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CRUCIFYING THE CONCEPT OF MITAKSHARA COPARCENARY AT THE ALTAR OF INCOME-TAX LAW *

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Abstract

In this paper an attempt is made to review and re-state how, in what manner and to what extent the concept of Mitakshara coparcenary has been modulated by the legislative intervention first through the Hindu Succession Act of 1956 and later through the Act of 2005, amending the principal Act that makes the daughter of a coparcener 'by birth' a coparcener in her own right in the same manner as the son. The critique mainly revolves around the decision of the apex court in *Chander Sen* (1986) and catena of cases dittoing its decision-principle. The paper argues that, notwithstanding the dilution of the principle of survivorship, the perspective of the institution of Mitakshara coparcenary has been widened. This, in turn, strengthens the joint or undivided family system, providing instantly to all the members of the family the much- needed-social-security-cover.

I Mitakshara coparcenary: An institution of social security

MITAKSHARA COPARCENARY under Hindu law is a unique institution.[1] It is an institution which is a creation neither of a statute

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1. Although Mitakshara and Dayabhaga Schools of Hindu law differ on birthright of coparceners and the rules of inheritance, yet they bear similar import so far as the constitution and functioning of joint or undivided family is concerned.

nor of agreement between the parties.[2] Its membership is solely a matter of status which is acquired by birth or adoption.[3] It provides, *inter alia*, social security umbrella not only to coparceners, but also to the large number of persons, males and females, who constitute an undivided or joint family. There is no limit to the number of persons who can compose joint family or to the degree of their remoteness from the common ancestor and to their relationship with one another. A joint Hindu family consists of persons lineally descended from a common ancestor and includes their wives and unmarried daughters. The daughter on her marriage ceases to be a member of her father's family and becomes a member of her husband's family. However, after the amendment of the Hindu Succession Act 1956 (30 of 1956)[4] by the amending Act of 2005,[5] a daughter of a coparcener (in respect of her property rights) has also 'by birth become a coparcener in the same manner as the son' and has the same rights in the coparcenary as she would have had if she would have been a son.'

The cardinal doctrine of Mitakshara coparcenary is that the property inherited by a Hindu from Hindu family is, thus, a larger body consisting of a group of persons who are united by the tie of *sapindaship* arising by birth, marriage or adoption. Property of his father, father's father, or father's father's father is ancestral property (*a-pratibandhadaya* – unobstructed) as regards his own male issues; that is, if he has son, grandson and great-grand son, they acquire an interest in it from the moment of their birth and they become coparcener with their paternal ancestor in such property.[6] In Mitakshara coparcenary there is community of interest and unity of possession: the interest of one member is the interest of all; the possession of one is possession of all. No member so long he remains undivided can predicate that he or that particular member is entitled to that particular share in coparcenary property.[7] If a coparcener dies undivided, the other members take the whole by virtue of survivorship.[8]

2. See, *Bhagwan Dayal* v. *Reoti Devi,* AIR 1962 SC 287.

3. See, for instance, *Satrughan* v. *Sabujpari,* AIR 1967 SC 272 and *Surjit Lal Chhaabda* v. *CIT, Bombay,* AIR 1976 SC 109.

4. Hereinafter referred to as HSA 1956.

5. Hindu Succession (Amendment) Act, 2005 (39 of 2005).

6. Property inherited by a man from other relations is his separate property, which is characterised as *sapratibandhadaya* – obstructed, obstructed by the fact of his living. However, on his dying intestate, even this property in the hands of his own son becomes unobstructed *vis-à-vis* his own son (grandson of the deceased).

7. See, *Appovier* v. *Rama Subba* (1986) 11 MIA 75 at 89.

8. See, *Katama Natchiar* v. *Rajah of Shivagunga* (1863) 9 MIA 539 at 611.

With a view to build up Mitakshara coparcenary to serve as an effective institution of social security, the coparcenary property is broadly divided into two parts: movable and immovable. As a general rule, immovable property is considered inalienable. Another general principle is that only the *karta* of the undivided family and not the individual member thereof is empowered to deal with the coparcenary property. While doing so, he too could deal with it only for limited defined purposes and for no others. He could alienate for meeting the needs of the family, to meet an emergent situation, and for fulfilling some religious objectives.[9]

For the same reason, namely to preserve the coparcenary property for the provision of social security, the *karta* of the family, in his capacity as *karta*, could not make a gift even of a small portion of movable coparcenary property without the consent of his sons except for extremely limited purpose of performing "indispensable acts of duty, and for purposes prescribed by the texts of law, as gifts through affection, support of the family, relief from distress and so forth."[10]

Similarly, the *karta* of the family could not alienate the property for his own purposes, for he has no greater interest in the coparcenary property even in the capacity of *karta* than other members constituting the coparcenary. Traditionally, prior to the Hindu Succession (Amendment) Act of 2005, he could bind his sons' interest (including grandson and great-grandson) for his own personal purposes through alienation but only in a very circuitous manner; that is through the doctrine of antecedent debts by invoking the principle of pious obligation.[11]

The objective of social security provision is strengthened by the enlarged ambit of what constitutes coparcenary property. The traditionally accepted principle is that any property received by a person from his father, grand-father and great grand-father (all on the paternal

9. For the exposition of incidents of Mitakshara coparcenary, see *State Bank of India* v. *Ghamandi Ram,* AIR 1969 SC 1330 at 1333.

10. See, Mulla on *Principles of Hindu Law* 340 (21st ed, 2010) citing *Mitakshara,* ch. I, s.1, para 27.

11. S. 6(4) of the HSA 1956, as amended by the Act of 2005, now stipulates that the right of the creditor to proceed against the son, grandson or great grand son after the amendment came into force on the ground of pious obligation is curtailed. Henceforth, the Act prohibits the creditor from proceedings against the said heirs. However, the right of the creditor to proceed against the specified heirs for the debts contracted by the ancestor before the commencement of amending Act is specifically saved and could be realised as per law existing at that time.

side only), known as ancestral property, instantly constitutes the nucleus and comes within the ambit of coparcenary property. Besides, any other property, known as separate property, whether self-acquired or received from any other source (that is other than the property received from father, father's father and father's father's father) but thrown into the common pool, either expressly or impliedly, also falls within the scope of coparcenary property,[12] with all incidents of joint family property.[13] All such property needs to be preserved as far as possible and used for family purposes.

Prior to the enactment of Hindu Gains of Learning Act of 1930, even the acquisitions made by a coparcener by virtue of the specialised knowledge, training, etc. which was acquired or gained at the cost of the coparcenary property would also belong to the coparcenary of which he happened to be a member.[14] The functional principle, in short, was that in a coparcenary, each member should contribute according to his capacity and each one would get according to one's own needs.

One of the prime purposes of the institution of Mitakshara coparcenary was, thus, to serve the social cause of all the members of the extended family through the principle of interdependence. It was certainly not meant to serve an individual only as an individual, but also an individual as a member of the family. Accession (and not really succession) to property was, therefore, per stripes and not per capita, and thereby giving benefit to all and not to just one particular person to the exclusion of others.

In this backdrop, at the instance of income-tax authorities, who naturally want to extend their net of income tax liabilities for augmenting the state resources, the question that has come to the fore is, whether after the enactment of the Hindu Succession Act of 1956 (30 of 1956) the income and assets of the father inherited by his son will be his separate property or coparcenary property in which his own son would also acquire an interest by birth?

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12. See, *D.S. Lakshmaiah* v. *L. Balasubramanyam,* AIR 2003 SC 3800. For elaborate exposition on this count, see *Mayne's Hindu Law and Usage,* 364-65 (11th ed.).

13. See, for instance, *Radhakant Lal* v. *Nazima Begum,* AIR 1917 PC 128. In this case, the property inherited from brother bore the character of separate property and when it was thrown into the common pool became the property of the joint family.

14. See, for instance, *Gokal Chand* v. *Hukum Chand Nath Mal,* AIR 1921 PC 35. In this case, since the person, while preparing for the premier service – Indian Civil Service (ICS) – was supported by the joint family resources, the income earned by him also belonged to the joint family.

II Impact of HSA 1956 on Mitakshara coparcenary: Two views of the Supreme Court

First view: Mitakshara coparcenary has been abrogated

The issue about the impact of the Hindu Succession Act of 1956 on Hindu Mitakshara came up before the various high courts at the instance of income tax authorities when they sought to impose tax liability in respect of the separate property that devolved upon the son after his father died intestate. Since there was variation in their views, the matter was referred to the Supreme Court for its authoritative determination. Such a culmination took place in the case of *Commissioner of Wealth Tax, Kanpur* v. *Chander Sen*.[15]

In *Chander Sen*, there was a joint family constituted by Chander Sen and his father that owned considerable property including a business. There was partial partition of the business between the two in the year 1961. The father, who carried his own business separately, died intestate in 1965 leaving behind his son Chander Sen and grandsons (sons of Chander Sen) surviving him. In this context, the specific question arose before a bench of two judges about the nature of property in the hands of inheriting son under the relevant provisions of HSA 1956: whether 'a son who inherits his father's assets when separated by partition should be assessed as income of the Hindu undivided family of the son, or his individual income.[16]

In order to answer this question, the Supreme Court examined the views of different high courts that hitherto prevailed in the light of the express provisions of the HSA 1956.[17] The bench, *inter alia,* examined how, in what manner and to what extent the whole notion of Mitakshara coparcenary under the traditional Hindu law has been amended and codified by the legislature. In the considered opinion of the bench, the inheriting son shall hold the property in his individual capacity and not as *karta* of the Hindu undivided family *vis-a-vis* his own sons.[18] This implies that the concept of Mitakshara coparcenary has been altered or even abandoned to that extent. Following year,

15. AIR 1986 SC 1753, per R.S.Pathak and Sabyasachi Mukherji, JJ. Hereinafter referred to as *Chander Sen.*

16. *Id.* at 1756 (para 10).

17. See *infra* note 48-52, and the accompanying text.

18. *Supra* note 15 at 1760.

this view was reaffirmed by the Supreme Court in *Yudishter* v. *Ashok Kumar*.[19] Since then, whenever *Chander Sen* is cited, its decision-principle has been invariably relied upon in successive cases by the apex court.

In this respect, illustratively, reference may be made to relatively two recent cases. First reference is made to *Makhan Singh (D) by LRs.* v. *Kulwant Singh*.[20] In this case, a piece of land purchased by the father was inherited by his four sons, who continued to live jointly as members of HUF (properly called coparcenary). One of the members of coparcenery, while remaining joint, sold his share to Makhan Singh. The question arose whether he could do so while remaining undivided. The trial court held that he could do so. The first appellate court concurred with the decision of the trial court. On second regular appeal, the Punjab & Haryana High Court reversed the decision. On special leave to appeal, however, the Supreme Court reversed the decision of the high court[21] summarily on the strength of its earlier decision in *Chander Sen* by reiterating that "a son who inherits his father's assets under section 8 of the Hindu Succession Act does so in his individual capacity and not as a Karta of the Hindu Undivided Family."

Secondly, one may refer to *Bhanwar Singh* v. *Puran* [22] that had come to the Supreme Court in an appeal again against the judgment of Punjab & Haryana High Court. In this case, one Bhima, a male Hindu, died in 1972 leaving behind a son, Sant Ram, and three daughters. Since the property left by Bhima was seemingly his own separate self-acquired property, the same was equally divided amongst his son, Sant Ram, and three daughters, under the relevant provisions of the HSA, 1956, as it then existed. 1/4th share of each is shown to be recorded in the revenue records of 1973-74. In 1977, a son (who is now appellant – Bhanwar Singh) was born to Sant Ram. During the minority of Bhanwar Singh, his father Sant Ram alienated the property to the respondents. On attaining majority, Bhanwar challenged the alienation, claiming that his father after his birth in 1977 had no right to dispose the property except for legal necessity. In this context the issue arose about

19. AIR 1987 SC 558.

20. AIR 2007 SC 1808, per B.P. Singh and H.S. Bedi JJ.

21. *Kulwant Singh* v. *Makhan Singh,* AIR 2003 P&H 142, per Satish Kumar Mittal J.

22. AIR 2008 SC 1490, per S.B. Sinha and V.S. Sirpurkar, JJ. (Hereinafter referred to as *Bhanwar Singh*)

the true character of property in the hands of Sant Ram under the provisions of HSA 1956: whether the appellant Bhanwar Singh had acquired an interest therein by birth in the year 1977.[23]

The Supreme Court, affirming the decision of the high court, held that the appellant did not acquire any interest in the said property, because his own father's interest in that property was absolute under the relevant provisions of the HSA, 1956. The line of reasoning to reach this conclusion adduced by the apex court may be abstracted as under.

(a) In view of the overriding effect of section 4 of the HSA, there is a "sea change in the matter of inheritance and succession amongst Hindus."[24]

(b) Under section 8 read with section 6 of the HSA, as it stood at the relevant time, which lays down the general rules of succession, the property of a male Hindu dying intestate devolves upon the heirs mentioned in class I of the schedule appended to the HSA.[25]

(c) In the said schedule, "natural sons and daughters are placed in class I heirs, but a grandson, so long as father is alive, has not been included."[26]

(d) "Section 19 of the Act provides that in the event of succession by two or more heirs, they will take the property *per capita* and not *per stripes*, as also tenants-in-common and not as joint tenants."[27]

(e) Keeping in view the above, S.B. Sinha J (for himself and S. Sirpurkar J) held that "in terms of Section 19 of the Act, as Sant Ram and his sisters became tenants-in-common and took the properties devolved upon them per capita and not per stripes, each one of them was entitled to alienate their share, particularly when different properties were allotted in their favour."[28]

While rendering decision in *Bhanwar Singh*, the bench also noted[29] that the principle of *Chander Sen* which they are applying was also reiterated by the Supreme Court in *Yodhishter* v. *Ashok Kumar*,[30] *Sunderdas Thackersay & Bros.* v. *Commissioner of Income-Tax*,[31] *Commissioner of Income-*

23. *Id.* at 1491 (para 10).
24. *Id.* at 1491 (para 11).
25. *Id.* at 1192 (para 11).
26. *Ibid.*
27. *Ibid.*
28. *Id.* at 1494 (para 18).
29. *Id.* at 1493 (para 15).
30. AIR 1987 SC 558.
31. 1982 (137) ITR 646.

Tax v. *P.L. Karuppan Chettiar*,[32] and *Additional Commissioner of Income-Tax* v. *M. Karthikeyan*.[33]

Second view: Mitakshra coparcenary has been retained

However, there has also been a discordant view taken by the bench of the Supreme Court of equal strength in a contemporaneous case, *Ass Kaur (Smt.) (Deceased) by LRs* v. *Kartar Singh (Dead) by LRs*,[34] *albeit* without any reference to the earlier view of Supreme Court in *Chander Sen*. In this case, the court has held with equal vehemence that on devolution of self-acquired property of the father to his son, it becomes coparcenary property in his hands *vis-a-vis* his own son; that is, his son would instantly acquire an interest in the same by birth. While considering the overriding effect under section 4 of the HSA 1956, the Supreme Court has reiterated the existence of the principle of Mitakshara coparcenary. S.B.Sinha J (for himself and Markendey Katju J) stated:[35]

> Property inherited from paternal ancestor is, *of course*, ancestral property as regards the male issue of the propositus, but it is his absolute property as regards other relations.

In support of their view, they abstracted the statements from the standard work, *Mulla's Principles of Hindu Law*:[36]

> (I)f A inherits property, whether movable or immovable, from his father, or father's fathers, or father's father's father, it is ancestral property as regards his male issue. If A has no son, son's son, or son's son's son in existence at the time when he inherits the property, he holds the property as absolute owner thereof, and he can deal with it as he pleases.

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32. 1993 Supp. (1) SCC 580: after the death of the father intestate, his separate property was inherited by and divided between his widow and son. The property so inherited by the son under s. 8 of the HSA 1956 was to be treated as his individual separate property and, therefore, income arising therefrom was not assessable in the hands of the HUF.

33. 1994 Supp. (2) SCC 112: a share obtained by a son from his deceased father's property is governed by s. 8 of the Hindu Succession Act, 1956 and therefore his separate property.

34. AIR 2007 SC 2369, per S.B. Sinha and Markendey Katju JJ citing *Dharma Shamrao Agalawe* v. *Pandurang Miragu Agalawe*, AIR 1988 SC 845 and *Sheela Devi* v. *Lal Chand*, 2006 (1) SCALE 75.

35. *Id.* at 2375 (para 32). *Emphasis added.*

36. 289(15th ed.).

Again:[37]

> The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue. They take an interest in it by birth, whether they are in existence at the time of partition or are born subsequently. Such share, however, is ancestral property only as regards his male issue. As regards other relations, it is separate property, and if the coparcener dies without leaving male issue, it passes to his heirs by succession.

After referring to these statements, the Supreme Court in *Ass Kaur* has further observed, rather assertively, that "(t)here is no dispute in regards to the aforementioned propositions of law."[38] As if to reinforce this view, the apex court cited[39] its two other earlier decisions, namely *Dharma Shamrao Agalawe* v. *Pandurang Miragu Agalawe* [40] and *Sheela Devi* v. *Lal Chand*[41].

III Relative evaluation of the two views with a focus on *Chander Sen*

It is indeed interesting to note that S.B. Sinha J (along with V.S. Sirpurkar J) was a member of the bench of the Supreme Court in *Bhanwar Singh*[42] and also a member of the bench (along with Markendey Katju J) in *Ass Kaur.*[43] In *Bhanwar Singh*, the decision of *Chander Sen* was relied upon, whereas there was no mention of *Chander Sen* in *Ass Kaur* in the consideration of the same proposition. For the resolution of this duality, therefore, it would be in order to undertake the relative evaluation of the two views. For this purpose, one may focus on *Chander Sen* and examine critically the legitimacy of its propositions. This may be done for three cogent reasons: one, *Chander Sen* represents a comprehensive decision inasmuch as it takes note of the conflicting views of the various high courts;[44] two, in cases that have followed *Chander Sen*, its reasoning has been virtually replicated without adding anything more;[45] and three, *Chander Sen* has become so much entrenched

37. *Id.* at 291.
38. *Supra* note 34 at 2375 (para 33).
39. *Id.* at 2376 (para 33).
40. AIR 1988 SC 845.
41. 2006 (1) SCALE 75.
42. *Supra* note 22.
43. *Supra* note 34.
44. See *infra* notes 51-55, and the accompanying text.
45. See, for instance, *Bhanwar Singh*, *supra* note 22.

as quite a few subsequent cases have relied upon its propounded principle unquestioningly even without the need of reproducing any of its relevant propositions.[46]

Rationale of holdings of *Chander Sen*

For abstracting the rationale of *Chander Sen*, it is pertinent to state that the whole range of devolution of Mitakshara coparcenary property as envisaged by the Act of 1956 is essentially dealt with under section 6 read with section 8 along with sections 9-13 and 19 of the HSA 1956. Although the old provisions of section 6 of the Act of 1956, called the principal Act, have been substituted by the provisions of new section 6 introduced by the Hindu Succession (Amendment) Act, 2005 (39 of 2005), the old section 6 of the principal Act continues to be relevant at least in three respects. One, the Act of 2005 is an amending and not the repealing Act and, therefore, for deciphering the change one must first know the old provision in order to appreciate its substitute; two, the operation of provisions of new section 6 is prospective and, therefore, the old section shall continue to apply to cases that arose prior to the amending Act came into force;[47] and three, the decisions rendered by the courts including the apex court in terms of old section 6 provide continuity in expounding the concept of Mitakshara coparcenary under the new section 6.

With this perspective in view, one may focus on the holdings of *Chander Sen.* In this case, for examining the true nature of property in the hands of the inheriting son, the bench of the Supreme Court consisting of Sabyasachi Mukherji and R.S. Pathak JJ specifically directed their concern to examine the impact of the said Act on the *hitherto* prevailing provisions of the Hindu law. For determining this impact, the Supreme Court took into account the views expressed by the various high courts specifically on this very issue in hand. In its analysis, the court noted the divergent views expressed by the Allahabad High Court

46. See, for instance, *Makhan Singh*, *supra* note 20.

47. The Amending Act received the assent of the President on Sep. 5, 2005 and came into force with effect from Sep. 9, 2005, the date on which it was published in the Gazette of India, Ext., Pt. II, S. 1.

in *Commissioner of Income-tax, U.P.* v. *Ram Rakhpal, Ashok Kumar*;[48] full bench of Madras High Court in *Addl. Commissioner of Income-tax, Madras* v. *P.L. Karuppan Chedttiar*,[49] Madhya Pradesh High Court in *Shrivallabhadas Modani* v. *Commissioner of Income-tax, M.P.-I*,[50] Andhra Pradesh High Court in *Commissioner of Wealth-tax A.P. –II* v. *Mukundgirji*,[51] and the contrary view of Gujarat High Court in *Commissioner of Income-tax*, *Gujarat-I* v. *Dr Babubhai Mansukhbhai*.[52]

In view of its analysis, the Supreme Court bench examined the impact of the HSA 1956 on the nature of property inherited by the sons *vis-à-vis* their own sons. The results of its analysis that constitute bases for eventual conclusion may be abstracted as under:

Re: The connotation of the preamble to the HSA 1956

The singular objective of enacting the Hindu Succession Act 1956, as indicated in the preamble, is "to amend and codify the law relating to intestate succession among the Hindus." Here the use of the term "amend" means "to modify (the hitherto prevailing principles of Hindu law) where necessary."[53]

Re: Overriding effect of the HSA 1956

Section 4 of the Act, "makes it clear" "that one should look to the Act in case of doubt and not to the pre-existing Hindu law."[54]

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48. (1968) 67 ITR 164. In this case, Ram Rakhpal and his father constituted coparcenary. There was partition between them in 1948. On the death of his father in 1958, Ram Rakhpal inherited his share in the coparcenary property. In this fact situation, Allahabad High Court held that the income of the property inherited by the son under the relevant provisions of HSA 1956 was his individual income and not the income of joint family of which he happened to be the *karta.* (Analyzed in *Chander Sen, supra* note 15 at 1756).

49. 114 ITR 523: AIR 1979 Mad. (Analysed in *Chander Sen*, *supra* note 15 at 1758).

50. (1982) 138 ITR 637: 1983 Tax LR 559. In view of s. 8 of HSA 1956, which is taken as "a self-contained provision laying down the scheme of devolution of property of a Hindu," the Madhya Pradesh High Court held that in construing the provisions of section 8 of the new codifying Act, earlier law should be ignored. (Analysed in *Chander Sen*, *supra* note 15 at 1759).

51. 144 ITR 18: 1983 Tax LR 1370. The Andhra Pradesh High Court held that the properties which devolved upon a son by inheritance under the HSA 1956 were the properties of the son in his individual capacity and not of the joint family in which his son would acquire any interest by birth and thereby a right to claim any share or sue for partition of such properties. (Analyzed in *Chander Sen, Supra* note at 15).

52. (1977) 108 ITR 417. (Analysed in *Chander Sen, supra* note 15 at 1758).

53. *Chander Sen, supra* note 15 at 1760 .

Re: Express mandate of section 8 of HSA 1956, laying down the general rules of succession, cannot be negated for the following reasons:

(i) Its very first rule provides that the property of male Hindu dying intestate shall devolve upon the heirs specified in class I of the schedule appended to the Act. These heirs (prior to the amending Act of 2005) were 12 in number.[55]

(ii) A perusal of the list of heirs mentioned in class I of the schedule show that it "only includes son, and does not include son's son, but does include son of a pre-deceased son." In other words, while including son and son of a pre-deceased son, the class I heirs "does not include specifically the grandson." (In the appended schedule, "natural sons and daughters are placed in class I heirs, but a grandson, so long as father is alive, has not been included.)

(iii) The inclusion of grandson along with the son despite his exclusion specifically would mean ignoring the overriding effect of the Act under section 4, read with section 8, which impliedly abrogates the Mitakshara law. (If son is taken to include his own son, that would imply that "he takes it as *Karta* of his individual family" – a view subscribed by the Gujarat High Court in *Dr Babubhai Mansukhbhai*. Such a view, in the opinion of the Supreme Court, "is not possible" in the light of the provisions of section 8 of the Act.)

Re: Creation of two classes amongst the class I heirs is not warranted

Under the HSA 1956, amongst the class I heirs it is not contemplated that property in the hands of males shall be coparcenary property, whereas in the hands of females it would be their separate property.[56]

Re: Clear and categorical mandate of section 19 of HSA 1956

"Section 19 of the Act provides that in the event of succession by two or more heirs, they will take the property *per capita* and not *per stripes,* as also tenants-in-common and not as joint tenants."

54. *Ibid.*

55. The amending Act has added six more heirs to class I by shifting them from class II heirs in the appended schedule.

56. *Chander Sen*, *supra* note 15 at 1757 (para 11).

Re: Chander Sen's conclusion

In the light of the reasons as abstracted above, the Supreme Court in *Chander Sen* affirmed that "the express language [of section 8 of the Hindu Succession Act, 1956], which excludes son's son, but included son of a predeceased son, cannot be ignored," and "must prevail."[57] To this extent, the traditional notion of Mitakshara coparcenary stands "amended." and, accordingly, the Supreme Court accepted the view expressed earlier by the High Courts of Allahabad, Madras, Madhya Pradesh, and Andhra Pradesh, in preference to the contrary view taken by the Gujarat High Court.[58]

Approval of the decision of the full bench of Madras High Court in *Addl. Commissioner of Income-tax, Madras* v. *P.L. Karuppan Chedttiar*,[59] also means that the ambit of the proposition propounded by the Supreme Court in *Chander Sen* stands enlarged to the extent "that property inherited by a son from his divided father – *even assuming that it was ancestral property in the hands of the father* – would be his separate property and individual property and not of the joint family consisting of his wife, sons and daughters[60]."

Critique of *Chander Sen*

The overriding effect of the Act, as stipulated in the provisions of section 4, is not unqualified, inasmuch as its opening clause begins, *"Save as otherwise expressly provided."* It clearly envisages, firstly that there are certain exceptions where the law immediately in force before the commencement of the Act in the form of any text, rule or interpretation of Hindu law and any custom or usage as a part of that law shall continue to apply.

Secondly, the text of section 4 itself limits the overriding effect of the Act by laying down that only those matters that are specifically dealt within the Act stand amended, and not the ones that are not covered and codified by it either directly or indirectly.

*Section 6 (both old and new) of the HSA 1956 speaks of retention of coparcenery rather than its abrogation***.** The opening and the principal part of old section 6 of the Act preserves the concept of Mitakshara coparcenary in its pristine form by providing unequivocally that when a male Hindu

57. *Id.* at 1760.

58. *Ibid.*

59. *Supra* note 49.

60. For this exposition, see Satyajeet A. Desai (Ed.), *Mulla on Principles of Hindu Law* 1129 (21st ed., 2010). *(Emphasis added.)*

dies after the commencement of this Act, having an interest 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. *Chander Sen* makes absolutely no reference to the provisions of section 6 of the HSA 1956 in its analysis.

*The concept of notional partition envisaged under explanation I appended to proviso to old section 6 of HSA 1956 does not mean abrogation of Mitakshara coparcenary.*The principle of survivorship is, however, defeated in a situation when a male Hindu dies 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. In that situation, instead of surviving members taking the whole property by virtue of surviving the deceased, the deceased's interest in the Mitakshara coparcenary property shall devolve in accordance with the provisions of section 8. This is the impact of the proviso on the principal provision made in section 6.

For crystallising the interest of the deceased in the Mitakshara coparcenary property, a legal fiction has been introduced by appending explanation I to the proviso, whereby "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."

The superseding of the principle of survivorship, it needs emphasis, does not mean that the concept of Mitakshara coparcenary has been totally abandoned or erased from the applicable body of Hindu law. To wit, even in the event of crystallising and separating the interest of the deceased coparcener, one is required to resort to the process of partition as envisaged under the Mitakshara law, signifying its continuing existence.

Having crystallised the interest of the deceased coparcener into a share allotted to him on partition, it would devolve upon the heirs in the order of succession as stipulated under section 8. According to the rules of this section, the class I heirs, twelve in number (prior to the amendment of 2005) that include both males and females, take precedence over all the rest.

Identifying the share of the deceased in the coparcenary property on the basis of notional partition – the partition resorted to only for a specific purpose of demarcating the share of the deceased – does not amount to partition among the

surviving members of the coparcenary. They continue to live jointly as before. This is borne out from the appended explanation II, which categorically provides that nothing contained in the proviso to section 6 (which makes room for the daughter to claim a share in the property of deceased father) shall enable a person who has separated himself from coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein. This implies that the purpose of proviso is only to carve out a share in the property of the deceased for the benefit of daughters, and let the Hindu undivided family and coparcenary go on as usual.

Section 10, read with section 8 of the HSA 1956, speaks of retention of coparcenary. Distribution of deceased's share in the coparcenary property carved out through notional partition amongst the heirs in class I of the schedule on the basis of per stripe or branch, and not per capita as in the case of class II heirs.

Section 19 of the HSA 1956, which spells out the mode of succession of two or more heirs, does not discard the retention of the concept of Mitakshara coparcenary in certain specified situations. It provides that if two or more heirs succeed together to the property of an intestate, they shall take the property "save as otherwise expressly provided in this Act, per capita and not per stripes; and as tenants-in-common and not as joint tenants." The Supreme Court did make a specific reference to the provisions of this section in *Chander Sen* by adding a special paragraph 12A. But, somehow or the other, the saving clause, "*save as otherwise expressly provided in this Act*", which is of critical importance in the context of devolution of property escaped the attention of the Supreme Court while considering the purport of this section. It appears that for its flawed incorporation, the court relied upon the judgment of the Andhra Pradesh High Court in *Commissioner of Wealth-tax A.P.–II* v. *Mukundgirji*, wherein there is an omission of the saving clause.[61] It is this omission, which led the court to conclude that whenever two or more heirs succeed together to the property of an intestate, they should always take the property as tenants–in-common and not as joint tenants. This means that the Act has chosen to provide that the property which devolved upon heirs mentioned in class I of the schedule under section 8 constituted the absolute properties and his sons have no right by birth in such properties.

A perusal of the provisions of section 19 reveals that two modes of

61. See *Chander Sen*, *supra* note 15 at 1759.

devolution of property are clearly intended when it is specifically stated that devolution of property on two or more heirs would be per stripes if so expressly stated, and otherwise it would be per capita, that is if it is not stated specifically whether it would be per stripes or per capita. The dual mode had been necessitated by the operation of the provisions of section 6 of the principal Act (prior to their replacement by the Amending Act of 2005) read with the provisions of section 10. In the process of devolution, the daughter is given a share in the property of her father without conferring the status of a coparcener on her, and as such she would get her share *per capita*, that is in her own individual capacity. On the other hand, the son acquires the property as *karta* of the family, which is per stripe, in which his son would take interest by virtue of his birth. In view of this exposition, it would, therefore, does not seem to be right to hold, as has been done in by the Supreme Court in *Chander Sen*, that two modes of devolution of property are not intended under the HSA 1956.

Chander Sen, for its analysis, relies upon the provisions of section 8 without making a reference to section 6 of HSA 1956.

On this count one may refer to a case emanating from Punjab & Haryana High Court, *Balbiri Devi* v. *Tejbir Singh*,[62] in which Sham Sunder J did not apply the principle proposition of *Chander Sen* by distinguishing it ingeniously, and rightly so, by holding that in that case "it was nowhere held that Section 6 of the Act would not be applicable, for the devolution of property in the hands of male holder."[63]

In the light of the above critique of *Chander Sen*, the following conclusions emerge:.

> (a) The concept of Mitakshara coparcenary was not intended to be done away as was evident from the old section 6 of the HSA 1956. The principal part of that section kept the notion of Mitakshara coparcenary intact in pristine form. However, a proviso was appended to that section in order to give a share in the property of the deceased to certain females and certain males through such females by resorting to the fiction of notional partition, as if the Hindu male dying intestate died divided, irrespective of the fact whether he was entitled to ask for partition. Thus, the design of

62. 2010(3) RCR (Civil) 35- 40, decided on 8-1-2010. Hereinafter referred to as *Balbiri Devi.*

63. *Id.* at 39.

section 6 showed that the purpose of the provision was not to discard or abandon the notion of Mitakshara coparcenary, but to retain it after carving out a share for certain females or males through females as enumerated in class I heirs of the schedule.

(b) Such a construction instantly gains support from the Hindu Succession (Amendment) Act of 2005, which makes the daughter of a coparcener by birth a coparcener in her own right in the same manner as the son, and who shall have rights in the coparcenary property as she would had if she had been a son, and be subject to the same liabilities in respect of the said coparcenary property as that of a son. From this premise, it is difficult to contend that the Hindu Succession Act of 1956, even prior to its amendment in 2005, intended to abolish the institution of Hindu Mitakshara coparcenary and thereby introducing only one mode of devolution of property whereby the inheritor takes it as per capita, and not per stripe. Had that been the legislative intent, the notion of Mitakshara coparcenary would not have been extended to daughters of the deceased.

c) Under the Income-tax Act of 1961, a 'Hindu Undivided Family' (HUF) continues to be a separate taxable unit for the purpose of income-tax and super-tax.[64] Since the Act of 1961 does not define the HUF, it has been taken to mean in the same sense in which the term or expression 'Hindu Joint Family' is understood under the traditional Hindu law.[65] For all intents and purposes, HUF is synonymous to Hindu joint family (HJF).[66]

Apart from this, the notion of HUF or HJF is much wider than that of Mitakshara coparcenary. Stated conversely, Mitakshara coparcenary is a narrower body than joint Hindu family or HUF, inasmuch as the former comprises (prior to the amending Act of 2005) only the lineal male descendants upto a certain degree from a common male ancestor, whereas the latter includes not only lineally

64. S. 2(31)(ii) of the Income-tax Act, 1961 defines a 'person' that clearly and categorically includes *inter alia* a 'Hindu Undivided Family.' Likewise, under s. 3 of the Wealth-tax Act, 1957, tax is charged for every financial year in respect of every individual, Hindu undivided family and company at the rate or rates specified in the schedule.

65. The Supreme Court in *Surjit Lal Chhabda* v. *The Commissioner of Income-tax, Bombay,* (1976) 3 SCC 142 at 148 (hereinafter cited as *Surjit Lal Chhabda*) adduced the reason for this omission: "The reason of the omission evidently is that the expression has a well-known connotation under the Hindu law and being aware of it, the legislature did not want to define the expression separately in the Act.

66. *Ibid.*

descended male members irrespective of the degree of their remoteness from the common ancestor but also their wives and unmarried daughters.[67] But why and wherefore HUF is given the status of a 'person' to be treated as a separate unit for the purpose of income-tax and wealth-tax? The answer is not far to seek. In functional terms, it serves a social purpose and not just a ploy to fulfil the interest of an individual as an individual. It provides an invaluable support in meeting the undefined needs and the concerns of social security of all the members of extended family, including the aged, the disabled, unmarried daughters, and widows.

The preservation of HUF as a social institution is zealously guarded. A three-judge bench decision of the Supreme Court in *N.V. Narendranath* v. *Commissioner of Wealth-tax, Andhra Pradesh*,[68] is a case in point on this count which comprehensively and authoritatively lays down that when a joint family property comes into the hands of a sole surviving coparcener he can deal with the property as if it is his separate property, but nevertheless, in his hands also the income of the ancestral property

67. Since we continue to follow the patriarchal (as distinguished from matriarchal) model notwithstanding the Amending Act of 2005, a daughter on her marriage ceases to be a member of her father's family and becomes a member of her husband's family. However, there is a needs to comprehend the implications of making the daughter of a coparcener as coparcener. As for the time being, the full discussion on this count is beyond the scope of the present paper, it should suffice to state that in view of the "Statement of Objects and Reasons" appended to the Hindu Succession (Amendment) Act, 2005, one needs to take the restricted view of the concept of 'daughter of a coparcener as coparcener.' The stand is taken for the following main reasons:

Preservation of the concept of Mitakshara coparcenary *albeit* in a drastically modified manner in respect of (i) abolition of the principle of survivorship under section 6(3), and (ii) conferment of the right to dispose of coparcenary property by testamentary disposition under section 6(3) read with section 30, of the Hindu Succession Act 1956 (as amended).

Retention of the rule of agnatic succession as the preferential basis of succession under section 8 of the Hindu Succession Act 1956 (as amended).

The retention of the concept of notional partition in the devolution of property of a male dying intestate also supports the retention of the concept of coparcenary in which the male descendents acquire an interest by birth under explanation appended to section 6(3) of the Hindu Succession Act 1956 (as amended).

Keeping the traditional notion of Hindu Joint Family intact, which is essentially premised on the patriarchical system as distinguished from matriarchical system.

The Act of 2005 is an amending Act, and through amendment , it is not intended to change 'the basic structure' of the principal Act by moving from patriarchy to matriarchy.

68. (1969) 3 SCR 882, per A.N. Grover, J.C. Shah and V. Ramaswami JJ. Hereinafter referred to as *Narendranath.*

is assessed in his capacity as *karta* of HUF and not in his individual capacity.[69]

There is yet another three-judge bench decision of the Supreme Court consisting of Y.V. Chandrachud, R.S. Sarkaria and A.C. Gupta JJ in *Surjit Lal Chhabda,*[70] which needs a special mention as it encourages creating and strengthening the institution of HUF and Mitakshara coparcenary. However, the mode and manner in which this has been done needs to be expounded in the light of its fact matrix. In this case, the appellant had self-acquired immovable property called "Kathoke Lodge" and until the assessment year 1956-57, he used to be assessed as an individual in respect of the rental income thereof. On January 26, 1956, he made a sworn declaration before the presidency magistrate in Bombay that he had thrown the said immovable property into the 'family hotchpot' in order to impress that property with the character of joint family property and that he would thenceforth be holding that property as the *karta* of the joint Hindu family consisting of himself, his wife and one child (an unmarried daughter). In the assessment proceedings for the year 1957-58, the appellant contended that since he had abandoned all separate claims to the said immovable property, the income which he received from that property should be assessed in the status of a Hindu undivided family. In order to settle this contention, the case had gone through successive stages with varying results.

The income-tax officer rejected the contention of the appellant on two counts: one, that in the absence of a nucleus of joint family property,

69. In *Narendranath,* the appellant filed returns for the assessment years 1957-58, 1958-59 and 1959-60 in the status of a HUF consisting of himself, his wife, and his two minor daughters. The appellant claimed to be assessed in the status of a HUF inasmuch as the wealth returned consisted of ancestral property received by him on partition with his father and brothers. The wealth-tax officer did not accept the contention of the appellant and assessed him as an individual for the said assessment years. On appeal to the appellate assistant commissioner of wealth tax the finding that he must be assessed as an individual was confirmed. The Income-tax appellate tribunal, however, on appeal by the appellant held that he should be assessed as a HUF. Thereupon, the commissioner of wealth tax applied to the tribunal to state a case to the high court under s. 27(1) of the Wealth Tax Act (Act No. 27 of 1957) to settle the question of law for the opinion of the high court, whether the status of the assessee was rightly determined as Hindu Undivided Family.' The high court disagreed with the view of the appellate tribunal and held that as the appellant's family did not have any other male coparcener all the assets forming the subject matter of the returns filed by the appellant belonged to him as an individual and not to a HUF. On further appeal, the Supreme Court reversed the view of the high court by holding that the status of the appellant was that of a HUF, and not as an individual as determined by the commissioner of wealth tax.

70. *Supra* note 65.

there was nothing with which the appellant could mingle his separate property; two, that there could not be a Hindu undivided family without there being undivided family property.

The appellate assistant commissioner on appeal by the appellant differed from the Income-tax officer on both the counts, but still dismissed the appeal on two other counts by holding, one, that even after declaration, the appellant was dealing with the income of the immovable property put into the common pool in the same way as before which showed that the declaration was not acted upon; two, that even assuming that the property was thrown into the common stock and was therefore joint family property, the income from that property still be taxed in the appellant's hands as he was the sole male member of the family.

The appellate income-tax tribunal, in turn, accepted the declaration of the appellant as genuine by agreeing with the assumption made by the appellate assistant commissioner, but differed from him on his finding that it was not acted upon. Resultantly, the tribunal held that though the appellant had invested his separate property with the character of joint family property, he being the sole surviving coparcener continued to have the same absolute and unrestricted interest to the property as before and, therefore, in law, the property had to be treated as his separate property.

At the instance of the appellant, the tribunal made a reference to the Bombay High Court under section 66(1) of the Income Tax Act, 1922 on the question, whether, on the facts and circumstances of the case, the income from the immovable property thrown into the common stock as to be assessed separately as the income of the Hindu undivided family of which the assessee was the *karta.*

The high court by solely relying on the decision of the Privy Council in *Kalyanji Vithaldas* v. *C.I.T.*[71] held that although from the date of the declaration by which the said immovable property was thrown into the common stock, was the property of the Hindu undivided family consisting of a single male member, his wife and unmarried daughter, and yet the position of the assessee-appellant in the absence of a son was that of a sole surviving coparcener and in that capacity he could deal with the coparcenary property in the same manner as if it were his separate property. Accordingly, the high court held that "the income

71. (1937) 5 ITR 90 (PC): AIR 1937 PC 36.

in the hands of the assessee would liable to be assessed as his individual income."[72]

V. Chandrachud J (for himself and R.S. Sarkaria and A.C. Gupta JJ) in final appeal before the Supreme Court eventually held: [73]

> The property which the appellant has put into the common stock may change its legal incidents on the birth of a son but until that event happens the property, in the eye of Hindu law, is really his. He can deal with it as a full owner, unrestrained by considerations of legal necessity or benefit of the estate. He may sell it, mortgage it or make a gift of it. Even a son born or adopted after the alienation shall have to take the family hotchpot as he finds it. A son born, begotten or adopted after the alienation has no right to challenge the alienation.

Since the personal laws of the appellant regards him as the owner of "Kathoke Lodge" (immovable property in question) and the income therefrom as the income even after the property was thrown into the family hotchpot, the income would be chargeable to income-tax as his individual income and not that of the family.[74]

The intrinsic merit of the three-judge bench of the Supreme Court lies in not reaching the eventual conclusion, which is almost similar to the one reached by the high court, but in the analysis of the fundamental principles of Hindu law that enabled the bench to reach the said conclusion. The high court in its decision-making, according to the Supreme Court bench, ignored the "principles of Hindu law governing joint families" by "calling them 'larger questions,' and, preferred wholly to rely on, so to say, the magic touch of *Kalyanji's case*."[75] Such an approach makes the process of decision-making 'inconsistent,' which is seemingly inimical to the development of law. To wit, the Supreme Court has pointed out in the instant case:[76]

> It [the High Court] assumed that a joint family may consist of a single male, a wife and daughter which means that it assumed that the appellant was a member of a joint Hindu family consisting of himself, his wife and daughter. However, in the very next breath the High Court concluded: 'But the assessee

72. *Surjit Lal Chhabda*. v. C.I.T., Bombay City, 75 ITR 458 (Bom HC).
73. *Supra* note 65 at 159 (para 43).
74. *Id.* at 159 (para 44).
75. *Id.* at 147 (para 7).
76. *Ibid.*

> has no son and therefore no undivided family.' An examination of fundamental might have saved the High Court from the inconsistency that a single male can constitute a 'joint family' with his wife and daughter but if that male has no son, there can be no 'undivided family'. In the first place, joint family and undivided family are synonymous terms. Secondly, when one says that a joint Hindu family consists of a single male, his wife and daughter, one implies necessarily that there is no son. If there were a son, there would be two males.

In the light of the fundamental principles of joint or undivided family under Hindu law, as expounded by the Supreme Court, two classes of cases are distinguishable, each requiring a different approach.[77] In one class fall the cases in which the property of a subsisting undivided family devolves on the sole surviving coparcener, then it does not cease to be the property of the joint family merely because the family is represented by a sole surviving coparcener who possesses rights which an owner of property may possess.[78] However, in the other class of cases the question to be asked is whether property which did not belong to the subsisting undivided family has truly acquired the character of joint family property in the hands of assessee.[79] In this respect, the response of the three-judge bench is of functional importance:[80]

In this class of cases, the composition of the family is a matter of great relevance for, though a joint Hindu family may consist of a man, his wife and daughter, the mere existence of a wife and daughter will not justify the assessment of income from the joint family property in the status of the head as a manager of the joint family. *It is of great relevance that he has no son and his joint family consists, for the time being, of himself, his wife and daughter*.

A perusal of the fact matrix of *Surjit Lal Chhabda* reveals that its decision-making clearly falls in the category of second class of cases. Accordingly the Supreme Court expounded:[81]

> 'Kathoke Lodge' was not an asset of a pre-existing joint family of which the appellant was a member. It became an item of joint family property for the first time when the appellant threw what was his separate property into the family hotchpot. The

77. *Id.* at 157-58 (para 39).
78. *Ibid.*
79. *Ibid.*
80. *Ibid. (Emphasis added).*
81. *Id.* at 159 (para 42).

> appellant has no son. His wife and unmarried daughter were entitled to be maintained by him from out of the income of Kathoke Lodge while it was his separate property. Their rights in that property are not enlarged for the reason that the property was thrown into the family hotchpot. Not being coparceners of the appellant, they have neither a right by birth in the property nor the right to demand its partition nor indeed the right to restrain the appellant from alienating the property for any purpose whatsoever. Their prior right to be maintained out of the income of Kathoke Lodge remains what it was even after the property was thrown into the family hotchpot: the right of maintenance, neither more nor less. Thus, Kathoke Lodge may be usefully described as the property of the family after it was thrown into the common stock but it does not follow that in the eye of Hindu Law it belongs to the family, as it would have, if the property were to be devolve on the appellant as a sole surviving coparcener.

The idea of quoting the application-statement of the three-judge bench of the Supreme Court *in extenso* is to show how, in what manner and under what circumstances the separate property of a member of Hindu joint family truly becomes the property of the joint family as a whole. If one applies the three-judge bench exposition of Mitakshara law, namely, that the separate property of a coparcener thrown into the common stock truly becomes the property of the HUF if he has son, then to deny the similar effect in the case of a person who inherited the property from his father as an heir *vis-a-vis* his own son, as happened in the case of *Chander Sen*, amounts to negating the *hitherto* well established principle regulating the functioning of Hindu joint family system in India. It would indeed be naive to think that while expounding the fundamental principles of Hindu law in the year 1976, the three-judge bench was oblivious of the impact of legislative intent of Hindu Succession Act of 1956. In fact, their propounded principles have strengthened the joint family and Mitakshara coparcenary still more by the Hindu Succession (Amendment) Act, 2005, which makes the daughter of a coparcener as coparcener.

In view of the legislative intent as expounded above on the basis of plain reading of the relevant statutory provisions of HSA 1956, it is respectfully contended that the principal proposition laid down by the

Supreme Court in *Chander Sen* in 1986 and thereafter followed in plethora of judicial decisions[82] needs reconsideration by a larger bench of the apex court, more so for two explicit reasons. One, the decision-principle of *Chander Sen* is in conflict with the proposition enunciated by a bench of co-equal strength in *Ass Kaur*.[83] Two, *Chander Sen* tends to reverse the tide so carefully and consciously built by the decisions of two three-judge benches of the Supreme Court in *Narendranath* and *Surjit Lal Chhabda* that encourage us to create and strengthen the institution of HUF rather than crippling the ones in existence by obstructing the flow of their natural resources. The little gains made in the state coffers through direct taxation by obliterating the concept of Hindu Mitakshara coparcenary are bound to seriously affect the social security benefit of the joint or undivided family, which has hitherto been a normal condition of social existence in India.[84] This indeed is "the plain truth," stated the Supreme Court with an unusual degree of assertion in *Surjit Lal Chhabda*.[85] With the continuing sway of *Chander Sen*,[86] it is tantamount to saying that you may continue with your existing HUF if you so like, but without any more natural inflow of property into its kitty for its sustenance! Such a stance would eventually impinge upon the functioning of HUF and thereby affecting its intrinsic social security role.

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82. A computer count *available at;* http:/www.manupatra.com/itimeline/BubbleChart.aspx? manuit+MANU/SC/0265/1986, dated 3/23/2011 reveals that the total number of times *Chander Sen* has been cited is 73: times by the Supreme Court and 65 times by the various high courts.

83. See *supra* part II, 'Second view: Mitakshra coparcenary has been retained,".

84. It is the normal mode of living in the sense that there is a presumption of a family being in the state of union unless the contrary is proved by the party who claims its disruption on account of partition. See, *Shankarrao* v. *Vithalrao,* AIR 1989 SC 879.

85. *In Surjit Lal Chhabda, supra* note 65 the three-judge bench of the Supreme Court rebutted the plea advanced on behalf of the commissioner of income-tax by observing that there was no substance in the contention of the respondent that in the absence of an antecedent history of being joint, the appellant could not constitute a joint Hindu family with his wife and unmarried daughter, for HUF is a normal condition of Hindu society. See, *id.* at 148 (para 11). See also the observation of the Supreme Court at 150 (para 17): "The view of the High Court that appellant has 'no son and therefore no undivided family' is plainly unsound and must be rejected."

86. Barring aside the case of *Balbiri Devi,* see *supra* notes 62-63, in which Sham Sunder J of P&H High Court obliquely pointed the basic flaw in the propounding of the principle in *Chander Sen.*