Hindu Law and Hindu Succession Act, 2005

It becomes difficult to sell the HUF property, as consent of all the coparceners are required. Possibility of disputes always remains higher. It is risky, hence such property fetches low value in the market. Sometimes, it is advisable to make a WILL or gift of self acquired property or individual property, before it gets the colour of ancestral property as discussed in this article. In case of testamentary succession, Indian Succession Act, 1925 will apply. Daughters have now equal right as that of son, if the father was alive till 9-9-2005 *i.e.* enactment of Hindu Succession (Amendment) Act, 2005.

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Modern Hindu law

A series of four major pieces of legislation were passed in the year 1955–56 and these laws form the first point of reference for modern Hindu law.

1. Hindu Marriage Act, 1955
2. Hindu Succession Act, 1956
3. Hindu Minority and Guardianship Act, 1956
4. Hindu Adoption and Maintenance Act, 1956

Even Buddhist, Jain and Sikhs are regarded as Hindus. Discussion in this article is confined to one of these four Acts i.e. Hindu Succession Act, 1956. Preamble to this Act says, *"An Act to amend and codify the law relating to intestate succession among Hindus"*.

Thus, from the preamble, it is clear that The Hindu Succession Act, 1956 applies only where a Hindu dies intestate *i.e.* without a "WILL" or gift. In case of testamentary disposition, Indian Succession Act, 1925

applies. There are two systems of inheritance amongst the Hindus in India, which are,
(i) Mitakshara System (Applies to whole India except Bengal and Assam)
(ii) Dayabhaga System (Applies to Bengal, Assam and adjoining part)

Mitakshara System recognises two modes of devolution of property,
(a) Devolution by survivorship
(b) Devolution by succession

The rule of survivorship applies with respect to joint family property or coparcenaries property whereas the rule of succession applies with respect to property held in absolute severalty or individual property or self acquired or separate property. Dayabhaga recognise only one mode of devolution namely succession.

Hindu Undivided Family can best be defined as a family that consists of a common male ancestor and all his lineal male descendants and their wives and unmarried daughters. They all are called members whereas not all members of the HUF are its coparceners.

The *coparcenary extends to four degrees* down the family hierarchy in the following manner:

1st degree:	Holder of ancestral property for the first time.
2nd degree:	Sons and daughters only w.e.f. 9-9-2005
3rd degree:	Grandsons.
4th degree:	Great Grandsons

Thus married daughter is coparcener in HUF of her father and not member, while she is member of her husband's HUF but not coparcener.

Every male member, on birth, within three generations, and daughter becomes a member of the coparcenary. This means that no person's share in ancestral property can be determined with certainty. It diminishes on the birth of a male member and enhance on the death of a male member due to concept of survivorship.

Salient features of coparcenary:
1. A coparcener has the right to demand partition of the joint family but a member cannot demand partition.
2. There may be small coparcenary within coparcenary *e.g.* A is grandfather, B father, C is Son. B's HUF constitute smaller coparcener with C and also part of larger coparcener along with A's HUF.
3. Where during the lifetime of a common ancestor one of his male descendant dies the coparcenary does not stretch down to one more generation *e.g.* in five generation A, B, C, D & E if A's HUF constitute coparcener till four generation alongwith B, C & D and if D dies still it will not stretch to include E. E is not coparcener hence cannot demand partition. However on death of A, E becomes coparcener of B's HUF and can demand partition of HUF property.

Coparcenary Property consists of:
(a) Ancestral Property
(b) Property jointly acquired by the members of the joint family
(c) Separate property of a member thrown into the common stock.
(d) Property acquired by all or any of coparcener by the aid of family fund

Ancestral Property refers to any property acquired by the Hindu great grandfather, which then passes undivided down the next three generations up to the present generation of great grandson/daughter. In short, firstly, this property should be four generation old; secondly, it should not have been divided by the users in the joint Hindu family as once a division of the property takes place, the share or portion which each coparcener gets after the division becomes his or her self's acquired property.

Separate or self acquired Property is property which is not coparcenary property and it includes:
1. Property purchased by an individual from his own resources.
2. Property inherited by Hindu from any person other than his father, grandfather, great grandfather would be his separate property *i.e.* from mother, grandmother, brother, uncles.
3. Any property obtained by a Hindu as his share of partition in HUF, provided he has no child shall be treated his separate property.
4. Property obtained by Hindu by way of a gift or WILL.
5. Self acquired property of father received as legal heir under Section 8 of Hindu Succession Act, 1956.

Scheme of law of succession under Hindu Succession Act, 1956 are,
- Devolution of interest in coparcenary property (Section 6)

- General rules of succession in case of male (Sections 8-12)
- General rules of succession in case of female (Sections 15 and 16)

Amended Section 6 of Hindu Succession Act, 2005 states as under:

The daughter of a coparcener shall,-

(1) (a) by birth become a coparcener in her own right in the same manner as the son;
(b)have the same rights in coparcenary property as she would have had if she had been a son
(c) …....

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, as property capable of being disposed of by her by testamentary disposition

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) 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 and,—
(a) daughter is allotted the same share as is allotted to a son
(b) ……..
(c) ……..

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

Section 6 discusses about manner of distribution of deceased's share in coparcenary property. It states that his interest in coparcenary property will be distributed equally to persons specified in class I of the schedule. However, it does not explain how deceased's share in coparcenary property will be ascertained. His share will be determined on the basis of concept of survivorship basis. *"While determining his share widow will also be given equal share as to her son."* In one of the important case the Supreme Court rendered this judgment. Facts of the case are, A died leaving behind his wife, two sons and three daughters. According to *Explanation 1* to Section 6 if partition had taken place between her husband and two sons immediately before the death of her husband she would have been allotted $1/4^{th}$ share. Out of $1/4^{th}$ share of her husband she will get $1/24^{th}$ share alongwith two sons and three daughters ($1/6^{th}$ of $1/4^{th}$ share). Thus total $7/24^{th}$ share. [*Gurupada Khandapa Vs. Heerabai (SC) 27-04-1978*]

Section 8. General rules of succession in the case of males
The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter:
(a) Firstly, upon the heirs, being the relatives specified in Class I of the Schedule;
(b) Secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in Class II of the Schedule;
(c) Thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and
(d) lastly, if there is no agnate, then upon the cognates of the deceased.

List of heirs specified in class I of the Schedule (12 relations are specified in schedule)

Son; Daughter; Widow; Mother
Son, daughter, widow of predeceased son
Son, Daughter, widow of predeceased son's predeceased son
Son, Daughter of predeceased Daughter

List of heirs specified in class II of the Schedule-
1. Father
2. (i) Son's daughter's son (ii) son's daughter's daughter, (iii) brother, (iv) sister,
3. (i) Daughter's son's son, (ii) daughter's son's daughter , (iii) daughter's daughter's son, (iv) daughter's daughter's daughter,
4. …..and so on.

Order of succession have been specified in Section 9 of the Hindu Succession Act, 1956 as to those in Class I shall take simultaneously and to the exclusion of all other heirs. And those in the first entry in Class II shall be preferred to those in the second entry; those in

the second entry shall be preferred to those in the third entry; and so on in succession. So if there is even one relation exist in class I of the schedule then these are not to look at the relations specified in class II, entire share will succeed to relation specified in class I of the schedule.

Section 10 of Hindu Succession Act, 1956 describes the manner of distribution of property among heirs in Class I of the Schedule in accordance with the following rules:

Rule 1. The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.

Rule 2. The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3. The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share.

Rule 4. The distribution of the share referred to in rule 3--(i) among the heirs in the branch of the pre-deceased son shall be so made that his widow (or widows together) and the surviving sons and daughters get equal portions; and the branch of his pre-deceased sons get same portion;

Section 11 of the Act describes the manner of distribution of property among heirs in Class II of the Schedule as to the property of an intestate shall be divided between the heirs specified in any one entry in Class II of the Schedule so that they share equally.

Position of Daughter after Amendment Act, 2005

Madras High Court in case of *S. Seshachalam vs. S. Deenadayalan dated 05-08-2009* decided the position of daughters after Hindu Succession Amendment Act 2005. Facts of the case are as under:

	Death occurred
A – Father	1965
B – Mother	1998

S1 S2 D1 D2 D3 (Death D3)

a b c d

From the preamble it is clear that The Hindu Succession Act, 1956 applies only where a Hindu dies intestate *i.e.* without a "WILL" or gift.

A father and B mother having two sons S1, S2 and three daughters D1, D2, D3. S1 claim partition of property. Suit was filed after the death of mother in 1998. S1 claimed ½ share in property. The Counsel on behalf of daughters argued that the amending provision is a beneficial legislation to remove the inequality between the two sexes. Therefore, he contends that the same is to be interpreted in such a way that it gives benefit to women rather than depriving the property to them. Madras High Court rendered the judgment stating that notional partition has to be assumed just before the death of father in 1965, when succession opened hence each will get 1/3rd share viz : A, S1, S2. As the mother is not alive hence her share will not be determined here.

Now as proviso to Section 6 all the five legal heirs (two sons and three daughter) will get 1/5th share of 1/3rd share of deceased father. Thus each five heir will get 1/15th share. Hence, Share of S1 and S2 (1/3rd plus 1/15th) *i.e.* 6/15th share each, share of D1, D2 and legal heir of D3 will be 1/15th share each.

If succession would have opened after passing the amendment Act, 2005 *i.e.* death of father would have occurred after passing amendment Act, 2005, two sons and three sister will get 1/5th share each. If father is no longer coparcener as on 9-9-2005 *i.e.* date of enactment then daughter would not be entitled to any right in HUF property as the Act does not confers any rights upon sisters.

Even intention of the amended provision is to confer better right on the daughters, it cannot be stressed to the extent of holding that succession which had opened prior to coming into force of the amended Act are also required to be reopened.

Hindu Undivided Family can best be defined as a family that consists of a common male ancestor and all his lineal male descendants and their wives and unmarried daughters.

Therefore it is clear that daughters would get benefit of the amendment Act only if her father is alive at the time of coming into force of the amendment Act.

However changed law is equally applicable to daughter born before 9-9-2005, if succession is opened after 9-9-2005.

Some issues require discussion on HUF taxation:

1. How to create HUF?
   The answer is get married. The HUF gets created as soon as you complete the seven (or four, whatever) circles round the holy fire and become husband and Wife. They don't have to wait till they have a baby to constitute their HUF.
2. How to create capital in HUF?
   For this purpose we need to keep in mind the provision of Section 64(2) relating to clubbing and 56(1)(vii) relating to gift. A way-out is to receive gifts from members of bigger HUFs, who though your relatives, aren't members of your smaller HUF. A father may make a gift of money to his son's HUF, clearly specifying in the Gift Deed that the gift is to his son's HUF and not to the son himself. This will keep Section 64(2) at bay. But after passing of the Finance Bill, 2012, this will not remain the position. The definition of relative amended to include member of HUF as relative of HUF. Therefore, gift received from father by son's HUF will be taxable in the hands of HUF, as father is not a member of son's HUF hence will not be a relative as per definition. Hence, gift received other than relative above ₹ 50000/- will be taxable in the hands of Son's HUF.

Some other persons, who aren't members of the HUF can make gift to the HUF but only upto ₹ 50000/- so that section Section 56(2) is not attracted.

Clubbing provisions can be bypassed if the HUF invests the money in instruments yielding tax-free income. The tax-free income can then be reinvested to earn even taxable income as income on income is out of the clubbing provisions.

3. Can HUF be partner in firm?
   The Karta can enter into partnership with a firm on behalf of the HUF. But the HUF itself, being not a legal person, can never be a partner in a firm. The fact that income tax law grants a PAN to it and treats it as an assessable entity does not best-ow upon it the status of a person under the general law. However, as far as partnership under Indian Partnership Act, 1932 is concerned, it will recognise only the individual capacity of such partner.
4. Can Karta of HUF draw salary or commission from firm?
   Yes, but whether such salary income is to be taxable in the hands of individual capacity or as HUF income will depend upon whether the remuneration received by such person in substance, though not in form, was but one of the modes of return made to the family because of the investment of the family funds in the business or whether it was a compensation made for the services rendered by the individual. If it is former, then it will be taxable in the hands of HUF but if it is latter, it will be taxed in the hands of the individual.
5. Can the Department attach the properties belonging to the HUF for recovery of the tax dues of the firm?
   No, as far as Partnership Act, 1932 is concerned and as per the ratio laid down by the Supreme Court in Rasiklal's case, such Karta is to be regarded as partner in his individual capacity and not in representative capacity. It is the Karta alone who, in the eyes of law, is partner and his rights and his responsibilities are governed by the Partnership Act, 1932 not by the Hindu law. As far as recovery of tax dues of the firm is concerned, the Department cannot attach the property belonging to the HUF. However, the personal properties of the Karta can be attached.
6. Can HUF earn commission income without investing any funds of HUF?
   While it is true that the concept of the HUF is not related to any possession of property by the family nor existence of such joint family property is an essential precondition for constituting the HUF, when one is concerned with an issue to decide whether a particular income can said to be belonging to the HUF or not, the issue of source from which such income accrued becomes relevant. Though the issue has to be decided keeping in view facts of each case, where an income is claimed to be belonging to the HUF without the HUF investing any fund to earn such income, the onus become very heavy on the HUF to prove so by cogent evidence.
7. Any distribution of capital assets on the total or partial partition of HUF is exempt under Section 47(i) i.e. certain transaction not regarded as transfer? ■