ANCESTRAL PROPERTY CONCEPT FADING AWAY

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INTRODUCTION:

Under generally approved and accepted sense, the term "ancestral property" means any property inherited up to four generations (including the holder of the property) of male lineage from the father or father's father or father's father's father i.e. father, grandfather, great grandfather. In other words, property inherited from mother, grandmother, uncle and even brother is not an ancestral property. The essential feature of the **"**ancestral property**"** is that if the person inheriting it has sons, grandsons or great-grandsons, they become jointly owners-coparceners with him, and have equal share with the person inheriting. They become entitled to it due to their birth, unlike other forms of inheritance, where inheritance opens only on the death of the owner.

2. The dominance of "male lineage" as a core concept and hallmark of the ancestral property got a jolt when the Hindu Succession (Amendment) Act, 2005, declared that a daughter 'shall by birth' became a coparcener in her own right in the same manner as a son. Hence, effective 9th September 2005 the daughters got equal rights in the ancestral property, even if they were born before the enactment of Hindu Succession Act, 1956, ruled the Apex Court recently on 1st February 2018 (Danamma & Suman Surpur vs. Amar)

The essential attributes of the "ancestral property" and their implications are elaborated in the latter paragraphs.

3. This monograph attempts to trace the origin of the un-codified Hindu Law, especially with reference to the Joint Family Property and inheritance rules and other aspects concerning gender inequality in holding the property under the personal laws and its gradual fading away with the onslaught of the Legislative dispensation commencing from the end of the nineteenth century, and further accentuated post–Independence with passing of the piecemeal Hindu

Code Bills, one of them being the Hindu Succession Act, 1956, having colossal impact on the unique concept of ancestral property under the Hindu personal law.

4. In truth and substance, it is not the Hindu Succession amendment Act, 2005, that made the history; but it was the State of Kerala that took lead & put the death knell on the ancestral property concept by passing "The Kerala Joint Hindu Family System (Abolition) Act, 1975", effective 01-12-1976.

- **Section 4 (1) of the said Act, 1975 proclaimed:**

"4. (1) All members of an undivided Hindu Family governed by the Mitakshara law holding any coparcenary property on the day this Act comes into force shall with effect from that day, be deemed to hold it as tenants-in-common as if a partition had taken place among all the members of that undivided Hindu family as respects such property and as if each one of them is holding his or her share separately as full owner thereof".

5. The State Amendments, such as the Hindu Succession (Andhra Pradesh Amendment) Act, 1986, and similar Amendments in the States of Tamil Nadu, Karnataka and Maharashtra giving a daughter equal status as that of a son, by birth, vastly diluted the ancient concept of the 'ancestral property' being exclusive privilege of the male lineage. A daughter could claim not only equal share in the ancestral property, but could, being a coparcener, on par with the son, demand 'at will' (whenever she wanted) partition of the ancestral property. This accelerated the downturn of the ancestral property concept.

6. By an interpretative process, the Honourable Supreme Court has demonstrated in the case of Prakash & Ors. Vs. Phulavati & Ors., decided 16-10-2015, that the concept of ancestral Property will go extinct sooner than later, when Sections 4, 6 and 8 of the Hindu Succession Act, 1956, are properly construed in accordance with the textual phraseology used therein on the contextual backdrop & environment.

The process of gradual fading away of the ancestral property in the light of these developments of law is discussed in the latter part.

HINDU LAW: HISTORICAL BACKGROUND

7. The broad concept of property ownership with equal rights to the male lineage up to three degrees, dominated unique "Hindu Joint Family" system. The family generally consisted of males/females, and other relatives living under the common roof, taking food & performing prayers jointly, caring for each other and sacrificing for the common goal of keeping the family and the society at large united. Everyone had a dogmatic belief in the rules, traditional practices & custom compendiously known as Hindu Dharmashatra OeceMeem$e, which prescribed rules of conduct, duties and obligations to different castes, groups and sects living in harmony to sustain common social fabric of material & spiritual life, popularly known as "Hinduism".

8. Half a century ago, a five-judge constitution bench of the Honourable Supreme Court of India in 'Sastri Yagnapurushadji' case [1966 SCR (3) 242 Swaminarayan sect] had attempted to narrate historical and etymological genesis of the word 'Hindu'. In no judgment has the Apex Court even remotely defined the term "Hindu" or "Hinduism", with any specificity.

In retrospect, it can be seen that "Hindu law", as a historical term, refers to the code of laws applied to Hindus, Buddhists, Jains and Sikhs in British India. Hindu law, in modern scholarship, also refers to the legal theory, jurisprudence and philosophical reflections on the nature of law discovered in ancient and medieval-era Indian texts. It is one of the oldest known jurisprudence theories in the world. The term 'Hindu' in these ancient records is an ethno-geographical term and did not refer to a religion.

9. Hindu tradition, strictly speaking, does not express the law in the orthodox sense of jus or of lex.https://en.wikipedia.org/wiki/Hindu_law - cite_note-ludorocherhcl-6 'Jus' was law in the abstract, right or duty. The actual laws were only the specific tool through which jus was applied. This division persisted for a long time. For example, the Fourteenth Amendment of the United States Constitution, distinguishes "due process of law", means 'by the law of the land', from "equal protection of the laws", means the State guarantees the same rights, privileges, and protection to all citizens.

10. The term "Hindu law" is a colonial construct, when the British colonial officials decided that European common law system would not be implemented in India, that Hindus of India would be ruled under their "Hindu law", and Muslims of India would be ruled under "Muslim law" (Sharia). Prior to the British colonial rule, Muslim law was codified as Fatawa-e-Alamgiri (a compilation of law), but laws for non-Muslims –such as Hindus, Sikhs, Jains, Parsis –were not codified during the 600 years of Islamic rule.

EVOLUTION OF HINDU LAW:

11. The Hindu law has had been evolved over successive generations, from Dharmaúâstra ÛeceMeem$e consisting of many texts; Manusmriti, cevemcelee being one of the many treatises (úâstra) on Dharma. The British, however, mistook the Dharmaúâstra as codes of law and failed to recognize that these Sanskrit texts were not used as statements of positive law until the British colonial officials chose to do so. Actually, Dharmaúâstra contained jurisprudence commentary, i.e., a theoretical reflection upon practical law, but not the law of the land.https://en.wikipedia.org/wiki/Hindu_law - cite_note-13 The British conveniently used Manusmruti cevemcelee as the standard, to settle the disputes among Hindus with regard to matters of inheritance, family disputes, marriage, and Royal succession, so as to perpetuate divide amongst the Hindus.

12. During the British colonial rule an attempt was made at "legal pluralism". Legal scholars stated that the Indian law and politics have ever since vacillated

between "legal pluralism— the notion that religion is the basic unit of society and different religions must have "different legal rights and obligations" and "legal universalism – the notion that individuals are the basic unit of society and all citizens must have "uniform legal rights and obligations". While the Hindus and other non-Muslims in India favor "legal universalism" based on Parliamentary laws; however, the Muslims favor "legal pluralism" with Sharia (Mejelle) as the source of law in relation to marriage, divorce and inheritance laws, for all Muslims in India.

JOINT FAMILY SYSTEM:

13. The joint and undivided Hindu family was the normal condition of the Hindu society from times immemorial, perhaps, as a social necessity. The joint family system comes first, and law of inheritance is of later growth; the senior-most male member exercised control over all affairs of the family and its property.

MEANING, AMBIT OF ANCESTRAL PROPERTY:-

14. The Hindu law or customary law refers to rules that are transmitted from one generation to another. Customary law means: "obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws".

15. Sir Dinshaw Mulla (1868-1934) was an Attorney-at-Law of Bombay high court and a Member of the Judicial Committee of the Privy Council, India. His book, titled: "**Principles of Hindu Law**", is acclaimed as most authoritative commentary on Hindu Law.

16. The Courts, the Privy Council and the text-books writers have indiscriminately used the expressions, 'joint property', 'joint family property', 'ancestral property' and 'coparcenary property' to denote one and the same property.

Ancestral property and separate property mans:

(a) Property inherited by a Hindu from his father, or father's father or father's fathers' father, is ancestral property.

(b) Property inherited by him from other relations is his separate property.

17. The Bombay High Court (in Shalini Sumant Raut & Ors vs. Milind Sumant Raut & Ors) has succinctly stated the principles of Hindu Joint family property. Some important aspects:

(i) A Hindu coparcenary is a narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property. (Hence joint property and coparcenary property or joint Hindu family property or coparcenary property is synonymous). -page 359

(ii) Ancestral property and separate property are distinct. The property inherited by a Hindu from his father, father's father, father's father's father is

ancestral property. The property inherited by him from other relations is his separate property.

Illustration: If A inherits property from his father, his two sons B & C, would become coparceners with him as regards such ancestral property. If B has a son D and C has a son E, the coparcenary will consists of the father, sons and grandsons. -page 361

(iii) The right to enforce a partition and the right of survivorship go hand in hand.

(iv) The Mitakshara law itself says that in the ancestral or grandfather's property in the hands of the father, the son has equal rights with his father; while in the self-acquired property of the father, his rights are unequal by reason of the father having an independent power over or pre-dominant interest in the same. [1953 AIR 495 S. C.].

JOINT FAMILY PROPERTY – DÂYABHÂGA:

18. The Smruti thesis authored by Sage Yadnyawalkya and a critique written thereon by Sage Vidnyaneshwar is known as Mitakshar. On the other hand, the Sampatti-Vibhaajan (division of property) thesis authored by Sage Jimootvaahan is known as **Dâyabhâga.**

Some eminent jurists have taken a view that the dichotomy between two systems: Mitakshara and **Dâyabhâga** was due to two different interpretations given to a single word "sapinda" (meeHe[).

(a) Manu has written that when a man dies, his property goes to his nearest "sapinda". The question is: What is the meaning of the word: "sapind?"

(b) That depends upon the meaning of the word "pinda" (eHe[).

(c) According to Dayabhaga, "pinda" means the 'rice balls' offered in the Shraddha (pee×) ceremony to one's deceased ancestors.

(d) On the other hand, according to the Mitakshara the word "pinda" does not mean the rice balls offered at the Shraddha; but it means the particles of the body of the deceased.

(e) The difference between the texts is based upon when one becomes the owner of property.

(f) The Dâyabhâga does not give the sons a right to their father's ancestral property until after his death, unlike Mitâkcarâ, which gives the sons the right to ancestral property upon their birth.

19. The Dâyabhâga School philosophy:

(i) Under the Dâyabhâga system, sapinda is any relative who can offer 'pindas', the balls of rice offered during the funeral of the deceased, or at the Shraddha (pee×) ceremony. This would include cognates, the women in the family as well, allowing them to freely inherit property.

(ii) The Dâyabhâga School neither accords a right by birth nor by survivorship, though a joint family and joint property is recognized.

(iii) It lays down only one mode of succession. Neither sons nor daughters become coparceners at birth nor do they have rights in the family property during their father's lifetime. However, on his death, the daughters also get equal shares along with their brothers, who all inherit as tenants-in-common.

(iv) Under the Dâyabhâga, the father is regarded as the absolute owner of his property whether it is self-acquired or inherited from his ancestors.

- To sum up: Joint family property under Dâyabhâga school:

  (a) Succession opens to a son only after the death of the father. A Dâyabhâga father is competent to make a testamentary disposition of the whole of property. A son has got no right to object to it, or claim partition in it.

  (b) Property passes by inheritance only and may go to female heirs like widows, daughter etc.

MITAKSHARA vs. DÂYABHÂGA:

20. The two main streams or schools of thought in patriarchic systems were Mitakshara and Dâyabhâga , which primarily differed in regard to rules of inheritance. While the joint family property concept under patriarchy system has been reviewed, it is important to examine the manner of succession to ancestral property under the matrilineal system, which was mainly prevalent in some parts of Madras (now Tamil Nadu, Chennai) and Cochin (now Kochi) in the State of Kerala.

JOINT FAMILY SYSTEM- MATRILENIAL INHERITANCE:

21. In the context of the Hindu Joint Family, which existed in ancient India, one cannot overlook the Definition in Section 3(1) (e) (ii) of the Hindu Succession Act, 1956 which speaks about "a common ancestress".

"Explanation", below the section says: 'In this clause "ancestor" includes the father and "ancestress" the mother'.

MATRILENIAL OWNERSHIP PATTERN:

22. Except in former Madras (now Tamil Nadu) & Cochin (Kochi, Kerala), all over India, a Hindu joint family, based on patriarchy, consisted of male members descended lineally from a common male ancestor, together with their mothers, wives or widows and unmarried daughters. The cord that knits the members of the family is not property but the relationship of one another.

23. Marumakkattayam Tradition**:** In the Marumakkattayam law, which prevailed in Kerala wherein the families were joint families, a household consisted of the mother and her children with joint rights in property. The lineage

was traced through the female line. Daughters and their children were thus an integral part of the household and of the property ownership, as the families were matrilineal. It is applicable to a considerable section of people in Travancore-Cochin and districts of Malabar and South Kanara.

Under the Marumakkattayam system of inheritance, descent and succession to the property was traced through females.

• The joint family under matrilineal system is known as Tarawad and it formed the nucleus of the society in Malabar.

24. The customary law of inheritance was codified by the Madras Marumakkathayam Act, 1932.

(i) As per the said Act, 1932, 'Marumakkattayam' means the system of inheritance in which descent is traced in the female line and 'Marumakkattayee' means a person governed by Marumakkathayam Law of Inheritance.

(ii) 'Tarawad' means the group of person forming a joint family with community of property governed by Marumakkathayam Law of Inheritance.

(iii) A Tavazhi used in relation to the female, is defined as the group of person consisting of that female, her children and all her descendants in the female line.

25. Section 3(1)(h) of the Hindu Succession Act, 1956, covers the system of "Marumakkattayam law" to include various enactments e.g. the Madras Marumakkattayam Act, 1932, the Travancore Nayar Act, the Travancore Ezhava Act, the Travancore Nanjinad Vellala Act, the Travacore Kshatriya Act, the Travancore Krishnanavaka Marumakkathayee Act, the Cochin Marumakkathayam Act, or the Cochin Nayar Act with respect to the matters for which provision is made in this Act.

26. For some time, there had been an urge for a thorough change in the old family customs. Accordingly, the Kerala Joint Hindu Family System (Abolition) Act, 1975, was passed by the State Legislature. By this measure, the joint family system among Hindus in the state of Kerala was obliterated. By force of Section 4 of that Act, joint family ownership was converted into tenancy-in-common as if partition had taken place among all the members.

• We may read s. 4 (2) at this point.

> (2) All members of a joint Hindu family, other than an undivided Hindu family referred to in sub-section (1) holding any joint family property on the day this act comes into force, shall, with effect from that day be deemed to hold it as tenants in common, as if a partition of such property per capita had taken place among all the members of the family living on the day aforesaid, whether such members were entitled to claim such partition or not under the law applicable to them, and as if each one of the members is holding his or her share separately as

full owner thereof. The emphasis, from the point of view of the date of transformation into tenancy-in-common, is on the date of coming into force of Act 30 of 1976. From that date (1-12-76) onwards a division in status and a quantification of shares per capita must be deemed to have occurred.

27. However, some Muslim families in Malabar and people of Lakshadweep are still governed by this customary law system of inheritance as the Abolition Act 1975 applies only to Hindus. Muslims in Malabar happened to follow this system as they were originally Hindu converts and Lakshadweep people are believed to be persons migrated from Malabar.

TRADITIONAL HINDU PERSONAL LAW:

28. In the Vedic era, women were economically treated on par with men. Wives had equal rights over their husbands' properties. Women's property rights were improved and defined during the time of eminent jurists like Yajnavalka, **Kâtyâyana** and Narada, who strived to promote the idea of women exercising their right to property. Streedhan (m$eeOeve), which translates literally to "woman's wealth", and denotes a type of property unique to women, was a term coined by the Smritikars. This was a woman's separate property. The Honourable Supreme Court has held: "The 'streedhan,' is her "exclusive and absolute property." Vide Pratibha Rani vs. Suraj Kumar & Anr.

INROADS INTO HINDU PERSONAL LAW:

29. "Hindu personal law" refers to the laws of the Hindus as it applied during the colonial period (British Raj) of India. The British found neither a uniform general principle administering law for the diverse communities, nor a Pope or a Shankaracharya (MekeÀjeÛ®ee³e) whose law or writ applied throughout the country. Due to discrepancies in opinions of pandits (Heeí[le) on the same matter, the East India Company began training pandits for its own Legal Service leading to the setting up of a Sanskrit (meimkeÀle) College, to help them arrive at a definitive idea of the Indian legal system.

30. It is from here that the modern Hindu Personal Law had its beginnings; and more appropriately so in 1772, when Warren Hastings appointed ten Brahmin pandits from Bengal to compile a digest of the Hindu scriptural law in four main civil matters—marriage, divorce, inheritance and succession.

31. Although the British did not directly interfere in the personal Laws of Hindus and Muslims; however, their judicial mechanism considerably influenced the growth of these laws. The plan of 1772 to place the administration of justice in the hands of English judges, although this change was innocent, inoffensive, tended to mould traditional concepts. The English judges used to consult Pandits (Heeí[le) and Mullas or Mawlawis, (ceuueeÙ, ceeueJeeÙ öa learned teacher or doctor of Islamic law) in matters relating to personal laws of Hindus and Muslims, but nonetheless the judge was a foreigner with a foreign background. He could only make his judgment conform to what he thought was the law; his principal task was to

search out a legal solution. Needless to say, the role of judges was primarily to put an end to disputes brought before them, but when the administration of justice fell into the hands of the British, the doctrine of precedent or stare decisis was introduced, which gradually made inroads into the scripture-rules governing the personal laws of Hindus and Muslims.

Thus, the law which had existed in scriptural work and treatises now came to be fixed in the "case laws" of the Courts.

HINDU LAW – NEVER A RIGID LEGAL CODE:

32. Before the advent of the British judicial system, the Hindu law was developed by commentaries and digests written by Hindu Jurists, who interpreted the scriptural law to meet the exigencies of the changing time.

(i) Religious legal systems, such as Hindu law shows that law's domain is co-extensive with life itself. While it has a high textual tradition, Hindu law was never envisaged as a fixed legal code valid for all time and place. Key provisions such as divorce and inheritance were revised depending on region, community and the ethos of the times.

(ii) The concept of Dharma Oece represents a comprehensive and consolidating view of life. This contextual specificity of Dharma permits a continuous adaptation to changing social situations and times. Oeej³eele Fele Oece: | The word "dharma" is derived from verb "dhaaraNa" "OeejCee" (beholds).

(iii) The principles of Hindu jurisprudence are not confined to the texts in Sanskrit. **Manu attests that custom is the foremost basis of jurisprudence.** Meem$eele ©{eyeuee³emee | Customary law delimits the legal theory.

(a) The Privy Council pointed out that it was not open to the judges to embark upon an independent enquiry into the meaning of the dharmaúâstra text. The text is to be understood only in the light of the actual practice.

(b) In Collector of Madura vs. Mottoo Ramalinga (1868), the Privy Council considering the importance of customs, said: "that under the system of Hindu law, clear proof of usage will outweigh the written texts of law".

(c) Custom in its legal sense means a rule which in a particular family, a particular class or caste or in a particular local area, has, from long usage, obtained the force of law.

BRITISH RULERS' INTERFEARANCE:

33. The Courts no longer made decisions based on changing contexts and relied instead on medieval Commentators. With the growth of case law, the innate flexibility to move with the times was lost.

Similarly, in the case of Muslim law certain misleading decisions were given by the English judges. The classic example is the Privy Council judgment in 1894in the Abul Fatah vs. Rassomoydhar Chaudhry' holding the family Wakf invlid.

• But the decisions of Abul Fata's case caused great dissatisfaction in the Muslim community, which eventually obtained not only the Mussalman Wakf Validating Act, 1913, but with retrospective validation in 1930.

34. One way to introduce English notions in Hindu and Muslim, personal laws was to adopt the formula of "justice, equity and good conscience". In fact, in the course of time, justice, equity and good conscience came to mean English law as far as applicable to the Indian situation. After consolidating their rule, they gradually changed criminal law and injected their own system in civil laws including the Personal laws of Hindus and Muslims, whenever the religious practices were not in line with their system of law.

LEGISLATIVE INROADS IN HINDU PERSONAL LAWS:

35. The Hindu Personal Laws underwent major reforms over a period of time, and created social and political controversies throughout India. The Hindu Personal Laws beginning with the creation of the 'Anglo-Hindu Law ' led to widespread changes, controversies and civil suits in Hindu society across all strata.

36. The Charter Act 1833 or Government of India Act 1833 was passed by the British Parliament, which legalized the British colonization of India. In pursuance of section 353 of the Charter Act, 1833, the first Law Commission was appointed in 1834 and Lord Macaulay was appointed as its Chairman, with instructions to prepare a draft penal code for India. The commission prepared the required draft and submitted it to the Government on October 14, 1837, before Lord Macaulay's departure from India.

RECOMMENDATIONS OF LAW COMMISSIONS

37. Meanwhile, the British had penetrated into rural districts of India and the absence of the law of the place posed many problems there. There was no territorial law for persons other than Hindus and Muslims in the Moffussils. Pursuant to different reports submitted by the Commission, many legislative enactments were made, **such as:**

(i) Native Converts Marriage Dissolution Act, 1866, (ii) Indian Divorce Act, 1869. (iii) The Hindu Wills Act, 1870; (iv) The Special Marriage Act, 1872; (v) The Christian Marriage Act, 1872,

Although, the new statutes applied alike to all people irrespective of their religious affiliations, the effect of some of the provisions was to limit the Hindu and Muslim laws in their own spheres of application and to introduce "English common law."

INROADS INTO THE RELIOUS & PROPERTY LAWS:

38. Many laws were passed introducing reforms in the old Hindu law. In most cases, the innovating Acts had the support of Hindu community, but conservative and orthodox Hindus weaved these innovations as encroachment upon their religious practices, e.g.

(i) The Hindu Widow Remarriage Act, 1856. A widow's re-marriage was contrary to Shastric prohibition (OeceMeem$ee³e éve<eOe-).

(ii) The Hindu Wills Act, 1870 conferred a power of testamentary disposition, previously unknown to Hindu law.

(iii) The Hindu Women's Right to Property Act, 1937.

In the field of Muslim law, very little legislative activity is noticed. The four statutes passed were:

(i) The Mussalman Waqf Validating Act, 1913;

(ii) The Muslim Personal Law (Sharia) Application Act, 1937.

(iii) The Insurance Act, 1938

(iv) The Dissolution of Muslim Marriage Act, 1939

HINDU LAW: REFORMS COMMITTEE (1941):

39. The Government of India appointed the Reforms Committee 1941 in the context of the Federal Court ruling that the Hindu Women's Right to Property Act, 1937 and (Amendment) Act, 1938 operated to regulate devolution by survivorship of property other than agricultural land.

- The Hindu Law Reforms Committee drew up two Bills:
- The Hindu Marriage Bill and (ii) The Hindu Intestate Succession Bill.
- These were introduced in the Central Legislature in 1943, but were eventually allowed to lapse, because of the opposition from the conservative elements in the society.

UNIFORM CIVIL CODE: 1947 TO 1955

40. The demand for a uniform civil code was first put forward by women activists, with the objective of women's rights, equality and secularism. India needed a uniform civil code for two main reasons:

(a) First, a secular republic needs a common law for all citizens rather than differentiated rules based on religious practices. This was a key issue debated during the writing of the Constitution, with passionate arguments on both sides. The Constitution was eventually stuck with a compromise solution, a directive principle in Article 44, which says:

"The state shall endeavour to secure for citizens
a uniform civil code throughout the territory of India."

(b) The second reason was gender injustice. The rights of women were usually limited under religious law, be it Hindu or Muslim. Dr. B.R. Ambedkar fought hard for the passage of the Hindu Code Bill, because he saw it as an opportunity to empower women; and eliminate social inequality unwittingly prevailing on account of caste system.

THE HINDU CODE BILL

41. The Constitution of India, 1949 did not recognize religious communities but only individuals, to whom it guaranteed:

Article 25: "Freedom of conscience and free profession, practice and propagation of religion"

This ideal concept of religion as a private matter implied a reduction in its sphere of influence, through the impact of the State in its capacity as the agent of 'modernization'.

42. The Hindu Code Bill was intended to provide a civil code in place of the body of Hindu personal law, and it principally aimed at a complete elevation of the nation as a whole, social up-liftment being a dire necessity along with economic and political up-liftment.

- Prominent ideals proposed under codification were as follows:

  (i) The property of a dying man has to be shared equally among his widow, daughter and son, which according to previous laws was entitled only for his son.

  (ii) The right of any woman over her inherited/self obtained property should not be 'the limited interest known as a Hindu woman's estate', instead it be made absolute, i. e. it can be possessed or disposed of as she wished.

  (iii) Allowing either partner to file for divorce on certain grounds such as domestic violence, infidelity etc. The granting of maintenance to the wife if she decides to live separately due to divorce on grounds as aforementioned.

  (iv) Making monogamy mandatory.

  (v) Allowing inter-caste marriages and adoption of children of any caste.

  (vi) Decisions regarding the guardianship of the child in case of divorce.

43. But even before the bill could be put up to the Legislative Body, some vocal sections of Hindu public opinion raised the bogey: 'Hinduism in danger'.

44. Finally, the Hindu Code bill was broken down it into four laws for the easy passage in the parliament. These four laws were:

(a) The Hindu Marriage Bill outlawed polygamy, dealt with inter-caste marriages and divorce procedures;

(b) The Hindu Adoptions and Maintenance Bill had its main thrust on the adoption of girls, which till then had been little practised;

(®e) The Hindu Succession Bill placed daughters on the same footing as widows and sons, where the inheritance of family property was concerned.

(d) The Hindu Minority and Guardianship Bill specifically defined guardianship, and relationships between adults and minors.

These laws were passed, one by one, during 1955-56 leading to passing of what we call as "Hindu Code Bill".

LEGISLATION OVERRIDES CUSTOM, USAGE:

45. All the four legislative enactments compendiously known as the Hindu Code Bill, declared that in respect of any matter, where the legislative dispensation is handed down, existing text, rule or interpretation of Hindu law or any custom or usage having the force of law would, per se, stand displaced. This is so provided in section 4 of the Hindu Succession Act, 1956, which is in focus, in regard to the subject on hand –the Ancestral Property.

Section 4, The Hindu Succession Act, 1956 reads:

> **4. Over-riding effect of Act.—**
>
> (1) Save as otherwise expressly provided in this Act,—
>
> (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
>
> (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

46. The whole purpose of the Legislation on the Hindu Personal Law was to wipe out the orthodox, incongruous and unjust practices /custom or usage, which had outlived their utility and to take the torch of socio-political ideologies in step with the modern way of thinking enshrined in the preamble to the Constitution of India.

Ancestral Property Concept Fading Away Alias

47. The Hindu Succession Act, 1956, introduced effective 17th June, 1956, inter alia, achieved many objectives and ushered in equality of genders to a great extent.

(i) The idea of 'the limited interest known as a Hindu woman's estate' as provided in the Hindu Women's Rights to Property Act, 1937 was abolished, certainly a progressive step.

(ii) Section 14 provided that any property possessed by a Hindu female, whether acquired before or after the commencement of this 1956 Act shall be held by her as full owner thereof and not as limited owner.

48. However, in truth & in reality, this 1956 Act is quite biased in favour of male heirs.

• An example of this gender based discrimination is the fact that in the presence of both male and female heirs, there being an ancestral dwelling house, the female heir cannot ask for partition of the residence until and unless the male heirs ask for their respective shares.

• Also the right of residence exercised by the daughter is limited by her marital status.

• A female may claim this right if she is unmarried or a widow or a woman who has been divorced from or deserted by her husband. She cannot claim her right to residence if she is happily married to her husband. (In 2005, this provision in section 23, has been "deleted'—yes, it took nearly 50 years)

• Section 14 of Hindu Succession Act is wide in its ambit. The legislation has defined women's property in the widest possible manner. To understand the sweep of the law, it is better to read the section itself, which is self-explanatory:

14. Property of a female Hindu to be her absolute property.—

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

Explanation:- In this sub-section, **"property" includes**

(i) both movable and immovable property acquired by a female Hindu

(ii) by inheritance or devise, or

(iii) at a partition, or

(iv) in lieu of maintenance, or

(v) arrears of maintenance, or

(vi) by gift from any person, whether a relative or not; either before, or at or after her marriage, or

(vii) by her own skill or exertion, or

(viii) by purchase or by prescription, or in any other manner whatsoever, and also

(ix) any such property held by her as streedhan immediately before the commencement of this Act.

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

49. One must carefully read section 14 (1) and (2) of the Hindu Succession Act. While section 14 (1) embodies the rule that the property howsoever acquired by a **female Hindu** shall be her absolute property, sub-section (2) dilutes it by a rider to the absolute ownership.

• According to sub-section (2) the female Hindu does not become absolute owner of the property acquired by gift, will or any other instrument, decree or order of a Civil Court or an award if such gift, will or instrument, decree or order or award **gives her only restricted right**.

• In Gaddam Rama Krishna Reddy, v. Gaddam Rami Reddy, the husband created life estate will in favour of his wife; the Honourable Supreme Court held that, wife's rights in properties would be governed by sub-section (2) of Section 14 of Hindu Succession Act, and her right would not blossom into absolute estate as contemplated under sub-section (1) of Section 14. So she has no right to transfer the property by way of sale.

• In other words, Will or Gift instrument giving limited ownership to wife or daughter or mother or sister for her life-time, is perfectly lawful & valid.

ANCESTRAL PROPERTY SURVIVORSHIP OR SUCCESSION:

50. The Hindu Succession Act,1956 made some advancement by providing equal rights to women in the self-acquired property, being specified in Class-I heirs category; but the ancestral property continued to devolve on the male coparceners until 2005, when the daughters were given equal birth-right as sons.

51. Recently, the Honourable Supreme Court has conclusively held in Uttam vs. Saubhag Singh, that the Act envisages that when a male Hindu having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall pass on by (a) survivorship, or (b) in specified circumstances, by testamentary or intestate succession in terms of this Act.

52. One may read the relevant provisions of section 6 of the Hindu Succession Act before its Amendment in 2005:

Section 6:

"6. **Devolution of interest in coparcenary property**.—When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act :

Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1:- For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2:- Nothing contained in the proviso to this section shall be construed as enabling a

53. The Honourable Supreme Court, in Uttam vs. Saubhag Singh, decided on 2nd March 2016 has summarized the law governing the Mitakshara joint family property, prior to the amendment of 2005.

The Apex Court summarized:

(i) When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (vide Section 6).

To proposition (i),

• **One exception** is contained in Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.

• **A second exception** engrafted on proposition (i) is contained in the **proviso to Section 6**, which states that if such a male Hindu had died leaving behind a female relative specified in ***Class I of the Schedule or a male relative specified in that Class who claims through such female relative surviving him, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and **not by survivorship**.

*** THE SCHEDULE Class I (i) Son; (ii) **daughter; widow; (iii) mother**; (iv) son of a pre-deceased son; (v) daughter of a pre- deceased son; (vi) **son of a pre-deceased daughter**; (vii) xxxx (xi) widow of a pre-deceased son of a pre-deceased son, (xii) **son of a pre-deceased daughter of a pre-deceased daughter**; (xiii) xxx (xv) daughter of a pre-deceased daughter of a pre-deceased son."

(ii) In order to determine the share of the Hindu male coparcener who is governed by Section 6 proviso, a partition is effected by operation of law immediately before his death. **In this partition, all the coparceners and the male Hindu's widow get a share in the joint family property.**

(iii) On the application of Section 8 of the Act, either by reason of the death of a male Hindu leaving self-acquired property or by the application of Section 6 proviso, such property would devolve only by intestacy **and not survivorship**.

(iv) On a conjoint reading of Sections 4, 8 and 19 of the Act, it is clear that on the death of Jagannath Singh in 1973, the joint family property which was ancestral property in the hands of Jagannath Singh and the other coparceners, devolved by succession under Section 8 of the Act.

• This being the case, the ancestral property ceased to be joint family property on the date of death of Jagannath Singh, **and the other coparceners and his widow held the property as tenants in common and not as joint tenants.**

NOTIONAL PARTITION:

54. Section 6 of the Hindu Succession 1956 Act does not interfere with the rights of those, who are members of Mitakshara coparcenary, **except** to the extent that where the coparcener dies intestate leaving behind female heirs specified in Class I of the schedule and also male heirs claiming through such female heirs, like son of a daughter, or of a pre-deceased daughter of a pre-deceased daughter, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and **not by survivorship**.

55. A share of a coparcener in the coparcenary property, in the event of his death is to be determined as of the date of his death, as if a partition had taken place; and the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

• Thus, a notional partition immediately before his death, and carving out his share in the coparcenary property, is mandated.

56. The section proceeds first by making provision for the retention of the right of survivorship and then engrafts on that rule the important qualification enacted by the provision.

(i) The proviso operates only where the deceased has left surviving him a daughter's son, or any female heir specified in Class I of the schedule.

Illustrations –

(a) A and his son B are members of a Mitakshara coparcenary. A dies intestate. Surviving him is his only son B. His undivided interest in the coparcenary property will devolve upon B by survivorship as clearly envisaged in the initial part of the section and not by succession.

(b) A and his sons B and C are members of a Mitakshara coparcenary. A dies intestate in 1958. Surviving him is his widow A1 and his two sons. B and C continue to be members of the joint family. A's undivided interest in the coparcenary property will not devolve by survivorship upon B and C, **but will devolve by succession, equally, upon A1, B, and C.**

(ii) The Amendment Act, 2005 retains the concept of notional partition but modified its application. Prior to this amendment, notional partition was effected only if the undivided male coparcener had died leaving behind any of the eight class I female heirs or the son of a predeceased daughter and did not apply generally in every case of death of a male coparcener.

57. The Amendment Act, 2005 makes application of notional partition in all cases of intestacies.

Section 6(3) states:

Section 6(3) – Where a Hindu dies after the commencement of the Hindu succession Act, 2005 his interest in the property of joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession as the case may be under this Act, **and not by survivorship,** and the coparcenary property shall be deemed to have been divided as if a partition had taken place.

• From the language of the section, two things are clear:

First, the doctrine of survivorship stands abolished in case of male coparceners, and

Secondly, in all cases where a Hindu male dies, his interest in the Mitakshara coparcenary would be ascertained with the help of a deemed partition or a notional partition.

• The Patna High Court in Sheodhar Prasad Singh vs. Jagdhar Prasad Singh And Ors. on 11 December, 1963

16. .... It is also well settled that though a wife cannot herself demand a petition, if a partition takes place between her Husband and his sons, (coparcenaers) she is entitled to receive a share equal to that of a son and to hold and enjoy that share **separately even from her husband**. Where at a partition

between a father and his three sons, the wife was not allotted a share, it was held that she was entitled to reopen the partition, there being no waiver merely by her not asking for a share. (See Section 315 of Mulla's book at page 485).

STATEMENT OF CORRECT LAW:

58. In Gurupad Khandappa Magdum 1978 AIR 1239 S. C., the Honourable Supreme Court held:

" ...Though the plaintiff, not being a coparcener, was not entitled to demand partition yet, if a partition were to take place between her husband and his two sons, she would be entitled to receive a share equal to that of a son. (see Mulla's Hindu Law, Fourteenth Edition, page 403, para 315).

(i) In a partition between Khandappa and his two sons, **there would be four sharers** in the coparcenary property, the fourth being Khandappa's wife, the plaintiff.

(ii) So, Hirabai Khandappa, wife, the Plaintiff would get her 1/6 share, (two sons + three daughters+ herself= 6 shares) and "in addition" her share in the notional partition (actually to work out share of each coparcener) is ¼ (Gurupad Khandappa + two sons + widow=4).

(iii) The Trial Court, following Shiramabai Bhimgonda's decision by the Bombay High Court, simply gave the Plaintiff Khandappa's ¼ share divided by six that is only 1/24 and did not add her own share on notional Partition. The Bombay High Court relying on subsequent decision of its own in Rangubai Lalji v. Laxman Lalji (68 Rom. L.R. 74) accepted the claim, that is 1/24 + ¼ = 7/24.

(iv) This stands "approved and endorsed" by the Honourable Supreme Court. **It is now, the correct law**.

JOINT PROPERTY GETTING DIMNISHED:

59. The share of the holder of the ancestral property dying intestate will devolve upon the heirs by Succession under section 8 of the Hindu Succession Act, and to that extent the total corpus of coparcenary property gets dwindling from generation to generation. {Commissioner of Wealth Tax vs. Chander Sen etc.}

60. In addition, in many cases along with sons, the daughters , who are coparceners after 2005, pan India, and in some states even before that date, can & would demand "partition". Again, the ancestral property gets freed from the coparcenary rules.

• It is for this reason, in the near future, there will be less and less "joint properties" floating around.

STATES STOLE A MARCH ON THE CENTRE:

61. Now, it is interesting to see that before the Parliament brought in the Amendment Act, 2005 by introducing the Bill on 20th December 2004, some of the States had already put in place Laws to wipe out gender "discrimination",

buy putting "daughters" on par with "sons", as coparceners in the Joint family property. While the Maharashtra and other four States gave daughters equal rights with sons, the Kerala State had abolished "coparcenery concept itself".

MAHARASHTRA STATE:

62. A glance at the Hindu Succession (Maharashtra Amendment) Act, 1994 introduced on 22.6.1994.

1. The Government of Maharashtra on 22.6.1994, announced a policy for conferment of the same coparcenary right on the daughters by suitably amending the Hindu Succession Act, 1956 in its application to the State of Maharashtra with a retrospective effect, that is, from the date of official announcement of the said policy.

2. However, the amendments **are made inapplicable** to the daughters married before 22-06-1994.

DAUGHTERS' COPARCENARY RIGHTS:

63. Despite the improvements brought about by the Hindu Succession Act, it remained gender discriminatory, especially where inheritance rights of daughters were concerned. The Hindu Succession (Amendment) Act, 2005 gave equal rights to daughters both in respect of separate property as well as coparcenary property left by the father. The disability of women inheriting their patrimonial i.e. ancestral property was taken away by section 6 of the amended Act.

64. The right accrued to a daughter in the ancestral property, by virtue of the Amendment Act, 2005 is absolute, except, in the circumstances provided in the amended Section-6. **The excepted categories are two, namely,**

(1) where the disposition or alienation including any partition which took place before 20-12-2004 and

(2) where testamentary disposition of the property was made before 20-12-2004.

HINDU LAW- CURRENT UPDATE 2018:

65. In the case of Danamma & Suman Surpur vs. Amar, the Honourable Supreme Court on 1st February, 2018 ruled that under the Hindu Succession Act, daughters were (per Amendment Act,2005) entitled to equal share in ancestral property, irrespective of the year they were born.

(1). The Honourable Court observed:

The issue, as to whether the right would be conferred only upon the daughters who are born after September 9, 2005 when Act came into force, was settled by the Supreme Court in the case of **Prakash & Ors. v. Phulavati & Ors. on October 16, 2015,** wherein it was held that the rights under the amendment are applicable to living daughters of living coparceners as on 9-9-

2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20-12-2004 as per law applicable prior to the said date will remain unaffected.

(2). The Court further observed:

(a) That the Amendment act stipulates that a daughter would be a coparcener from her birth, and would have the same rights and liabilities as that of a son.

(b) That the fundamental changes brought forward are perhaps a realization of the immortal words of Roscoe Pound (an American jurist & an exponent of the 'sociological jurisprudence') that "the law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and the need of change."

DAUGHTERS' SHARE IN THE ANCESTRAL PROPERTY:

66. How the ancestral property would pass on and what would be the shares of the sons and daughters is well illustrated in the case of Mangammal & Thulasi and ANR. Vs. T.B. Raju and Ors. decided on **19th April 2018**.

The Honourable Supreme Court held:

(i) The State Government enacted the Hindu Succession **(Tamil Nadu** Amendment) Act, 1989 effective from March 25, 1989 giving equal rights in coparcenary property **to an unmarried daughter,**

(ii) It is undisputed fact that Late T.G. Basuvan, father of the appellants, **had only ancestral properties** and he had not left behind any self acquired properties.

(iii) On a plain reading of the newly added provision i.e., Section 29-A of the Act, it is evident that, daughter of a coparcener is entitled to claim partition in the Hindu Joint Family Property.

(iv) In the instant case, it is admitted position that both the appellants, namely, Mangammal, got married in the year 1981 and Indira, got married in or about 1984 i.e., prior to the commencement of the 1989 amendment. Therefore, in view of clause (iv) of the Section 29-A of the Hindu Succession (Tamil Nadu Amendment) Act, 1989, appellants were not the coparceners.

DIVISION OF THE ANCESTRAL PROPERTY:-

67. In the above Mangammal case, with a view to doing complete justice, the Supreme Court observed:

(a) The ancestral property in the hand of Late T.G. Basuvan got divided between him and his son T.B.Raju-Respondent No. 1. In such partition, **Late T.G. Basuvan got 1/2 share** and T. B. Raju also got 1/2 share. Now the property left in the hand of Late T. G. Basuvan **would be his separate property**.

(b) On his death, such separate property would devolve through succession by applying the rules of Sections 8, 9 & 10 of the Hindu Succession Act, 1956 in the following manner:

- Widow i.e. mother of the appellants would get 1/4 of the half share which stands at 1/8.
- Daughter Mangammal-Appellant No. 1 would get 1/4 of the half share which stands at 1/8.
- Daughter Indira-Appellant No. 2 would get the 1/4 of the half share which stands at 1/8.
- Son T. B. Raju-Respondent No. 1 would get the 1/4 of the half share which stands at 1/8. This 1/8 share would be in addition of 1/2 share which he got in partition.

(c) On the death of the widow i.e., mother of the appellants, her 1/8 share which she got in succession, would devolve through succession by applying the rules of Sections 15 & 16 of the Hindu Succession Act, 1956 in the following manner:

- Daughter Mangammal-Appellant No. 1 would get the 1/3 of the 1/8 which stands at 1/24.
- Daughter Indira-Appellant No. 2 would get the 1/3 of the 1/8 which stands at 1/24.
- Son T. B. Raju-Respondent No. 1 would get the 1/3 of the 1/8 which stands at 1/24.

(d) Final Share of Each Person:-

1. Daughter Mangammal-Appellant No .1, total share would be 1/8 + 1/24 = 4/24 or 1/6.
2. Daughter Indira-Appellant No. 2, total share would be 1/8 + 1/24 = 4/24 or 1/6.
3. Son T.B.-Respondent No. 1, total share would be 1/2 + 1/8 + 1/24 = 16/24 or **2/3.**

ANCESTRAL PROPERTY BECOMES SEPARATE PROPERTY:

68. The above analysis of ancestral property division brought out lucidly by the Honourable Supreme Court in Mangammal case (supra) demonstrates unmistakenly that with each partition and with each demise of a coparncener dying intestate, the chunk of the 'ancestral property' passing hands gets a new 'label': "separate property", and generation after generation from 1956 onwards the aggregate Joint Family property gets diminished bit by bit; and the process would have got a multiplier effect ever since the State after State brought out Amendments to the Hindu Succession Act, 1956 by conferring 'equal status' on

the daughters on par with the sons, in relation to the ancestral property, emboldening the daughters to demand the 'partition at will' before they get 'married' so as to reap the benefit that may otherwise be stolen from their hands post-marriage.

Incidentally, the Amendment Act, 2005, deletes section 23 of the 1956 Act, which placed restrictions on the daughter to claim partition of the dwelling house. Now, they can claim partition, even if the male members do not ask partition.

EPILOGUE:

69. From the foregoing discussion, one thing appears clear that the days of the concept **of the coparcenary property** are numbered:

(a) The Hindu Succession Act, 1956 (HSA) & then Hindu Succession (Amendment) Act, 2005 witnessed a paradigm shift in the concept of coparcenary property.

(i) Section 4 of the HSA gave an overriding effect by abrogating all the rules of succession hitherto applicable to the Hindus.

(ii) The HSA gave a woman greater property rights. Section 14 declared that any property possessed by a female Hindu, shall be held by her as full owner thereof and not as a limited owner, with a fresh stock of heirs under sections 15, 16 of the HSA.

(iii) For intestate, the HSA lays down a set of general rules in sections 8 to 13.

(iv) Under section 6 of the HSA Coparcenary property, devolved upon surviving coparceners. However, if there is a female relative specified in class I of schedule I, or a male relative claiming through such female relative, then the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession under this Act **and not by survivorship.**

(v) Further, section 30 of the HSA entitles a coparcener to make a testamentary disposition and after the Amendment Act,2005, the daughters as 'coparceners' can ask for 'partition' or make a will of her share in the Joint property.

(vi) Five States in India have amended the law relating to coparcenary property. Four States, viz., Maharashtra, Andhra Pradesh, Tamil Nadu and Karnataka, adopt a common pattern & have conferred upon daughters a birth-right in coparcenary property on prospective. The Maharashtra Amendment operates retrospectively from 22-6-1994. A daughter married before the date of operation of the Act is excluded from these benefits.

(vii) The Kerala Joint Hindu Family System (Abolition) Act, 1975 abolishes coparcenary system governed by Mitakshara law and declares coparceners as tenants in common and full owners of their share.

(viii) Section 6(3) of the Hindu Succession (Amendment) Act 2005 provides that where a Hindu dies after commencement of the Act, 2005, his interest in the property of a joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession as the case may be under this act and not by survivorship and the coparcenary property shall be deemed to have been divided as if a partition had taken place.

(ix) Thus, the traditional concept of coparcenary property with incidents of survivorship stands abolished expressly by section 6 (3) of the Amendment Act, 2005.

With the heavy blow of the Amendment Act, 2005, and in particular, section 6 (3), generation after generation would find the diminishing stock of joint property, coupled with the Kerala State taking the lead in complete abolition of concept of joint family ownership. It appears that it may be just a matter of time when the family property would be held by "tenants-in-common", rather than by "joint-tenants".

Perhaps, sooner than later, the concept of ancestral property would be relegated to the history of the Hindu Personal Law.
