

SUCCESSION OF PROPERTY OF HINDUS

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N. M. RANKA
Senior Advocate

1. INTRODUCTION

The Hindu Succession Act, 1956, was enacted on 17.06.1956 to amend and codify the law relating to intestate succession among Hindus. It extends to the whole of India except the State of Jammu & Kashmir. It brought about changes in the law of succession among Hindus and gave rights which were till then unknown in relation to women's property. However, it did not interfere with the special rights of those who are members of Hindu *Mitakshara* coparcenary except to provide rules for devolution of the interest of a deceased male in certain cases. The Act lays down a uniform and comprehensive system of inheritance and applies, *inter alia*, to persons governed by the *Mitakshara* and *Dayabhaga* schools. The Act applies to Hindus, Buddhists, Jains or Sikhs. In the case of a testamentary disposition, this Act does not apply and the succession of the deceased is governed by the Indian Succession Act, 1925. Section 6 of the Act deals with the devolution of interest of a male Hindu in coparcenary property and recognises the rule of devolution by survivorship among the members of the coparcenary. To remove the gender discrimination, the amending act of 2005 has given equal rights to the daughter as that of the son in the Hindu *Mitakshara* Coparcenary property. The daughter has been made a coparcener, with right to partition. Sections 8 – 13 contains general rules of succession in the case of males and section 14 made property of a female Hindu to be her absolute property. Sections 15 – 16 enact general rules of succession in the case of females. Section 17 – 30 deal with general provisions with testamentary succession. It is a self-contained code and has overriding effect and makes fundamental and radical changes.

2. COPARCENARY / HINDU UNDIVIDED FAMILY PROPERTY AND DEVOLUTION OF INTEREST

Mitakshara, which is prevalent in large number of states except West Bengal, recognises two modes of devolution of property, namely, survivorship and succession. The rule of survivorship applied to joint family (coparcenary)

property; the rules of succession apply to property held in absolute severalty. *Dayabhaga* recognises only one mode of devolution, namely, succession. It does not recognise the rule of survivorship even in the case of joint family property. The reason is that while every member of a *Mitakshara* coparcenary has only an undivided interest in the joint property, a member of a *Dayabhaga* joint family holds his share in quasi-severalty, so that it passes on his death to his heirs, as if he was absolutely seized thereof, and not to the surviving coparceners as under the *Mitakshara* law. The essence of a coparcenary under the *Mitakshara* law is unity of ownership. The ownership of the coparcenary property is in the whole body of coparceners. According to the true notion of an undivided family governed by the *Mitakshara* law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a definite share, that is, one-third or one-fourth. His interest is a fluctuating interest, capable of being enlarged by deaths in the family, and liable to be diminished by births in the family. It is only on a partition that he becomes entitled to a definite share. No female could be a coparcener under *Mitakshara* law. Share of wife is not as her husband's coparcener, but is entitled to equal share where there is a partition between her husband and her children.

2.1. Where a Hindu dies after 09.09.2005, his interest in the property shall devolve by testamentary or intestate succession and the coparcenary property shall be deemed to have been divided as if a partition had taken place. A notional partition and division has been introduced. Upon such notional partition, the property would be notionally divided amongst the heirs of the deceased coparcener, the daughter taking equal share with son, the share of the pre-deceased son or a pre-deceased daughter being allotted to the surviving child of such heirs. To put a stop to escape the consequences, it has been specified that partition before 20.12.2004 made by registered partition deed or affected by a decree of court, alone would be treated as valid.

2.2. The Supreme Court in *Gurupad Magdum vs. H. K. Magdum - AIR 1978 SC 1239 : (1981) 129-ITR-440 (S.C.)* observed : “What is therefore required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death. That assumption, once made, is irrevocable. In other words, the assumption having been made once for the purpose of ascertaining the shares of the deceased in the coparcenary property, one cannot go back on that assumption and ascertain the share of the heirs without reference to it. The assumption which the statute requires to be made that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of the heirs, through all its stages.... All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased”. On reading the said judgment the Supreme Court does not say that the fiction and notional partition must bring about total disruption of the joint family, or that the coparcenary ceases to exist even if the deceased was survived by two coparceners. It is submitted that the notional partition need not result in total disruption of the joint family. Nor would it result in the cessation of coparcenary. In *Shyama Devi (Smt.) and Ors. vs. Manju Shukla (Mrs.) and Anr. (1994) 6 SCC 342* followed the judgment in *Magdums case (supra)*. The Hon'ble Court went on to state that Explanation 1 contains a formula for determining the share of the deceased on the date of his death by the law effecting a partition immediately before a male Hindu's death took place.

2.3. In *State of Maharashtra vs. Narayan Rao Sham Rao, AIR 1985 SC 716 : (1987) 163-ITR-31 (SC)*, the Supreme Court carefully considered the above decision in Gurupad's case and pointed out that Gurupad's case has to be treated as authority (only) for the position that when a female member who inherits an interest in joint family property u/s. 6 of the Act, files a suit for partition expressing her willingness to go out of the family, she would be entitled to both the interest she has inherited and the share which would have been notionally allotted to her as stated in Explanation 1 to section 6 of the Act. It was also pointed out that a legal fiction should no doubt ordinarily be carried to its logical end to carry out the purposes for which it is enacted, but it cannot be carried beyond that. There is no doubt that the right of a female heir to the interest inherited by her in the family property, gets fixed

on the date of the death of a male member u/s. 6 of the Act, but she cannot be treated as having ceased to be a member of the family without her volition as otherwise it will lead to strange results which could not have been in the contemplation of Parliament when it enacted that provision. It was also pointed out in this later decision of the Supreme Court that the decision in Gurupad's case has to be treated as an authority (only) for Explanation 1 to section 6 of the Act. The decision of the Supreme Court in *Raj Rani vs. Chief Settlement Commissioner, Delhi – AIR 1984 SC 1234* say the explanation speaks of share in the property that would have been allotted to him if a partition of the property had taken place. Considering these words used in the explanation, it is clear that such property must be available for computation of share and interest. In my view, not in automatic partition under the Income-tax law.

2.4. In a recent judgment the Apex Court in *Uttam vs. Saubhag Singh – AIR 2016 S.C. 1169*, considered both the above cases and held (i) Interest of the deceased will devolve by survivorship upon the surviving members subject to an exception that such interest can be disposed of by him u/s. 30 by Will or other testamentary succession; (ii) A partition is effected by operation of law immediately before his death, wherein all the coparceners and the male Hindu's widow get a share in the joint family property; (iii) On the application of section 8 such property would devolve only by intestacy and not survivorship; (iv) On a conjoint reading of sections 4, 8 and 19 of the Act, after joint family property has been distributed in accordance with section 8 on principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it as they hold the property as tenants in common and not as joint tenants. While coming to the above proposition the Hon'ble Court observed in para 13 “In *State of Maharashtra vs. Narayan Rao Sham Rao Deshmukh and Ors., (1985) 3 S.C.R. 358 : (AIR 1985 SC 716)*, this Court distinguished the judgment in *Magdum's (AIR 1978 SC 1239)* case in answering a completely different question that was raised before it. The question raised before the Court in that case was as to whether a female Hindu, who inherits a share of the joint family property on the death of her husband, ceases to be a member of the family thereafter. This Court held that as there was a partition by operation of law on application of explanation 1 of Section 6, and as such partition was not a voluntary act by the female Hindu, the female Hindu does not cease to be a member of the joint family upon such partition being effected.

2.4.1. In my humble opinion the last proposition as to “the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it” needs clarification, reconsideration and review. If so, the joint family property would become extinct in all cases where section 6 applies and the sons of the last recipient would not get any share and the recipient’s property would have character of individual property. To illustrate ‘A’ has coparcenary property; the family consists of ‘A’ father, ‘H’ wife, ‘B’, ‘C’ sons and ‘D’ daughter. ‘B’ & ‘C’ are married and have sons ‘G’ & ‘H’ and wives, ‘N’ & ‘M’ respectively. They are living together and carrying on family business – on death of ‘A’ his interest would devolve and there would be notional partition of the family. The share received by ‘B’ and ‘C’ respectively would become their individual property governed by section 8 and not section 6, resulting in extinguishment of share and interest of ‘G’, ‘H’, ‘N’ and ‘M’ and debarring them to inherit ancestral property.

2.4.2. Though the members live and want to continue to live jointly and do not want to exercise the volition of living separate, separation would be thrust upon them, with extinction of family property. Section 171 of the Income-tax Act, 1961 which requires division by meets and bounds and an application u/s. 171(2) on there being total or partial partition, would become inoperative and non-existent. ‘G’ & ‘H’, who have share and interest in coparcenary/ancestral property would lose and ‘B’ & ‘C’ would gain. Considering from all angles, the share received on notional partition by ‘B’ and ‘C’ would have the character of H.U.F. property and the share received by each would be for and on behalf of himself, his wife and son.

2.4.3. Many old judgments of the Apex Court like *Gowli Buddana vs. C.I.T. (1966) 60-ITR- (SC) 293*; *N. V. Narendra Nath vs. C.W.T. (1969) 74-ITR-190 (S.C.)* holding that : “When a coparcener having a wife and two minor daughters and no son receives his share of joint family properties on partition, such property, in the hands of the coparcener, belongs to the Hindu undivided family of himself, his wife and minor daughters and cannot be assessed as his individual property for the purposes of wealth-tax” - *C. Krishna Prasad vs. C.I.T. (1974) 97-ITR-493 (S.C.)*. *Surjit Lal Chhabra vs. C.I.T. (1975) 101-ITR-776 (S.C.)*; *Controller of Estate Duty vs. Alladi Kupuswamy (1977) 108-ITR-439 (S.C.)* and *Pushpa Devi vs. C.I.T. (1977) 109-ITR-730 (S.C.)* needs be considered, discussed and deliberated. The Hon’ble Supreme Court escaped (sic) the above cases, which are of material substance and direct on the point at issue.

2.5. An unfounded controversy has been created by the two-judge judgment in *Uttam’s case (supra)* after distinguishing the three-judge judgment in *Narayan Rao Sham Rao (supra)*. In my analysis better view is in *Narayan Rao Sham Rao case* and later judgment in *Kaloomal Tapeshwari Prasad (H.U.F.) (1982) 133-ITR-690 (S.C.)* where it has been held that mere severance of status under Hindu Law would not be sufficient to establish partition and there must be division of property by meets and bounds coupled with application after voluntary separation. Case of *Uttam (supra)* is on its own facts and completely distinguishable on facts and under the Income-tax Act. Otherwise also judgement in *Narayan Rao Sham Rao (supra)* is by three judges, whereas in case of *Uttam (supra)* by two judges. For purposes of income-tax assessment judicial precedent would be the case of *Kaloomal Tapeshwari Prasad (supra)*. At best such observations in *Uttam’s case (supra)* would be *obiter dicta* and inapplicable as a judicial precedent.

2.6. Recently on 02.07.2018 the Supreme Court in *Shyam Narayan Prasad vs. Krishna Prasad – AIR 2018 S.C. 3152* observed in para 12 : “It is settled that the property inherited by a male Hindu from his father, father’s father or father’s father’s father is an ancestral property. The essential feature of ancestral property, according to Mitakshara Law, is that the sons, grandsons, and great grand-sons of the person who inherits it, acquire an interest and the rights attached to such property at the moment of their birth. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. After partition, the property in the hands of the son will continue to be the ancestral property and the natural or adopted son of that son will take interest in it and is entitled to it by survivorship”. It referred to *C. Krishna Prasad Case (supra)*; *M. Yogendra and Ors. vs. Leelamma N. and Ors, 2009 (15) SCC 184*; *Rohit Chauhan vs. Surinder Singh and Ors. AIR 2013 S.C. 3525* etc. Thus it can be said that *Uttam’s case* would be completely distinguishable and inapplicable.

2.7. Eliminating gender discrimination, putting a daughter on same pedestal as that of a son, making her as a coparcener as that of son and with equal rights and obligations is a right step after 50 long years towards women empowerment and equality. Son and daughter are born out of the same womb, why should there be preferential treatment to son *dehorse* the daughter? Now a daughter would get her interest in coparcenary property of her father as also share on partition of family of her

husband, being a wife. Double share is laudable. Now she can be sole coparcener. A doubt is raised as to whether a daughter i.e. a female can be Karta/Manager of her father's family? In my humble submission, she being a coparcener, if is possessed of the property and manages it, she can be a Manager and perform her duties. It is a misnomer that, only the eldest son can be a Karta / Manager. In the family of His Late Highness Maharana Bhagwat Singh of Mewar, the honourable Rajasthan High Court accepted younger son Shreeji Shri Arvind Singh of Mewar as a Manager instead of Shri Mahendra Singh of Mewar. However, she cannot be a Karta/Manager of her husband's family. It shows a daughter remains as daughter married or unmarried, until her last and also Karta of her father's family in appropriate eventuality. It is noticed that some persons persuade the sisters and pressurise them to release their interest in their favour, which is unethical and needs to be eschewed and criticised. Women's rightful gain must go in their kitty.

3. SUCCESSION OF PROPERTY OF MALE HINDU

The property of a male Hindu dying intestate i.e. without a Will, shall devolve upon his heirs as specified in class I of the Schedule; if none, then upon the heirs specified in Class II of the Schedule and in the absence of the said heirs, then upon the agnates of the deceased and lastly if there is no agnate, then upon the cognates. Heirs specified in Class I of the Schedule shall take simultaneously and equally. The property is distributed as per rules in section 10. All widows together would take one share; sons and daughters and mother each shall take one share and the heirs of each predeceased son or each predeceased daughter shall take between them one share. Heirs specified in any one entry as in Class II of the Schedule would have equal share. Agnates and Cognates shall receive as per section 12 with computation of degress as specified in section 13. Property possessed or acquired by a female Hindu would be held by her as a full owner, with all powers to transfer, gift, encumber or bequeath.

3.1. The Supreme Court after considering preamble and its over-riding effect on Hindu Law observed in *C.W.T. vs. Chander Sen and Others – AIR 1986 S.C. 1753 : (1986) 161-ITR-370 (S.C.)*, it is not possible when Schedule indicates heirs in Class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by section 8 he takes it as karta of his own undivided family. It also

stated it would be difficult to hold today the property which devolved on a Hindu u/s. 8 of the Hindu Succession Act would be HUF in his hand vis-à-vis his own son. This view has been followed in *C.I.T. vs. P. L. Karuppan Chettair (1992) 197-ITR-646 (S.C.)*.

4. WOMEN'S PROPERTY

Under the ancient Hindu Law in operation prior to the coming into force of this Act, a woman's ownership of property was hedged in by certain delimitations on her right of disposal by acts *inter vivos* and also on her testamentary power in respect of that property. Absolute power of alienation was not regarded, in case of a female owner, as a necessary concomitant of the right to hold and enjoy property and it was only in case of property acquired by her from particular sources that she had full dominion over it. Section 14 provides that any property whether movable or immovable or agricultural acquired by inheritance or devise or at a partition or in lieu of maintenance or by gift from any person, at or before or after marriage or by her own skill or exertion, or by purchase or *stridhan* or in any other manner whatsoever possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not a limited owner. The said section is not violative of article 14 or 15(i) of the Constitution and is capable of implementation as held in *Pratap Singh vs. Union of India – AIR 1985 S.C. 1694*.

4.1. If a male dies leaving only a widow, she would be sole owner, but if two widows, each would share equally. Once a widow succeeds to the property of her husband and acquires absolute right over the same under this section, she would not be divested of that absolute right on her remarriage. Property received, acquired or possessed by a female Hindu would be her individual property. Share received from her father's coparcenary u/s. 6 of the Act on partition between her husband and son, would be of the character of an individual property. She has right to give away by testamentary succession. In case of her intestacy, succession would be in accordance with section 15 of the Act. It is a right step towards women's empowerment and eliminates gender vice. Now there is no distinction between a man and a woman.

5. SUCCESSION OF PROPERTY OF A FEMALE HINDU

The property of a female Hindu dying intestate shall devolve as mandated in section 15 and in accordance with the rules set out in section 16. Firstly, upon the sons,

daughters, children of pre-deceased son or daughter and the husband. Secondly, on the heirs of the husband; thirdly, upon the mother and father of the female; fourthly, upon the heirs of the father, and lastly, upon the heirs of the mother. However, any property inherited by a female from her father or mother shall devolve upon the heirs of her father, if in the absence of any son or daughter or children of any pre-deceased son or daughter or their children only.

Secondly any property inherited by a female from her husband or from her father-in-law shall devolve, in the absence of any son or daughter or children of any pre-deceased son or daughter, upon the heirs of the husband. These exceptions are on property inherited from father, mother, husband or father-in-law and not from others or her self-acquired property. Object is to revert back to the heirs of the same from whom acquired. The order of succession and manner of distribution amongst heirs of a female Hindu are: Firstly among the heirs specified hereinbefore in one entry simultaneously in preference to any succeeding entry; Secondly in case of pre-deceased son or daughter to his/her deceased son or daughter living at the relevant time. Other rules would apply.

6. GENERAL PROVISIONS

Heirs related to full blood shall be preferred as against half blood. When two or more heirs succeed together, they would receive per capita and not per stirpes and as tenants-in-common and not as joint tenants. A child in womb at the time of death of deceased, shall have same right to inherit as a born child.

In case of simultaneous deaths, it shall be presumed, until the contrary is proved, that the younger survived the elder. Preferential right to acquire property by the heirs specified in Class I of the Schedule, shall vest in other heirs, if a heir proposes to transfer his share at the consideration mutually settled or decided by the Court. If a person commits murder or abates in the crime he would dis-inherit the property of person murdered. It is based upon principles of justice, equity and good conscience. Converts to any other religion and his/her descendants are disqualified and would not inherit. He/she shall be deemed as died before the deceased. Any disease, defect or deformity would not disqualify from succession. If there is none to succeed, the property of the deceased shall devolve on the Government along with obligations and liabilities.

7. TESTAMENTARY SUCCESSION

'Will' as defined u/s. 2(h) of the Indian Succession Act

means "the legal declaration of the intention of a Testator with respect of his property which he desires to be carried into effect after his death". A Will comes into effect after the death of the Testator and is revocable during the life-time of the testator. Every person of sound mind not being a minor can dispose of his property by Will. The testator is at liberty to bequeath the disposable property to any person, he likes. There is no restriction that a Will has to be made in favour of legal heirs, relatives, close friends, etc. A Will or codicil need not be stamped or registered though it deals with vast immovable properties. A Will can be on a sheet of paper. It need not be on a stamp or Government paper. However, to generate confidence, it is advisable to execute on a stamp of any denomination. It is advisable to get each sheet of the Will signed in the aforesaid manner from the testator and to put photo of the testator. Attestation should be as per section 63 of the Indian Succession Act. However, it is desirable to get it Notarised or registered under the Indian Registration Act.

A Hindu male or female can bequeath individual property as well as share in the coparcenary property by way of a Will. Manifold benefits are inherent by making a Will. However, it has been noticed that very negligible few tax payers are taking advantage of the medium of Will. It can be a tool for further reducing the nominal rate of tax and expanding units of assessments with manifold advantages to regulate the members of family and relatives. Its importance need not be emphasised but is well known. It is highly desirable that every person makes a Will to avoid and avert litigation amongst legal heirs and representatives and in order to reduce the rate of tax in the hands of relatives and would-be children, grand-children, daughters and sons-in-law and to create Hindu undivided family, to add more units. Such persons could be surely reminded : "Have you executed your Will, if so, please see that it is in a safe place and do inform your spouse about it. If not, please fix up the earliest appointment with the ever-friendly lawyer next door! All the ladies should ask their husbands that there is a proper Will duly executed by them and insist on seeing it and also to ensure that the (wife) is the sole beneficiary under that Will. One should advice to act expeditiously. Liability of tax after death of an individual can be better managed through a Will. It is high time to explore the multi-fold benefits of a WILL.

8. CONCLUSION

Old Hindu Law and outdated customs stand deleted, codified in succession and inheritance with overriding

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