

## CHAPTER - II

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### THEORETICAL PERSPECTIVE OF HINDU UNDIVIDED FAMILY

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#### 2.1 INTRODUCTION:

The institution of **joint Hindu family** is peculiar. It has its origin in the ancient texts and writings of Smritikaras. The joint family system has, in fact, sprung from the ancient patriarchal family system, which can be said to be the earliest unit of human society. The head of such a unit is always, in practice, despotic and also an object of respect, if not always of affection, which is probably seated deeper than any positive institution. The induction of co-parceners by birth into a family considerably whittled down the absolute power of the father. This body, which is a creature of law, enfolds within it the lineal male descendants of a common ancestor and includes their mothers, wives or widows and unmarried daughters. The 'joint family' status is ordinarily the result of birth or affection by adoption or marriage and need not necessarily be linked with the possession of the joint family property.

#### 2.2 JOINT FAMILY - ITS NATURE AND CONSTITUTION:

Joint family system is a cherished institution of Hindus and is peculiarly characteristic of their society. The joint and undivided family is the normal condition of

of the Hindu society. Since time immemorial, the Hindus are accustomed to live in joint family units. A joint Hindu family at best may be defined by stating the jointness of members of whom it is made up of. Thus, "it consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters". A daughter ceases to be the member of her father's family on marriage and becomes a member of her husband's family. Conversely, it may be said about a joint family that existence of joint estate is not an essential requisite to constitute a joint family and a family which does not own any property may, nevertheless, be joint under normal circumstances. A Hindu family is joint not only in estate but also in food and worship.

Possession of property is not, under the Mitakshara law, a necessary requisite for the constitution of a joint family though where persons live together, joint in food and worship, it is difficult to conceive of their possessing no property whatever such as household articles which they would enjoy in common.

Speaking about the characteristic features of a joint Hindu family, that the joint Hindu family is thus a larger body consisting of persons who are unified by the tie of sapindaship, arising by birth, marriage or adoption. The fundamental principle of joint Hindu family is the sapindaship. That it does not take more than one male to form a joint Hindu

with females is well established.

### 2.3 CHARACTERISTIC FEATURES OF JOINT AND UNDIVIDED FAMILY:

#### 1. The Tie of Sapindaship:

A joint and undivided family is a body or group of persons who are united by the tie of Sapindaship arising by birth, marriage or adoption.

#### 2. Fluctuating Body:

A joint and undivided family fluctuates by reason of:

- (a) births and deaths in the family,
- (b) marriages, and
- (c) adoptions.

#### 3. Creature of Law:

A joint Hindu family is purely a creature of law and cannot be created by an act of parties for the fundamental principle of joint family is the tie of Sapindaship arising by birth, marriage or adoption. A Hindu joint family is not, however, artificial like a corporation. A Hindu family is not a legal person but it is a legal entity known to law.

#### 4. Joint status, result of Sapindaship alone:

The joint and undivided status of a family bound by the tie of Sapindaship is entirely the result of Sapindaship without more.

5. Joint status continues until  
determined by law:

The jointness or the state of union created by Sapinda-ship continues until it is determined in the manner recognized by the Hindu law. The joint status may be determined either,

- (a) by an act of parties, such as partition, or
- (b) by operation of law.

It may also be taken away from the family as a whole or from certain members only.

**2.4 MEMBERS OF JOINT HINDU FAMILY:**

The members of a joint Hindu family consist of the following:

(a) Males:

- 1. those that are lineally connected in the male line,
- 2. collaterals,
- 3. relatives by adoption,
- 4. poor dependents,
- 5. son born out of marriage between Hindu man and Christian woman under Special Marriages Act.

(b) Females:

- 1. the wife or widowed wife of a male member, and
- 2. his maiden daughters.

## 2.5 HINDU UNDIVIDED FAMILY:

By the time the British came on Indian scene and taxation on income was introduced in the late 19th Century, an undivided family was a living, vibrant, social entity engaged in commerce and industry, not only among Hindus all over the country, but also among the Sikhs, Jains and Buddhists as well as some Muslim communities like Khojas of Gujarat. The British, therefore, found it both practical and politic to include Hindu undivided family as a unit of taxation like an individual, a firm, an association of persons and a company. However, the statute did not feel it necessary to define the term 'Hindu undivided family'. Presumably, most Indians understood as to what it stood for. Even though, it is fairly wellknown that

*a Hindu undivided family consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters,*

and that such a family is capable of and does, in fact, own property and that the interests of its members in undivided family, though fairly wellknown in general terms, are not specifically defined, yet there are differences in respect of Hindu undivided families governed by different schools of law prevailing in different parts of the country. Hindu society and consequently, the laws governing the society, are nothing if not resilient and have been moulded to suit the conditions of time and place. And leaving the term 'Hindu

undivided family' undefined in the taxation laws did not result in an ambiguity, as it would have normally done because the Hindu law had developed its own written and unwritten code, extensively commented upon by authorities respected as much for their erudition as for their just and judicial approach.

## **2.6 MITAKSHARA SYSTEM:**

This system is prevalent in all parts of the country, except in Bengal. Under this system, each son inherits, on birth, an equal interest alongwith his father, in the ancestral property. He is also entitled to seek partition (after attaining the age of majority). It is because of this reason that the share of each person in the family property remains undefinec, subject to change on every birth and death in the family. The essence of this system lies in the unity of ownership.

## **2.7 DAYABHAGA SYSTEM:**

This system prevails in Bengal and in some parts of Orissa. According to this system, the son does not acquire any interest in the ancestral property by mere birth, which is held by father, unlike in Mitakshara. The son's right arises only on the death of his father. It is important to note that on the death of his father, the son acquires rights

in both properties, ancestral as well as self-acquired by the father. The important feature of this system is that the sons get shares in defined proportions and not equally. Therefore, they are not entitled to claim partition during the lifetime of their father, who alone is the absolute owner of the property. Since the shares are defined, the sons may continue to enjoy unity of possession or may prefer to seek partition. The father has an unfettered right to dispose off the property in anyway he likes.

Table 2.1  
Mitakshara and Dayabhaga Systems - Distinguishing Characters

Mitakshara	Dayabhaga
1. The son gets a right by birth in the joint family property. In case, he is an adult, he can demand partition even during the life-time of his father.	1. The son has no right in the joint family property so long as his father is alive.
2. He has a say and can prevent the father from unauthorised alienation of the ancestral property.	2. The father is the absolute owner of the property and can deal with it in any way he likes.
3. A co-parcener has no right to alienate his share in the joint family property. On his death without male issue, his interest survives to his brother.	3. Each adult member, male or female, has a right to demand partition and can alienate his/her interest. On the death, his/her share will be inherited by his/her heirs.
4. The widow of the deceased co-parcener cannot enforce partition. She has a right of maintenance.	4. The widow becomes a co-parcener with her husband's brother and can demand partition.
5. The essence of co-parcenary is the unity of ownership.	5. The essence of co-parcenary is the unity of possession and not ownership.



## **2.8 JOINT PROPERTY OF HINDU UNDIVIDED FAMILY:**

The joint property of the Hindu undivided family includes the following:

- (1) Property which in the hands of the first holder is ancestral, i.e. the property inherited by him in the male line,
- (2) Property acquired by him or the members of the family with the help of the inherited property as distinct from the property acquired by him or other members of the family by their individual effort,
- (3) Separate property acquired by members of the family but thrown into the common hotchpot of the family,
- (4) Property acquired on partition of a Hindu undivided family.

## **2.9 RIGHTS AND OBLIGATIONS OF A 'KARTA':**

The HUF property, usually and normally, though not necessarily, is managed by the father. The management can also vest in some other senior co-parcener of the family. Such a manager is known as the 'Karta'. He is the head of the family and is the custodian of its finances. He is expected to utilize the income of the family for the purpose of the family - maintenance, education, marriages, Shraddha and other religious ceremonies of the co-parceners and members of the family. It may, however, be noted that he is somewhat different from what is commonly understood by the term

'manager' in commercial parlance. Karta is not liable to submit to anyone, even in the contingency of a partition. He has power to contract debts on behalf of the family, discharge claims against the family, etc.

## 2.10 HINDU CO-PARCENARY:

A Hindu co-parcenary is a much narrower body than the joint Hindu family. It includes only those persons who acquire by birth an interest in the joint, or as it is called, a co-parcenary property.

A co-parcenary is a body consisting of the male members of a joint and undivided family who are related to the head of the family for the time being, within four degrees. These being the sons, grandsons and great-grandsons of the holder of the joint property for the time being.

The conception of a joint Hindu family constituting a co-parcenary is a common male ancestor with his lineal descendants in the male line, within three degrees from such an ancestor. So, we see that every co-parcenary starts with a common ancestor, which, after his death, can consist of collaterals only. The number of persons forming, for the time being, the members of undivided Hindu family fluctuates both by births and deaths in the family.

The essence of co-parcenary under Mitakshara is a

community of interest and unity of possession between all the members of the co-parcenary. Each co-parcener is entitled to joint possession and enjoyment of the common property. The essence of co-parcenary being unity of ownership, no individual members of the family, while it remains undivided can predicate of the joint and undivided property that he (the particular member) has certain definite share. The first requisite of such family is the family-unit and the possession of the property in the second unit. But such corporate body with its heritage is purely a creature of law and cannot be created by the act of parties, save insofar as that by adoption, a stranger be affiliated as member of that corporate body. Persons, who by birth or by adoption or non-members of a Hindu family, cannot, in the absence of custom having the force of law, by mere agreement, become or be made members of a joint family.

Thus, if a person inherits property from his father, grandfather, great-grandfather, his sons, grandsons and great-grandsons, acquire an interest in it by birth and then they become with him joint owners of the co-parcenary property with a right to demand partition of the same and all of them are co-parceners and constitute a co-parcenary.

## **2.11 WHO IS A CO-PARCENER:**

A Hindu undivided family consists of members, male

and female, adult and minors. Some of the members of the Hindu undivided family are designated as co-parceners. They are from among the male members of the Hindu undivided family. A co-parcener must be a member of the family, but a member of the family need not be a co-parcener. Only a male member of the family can be a co-parcener, whereas membership of the Hindu undivided family consists of both males and females.

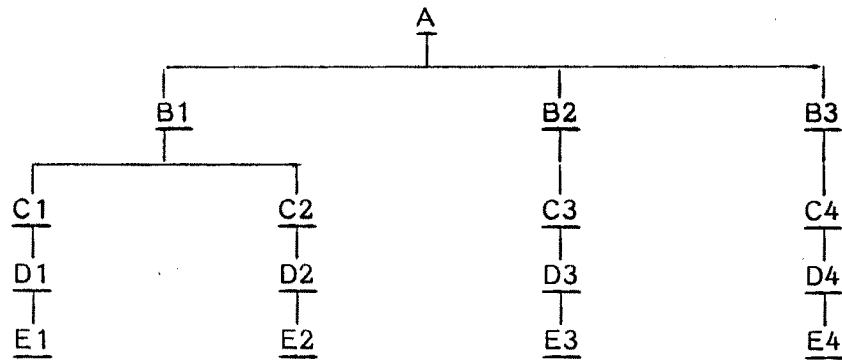
The status of the co-parceners of a Hindu undivided family in relation to the inherited properties are:

- (a) the one who inherited the HUF property, that is, the one in whose time, the family acquired the property by inheritance for the first time;
- (b) his sons,
- (c) his grandsons, and
- (d) his great-grandsons.

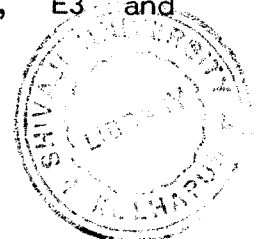
These would constitute a Hindu co-parcenary. In other words, co-parcenary consists of male ancestors and his lineal descendants in the male line within four degrees, including himself. A co-parcenary thus consists of:

- 1st degree : Holder of the ancestral property for the first time,
- 2nd degree : sons,
- 3rd degree : grandsons,
- 4th degree : great-grandsons.

On the death of the common male ancestor, males of another generation will be added to the co-parcenary, i.e. the co-parcenary after his death, will consist of his sons, grandsons, great-grandsons and great great grandsons. To constitute a co-parcenary, it is not necessary to have a common living ancestor. After the death of the common ancestor, the co-parcenary may consist of collateral brothers and their progeny in the male line upto the descendants of fourth degree, including the brothers. Co-parcenary is not restricted to four degrees from the common ancestor but to four degrees from the living holders of the HUF property, i.e. the senior-most living co-parcener of the family. This can be illustrated by the following family tree:



- (a) As long as 'A' is alive, the co-parcenary will consist of A, B1, B2, B3, C1, C2, C3, C4, D1, D2, D3 and D4. The descendants in the fifth degree, i.e. E1, E2, E3 and E4, are the members of the HUF but, though males, are not co-parceners.
- (b) Even if anyone of B1, B2, B3 predeceases A, being descendants in the second degree, E1, E2, E3 and



E4 do not become co-parceners, they belong in the fifth degree of descent from A.

- (c) On A's death, the co-parcenary will consist of B1, B2, B3, C1, C2, C3, C4, D1, D2, D3, D4, E1, E2, E3 and E4; thus, E1, E2, E3 and E4 will become co-parceners, now being in the fourth degree of descent from the senior co-parcener.

## 2.12 CHARACTERISTIC FEATURES OF A CO-PARCENARY:

Following are some of the major characteristic features of a co-parcenary:

### 1. Unity of ownership:

The essential feature of a Hindu co-parcenary is the unity of ownership. The ownership of co-parcenary property is in the whole body of co-parceners. 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 has a definite share.

### 2. Indeterminability of Shares:

The interest of a member of a joint family in the joint family property is a fluctuating interest capable of being enlarged by death in the family and liable to be diminished by births in the family. It is only on the partition that he becomes entitled to a definite share.

In a Hindu undivided family governed by Mitakshara law, no individual member can predicate while it remains undivided that he has a certain definite share in the property of the family.

3. Community of Interest:

This feature of a joint family signifies that no co-parcener is entitled to any special interest in the co-parcenary property nor is he entitled to an exclusive possession of any part of the property. As observed by their Lordships of the Privy Council, "There is a community of interest and unity of possession between all the members of the family".

4. Exclusion of Females:

No female can be a co-parcener under the Mitakshara law. Even a wife, though she is entitled to maintenance out of her husband's property and has to that extent, an interest in his property, is not her husband's co-parcener.

5. Devolution by Survivorship:

Another distinctive feature of the Mitakshara co-parcenary is that on the death of a co-parcener, his interest in the co-parcenary property does not pass on by succession to his heirs. It passes on by survivorship to the other co-parceners, subject to the rule that where the deceased co-parcener leaves male issues, they represent his rights to a share in the partition.

### 2.13 RIGHTS OF A CO-PARCENER:

Following are the rights of a co-parcener:

1. A co-parcener has the right to ask for partition of the family property and separate from the family.
2. Each co-parcener has right and interest in the whole joint family property, yet none of them has a definite share therein and are not competent to dispose off any particular portion or part of the family property. No co-parcener of an undivided family can predicate of the joint and undivided property that he has a certain definite share.
3. Each co-parcener has a right to be maintained out of the common fund to an extent which is at the Karta's absolute discretion.
4. If a co-parcener is excluded entirely from the benefits of the joint enjoyment, then he can take appropriate proceedings against the Karta to ensure recognition of his future maintenance rights and also to obtain compensation for his earlier exclusion.
5. There is a community of interest and unity of possession between all co-parceners and upon the death of any one of them, the others may take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession.



#### **2.14 CREATION OF H.U.F.:**

The word 'creation' often implied with HUF is misnomer. Creation of an HUF is a god-gifted phenomenon. Following are the various modes of creation of HUF:

1. by Partition,
2. by Gift,
3. by Property received on death of an ancestor,
4. by Blending separate property as joint family property,
5. by Joint labour,
6. by Re-Union.

#### **2.15 TAX BENEFITS TO A HINDU UNDIVIDED FAMILY:**

A Hindu undivided family is a separate entity under the country's tax laws and as such, its income and wealth as well as the gifts made by it are liable to be taxed. Therefore, the basic exemptions as are allowable under these tax laws are available to the Hindu undivided family. Some unscrupulous taxpayers, however, twist these exemptions in such a way so as to enjoy their benefits both as an individual and as a coparcenary or member of a HUF.

Partition of an HUF is an easy mode of transfer of the income and wealth of the family to the members thereof, without attracting any liability for capital gains tax, gift tax, stamp duty, etc.

Partition of an HUF makes a larger number of HUFs, i.e. of each of its coparcener qua his family and as such, larger number of taxable entities are created.

The liability of capital gains on the assets of HUF at the time of sale can be considerably reduced, if the assets of the HUF are partitioned before the sale.

There is no disallowance of interest paid to any of the members of the HUF under section 40(b).

No registration under Income-tax Act is required, like a partnership firm and no declaration under section 184(7) is to be filed every year, non-filing of which may attract severe consequences.

Provisions of section 2(22) of the Income-tax Act relating to deemed dividend can be avoided by holding share for HUF.

Provisions of section 64 regarding clubbing of income are not applicable to HUF.

Penalty and interest under tax laws cannot be computed at higher rate, as in the case of a registered firm, they are computed as unregistered firm.

HUF is a perpetual entity. It does not extinguish unless it is completely partitioned. The birth, death, marriage

of any of its members does not affect its continuance.

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