CHAPTER - II

THE JOINT HINDU FAMILY - A UNIQUE CONCEPT AND COPARCENARY

I. JOINT HINDU FAMILY

The joint Hindu family, with its restricted and joint ownership is one of the most cherished institutions of the

1. Appropriate Sanskrit term for the expression joint Hindu family is Kutumba, sometimes also referred to as Avibhakta Kutumba. See for instance, Mitakshra 1,(1) 28,29 and Dayabhaga, 2,26.

Professor Bhattacharya does not agree with this view and he cites the text:

उत्सर्जनां सोहितां तु त्यत्यता मृदु त्यत्यता

to show that the word has been used to express the concept of the word as a family. He further cites the text of Narada:

नारादश्च महानाण्डसादं सार्वदमानवाच्यं

नरेश्वन विशेषता वैस्मानवाच्यं सार्वदमानवाच्यं

Narada, 13,10.

to show that the word Kutumba has been used to mean "wife and children". See Bhattacharya, K.K., Joint Hindu Family, Tagore Law Lectures (1884-85), p.33. Even so, merely because a word has been used by certain authors to denote a wider or a narrower concept, it does not necessarily follow that the word has lost its primary meaning (Sampath, B.N., The Joint Hindu Family- Retrospect and Prospect, Ben. L.J.,1965, p.33).

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Hindus. It is a unique contribution of Hindu Jurisprudence, which has no parallel in any ancient or modern system of law. Ever since 1850, laws have been enacted which, in general,.

... It may be pointed out that the word Kula does not represent the Joint Hindu Family. First, when two persons are said to belong to the same Kula it merely means that both of them are descendants of such ancestors as were members of the same family. It is in this sense that the word Kula is used in its compound form Sakulya, i.e., the descendants of a common remote ancestor (of course, apart from its technical meaning). Thus, while Kula does lay stress on the members having descended from a common remote ancestor, it is quite inadequate to determine the composition of the family. Second, in Bhagavad Gita (1, 38-43) the word Kula is used in the sense of a race. Third the commentaries and digests never use the word Kula to denote joint family. See Sampath, B.N., The Joint Hindu Family - Retrospect and Prospect, Ban. L.J., 1965, p.33.

2. In fact, for a Hindu there is no escape from the Joint family. May be in one generation it is broken, it is brought to an end by partition but again in the next generation it comes into existence automatically, and there is no way in which one can escape from it. See Dewan, P., Modern Hindu Law, 1979 Edn., p.224.

tend to disrupt the joint family system. Judicial decisions have played no less an important role in its annihilation.

But joint family system is still forceful, important and fundamental aspect of the life of Hindus. It still plays a

4. Mayne observed in preface to first edition of his *Hindu Law and Usage*:

"The age of miracles has passed, and I hardly expect to see a code of Hindu Law which shall satisfy the trader and the agriculturist, the Punjabi and the Bengali, the pundits of Benares and Ramaiswaram, of Amritsar and Poona. But I can easily imagine a very beautiful and specious code, which should produce more dissatisfaction and expense than the law as at present administered".


6. If the onslaught on the institution continue in the same pattern, we can be sure that the institution will be extinct within the next few decades, and at the dawn of the twenty-first century, it has to be looked upon as any other institution given to desuetude. Though new developments are causing its disintegration rapidly, but joint family still has its usefulness and can exist in the present set up.

7. Though joint family has its roots in Hinduism but it is not based on religious grounds alone, as it has secular aspect also which we may notice later.
vital role in the social, political, economic and financial institutions of the country. The joint family gives a great social security. No other institution is so effective as it is. Whatever the sceptic may say about the future of Hindu joint family, it is an integral part and the most characteristic way of Hindus.

8

(1) **Origin**

According to Hindus family is the threshold for the practice of Dharma. Religion and charity begin at home in the cultivation of proper relations in the domestic sphere with


9. Family may be defined as an association of individuals related to one another by kinship, affinity or adoption. An individual in a family is the centre of various relationship. He is the son of another, may be husband of the second, the father of the third and so on. The institution of family with its varied composition during the several millenia of human existence, has been a great conserving agency to preserve the social order and to transmit from generation to generation the cherished values of any community. In the destruction of a family, immemorial family traditions perish; in the perishing of traditions lawlessness over comes the whole family ... This confusion draggeth to hell slayers of the family and the family. See *Bhagavad Gita* I, 40 & 42.

10. "Dharma" signifies some total of religious, moral, social and legal duties of all persons in all walks of life. The Hindu system does not dichotomize welfare into two categories, namely, the temporal and spiritual. Dharma is the general policy which aims at the attainment of both the

(Contd....)
parents and children and brothers and sisters. Maximum amount of good to others, truthfulness, compassion, gratitude, devotion and self control are some of the tenets on which is founded the family life. Yet, in spite of all pervading importance of the family and notwithstanding the fact that the Hindu Dharma, the epics, and the Puranas, which are the standing monuments of Dharma, extol the blessings of family life in abounding terms, the origin and development of family have been shrouded in obscurity. There is no available evidence to reconstruct the past, nor, are we likely to find any such evidence, for family relationship is essentially psychic and in its very nature is not likely to leave any material evidence for the enlightenment of anthropologists thousands of years later. Under these circumstances we can only speculate on the enticing mystery so effectually hidden from us.

(ii) Development

The natural family of parents and children is a biological necessity for nature has implanted instincts which not only draw

... temporal and the spiritual welfare of the individual. See Kane, P.V., History of Dharma, Vol. I, pages 1-4 for definition and meaning of "Dharma".

11. The family is the most important group and oldest form of human organisation. The individual, from a sociological point of view, is almost entirely a creation of his family.

the sexes together but also strengthen the filial bonds.

But the family as an institution, a unit of co-operation and a vehicle for the transmission of property and status, is a later development. The family is a cultural super-structure on a biological foundation. In order to discern the structure of family in early times, we have to take into consideration the institution of marriage prevailing in those times: marriage is an institution and family is the association that embodies that institution. A society which practises patriarchal form of marriage gives rise to patrilineal families; but society wherein matriarchy is the rule gives rise to matrilineal families. Whether the form of family, at the dawn of human civilisation, was patriarchal or matriarchal is a quest beset with controversies. Judging from the material evidence available we find that, depending solely upon local circumstances, either system may arise and spread out at any level of human civilisation; both may exist.

13. Patriarchal form of marriage is one where a man appropriates a woman exclusively and, as a result, the women and the children come under the potestas of the husband.

14. In matriarchy, there is no question of exclusive appropriation of the woman by any man. The head of the Matriarchal family is the eldest living female and the lineage is traced through females only.

15. Sir Henry Maine believed that patriarchal form of social life was the original and universal form of social life. The SWISS Jurist Bachofen reached precisely the opposite conclusion.
side by side;\textsuperscript{16} and either may spring from or develop into the other. Further, at a very early period of human civilisation, patriarchal family system rose to ascendancy and was widely prevalent, throughout the world.\textsuperscript{17}

The patriarchal family resembled a miniature state, having at its head the paterfamilias who enjoyed vast and exclusive authority over the members and the property of the family. After the death of paterfamilias the patriarchal family either split up,\textsuperscript{18} into as many patriarchal families as there were sons of the deceased, with each son becoming a paterfamilias, or continued\textsuperscript{19} as such under the leadership of the eldest male member of the family who, not being the father, enjoyed lesser powers than the paterfamilias. It is difficult to ascertain the causes that led to the abandonment of the patriarchal family system and the adoption of joint family system in India. It is also not certain when this transmission took place, though there are indications that the

\textsuperscript{16} For instance, Malabar where both systems co-exist.
\textsuperscript{18} As in Rome.
\textsuperscript{19} As in India.
joint family system existed in the Vedic period and was the forerunner of the village community.

20. An analysis of the Vedic and Brahmana literature leads to the conclusion that the joint family system was prevalent in the Vedic Age. See for instance Ghurve, Family and Kin, p. 45; Pusalkar, The Vedic Age, p. 384; Radhakumud Mukerjee, Hindu Civilization, 1st ed., p. 78; See also Gupta, N.C., Evolution of Law, pp. 142-143 where he denies the prevalence of joint family system in Vedic period. It may, however, be mentioned that although he professes to rely upon both Girihiya Sutras as well as Dharmasutras, he has in fact founded his theory on passages drawn entirely from Girihiya Sutras. In the Girihiya Sutras, we find the ideal picture of a householder, whereas in Dharmasutras, we find the wisdom of practicality that is maintained in life. Srauta Sutras, Girihiya Sutras and Dharmasutras are supplementary treatises and all the three are to be taken together to draw a particular conclusion. Consequently a picture of the Vedic family drawn on the basis of the Girihiya Sutras only cannot be taken as accurate (See Sampath, B.N., The Joint Hindu Family - Retrospect and Prospect, Ben. L.J., 1965, p. 36).

21. Professor Mitra, R.C. The Law of Joint Property and Partition, Tagore Law Lectures, 1913 Edn., et p. 22 holds the view that:

"In the natural order of things, the patriarchal family consisting of the father and his sons in which the influence of the father was supreme must have preceded the joint family and the village community. Upon the death of the patriarch or the father, the family consisted of brothers and their sons and when they chose to live together, they lived as a joint family. The joint family thus became the second stage of living in groups — in the infancy of the world when hunting was a man's chief occupation and his wants were few, the families naturally grouped together for their protection from the inroads of their neighbours and hence arose the system of village communities".

(Cont'd....)
(iii) Nature and Incidence

A joint Hindu family comprises of males lineally descended from a common male ancestor, their wives, and

... But Professor Bhattacharya is of the view that the joint family system is posterior to the village communities,

See Bhattacharya, K.K., Joint Hindu Family, Tagore Law Lectures, 1884-85, pp. 72-87.

It is, however, submitted that the institution of joint family and village community system are not inconsistent with each other; both may exist simultaneously. If village community is the outer circle, joint family is the inner circle. It may be, as Professor Bhattacharya asserts, that the proprietorship of the village land vested in the community; but there is nothing to show that the village community encroached upon other rights of the family. For instance, joint families existing in a village community owned all sorts of wealth such as houses, utensils, slaves, cattle etc., which did not vest in the community (See Sampath, R.N., The Joint Hindu Family - Retrospect and Prospect, Ban.L.J., 1965, p.36. See also Devan, P., Modern Hindu Law, 1979 Edn., p.224, wherein it is stated that Anthropologists and sociologists still do not agree as to whether the Mitakshra joint family evolved out of the despotic patriarchal family or the democratic village community. See also, B. Sridharan V C.W.T. (Mad.), A.I.K., 1970. Vol.L.249/252, wherein High Court beautifully traced the origin and development of Mitakshra Joint Family on the basis of judicial precedents and statutory enactments.

22. Joint Family may be upto any generation, but seldom stretches, in modern times, beyond four generations.

unmarried daughters. The daughter, on marriage, ceases to be a member of her father's family and becomes a member of her husband's family. The joint 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. The fundamental principle of the Hindu joint family is the tie of Sapindaship, without which it is impossible to form a joint Hindu family. With it, as long as family is living together, it is almost impossible not to form a joint Hindu family. It is like Sapinda relation, which distinguishes the joint family, and is of its very essence. The joint Hindu family, with all its incidents, is thus a creature of law and cannot be created by act of parties. It confers a status on its members which can be acquired only by birth or by marriage to a male or by adoption. It has to be clearly understood that the existence of the common ancestor is necessary for bringing a Hindu joint family into existence; for its continuance common ancestor is not a necessity. The death of the common ancestor does not mean that the joint family will come to an end. Upper links are removed and lower ones are

24. It includes within its fold illegitimate sons and concubines who enjoy certain limited rights. Same is the case of widowed daughters who return to their father's family. See Velliappachetty v Natarajan, AIR 1931 P.C. 294 approved in Gur Narain Pass v Gur Tahal Das, AIR 1952 S.C. 225.

added and in this manner, so long as the line does not become totally extinct, the joint family continues and can continue indefinitely, almost till perpetuity. One thing worth noticing is that in a family of husband and wife there is no common ancestor.

(iv) Joint Family vis-a-vis Corporation, Joint Tenancy and Composite Family:

The joint family though resembles a corporation, but it is not a corporation. It has no legal entity distinct and separate from that of the members who constitute it. It is not a juristic person either. Additions to and deaths in the family do not alter the character of the family; they merely affect the quantum of interest of the members to be ascertained at the time of partition though so long as the joint family status continues, the members of the family cannot predicate their interest in the joint family property. Every member is entitled to the benefits which the family affluence can provide. The joint Hindu family is often

compared to the English joint tenancy. However, beyond an apparent resemblance in the incidents of unity of interest, the right of partition and the rule of survivorship, the joint Hindu family is entirely distinct in character and conception. Hindu joint family is also different from a composite family, which is unknown to Hindu law. The Institution of composite family is a creature of custom and owes its constitution to an agreement. Where two or more families agree to live and work together, pool their resources, throw their gains and labour into the joint stock and shoulder the common risk, there comes into existence a composite family.

(v) Presumption of Jointness

The presumption is that the members of a Hindu family are living in a state of union, unless the contrary is


31. This presumption can be rebutted by direct evidence or by a course of conduct. If one of the coparceners, separates himself from the other members of the joint
established. The strength of the presumption may vary from case to case depending upon the degree of relationship of the members and the farther one goes from the founder of the family, the weaker may be the presumption.\(^3\) But, generally speaking, 

... family and has his share in the joint property partitioned off for him, there is no presumption that the rest of the coparceners continue to be joint. There is no presumption that because one member of the family separated himself, there has been a separation to all. It would be a question of fact to be determined in each case upon the evidence relating to the intention of the parties whether there was a separation amongst the other coparceners or that they remained united. The burden would undoubtedly lie on the party who asserts the existence of a particular state of things on the basis of which he claims relief. It may be added that in the case of old transactions when no contemporaneous documents are maintained and when most of the active participants in the transactions have passed away, though the burden still remains on the person who assert that there was partition, it is permissible to fill up gaps readily by reasonable inference than in a case where the evidence is not obliterated by passage of time.


See also Bharat Singh v Mst. Bhagirathi, 1966 S.C. 405 (There is a strong presumption in favour of Hindu brothers constituting a joint family. It is for the person alleging severance of the joint Hindu family to (Contd...)
the normal state of every Hindu family is joint and in the absence of proof of division, such is the legal presumption. Thus a man who separates from his father or brothers may, nevertheless continue to be joint with the members of his own branch. He becomes the Head of a new joint family, if he has a family, and if he obtains property on partition with his father and brothers, that property becomes the ancestral property of his branch qua him and his male issues. The normal state of every Hindu family is that it is joint family, presumably joint in food, worship and estate and the presumption is that it continues to be joint. If it is not joint in food or worship or estate, in any one or all of them, it does not necessarily imply that it has ceased to be joint family. Severance in any of them or all of them is a strong piece of evidence for severance of joint status, but

establish it. The mere fact that mutation entry after the death of the father was made in favour of three brothers and indicated the share of each to be one third, by itself can be no evidence of the severance of the joint family which, after the death of father consisted of the three brothers who were minors); Girijanandini Devi v Bijendra Narain Choudhary, AIR 1967 S.C. 1124 at pp.1127-1128 (The presumption is the strongest in the case of father and son and brothers and one who alleges that they have separated has to prove it satisfactorily).

See Sat Charandas Debi v Kanai Lal Moitra, AIR 1955 Cal. 206 at p.206:presumption is stronger in case of brothers than in the case of cousins. See also Rukhmbai v Laxminarayan, AIR 1960 S.C. 335.
by itself not conclusive.\textsuperscript{34} For instance where three brothers owning a joint family house were working at three different places, it was held that they constituted a joint family; simply because they were not living joint does not lead to an inference that they did not constitute a joint family.\textsuperscript{35} The existence of joint\textsuperscript{36} estate is not an essential requisite to constitute a joint family and a family which does not own, any property may nevertheless be joint.\textsuperscript{37} Hindus get a joint family status by birth and the joint family property is only an adjunct of the joint family\textsuperscript{38} where there is a joint estate, and the members of the family become separate in estate, the family ceases to be joint. Mere severance of food and worship does not operate as a separation.\textsuperscript{39}

\textsuperscript{34} Dewan,P., Modern Hindu Law, 1979 Edn., p.225.
\textsuperscript{35} Kathaperumal Pillai V Rajendra, AIR 1959 Mad.409.
\textsuperscript{36} It will be a rare case where joint family possesses no property. At least it may have utensils and other articles of daily use which members use in common.
\textsuperscript{37} Jankiram V Nagamony, AIR 1926 Mad. 273; Laldas V Motibai (1908) 10 Ram.L.R. 175; Pandit Mohan Lal V Pandit Ram Dayal (1941), 16 Luck.705.
\textsuperscript{39} Chowdhry Ganesh Dutt V Jewach (1904) 31 I.A. 10.
II. COPARCENARY

(i) Origin and Development

Two principal schools of Hindu Law, the Mitakshara and Dayabhaga, fundamentally differ regarding the principles of inheritance and the joint family system, each of them having a respectable antiquity to support its theory. Authors of both schools gave crystallized form to the prevailing customs and usages of their times buttressing their stand with the texts of hoary sages of ancient times.

The doctrine of right by birth has been the bone of contention between these two schools. Whereas Mitakshara upholds the Janma Swatwavad, Dayabhaga refutes the same to establish the theory of Uparama Swatwavad.

The principle of right by birth as understood and applied today is the culminating point of a long process of evolution covering thousands of years. Moreover, the original


41. Acquisition of right by birth.

42. Acquisition of right on the demise of the previous owner.
concepts were on occasions, extended and even distorted to meet local needs, whether of permanent nature or temporary character. It is, therefore, not surprising that we find innumerable and at times even irreconcilable inconsistencies among, texts of sages. Consequently, we cannot dogmatise any particular proposition relying only upon the texts of a sage, however, great he may be. A proper appreciation of the text needs study of the text in the context of its background and rationalisation in terms of the purpose which the text purported to achieve.\textsuperscript{43} Texts relating to right by birth may be classified into three broad heads.\textsuperscript{44}

(1) Texts that definitely establish the absolute dominion of the father over the property in his hands and give him unfettered right of disposition. It is emphatically stated in these texts that the sons have no right in the property in the hands


\textsuperscript{44}. See Sen Gupta's \textit{The Evolution of Ancient Indian Law}, p.203.
of the father during his life time. Indeed Manu's text even denies the right of the son in the property acquired by the son himself.

(2) Texts that concede to the sons certain rights in the property in the hands of father, such as the right to restrain the dissipating father from alienating the ancestral or even self acquired immovable property.
(3) Texts that specifically declare the co-ownership of the father and the son in the property in the hands of the father. According to these texts, a son, as soon as he is born, becomes a co-owner with his father, of the ancestral property and even acquires some interest in the self acquired property of the father.

It is significant that all the texts of sutras or earlier period denied the son any right in the father's property and the texts laying down the co-ownership of the father and son belong to the smritis period. Manu can be cited both to support father's absolute powers as also son's co-ownership.

48. नवीन शुचनि उक्तनां यदि सर्वाः पिता अभिषिक्तः || तत्रावस्थितम् उन्हें से महाभाषण कर दिला कर लिखस्या ||
हेतु धिता यथा भागदा विकल्पणो एकस्यकलो िषा यथान सर्वाः हर्षस्ये देवमेव पितु: पुजयाद मन्त्रमेकवः ॥

49. This anomaly may be due to the fact that Manu Smriti occupies, in point of time, an intermediate position; it marks off the end of sutra period and the beginning

(Contd....)
To sum up, the son was denied any right in the property at the earliest period, even in his self-acquired property he had no right of disposition. This rigidity softened in latter times where we find fathers in their decrepitude, distributing their property among their sons. Though the sons could not claim partition as a matter of right, yet instances of unrighteous sons forcing their fathers to partition the property were not unknown. To begin with, this attitude of sons was met with utmost opprobrium and such sons were subjected to social ostracism e.g. they were deprived of invitation in funeral repasts. However, it is likely that

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of the Smriti period. It is plausible that Manu was on the Horns of dilemma. He could not abandon the pronouncements of the predecessors, yet he could not overlook the prevailing customs and usages. Perhaps the dilemma was sought to be resolved by stating the norms of the hoary sages of the past but prescribing rules consistent with the spirit of prevailing customs and usages, a practice which brought in inconsistencies in the Manu Smriti (see Sampath, The Joint Hindu Family: Retrospect and Prospect, Ban. L.J. January 1965, p. 39).

50. Gautama XV, 15, 19.

51. Ibid.
fathers misused their absolute powers to the detriment of their off-springs. It is only on this premise that we can explain the moral precept limiting fathers' absolute powers which we come across in later times.\textsuperscript{52}

It is also likely that the limitations of the moral precept were exposed by continued misuse of the absolute powers and society reacted by changing its attitude towards a son who claimed partition. At a still later stage, the evil of misuse of absolute power was sought to be restrained by recognising co-ownership of father and son.

The conflict between the theory of absolutism of the father and theory of right of birth of the son is, thus, of respectable antiquity. It existed prior to \textit{Smriti} period. Vijnaneswara and Jimuthavahana did not, contrary to general assumption, propound novel theories; they merely took sides with the existing theories and paved the way for their general acceptance. The reason why Jimuthavahana re-arrested the theory of absolutism of the father is a matter of conjecture.\textsuperscript{53}


\textsuperscript{53} Ibid., p.40.
It may be emphasised that Mitakshara mentions only the son and the grandson and does not refer to the great grandson. It is only Mitra-Misra, author of Viramitrodaya who elicits the right of the great grandson from the text of Yajnavalkya, but the arguments of Mitra-Misra is not very convincing.\(^5^4\)

\(^5^4\) Yajnavalkya enjoins the sons and the grandsons to pay the debts of the father who is dead, who has gone abroad or who is afflicted with disease. And because Yajnavalkya used the word in plural number i.e. "Pautrii" Mitra-Misra, concludes that the great grandsons are also included. Mitra Misra argues that if Yajnavalkya had really intended to include merely sons and grandsons he would have used the word in dual number and not in plural number. But this argument is hardly convincing. The use of the word in plural number suggests that more than one off-spring in the same generation was sought to be included and not that more than one generation of descendants were being included.

There is no reported decision which specifically discusses the right of the great grandson. However, the Courts have always recognised the right of the great grandson. The authority is more in judicial lore echoing bold statements of certain commentators than in reasoning (See Sampath,B.N., The Joint Hindu Family - Retrospect and Prospect, Ban. L.J., January 1965, p.41).
There is a catena of cases\(^5\) that the son has right by birth only in the ancestral property in the hands of father and the father has absolute right to dispose of his self-acquired property. But this view is not in conformity with ancient texts. P.N. Sen rightly points out that, according to śārīritis, the son acquires interest by birth in the ancestral as well as self-acquired property in the hands of the father, though the nature of his interest is different in the two categories of properties.\(^6\)

The nature of the interest of the son, according to śārīritis depends on as to whether the property is movable or immovable. The father has an unrestricted right of alienation over his self acquired movable property. But the right to alienate ancestral movable property is subject to being for proper use. Thus when the father begins to dissipate or wants to dispose of ancestral movable property in favour of one son to the exclusion of others, his power\(^7\)

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55. Rai Balwant Singh v Rani Kesori (1898) 25 I.A. 54; Arunachala Mudaliar v Muruganatha Mudaliar, AIR 1953 S.C. 495; Muddun v Gopal v Ram Baksh (1963) 6 W.R. 71 (Cal.).


57. In Lakshman Dada Nayak v Ramchandra (1881) 7 I.A. 181, a Hindu father had bequeathed a large amount of ancestral movable property to one of his individual sons. The Privy Council held the bequest invalid because the text distinctly prohibited such an unequal distribution.
of free disposition is fettered. As regards immovable property, whether self acquired or ancestral, the father cannot alienate the same without the consent of sons. However, though the son, being a co-owner in the ancestral immovable property, has the right to enforce partition of the same, he has no such right in the self acquired immovable property of the father.

Jamuthavahana establishes that the son has no right either in the ancestral or self acquired property in the

58. एवं ना निषुध्द नित्ती अत्यन्ति रत्नाशासिति सं प्रवेश्या

कृतानां (वाचनः) ति वाचनं ति नित्तिर्माणः।

59. Rule laid down by the Privy Council in Rai Balwant Singh v Rani Kishori (1898) 25 I.A. 54 that the father could alienate the self acquired property in a way he liked and the text, which restricted the rights of the father were only recommendatory, is a clear departure from the strict and wholesome rule of Mitakshara.

60. Strictly speaking there is no Joint Family between father and son under the dayabhaga school. Sons have no right by birth. Jamuthavahana makes "uparama Swatwavad" the bedrock of his doctrine and states that the word "heritage" is used signifies wealth in which property dependant on relation to the former owner arises on the demise of the owner - See Dayabhaga I, 4-5.
hands of his father. Under Dayabhaga all properties self acquired as well as coparcenary devolve by succession. It is, however, interesting to note that, notwithstanding his denial of son's right by birth, he did not entirely endorse the view that the father had absolute right of disposal over the ancestral property. While explaining the text of Vyasa, he asserts that alienation of ancestral property which effects the maintenance of the family is not proper. Further, he did not detail all the circumstances under which it would be proper or improper for the father to dispose off the ancestral property. Nor did he precisely indicate the nature or extent of the son's interest in case of improper alienation or division of ancestral property by the father. He left the consequences of his doctrines to take their own course.

The sweeping proposition laid down by the courts that the Dayabhaga father could alienate both ancestral and self-acquired property is not fully warranted by the texts of

63. Rama Koomar v Kishunkunker (1812) 2 S.D. 42 (52), Juggo Mohun v Neemo Morton 90 S.D. quoted in Mayne's Hindu Law, p. 451 and 452, Foot Note (1950 Edn.).
Jimuthavahana. By quoting Dhareswara and Vishnu, Jimuthavahana reluctantly concedes, that sons have some interest, in the ancestral property, in the hands of their father, though not amounting to a right, by saying -

"a father can divide his self acquired property among his sons in any way he likes, but, not so in regard to ancestral property because the rights of the father and son are equal in it."

From these texts, we find that Jimuthavahana's theory "Uparama Swatwavad", the bed rock of his doctrine with which he has so gallantly combatted fails. The pitfalls of his doctrines are, here, apparent. On one hand he denies the son's right by birth and upholds the absolute right of the father in both the ancestral and self acquired properties. On the other hand, faced with the facts of life, he denounces the father's right to divide the ancestral property in unequal shares, or to alienate the ancestral property to the detriment of the family.

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64. For comments see G.S. Sastry, *Hindu Law*, p.129 (1st Edn.).
65. Emphasis supplied.
67. *Dayabhaga* I, 4-5.
68. Supra f.n.65.
(ii) Nature of Coparcenary

Coparcenary is a creature of Hindu law and cannot be created by agreement of parties except in the case of reunion or adoption. It is a corporate body or a family unit. The law also recognises a branch of the family as a subordinate corporate body. The said family units, whether the larger one or the subordinate one, can acquire hold and dispose of family property subject to the limitations laid down by law. Ordinarily, the Manager, or by the consent, express or implied of the members of the family, any other member or members can carry on business or acquire property, subject to the limitations laid down by the said law, for or on behalf of the family. Such business or property would be the business or property of the family. The identity of the members of the family is not completely lost in the family. One or more members of that family can start a business, or acquire property without the aid of the joint family property,

72. On adoption the adopted son becomes coparcener with his adoptive father as regards the ancestral properties of the latter. Sitabai v Ram Chandra 1970 S.C. 343; State Bank of India v Ghamandi Ram, AIR 1969 S.C. 1330 at p. 1333; Savan Ram v Kalavati, 1967 S.C. 1761; See also Motilal v Sardar, 1976 Raj. 40.
but such business or acquisition would be his or their acquisition. The business so started or property so acquired can be thrown into the common stock or blended with the joint family property in which case the said property becomes the estate of the joint family. But if he or they do not do so, the said property would be his or their "self-acquisition", and succession to such property would be governed not by the law of joint family but only by the law of inheritance. In such a case, if a property was jointly acquired by them, it would not be governed by the law of joint family; for Hindu law does not recognise some of the members of a joint family belonging to different branches, or even to a single branch, as a corporate unit. Therefore, the rights inter-se between the members who have acquired the said property would be subject to the terms of the agreement whereunder it was acquired.\[74\]

(iii) Incidents of Coparcenership

A coparcener has an interest by birth\[75\] in the joint family property, though until partition takes place this is

\[74\] Supra f.n. 70 at p.304.

\[75\] Kanta v Rajah (1863) 9 M.I.A. 539; Venugopala v Union of India, AIR 1969 S.C. 1094.
an unpredictable and fluctuating interest which may be enlarged by deaths and diminished by births in the family; every coparcener has a right to be in joint possession and joint enjoyment of joint family property—both these are expressed by saying that there is a community of interest and unity of possession. Ownership acquired by birth in the coparcenary property has given birth to the doctrine of Samudaya Svatawavad or aggregate ownership in the Mitakshara school. Till partition all the coparceners

76. See also C.I.T. V Raja of Bhor (1967) 65 I.T.R.634 at p.637.

77. "No individual member can say that, 'this is mine' or that 'this item of property belongs to me'; what he can say is, "this is ours". The moment a person is born in the family, we say that he acquires an interest, in the sense that he has right of common enjoyment and common use of all properties, because he by birth becomes a member of the community. So long as he is alive he has an interest and cannot be denied common enjoyment and common use. But once he dies, he leaves nothing behind. Those who survive him continue to have the right of common enjoyment and common use. This phenomena is expressed by saying that the one who is born in the family has a right by birth and those who are left behind, i.e., survive the others, have a right of survivorship". See Dewan, P., Modern Hindu Law, 1979 Edn., p.229.

78. Joint ownership can be traced in an embryonic form to the Vedic times - see Vedic Index, 1, 245; Jolly; Law and Customs, 203-204, quoted in Mayne, Hindu Law and Usage, 309 (11th rev. ed. by N.Chandra Sekhara Aiyer, 1957).
have got rights extending over the entirety of the coparcenary property. According to Mitakshara School of Hindu Law all the property of a Hindu joint family is held, in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and thereafter to be born. 79 Every coparcener has a right to be maintained including a right of marriage expenses being defrayed out of joint family funds. 80

To sum up the incidents of coparcenership under the Mitakshara law are:

1. the lineal male descendants of a person upto the third generation, acquire on birth ownership in the ancestral properties of such person; 82

79. See Mitakshara, Ch.1,1-27.
82. C.I.T. V Laxminarayan, AIR 1935 Bom. 412; Mat Sirtaji V Algu Upadiya, AIR 1936 Oudh 331; Raja Ram Narain V Pertuon Singh (1873) 11 Beng. L.R.397.
83. Since under the Mitakshara Law, the right to joint family property by birth is vested in the male issues only, females who come as heirs, to obstructed heritage (sapratibandha days) cannot be coparceners. See Gristithi (Contd....)
2. that such descendants can at any time work out their rights by asking for partition;

3. that till partition each member has got ownership extending over the entire property, conjointly with the rest;

4. that as a result of such co-ownership the possession and enjoyment of the properties is common;

5. that no alienation of the property is possible unless it is for a necessity, without the concurrence of the coparceners; and

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85. Appovier V Rama Subba (1866) 11 M.I.A. 75.

86. Katama Natchlar V Rajah of Shivagunga (1863) 9 M.I.A. 539.


6. that the interest of a deceased member lapses on his death to the survivors. 89

But the incidents of coparcenership and joint family under Dayabhaga law fundamentally differ from their counterpart in the Mahakshara law. In the Dayabhaga law - (1) there is no 'right by birth' in any property, ancestral or self acquired; (2) there is no 'unity of ownership', but there is 'unity of possession' of defined shares. It is the unity of possession which makes them coparceners and the joint family also exists in the unity of possession; (3) coparceners have defined shares in the joint family property and are owners of that share; (4) there is no devolution by survivorship; it is always by succession; (5) every coparcener has absolute

89. Katama Natchier V Rajah of Shivasagar (1863) 9 M.I.A., 539; Musammat Lakhtati v Farneshwar, AIR 1931 Oudh. 108; though where the deceased coparcener leaves male issues, they represent his rights to a share on partition Sheo Gopal v Firm Ganesha Das Ram Gopal, AIR 1931 Oudh. 327.

90. See Batai Bala v Chahal Sen, AIR 1974 Pat. 147 at p.149; Bageshwari Prasad v Deopati Kuer, AIR 1961 Pat. 416 at p.418.


92. When two or more persons inherit jointly, they take as tenants-in-common, except only (1) widows, and (2) daughters, who take as joint tenants with right of survivorship. See Mulla, Principles of Hindu Law, 1970, Edn., p.87.
rights in his defined share in the joint family property;
(6) coparcenership could consist of males as well as females;
and (7) every adult coparcener, male or female is entitled to
enforce a partition of the coparcenary property.\(^{94}\)

**Status of a son in Embryo**

Under the Hindu law a son conceived is in many respects,
equal to a son born.\(^{95}\) A son is deemed to be a part of the
joint family, the moment he is conceived for the purposes of
alienation, partition and inheritance.\(^{96}\) This also applies
in case of an alienation made by a sole surviving coparcener\(^{97}\).
A property obtained by the sole surviving coparcener in a family
does not become his "separate property" so long as there is a
woman in the family who can bring into existence a new coparcener
by adoption.\(^{98}\)

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93. Bageshwari Prasad V Deopati Kuer, AIR 1961 Pat. 416 at
p.418.

Mahmood, Tahir, Hindu Law, 1981 Edn., p.704; Dewan P., Modern

95. Sabapati V Soma (1893) 16 Mad. 76.

96. T.S. Srinivasan V C.I.T., AIR 1966 S.C. 984 at 985 (This
document cannot be extended to invalidate adoption nor
it is relevant in tax matters. For tax purposes Hindu
undivided family cannot be said to come into existence from
date of conception of son. Child in mother's womb not
considered as member of family for purposes of assessment
of income-tax.


98. Manohar Lal Ganeriwal V Bhuri Bai (1973) 3 SCC 432,434; See
 (Contd..)
Status of Illegitimate Son as a Coparcener

An illegitimate child under Hindu law has never been considered as a filius nullius. Son born to an exclusively and permanently kept concubine (Dasiputra) has always been regarded as a member of his putative father's joint family and has a right to be maintained out of the joint family funds during his entire life. However, he has never been considered a coparcener.

The illegitimate son of a Sudra by a continuous concubine has the status of a son, and that he is a member of the family. The share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son.

The illegitimate son does not acquire by birth any interest in his father's estate and he cannot therefore demand....

... also Gurupad v Hirabai, AIR 1978 SC 1239 for the changed situation.

100. Ibid.
101. Undoubtedly he is a co-sharer in the separate properties left by the father and unless exclusion and ouster are pleaded and proved he is entitled to partition. See Gur Narain Das v Gur Tabaal Das, AIR 1952 S.C. 225 at 227.
partition against his father during the latter's life time. On his father's death, the illegitimate son succeeds as a coparcener to the separate estate of the father along with the legitimate son(s) with a right of survivorship and is entitled to enforce partition against the legitimate son, though the illegitimate son takes only one half of what he would have taken if he was a legitimate son.  

The Hindu Succession Act, 1956, has perhaps, unintentionally altered the law relating to illegitimate sons. Under the Act illegitimate sons, even of the Sudras, do not have any right of inheritance. Under these circumstances they can hardly claim a share in the deceased father's property. The question of claiming partition, therefore, does not arise. We do not approve of the present legislative provisions. Quite apart from being unjust to the illegitimate son, it does nothing to solve a social evil which is no less rampant today than it was in the past.

102. Yajnavalkya II, 133-134. Though illegitimate son is not entitled to demand partition where the father has left no separate property and no legitimate son but was joint with his collaterals, he can enforce partition where the father was separate from the collaterals and has left separate property and legitimate sons. The illegitimate son is entitled to succeed to separated father's property whether ancestral or separate in the hands of legitimate sons. See Sadashiv V. Bala, 1972 Bom. 164.  
(iv) Concept

A Hindu Coparcenary under Mitakshara law is a narrower body of persons within a joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property, and consists of father, son, son's son and son's son's son. Like joint family, to begin with, it consists of father and his three male lineal descendants; in its continuance the existence of the father-son relationship is not necessary. Thus a coparcenary can consist of grand-father and grandson, of brothers, of uncles and nephews and so on. This rule is that so long as one is not removed by more than four degrees from the last holder of the property, howsoever removed one may be from the original holder, one will be a coparcener.

But the conception of a coparcenary according to Dayabhaga law is entirely distinct from that of Mitakshara law. Under the Dayabhaga law there is no coparcenary between the father and


106. No female can be coparcener, see Mulla, Hindu Law, 13th ed. (reprint 1970), p.245.

107. Last holder means the senior-most living lineal male ancestor. See also Dewan, P., Modern Hindu Law, 1979 Edn., pp.226-227 for details.
The son has no interest either in the ancestral or self-acquired property in the hands of his father. Coparcenary comes into existence only after the demise of the father when the brothers inherit from their father. On the demise of the father the succession among his sons is per stripes in equal shares. The share of each son does not belong to his branch as is the case under the Mitakshara law, his issues would have no right in that property by birth as each son takes his share absolutely. But if any son is dead and he leaves behind son(s), he (they) by representation will take the same share which his (their) father would have taken, if he (they) would have been alive on the date of the death of his father. Where a son dies leaving behind a widow or daughter, then she would inherit and becomes a coparcener. Thus coparcenary under the Dayabhaga law could consist of males as well as females. Worth noticing point is that under the Dayabhaga law there cannot be a coparcenary of father and son, or grand-father and grandson, or great grand-father and great great son as is


109. Likewise there cannot be a joint family consisting of the father and sons; so long as father is alive, he is the absolute owner. See Charen Dass v. Kanai, AIR 1955 Cal. 206 at p. 208; Kunj Behari v. Gournari, AIR 1958 Cal. 105 at p.109; See also Makhan Lall v. Susbama Rani, AIR 1953 Cal. 164.
the case under the Mitakshara law, though it can be of uncles and nephews.\textsuperscript{110}