

PARTITION

Partition in literal sense means severance of joint status by the members of a Hindu undivided family. In Hindu Society, Jointness of a family is a normal condition. Hence, there is a presumption in law that every family is a joint family, unless shown to be separate in mess, status and worship.

Partition of joint family property is basically a division of property held jointly by Co-Owners, where every co-owner owns every parcel of the property, jointly with others. As every co – owner has joint ownership over every parcel of the property, there is no definite and demarcated right or interest or ownership rights of the co-sharers in such property. As the inheritance of joint family is by survivorship, subject to the provisions of section 6 of the Hindu Succession Act, the quantum of shares of members continues to fluctuate till the partition of the joint family is effected. When a property is divided, each member becomes the sole and exclusive Owner of his portion of the property. Each divided property gets a new title and each sharer gives up his or her interest in the estate in favour of other sharers. Therefore, partition is a combination of release and transfer of certain rights in the estate, except those, which are easements in nature.

Partition means collapse of joint ownership. It destroys the harmony of joint ownership and of possession. A large property falls into pieces over a generation or two. The land is very much there in bits and pieces in the name of different Owners.

It, therefore, be understood that Partition is neither a gift nor a transfer of property. It merely breaks a joint right into several rights. It is not acquisition of property or exchange of property. It is a combination of release and conveyance of the rights of the property in favour of individuals or rearrangement of already existing rights. And therefore, it can be effected orally also. But it is advisable to effect Partition in writing for the sake of clarity, posterity and record. Thus Partition is not transfer, but when it assumes the form of transfer, the intention may be to hoodwink the Creditors.

The basic character of joint Hindu family is that each member has inherited title to the property by birth. Each member has joint title to the entire property and that joint enjoyment of the title is converted by partition into separate title of the individual Co-Owner for his enjoyment. Therefore, it is now an established fact that partition is not transfer, but transformation of joint property.

And that brings us to the question as to who are the members of the family who are entitled to a share in the joint family property and what properties can be partitioned, as not every property held by a Hindu is available for partition.

One must understand that properties held by a Hindu can be classified in two main categories : 1) joint family property and (2) Separate or self acquired property. Now joint family properties are further divisible in two categories, (1) ancestral property and (2) separate or self acquired properties thrown in common family or coparcenary stock. In so far as self acquired properties are concerned, they can not be subject matter of partition, during the lifetime of the person who acquired the same. Hence, such property can be dealt by a Hindu as per his wish and will. But after his death, they become ancestral property in the hands of the rest of members and thus would be governed by the rules applicable to joint family property or by the provisions of the Hindu Succession Act.

In so far as the ancestral properties are concerned, it may be borne in mind that every Hindu male and now female also (on account of the amendments made to the Hindu Succession Act in 2005) by virtue of their birth in the family, becomes a member of the Hindu Coparcenary and as a corollary, gets an inherent share in the joint family property. But this right is restricted up to three degrees of ancestors. That means a Hindu has a right/share only in the properties of his Father, Grand father and Great Grand Father. Such properties are known as ancestral properties. Thus, all such persons, who are a direct lineal descendant of a common ancestor, up to three degrees next to the common male ancestor, form a joint Hindu family, constituting a Coparcenary and all such persons, are coparceners or members of

the joint family and are, therefore, entitle to a share in ancestral properties by virtue of their birth.

As noted above, shares of members are not defined in a joint family property and they remain flexible till partition. This is because of the principal that the inheritance in a joint family property is by survivorship and hence, the share or interest of the members gets enlarged or reduced by deaths or births in the family. Though there is an exception to this rule by virtue of section 6 of the Hindu Succession Act which provides that if a Hindu at the time of his death, having an interest / share in a Mitakshara Coparcenary property left behind a female relative specified in class I or a male relative of that class claiming through such female relative, then such share or interest of the member shall devolve by testamentary or intestate succession, as the case may be, as per the provisions of the said act and not by survivorship.

Similarly, properties though separate or self acquired but thrown in common stock of joint family property is also available for partition as the ancestral property. But it has been an experience that usually at the time of partition, a claim is raised that it is separate property and hence not divisible. And hence strong proof, either in writing or inferential, is required to prove that though separate, the property was thrown in common stock i.e it was used or was always intended to be used as a joint family property. This being so because of the principal that there is no presumption of jointness of property. The burden is always on the person who asserts that a particular property is a joint family property.

While dwelling on this subject it may also be borne in mind that apart from properties which are ancestral in nature, all such properties, which are acquired or gained from such joint family properties or the nucleus of joint family property, are also joint family properties. Similarly, business or properties, gained, acquired or created out of common labour and exertion by the members of the joint family are also joint family properties and hence, liable for partition. It is immaterial that this labour or exertion has been done by all or some of the members of the family. Factum of common exertion or labour is of primacy.

Thus, while considering an issue of partition, the first thing which needs to be done is to prepare chart of all the properties, moveable and immoveable, of which a partition is desired. Then to see whether the property is a joint family property or self acquired property. As already noted, joint family property could be ancestral or separate property thrown in common stock. Then to draw a family tree/ chart of all the persons, who are direct lineal descendant of the common ancestor who acquired the property, up to three degrees next to such common ancestor. After doing so, then provisions should be made for discharging debts / encumbrances over the family and the properties. Provision should also be made for maintenance of widows and such other persons in the family and then to devise a formula for division of the property in such mode and manner so that all the members get an equal share. Equality of share / interest being essence of a coparcenary. While doing so, it may be kept in mind that though equality of interest is the essence of joint family property, it is not necessary that division of the share needs to be equal in all aspects. Such division is subject to agreement between the members and hence, members are free to divide the property in the mode and manner deemed fit and agreeable. It is flexible in nature. But once agreed, it binds the member and his lineage. But, if there is no agreement and in case of any dispute, the courts are inclined to grant shares of equal nature.

It may also be borne in mind that partition can be total, i.e by metes and bounds i.e actual and physical, or partial or notional. The main factum is the intention to separate. A partial partition can be in respect of the properties and/or the members of the coparcenary.

Another aspect is that there are some properties which cannot be divided physically. If physical division is not possible, partition can still be effected by paying cash or other assets to a sharer in lieu of his or her share in the property. Such situation arises, when the division of an estate is considered to be dangerous and unreasonable and when such division dilutes the inherent value of the property, or when the immovable property is too small for division.

The instrument of partition is a document by which the Co-Owners of a property agree to divide the property among themselves by oral

agreement or written agreement or by arbitration or through Court. If a document of release shows that the executants are to get cash or other assets, the document is an instrument of partition. The basis of partition is equality. The parties shall share the property equally.

If there is no agreement among the Co-Owners for amicable division of the property, the only alternative is to sell the property by mutual consent or by Court decree and distribute the sale proceeds among the Co-Owners. Any of the Co-Owners may also enforce partition through Court.

In a partition suit, a Court may have decreed partition of the property in the interest of the Co-Owners. But, if it is found that the sale of the property and distribution of the proceeds to the Co-Owners is more beneficial, the Court can at the request of the shareholders direct sale of the property and distribution of the proceeds to the co-sharers.

One more important aspect of the joint family property is that the shares or interest of the members in such property is not defined and remains flexible till partition is effected. This is because of the principal that the inheritance of the joint family property is by survivorship, subject to provisions of section 6 of the HS Act. It is also clear that till partition is effected no exclusive ownership is vested. But despite this, now it has been a settled law that undefined interest / share in the coparcenary property can be sold by a coparcenor and such a purchaser can seek partition.

There are three types of Co-Owners; Joint tenants or tenants-in-common; Hindu Joint Family owners or Co-Parceners; partners of a partnership firm.

Under the Hindu Law in general, everyone being a Co-Owner in a joint ownership has a right to claim his share and such right cannot be denied to him if the property is held as joint tenants. Since joint tenancy is unknown to

Indian Law, there is not much difference between joint tenancy owners and tenants-in-common.

Christians and Muslims hold properties as tenants-in-common or as joint tenants and partition of such immovable property can happen by mutual consent or by partition deed or by Court decree or arbitration.

Partition in Hindu law covers two aspects. One is the division of the status of the members and the other is the division of the joint family property. In the former case, the members are divided according to their standing in the joint family and in the latter case division of joint family property into separate shares. Share of a member depends on the status he enjoys in the family. These are interlinked.

Partition must be according to Law. If a minor gets less shares than he is entitled to in Law, the partition is defective and he can re-open the same when he attains majority. If a member gets more than his share in a property, the excess received will be treated as a gift.

It is not necessary that all Co-Owners agree to partition. When a member desires partition, the property is divided into two portions one for the separating one according to his status and share and the rest jointly for the others. Though oral partition is allowed under Hindu Law, it is not preferable as it may give rise to disputes particularly with respect to immovable properties. It is advisable that oral partition should be reduced into writing. Also, the Income Tax Act does not recognize oral partition of a Hindu Family property unless the Income Tax Officer is satisfied with the facts and this is possible only when it is recorded in partition deed.

Effects of Partition:

When a property is divided into more than two parts, the Co-Owners of the different portions shall agree to hold their portions separately as absolute Owners and each of them shall make a grant to release his share from portions given to others. Necessary covenants in a partition deed are about encumbrances on the property, quiet enjoyment, custody and production of title deeds, easements of necessity, payment of rent and taxes and performance of other conditions of lease, if

any, etc. Partition of joint property is not an exchange. The word partition has now been explained in the HS Act, by virtue of Section 6, duly amended in 2005. Thus a partition is now required to be in writing and registered or effected by a decree of Court. Thus, if it is reduced into writing, it must be registered in the case of immovable properties. Deed of partition requires registration. Mere writing of previous partition does not require registration. Mere list of properties allotted to different Co-Owners does not require registration. Unregistered deed of partition though not admissible in evidence to prove the fact of partition, can be used to prove that a particular property was allotted to a particular Co-Owner as his share.

WILLS

Wills under Hindu Law:

A will is the legal declaration of the intention of the person making it, with respect to his property, which intention he desires to be carried into effect after his death. Wills were wholly unknown to pure Hindu law, but section 30 of the Hindu Succession Act, has provided the testamentary powers to Hindus in respect of undivided interest in joint family property. Today, however, the Indian Succession Act governs wills made by Hindus.

Capacity to make and to take under a will:

Subject to certain limitations, every Hindu who is of sound mind and who is not a minor may dispose of his property by will. As to acceptance of bequests under a will, there is no restriction. Thus, even a minor, a lunatic or a person disqualified from taking a share on partition, may be given a bequest.

What property may be disposed of by will?

Prior to the Hindu Succession Act, 1956, a Hindu could not, by will, bequeath property which he could not have alienated by gift inter vivos. Even after the Hindu Succession Act, a Hindu cannot, by will, so dispose of his property as to defeat the legal right of his wife or any other person to maintenance. (See Ss. 18-22 of the Hindu Adoptions and Maintenance Act, 1956.)

However, the above rule that a Hindu cannot, by will, bequeath property which he could not have alienated by gift inter vivos is now altered by S. 30 of the Hindu Succession Act, 1956, which permits a member of a Mitakshara coparcenary to dispose of, by will, his undivided interest in the coparcenary property.

As regards property which a Hindu could dispose of by will, the following five propositions under the ancient uncodified Hindu law may be noted:

(i) A Hindu could not, by will, dispose of his entire property, so as to defeat the claim of his wife and of other persons who are legally entitled to maintenance from him. (Promothanath v. Nagendrabala, 12 C.W.N. 808)

(ii) The power to make wills could be exercised in regard to the separate or self-acquired property of the testator. In this respect, there was always an agreement among all schools of Hindu law. In regard to coparcenary property, the power to make wills differ according to different schools of Hindu law. The Dayabhaga School recognised the right of a coparcener to dispose of his interest in the joint family property by will. According to the Mitakshara School, however, no coparcener could dispose of his undivided interest by will, even if the other coparceners consented to such disposition. The right of survivorship prevailed against any will made by the coparcener. (However, today, under S. 30 of the Hindu Succession Act, a Hindu may dispose of, by will or other testamentary disposition, even his interest in a coparcenary property.)

(iii) The owner of an impartible estate could dispose of such estate by will, except when the nature of the estate did not admit of such alienation or there was a special custom prohibiting such alienation.

(iv) A Hindu female could dispose of her stridhana property by will, except when the stridhana was non saudayika, in which case the consent of the husband was required to validate the will. (However, now under S. 14 of the Hindu Succession Act, any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, becomes her absolute property, and she becomes the absolute owner of such property and is, therefore, entitled to dispose of such property by will.)

(v) A sole surviving coparcener could dispose of his property by will, but such disposition would be inoperative against a subsequently born or adopted son. This rule was true in regard to coparcenary property, but a Hindu adopting a son could make a will in regard to his separate property, and the adopted son could not challenge that right. (Sri Raja Venkata Surya v. Court of Wards, 22 Mad. 383)

Representation to the estate of a deceased Hindu:

Where a Hindu dies intestate

(i) Letters of administration are not necessary to establish a right to any part of his estate;

(ii) no probate is necessary in the case of a Hindu will, except (a) where it is made within the territories of Bengal or Ordinary Original Civil Jurisdiction of High Courts at Bombay and Madras and (b) when it affects immovable property within those limits, even though the will be made outside, provided that in either case, the will was made after 1870 and before 1927;

(iii) where a debt due to the estate of a Hindu is to be recovered, no Court can pass a decree against the debtor, except on production of (a) Probate, or (b) Letter of administration, or

(c) Succession Certificate, specifying the debt.

Gift or bequest to unborn person:

As laid down in the Tagore's case (see below), a person capable of taking under a will must, either in fact or in contemplation of law, be in existence at the death of the testator.

But this rule of pure Hindu law has been relaxed by (i) Hindu Transfers and Bequests Act, 1914 (applicable to the province of Madras, except Madras city); (ii) Hindu Disposition of Property Act, 1916 (applicable to the whole of India, except the province of Madras); and (iii) Hindu Transfers and Bequests (City of Madras) Act, 1921 (applicable to that city only).

Now, therefore, a bequest can be made to an unborn person, subject to the limitations laid down in the Indian Succession Act.

Tagore v. Tagore (1872 9 Beng. L.R. 377) In this case, a testator made a will, giving his property to A for life, and then to A's eldest son for life. On failure of determination of the above estate, the property was to go to B for life, and thereafter to B's eldest son for life. Once again, on failure or determination of the second estate [i.e., B and his heirs), the property was to go to C's heirs. Thus, the will expressly adopted primogeniture in the male line through males, and excluded females and their descendants. The testator's son, S, was, however, totally excluded from the will (as he had become a Christian).

When the testator died, A had no son. B who was the head of the second series of estates, had a son D (who was born in the testator's life-time). C was dead when the will was made, leaving a grandson, F (who was also born in the life-time of the testator).

The son, S, who got nothing under the will, filed a suit to set aside the will. The Court held that the bequest to A for life was a valid bequest, but all the subsequent bequests were void. So, after A's death, S would get whole estate, as the only heir of the deceased. The estates in tail male (i.e., B's heirs, C's heirs) were held to be inconsistent with the Hindu law of inheritance, and therefore, void.

Construction of Hindu Wills:

The Privy Council has laid down that, in construing a Hindu will, the words of the will are to be primarily considered.

However, in ascertaining the intention of the testator, the following five factors may also be considered:

- (i) The social position of the testator;
- (ii) The relationship of the testator with his family members;
- (iii) The probability that the testator would use certain words in a particular sense;
- (iv) The race and the religious opinions of the testator; and
- (v) The ordinary notions and wishes of Hindus with respect to the devolution of property.

The English rules of construction should, however, be applied to Hindu wills with great caution. "English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing. It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point, think differently and speak differently from Englishmen." (Ram Lai Settv. Kanai Lai Sett, 12 Cal. 663)

In *Mahomed Shumsool v. Shewukram* (2 I.A. 7), it was held that “in construing the will of a Hindu, it is not proper to take into consideration what are known to be the ordinary notions and wishes of Hindus, with respect of the devolution of property.”

As the law is now settled, there is no distinction between a gift to a male and a gift to a female. The fact that the donee or devisee is a woman does not make the gift or bequest any the less absolute, where the words would be sufficient to convey an absolute estate.

Power of Appointment:

When a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property (Explanation to S. 69, Indian Succession Act). A power of appointment is thus an authority reserved by or limited to a person to deal with or dispose of, either wholly or in part, movable or immovable property, either for his own benefit or that of others. In short, such a power is the ability to dispose of property independently of any ownership over it, although a power may exist concurrently with such ownership.

The pure Hindu law did not make any provisions for appointment. The question arose for the first time in *Motivahu v. Mamubai* (21 Bom. 709), in which the Privy Council held that there could be no bar to such an appointment. As the testator can himself designate the person in the event of a legatee dying without issue, so also, he can authorise a legatee to appoint another person who will get the property on his death. Thus, a Hindu may, by deed or will, grant a power of appointment to a person or persons named in the will.

Before the Hindu Transfers and Bequests Act, 1914, the Hindu Disposition of Property Act, 1916, and the Hindu Transfers and Bequests (City of Madras) Act, 1921, it was necessary, for the valid exercise of a power of appointment, that it should have been exercised in favour of a person who was in existence either actually or in contemplation of law at the date of the gift or at the testator's death, as the case might be. Since the passing of those Acts, a power can be exercised even in favour of an unborn person subject, however, to the limitations and provisions contained in (i) Chapter II of the

Transfer of Property Act as regards gifts, and (ii) Ss. 113- 116 of the Indian Succession Act as regards wills.

When an appointment is made pursuant to a power in favour of two or more persons, and the appointment is invalid as to some or one of them, it may still be valid as to the rest. (Javerbai v. Kabilibai, 16 Bom. 492).

Factors to be borne in mind while reading or drafting a Will :

A will is not required to be registered and can be written on plain paper, it could be oral also. The courts have recognised videographed wills, which are species of oral will.

The Testator must have a disposing domain over the property sought to be bequeathed.

The testator must be in sound disposing state of mind at the time of its execution.

A will, if written, must bear the signature or writing of the testator and of minimum two witnesses in terms of the provisions of the section 68 Indian Evidence Act.

There is no particular form for will, but it should be legible, clear and readable.

Will for an illegal purpose is void, as any other contract or instrument.

A will can not create rights in perpetuity or create hardship on the beneficiary.

A will should see the light of the day at the first available opportunity and must come from proper custody, or else a doubt about its execution, genuineness, etc. is raised.

There should be a writing or proof that the will was signed by the testator and the witnesses in presence of each other or else the will becomes invalid or can not be proved in Court.

As the will speaks after the death of the Testator or from his Grave, it should be free from doubts and suspicious circumstances.

Will is not a transfer of property.

Will can be revoked, altered etc. But last will shall always prevail.

Despite being registered, a will is required to be proved in the manner an ordinary document is proved (please also see section 68 of the Evidence Act) and the legal presumptions about registered documents, is not attracted to such wills. But still it is desirable to get the wills registered.

Burden to prove will is always on the propounder i.e the person who seeks benefit from it.

Bequeath of undivided interest in a joint family property can be made and no more. Self acquired property can be bequeathed fully by way of will.

A will surrounded by suspicious circumstances, if not explained properly by the propounder, can be held invalid by courts.

A will made in favour of a total stranger, ignoring near relatives, creates suspicious circumstances.

In case of inherent contradiction in a will, the last words or disposition shall prevail over the earlier contradictory bequeath or statements, it being considered as the last wish and will of the Testator.