minority and cannot demand partition under any circumstances.

Since the illegitimate son of a Sudra is entitled to a share, he can enforce partitton after the death of his putitive father. But he cannot enforce partition against his father in his lifetime. *(Raja Jogendra V. Nityanand* (1891) 18.Cal.151).[216] (As to other matters like share of an illegitimate son, etc. see ``Illegitimate son'' in chapter ``Succession'').

3. Purchaser : The purchaser can demand partition even for the fractional share of the property purchased by him without asking for partition of the whole joint estate. *(Barahi V. Debkamini* (1893) 20.Cal.682).[217] Stranger-purchaser :-

—A member of an undivided family can maintain a suit for injunction restraining a stranger-purchaser of a portion of the joint property from taking possession of the property. (1957) 9. D. L. R. 119.[218]

A stranger-purchaser of a dwelling house of undivided family is not entitled to get joint possession or other common or part enjoyment of the house. His only remedy is to file a suit for partition and for specific possession on the partition of his share, subject to the rights of the co-sharers under Section 4 of the Partition Act. (1957) 9.D.L.R.119.[219]

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216. *(Raja Jogendra V. Nityanand* (1891) 18.Cal.151).
217. *(Barahi V. Debkamini* (1893) 20.Cal.682).
218. (1957) 9. D. L. R. 119.
219. (1957) 9.D.L.R.119.

4. Wife : A wife cannot demand partition nor can she claim a share on partition. *(See Sorolah V. Bhoodun* (1888) 15.Cal.292).[220]

5. Mother : A mother cannot herself demand partition, but if a partition takes place between her sons, she is entitled to a share equal to that of a son. The value of *stridhana,* if any, received by her from her husband would be deducted from her share. *(Kishori V. Moni Mohun* (1886) 12.Cal.165).[221]

A Hindu, under Dayabhaga law, may dispose of his property by will so as to deprive his widow of a share on a partition between her sons. But if the whole property be willed away, she has a right to maintenance out of her husband's property. *(Debendra V. Brojendra* (1890) 17.Cal. 886).[222]

A sonless step-mother is not entitled to a share on partition between her step-sons. *(Srimati Hemangini V. Kedarnath* (1889) 16.Cal.758, 765=16.I.A.115).[223]

On a partition between sons by different mothers the same rule is followed as under Mitakshara. But the mother of only one son is entitled to maintenance only out of the share allotted to her son and not to any separate share for herself. *(Srimati Hemangini V. Kedarnath,* supra).[224]

A mother gets a share in lieu of maintenance and she cannot claim any share in case of a partial partition, provided, she can be maintained adequately from the undivided property. *(Barahi V. Debkamini,* supra).[225]

The mother cannot claim a share on mere institution of a suit for partition by her sons unless the suit is decreed.

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220. *(See Sorolah V. Bhoodun* (1888) 15.Cal.292).
221. *(Kishori V. Moni Mohun* (1886) 12.Cal.165).
222. *(Debendra V. Brojendra* (1890) 17.Cal. 886).
223. *(Srimati Hemangini V. Kedarnath* (1889) 16.Cal.758, 765 = 16.I.A.115).
224. *(Srimati Hemangini V. Kedarnath,* supra).
225. *(Barahi V. Debkamini,* supra).

6. Grand-mother : A paternal grand-mother cannot herself demand a partition but if a partition takes place between her sons (or a son and a son's daughter), grand-sons or great-grand-sons, she is entitled to a share. *(Purna Chandra V. Sarojini* (1904) 31.Cal.1065).[226] The value of *stridhana* received by her from her husband or father-in-law would be deducted from her share. *(Kishori V. Moni Mohun,* supra).[227]

(Marriage of daughters.) "Under Hindu law although the conception of coparcenary property according to Dayabhaga school is entirely distinct from that of the Mitakshara school, yet where the Dayabhaga school is silent, the Mitakshara school of Hindu law will be accepted. As there is no authority as to whether the marriage of a daughter under the Dayabhaga school is a joint family affair or not, under the Mitakshara school of Hindu law that will be treated as joint family affair." (1959) 9.P.L.R. (Dac.) 401.[228]

"Karta of a joint family need not sign any document as Karta to bind other members of the family." (1959) 9.P.L.R. (Dac.) 401.[229]

Marriage expenses of daughters shall be a charge on the joint family property. *(Suorindra Chandra Singha Sarma V.D.K. Singha Sarma* (1961) 13.D.L.R.232).[230]

(Allotment of shares.) On a partition between brothers they all take equally. the share of a brother who is dead is taken by his heir, devisee or assignee.

Each branch takes *per stirpes* as regards every other branch, but the members of a branch take *per capita* as regards to one another.

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226. *(Purna Chandra V. Sarojini* (1904) 31.Cal.1065).
227. *(Kishori V. Moni Mohun,* supra).
228. (1959) 9.P.L.R. (Dac.) 401.
229. (1959) 9.P.L.R. (Dac.) 401.
230. *(Suorindra Chandra Singha Sarma V.D.K. Singha Sarma* (1961) 13.D.L.R.232).