The Allahabad High Court and the Mitakshara

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In such a brief essay as the present, only some of the notable contributions made by this Court during the first few years out of the one hundred years of its interpretation and application of the Mitakshara, can be noticed. The scope has had to be limited, not only as to the period of survey, but also as to the subjects that could be noticed.

Reported cases do not indicate any period of infancy, but of mature wisdom and far-sightedness, from the very beginning. There was no hesitation in engrafting, from time to time, new propositions not repugnant to the existing systems of Hindu law. As Cowell has said:

> "The Hindu law system is not and does not profess to be exhaustive; on the contrary, it is a system in which new systems and new propositions not repugnant to the old law, may be engrafted upon from time to time, according to circumstances and progress of society. " (T. L. L.) 1871, at page 256).
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> **[Sanskrit Slok]**
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> (If there was conflict between two Smritis, equity should supersede the law, the rule being that religious code is superior to a legal code.)
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> **[Sanskrit Slok]**
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> (Brihaspati as quoted in Vyavaharnirnaya).
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> [(A decision should not be based only on the sastras. By an inequitable judgment, there is a permanent loss of dharma.) Quoted from Peramnayakam vs. Sivoraman, (1952) 1 M. L. J. 308 F. B. at page 386].

Equity and justice, as a residual source of law, stood long recognised.

There have been many contributions of this Court on questions on which, either there was a conflict of opinion in the Mitakshara itself or, where it was silent or, had laid only a moral instead of a legal rule, which are remarkable. They continue to be good law today even after the lapse of years. Any court can justifiably be proud that the interpretations achieved such lasting value without all the modern aids to interpretation.

The subject of Inheritance is defined by the Mitakshara as below:

> **[Sanskrit Slok]**
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> (The wealth which becomes the property of another solely by reason of kinship to the owner is called by the term)

The use of the term solely excluded property coming by gift or sale.

Mitaskhara classifies inheritance into two classes-

> unobstructed and obstructed
>
> **[Sanskrit Slok]**

Neither of the above classes of heritage was limited to any particular kind of property.

"Although property arises by birth in paternal as well as grand-paternal (ancestral) estate, we shall mention a distinctive peculiarity in dealing with the text, 'land acquired by grand-father, etc., ' the peculiarity being that in regard to property derived from grand-father, the father's right of free alienation is restrained by the co-equal co-ownership of the son, while in regard to properties acquired by the father himself, the son has no right to object to the father's alienation but must acquiesce therein" (Mit. quoted from Hin. Juris., T. L. L. 130). This subjects the father to a restriction in regard to ancestral estate consisting of land only.

There is an earlier passage which speaks thus: "the father is subject to the control of his sons and the rest in regard to immovable estate, whether acquired by himself or inherited by his father or other predecessors since it is ordained. " (Mit. quoted from Hin. Juris., T. L. L. 132).

In regard to alienation, it is slid: "though immovable and bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born, and they who are yet unbegotten, and they who are stil1 in the womb require the means of support, no gift or sale should therefore be made. " (Mit. Ch. I, Sec. I, 27).

Now, when a father sold without authority, could the son eject the purchaser? Which text out of the above was to be followed? This question actually arose in this Court and was referred to a Full Bench in the case of Baboo Ram v. Gajadhur Singh, (1867), Agra H. C. F. B. R. 86. The Full Bench returned the answer that during the lifetime of the father the son could not sue to eject the purchaser.

Was property, inherited by obstructed heritance, the absolute and separate property of the person inheriting it? Which of the above texts should prevail? This Court (Roberts and Pearson, JJ.), in Special Appeal, in the case of Jawahir Singh v. Guyan Singh, (1868), 3 N. W. P. H. C. R. 78, held that it was the absolute and separate property; and a son could not control his father's act in respect of it.

The doctrine of survivorship in respect of ancestral property has flowed from the co-equal co-ownership of the son with the father. It is, however, subject to the rule that male issues of a deceased coparcener "are declared to be the heirs of the shares of the respective fathers". (Brih. XXV, 14, cited in Mayne; 11th Ed., 528). Besides, there is also the rule of preference, the nearest excluding the more remote. The question was whether by mutual agreement the course of inheritance, prescribed by the above rules, could be altered? A Bench of this Court (Morgan, C. J. and Pearson, J.) answered it in the affirmative in the case of Meherban Singh v. Sheo Koomver (Mussumut), (1866) 1 N. W. P. H. C. 106.

Although in that case the question whether an immediate reversioner could also disclaim was not raised, the

principle for decision of this question is perceivable in the Judgment. In a later case, Gooshaeen Teekumjee v. Pursottum Lall Jee, (1868) 3 Agra 238, a Bench of this Court (Morgan, C. J., and Ross, J.) recognised that there could be a disclaimer by the immediate reversioners of their rights.

Can reversioners, distant in succession, challenge an alienation when reversioners nearer in succession do not ? The rule of preference could decide the question of succession, only if there was some property to be succeeded to, but not the right to recover by suit a property alienated. This difficult question was answered by a Full Bench of this Court in the case of Dowar Rai v. Boonda (Mussumut), (1866) N. W. P. F. B. R. 56, in the affirmative.

Partition (severance of co-ownership) is known to Mitakshara (see Ch. I, Sec. I, 4). Unequal division by the father is disapproved since sons are co-equal co-owners with their father. This Court (Turner and Spankie, JJ.) extended this principle to wills, and gave it a legal force in the case of Baldeo Singh v. Mahabeer Singh, (1866) 12 N. W. P. H. C. 155, by holding that there was no right of unequal disposal by will of an interest in the coparcenary property.

"Hindu law does recognise the existence of qualified ownership of property; and the restriction upon the right of free disposal may even go as far as almost to deprive the owner of his right of alienating the property according to his choice. " (Hin. Juris. T. L. L. 49-50). Property where the right is limited to the enjoyment of usufruct only, without prejudicing the corpus, is said, to be [**Sanskrit** word].

If however a widow, in possession of her husband's property, acts in a way destructive or detrimental to the corpus, there ought to be some method of preventing her. In Jawala Nath v. Kulloo, (1868) 3 N. W. P. H. C. 55, a Full Court of six Judges (Morgan, C. J., Ross, Roberts, Pearson, Turner and Spankie, JJ.) recognised the power of Court to dispossess the widow or other female restricted owner, and appoint a receiver in suitable cases where the corpus was threatened, in order to protect the reversion.

Neither the corpus nor the usufruct belongs in presenti to the immediate reversioners as long as the widow is alive. They have only a chance of succeeding. The objection that the immediate reversioner has no right of suit was raised in the case of Golab Koonwer (Mussumut) v. Shib Sahai. (1867) 2 N. W. P. H. C. 54, and this Court (Pearson and Turner, JJ.), overruled the objection and upheld the right of the daughter to sue her mother to restrain a. lienation as her reversion was threatened.

In another case, Udhar Singh v. Ranee Koonwer (Mussumut), (1866) 1 N. W. P. H. C. 234, the competency of a widow to surrender her whole estate to another female immediate reversioner was upheld (Morgan, C. J., and Pearson, J.).

In the case of Gunput Singh (Baboo) v. Gunga Persad, (1867) 2 N. W. P. H. C. 230, a wife had received property in partition during the lifetime of her husband. A question arose whether she took absolutely or only a widow's estate. There were no express words conveying an absolute estate and it was held (Ross and Spankie, JJ.) that she took only a widow's estate.

In the case of Oomrao Singh v. Man Koonwar (Mussumut), (1867), 2 N. W. P. H. C. 136, it was held (Edwards and Turner, JJ.) that persons entitled to maintenance only were not entitled to sue for possession of property.

The liability to repay a debt incurred by another does not, in Mitakshara, arise from relationship.

> [**Sanskrit Slok**]
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> (A woman is not bound to repay the debt contracted by her husband or her sons, a father the debt contracted by the son, nor a husband the debt contracted by the wife, except when it was taken for the maintenance of the family.)
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> [**Sanskrit Slok**]
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> (A son is not to pay the debt even though hereditary, if it is contracted for the purpose of drinking, debauchery, or gambling or if it is the residue of a fine or duty unrequited, or anything idly promised.)

Under the following texts of Yajnavalkya, the liability arose from inheritance.

> [**Sanskrit Slok]**
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> (Any debt contracted in a joint family for maintenance of the members thereof should be repaid by the head of the family; on his death or on his departure to a foreign country, the members who inherit the property must repay it.)
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> [**Sanskrit Slok**]
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> (One who inherits the property must repay the debt, similarly, the taker of the wife (Sanskrit word) then the son, and in case of one who is sonless, the person who inherits the property must repay his debt.)

A difficult question therefore arose in the case of Zaburdust Khan v. Indurmun, (1867) Agra H. C. F. B. R. 55 (1874 Ed.). A son alienated property inherited from his father, who had contracted a simple money debt. The question was whether the creditor of the father could claim his debt against the alienee of the son. The Full Bench ruled that the creditor had no remedy, except in certain circumstances. Those circumstances were stated to be where the alienation was, to the know ledge of the alienee, being made in order to avoid the debt, or with the intention of avoiding it. The remedy of the creditor in such cases was against the son or heir personally.

In the case of Soorjoo Pershad v. Krishan Pertab (Rajah), (1869) 2 N. W. P. H. C. 46, this Court recognised the right of a widow to alienate property for repayment of debts. Among the various purposes of alienation, funds for maintenance or for protection or preservation of the estate were also recognised as being necessary purposes.

Hundred years have gone by. The propositions have come down to us without having been materially affected. Hundred years have not added anything to them, nor have they detracted from the value of those decisions. But for many of the clarifications made by this Court, the development of Hindu Society might have been confused. This Court will, therefore, always occupy a very high place for its contributions to the application of the Mitakshara.