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Incidents of Separate Property

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ABSTRACT

The crux of the paper is a concept of joint family system which devolves around the properties owned together by the entire family. Separate property is something that a coparcener owns exclusively. The coparcener plays a pivotal role in the division of the property or keeping it together. Joint family property is also called ancestral and coparcenary property. The legal provision for the division of the property is based on the Hindu Succession Act of 1956. The criteria for distribution of the property are based on Dayabhaga and Mitakshara school of law, which are distinct. The criteria for the separate/self-acquired property are highlighted and is well laid down in the paper. In the present scenario, the coparcener has become individualistic/ self-centered by acquiring property by many ways and means like education, knowledge or skills or competence without the support of other embers. Separate property is something that is exclusively available only to the coparcener and no other members' interest is associated with it. The differences, benefits and disadvantages between the separate and joint property are elucidated in the study. The case laws have been studied and how different the rights are between the self-acquired and joint property is has been highlighted. The judgments are explained in the report. The partition of property between the coparceners is a soft issue which could be amicably and acceptingly done by mutual agreements. The incidents of separate property and how a property becomes a separate property is explained.

KEYWORDS

Separate property, Joint family, Partition, Coparceners, Self-acquired, Coparcenary property

SCOPE OF RESEARCH

1. To understand how the separate property works and to know what is a separate property and how it is acquired.
2. To know the distinction between self-acquired property and joint family property with regard to law.
3. To know the criteria for a property to be a separate property.

LITERATURE REVIEW

1. Property owned by a Joint family member can be divided into two under the Mitakshara school of law- one being a Joint family property and the other being a separate property. Doctrine of blending is something that explains how the separate property can be blended with a self-acquired property. – **Law Corner, 21st October 2020**
2. There are several distinctions between Joint Family property and self-acquired property. A self-acquired property can be acquired through education, merit. Also, the property earned by education, even if family aided to support his education, it still would be a separate property. – **Shareyouessays.com**
3. The partition of the property happens through the guidelines given in the Hindu Succession Act. A Joint family property has to eventually be partitioned, but there is no such necessity for a separate property. – **Poonam Pradhan Saxena, Family law II, 5th edition**

RESEARCH QUESTIONS

1. Does a joint family property become separate property after partition?
2. Does sharing the separate property with the other family members make it a shared property?

3. Can a coparcener give up his self-acquired property?

INTRODUCTION

Joint families are something which have been existing since many years. The concept of joint family is when more than one generation lives together, it can be called a joint family. The property the entire family owns together is known as Joint Family Property. The concept of coparcenary also originated from this system. Normally, during partition the share is given to all the coparceners. For partition to happen, there must exist more than one coparcener. Even though the system of coparcenary is not prevalent in the current time, it was the only system which governed the division of property before the Hindu Succession Act came into existence.

There are two schools of Hindu law and these two provide different criteria for the partition of property. The Dayabhaga school of law says that the partition should happen through metes and bounds and the Mitakshara school does not clearly specify the process of partition. The school just tells us that joint family property is collectively owned by all and during partition, each coparcener is given his share.

The Mitakshara school property into two categories- one being Joint Family Property and the other being Separate Property. The head male member, when he purchases a property, and he gave up the right to make it a separate property voluntarily, then that constitutes as a Joint Family Property. A Joint Family property is collectively owned by the coparceners. A separate property is something the coparceners acquire, which is not a part of the Joint family property. The self- acquired property becomes separate property for the father and the brothers of the coparcener who holds the property, but still would continue to be a joint

Family property for his son. It is also said that once the head male gives up the purchased property, he cannot claim it back if he gets less share during partition.

CRITERIA FOR A PROPERTY TO BE A SEPARATE PROPERTY

There are certain ways in which an acquired property would be a self-acquired/separate property. It is already established that separate property is something that exists out of the Joint family Property. The criteria are as follows-

1. The coparcener should have acquired the property by his own with his own efforts. Any member of the Joint family should not have contributed anything to help him acquire the property.
2. A joint family property, after partition, and the share he gets would be his own property and not a Joint family property anymore.
3. Any property that does not belong to his father, grandfather or great grandfather would be termed as his own property.
4. If the coparcener acquires any property as a gift from his father, or anyone, it would be a separate property.
5. When there is only one coparcener, i.e., a sole surviving coparcener, and the entire property goes to him, it would be termed as a separate property.
6. A property that the government granted to the coparcener would be called a separate property, as any service to the government had resulted in him getting a grant.
7. After a joint family dissolves, if a coparcener built another Joint family with his own efforts, then the property associated with him is a self- acquired property.

Now, if a coparcener earned a property by education, knowledge or skills, without the support of any other Joint Family members,

it would also be a self- acquired property. However, it was a controversial question whether the property gained by the coparcener through education or knowledge, but the members of the family financially supported him in gaining the knowledge or getting the education, is a separate property or a Joint Family Property. The Hindu Gains of Learning act said that even though the coparcener has gained the property through support in education from family members, it would still be his separate property as it was acquired by of his hard work.

MAIN DIFFERENCES BETWEEN JOINT AND SEPARATE PROPERTY

1. In a joint family system, when the Karta dies, the ancestral property is given to the surviving coparcecer. So, the doctrine of survivorship applies here. Whereas in separate property, when one coparcener dies, his property is divided by succession and not on the basis of survivorship.
2. The joint family members share a common interest in the joint family property and enjoy a unity in the possession. Whereas in a separate property, the coparcener enjoys the right and possession over the property only by himself or exclusively.
3. The coparcener cannot exclusively mark his share before the partition in the case of a joint family property. The coparcener cannot say that $1/4^{\text{th}}$ of the property belongs to him etc. Till the partition actually happens, he does not have a fixed share for himself. Whereas in a separate property, as he enjoys an exclusive possession and interest, there is no question of how much share he would get.
4. The children, grandchildren and the subsequent generations would automatically gain an interest and share in the Joint family property by birth. Whereas in case of a

separate property, the children of the coparcener whose property it is, even they would not get the interest in the property by birth.

5. The coparcener cannot transfer his undivided interest through a will in case of a joint family property. Whereas in the case of a separate property, he can transfer his undivided interest by a will.
6. A coparcener can alienate, transfer by gift or do anything with his separate property to anyone. However, in the case of a joint family property, the coparcener cannot sell his undivided interest without the permission of the other coparceners. Even the Karta of the joint family cannot do anything with the property without the consent of the coparceners. It is also necessary to see that there is an important or necessary reason or an emergency to do so. The joint family property cannot be alienated without a proper reason.
7. The joint family property cannot be alienated through sale or mortgage without the consent of the other coparceners. It is necessary that the Karta takes the consent of all coparceners before doing so. The Karta, without the consent can alienate the property when there is a legal necessity or an emergency or for some pious duties. In the case of separate property, the coparcener can do anything he wants to do with the property, put it on sale, mortgage it or completely alienate it.
8. A joint family property can be put for partition, whereas there is no such necessity in the case of a separate property.

TYPES OF INHERITED PROPERTY

- ***Property Inherited From Mother's Father***

The question whether a property inherited from the maternal

grandfather is coparcenary property or a separate property is answered here. The council in the case of *Nakayama vs. Venkataramanayyama*¹, said that the property inherited from the mother's father would be an ancestral property. The facts of this case were two sons living in a joint family inherited property from their maternal grandfather. One of the sons died. Now the confusion was whether to give the property to the remaining son, i.e., his brother by survivorship or give it to his widow by the laws of succession. The council in this case held it to be an ancestral property and said that the share would go to the brother. However, the council revisited its decision in the *Mohammad Hussain Khan vs. Babu Kishya Nandan Sahai*² and said that the property inherited from the maternal grandfather would not be an ancestral one but will be separate property.

- ***Property Inherited from the Female Members of the Family***

The only property that would be constituted as an ancestral property is when it is inherited from the father's side. Therefore, it can be seen that when property is inherited from the maternal side of the family, it is a separate property.

- **Property Acquired as a Gift From The Paternal Side**

When the father of a coparcener makes a gift to his son, giving him his self- acquired property, the question is whether it would be a self-acquired property to the son or an ancestral one. The Supreme Court tries to answer this question in the *Arunachala Mudalier vs. Muruganatha*³ case that the property acquired as a gift, would always not become an ancestral

¹ Nakayama vs. Venkataramanayyama, (1902) ILR 25 Mad 678.

² Mohammad Hussain Khan vs. Babu Kishya Nandan Sahai, 1937 PC.

³ Arunachala Mudalier vs. Muruganatha 1953 AIR 495 ,1954 SCR 243.

property, rather the intention of the donor should be looked into. The court observed that it should be seen whether the donor actually wanted to give the property to the donee as a self-acquired or an ancestral property. Hence there is no full-proof answer to determine whether such a property is ancestral or a separate one. The facts of the case should be looked into in this kind of an issue.

There should be one thing kept in mind that if there is only a single member in the family, the property he has would be called a separate property as long as it is only under his possession. However, once a son is born or adopted or a new male member is added in the family, the property becomes a joint family property as he gains an interest in the property.

CASE LAWS

- ***Shri. Shashikant Shripad pandit vs. Shri Kaustubh Subhash Pandit and Ors.***

This was an appeal case between the appellants who were the original defendants and the respondent who was the original plaintiff. The property in question was the separate property of the grandfather of the respondents. The grandfather had four sons and four daughters and $1/8^{\text{th}}$ share of the property would be given to each son and daughter. However later, the daughters executed a deed giving up their rights in the property and releasing it to the four sons, i.e., the sons would now get $1/4^{\text{th}}$ share each. The respondents filed a partition suit and said that they should now get $1/4^{\text{th}}$ share each in the property, upon the death of the grandfather and his wife. The respondent was the son of one of the daughters. However, the appellants said that this cannot be done as the daughters had already given up their rights on the property. The trial court

however held that the respondent had the right to the share in the property as it was reserved for them. Thus, the appellants went for an appeal. It was seen by the court that the property was not an ancestral one for the respondents or the appellants. The court said that the trial court's decision to declare that the property was ancestral and giving the respondents (original plaintiffs) a share was incorrect. Also, the court said that the deed signed by the sisters of the appellants was only in the favor of them and not in favor of all the joint family members. Hence, only the appellants would be entitled to the share in the property.

The court also took the *Mangammal Tulasi vs. T.B Raju*⁴ in reference. The court in this case held that a property that has been inherited through four generations, i.e., the father got it from the father's father who got the property from the father's father who got the property from the father's father's father's father would be called an ancestral property. Hence, in this case, it would not be called an ancestral property as it did not fulfill the conditions. The property in this case was held to be a separate property. The court in this case also referred to the *Kishore Tulsiram vs. Dilip Janak Mantri*⁵ that a self-acquired property would be inherited by the legal heirs only upon the owner's death and would be distributed to all legal heirs equally. It was also held that the legal heirs can give up their rights on the property if they wish to. Thus, the four sisters could also give up their rights to their brothers.

- ***V.D. Dhanwatey vs. CIT***

This case held that a property that is bought from aid received from the entire family is known as a joint family property. This

⁴ *Mangammal Tulasi vs. T.B Raju*, Civil Appeal No. 1933 of 2009.

⁵ *Kishore Tulsiram vs. Dilip Janak Mantri*, (Civil) No. 1882/2019.

case held that a separate or a self-acquired property is the one that is received without any aid from the family, on the efforts of the coparcener only.

- ***Lakkireddi Chinna Venkata Reddi vs. Lakkireddi Lakshmama***

In this case it was held that for a separate property to be blended with the joint family property, the coparcener, whose separate property it is, should express his intention to abandon the property and blend it with the joint family property explicitly. If the coparcener helps the other family members by giving them the money arising out of the property or sharing the property with the other members etc. would not be called as expressing his intention to abandon the separate property.

CONCLUSION

The Indian living systems have been evolved along the Joint families, which have been in place from years back. Joint family is a family wherein more than one generation lives together. The properties owned by individual members of the family together is called a Joint family property. The coparceners of the joint family do share the property or assets during the partition. A partition to the family due to many reasons like conflicts between the coparceners, differences of opinion in the lineage and due to demise of some member/members of the family. The division of the property between the coparceners is devolved around the Hindu Succession act, 1956. The two schools of Hindu law which provide the different criteria for the division of the property are- Dayabhaga school of law and Mitakshara school of law. Dayabhaga school says that the partition should take place through metes and bounds. The Mitakshara school doesn't mention about the process of partition. In my opinion, the ones

who own a separate property enjoy more rights as compared to the ones who own a joint family property. In the advent of nuclear families, the joint family system is degenerating/degrading and the process of partition or separation of properties had been very prominent.

Nowadays, many families are converting into nuclear families and the trend to own a separate property is increasing. In view of the current occupations of livelihood being drifted from the joint family system, the earnings of the individual members have taken a prominent pace in the asset management system. It can also be found out that all the property that is inherited from the paternal side constitutes as an ancestral property. The present trending in socio-economic and technological environment, the joint families are being distorted in view of the individual requirements such as housing, start-up businesses, overseas education etc. It can be seen that the individual's right and freedom as a coparcener plays a dominant role in the separation or distribution of the property. Under the present circumstances with the evolution of Information Technology, the coparceners are more oriented towards individualism and the associated interests. This is a big blow to the joint family system and ancestral property. In my opinion, the survival of joint family system in the future is an uncertainty as the individual interests are divested. After analyzing the case laws, it can be seen that a clear distinction between what is a joint family property and what is a separate property. I feel that if there is any confusion whether it is a joint or separate property, the facts of the case should be analyzed. Also, all sections regarding the relinquishment of the rights to inherit should be mentioned specifically so as to make the coparceners aware.

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