

Quadrant II – Transcript

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Module Name: Alienation of Property- Separate and Coparcenary

Module No: 04

Hello students, I'm assistant professor Ashwini Naik from V M Salgaocar College of Law and today I'll be discussing an important topic with you all, which is alienation of property, that is alienation of separate property and alienation of coparcenary property. At the end of this video you will be able to analyze the concept of alienation of property. You will understand the powers of Karta and coparceners while alienating property. You'll also be able to explain the reasons why Karta can alienate property without the consent of the Coparceners in certain specific cases.

First we will try to understand the meaning of the word alienation. Alienation means transfer of property and this is a very fundamental feature of ownership. Therefore, the term alienation refers to a transfer of property inter vivos or between parties, such as by sale, mortgage, gift, license, or even a lease. Alienation has added importance in Hindu law, as ordinarily neither the Karta nor the coparceners by themselves have the power to alienate the ancestral property.

A coparcenary property is also called a joint Hindu Family property or is also called an ancestral property. Now this concept of ancestral property has been in existence since time in memorial. The term, however, has not been defined in any of the legislations governing inheritance or succession of property amongst the members of the family. Therefore, the term ancestral property can only be understood through judicial pronouncements. In general, the property which is inherited upto three generations is referred to as ancestral property. That means if X has inherited the property from the father or father's father or father's father's father, then that will be ancestral property.

Now let us try to understand the concept of separate property. All property other than joint family or coparcenary property is separate property. A Hindu may possess separate property. Even if he is a member of the joint Hindu family, the term self acquired here indicates that the property has been acquired by the coparceners through his own exertion through his own hard work without the assistance of any family funds. So property which is so acquired either by exertion or he being a legal heir or through a will or property which is inherited from mother, brother, grandmother. Etc. Such property will be called as self acquired property or separate property.

Now let us come to alienation of ancestral property or coparcenary property. We have understood from the previous module that Karta has the power to take care of the family property. He owns an income and he maintains the entire Hindu household. So the Dharma Shastras, they understood that the power given to the Karta is very vast, and they warned that if these powers of Karta are not kept in check, then there are high chances that he may just alienate the property without consulting the coparceners. And this in turn will be detrimental to their interest.

The Smritis and Commentaries empower the Karta to alienate the property even though the coparceners may not favour such alienation, but this can be done only under very few or certain circumstances which Vijnaneshwara has specified in Mitakshara School of Law.

These three instances are:

- a. Aapatkale
- b. Kutumbarthe
- c. Dharmarthe

Now let's try to analyze all these three terms.

- a. Aapatkale

Aapatkale has come from the Sanskrit word Aapatkal which means emergency. So a Karta can alienate ancestral property or coparcenary property if he faces any kind of an emergency in the family. There can be emergencies like medical emergencies or financial emergencies or any kind of emergency related to his business. As long as he can prove that he faced aapatkal, he can alienate joint family property or ancestral property without consulting the coparceners.

- b. Kutumbarthe

The second term is Kutumbarthe. Kutumbarthe has been generated through the Sanskrit word kutumb, which means a family. A Karta can alienate joint Hindu family property or ancestral property for the sake of the kutumb or for the sake of the family. That means if he doesn't have any funds to take care of the family to feed them or for the education of the minor coparceners, then he can alienate this ancestral property without consulting anyone and he will stand justified.

- c. Dharmarthe

The third terminology is Dharmarthe. Dharmarthe has also come from the Sanskrit word Dharma, which means religion. In every Hindu household, there are certain religious duties which a Hindu has to perform. Simplest examples are namkaran ceremony, that is the baby naming ceremony or a marriage of any family member or a daughter and finally thread ceremony. A Karta has to perform these ceremonies for which he obviously requires money. If he doesn't have money, then for the sake of dharmarthe or for the sake of these religious duties or indispensable duties, a Karta can alienate joint family property without consulting any of the coparceners.

In modern and contemporary times the rephrasing and dilution of this concept of alienation, as explained in Dharmashastras, was done by the British Indian courts in light of the needs of the society. Then they interpreted these three terms and they recognized them as

- a. legal necessity.
- b. benefit of estate
- c. Performance of religious and indispensable duties.

Legal necessity you will find here that this is a combination of aapatkale and kutumbarthe and the benefit of estate is actually kutumbarthe and performance of religious and indispensable duties is dharmarthe. Legal necessity is aapatkale and we have to understand any kind of necessity that Karta faces while maintaining his household. Again, it can be any financial, medical emergency or any emergency pertaining to his family or business.

Benefit of estate is when a karta wants to alienate property for the sake of the family. For the developing his estate, which is property, he can alienate existing property.

And third for the performance of religious and indispensable duties, as I've just discussed under Dharmarthe, the Karta can alienate joint Hindu family property.

But there are certain things that have to be kept in mind here by Karta for alienating these properties for any of these three grounds stipulated here. The first thing to remember is that Karta should actually feel the necessity to alienate joint Hindu family property. Secondly, he should not have any other alternate source of raising money for the kind of necessity that he is or trying to provide funds to. And Thirdly, if the coparceners challenge this alienation, then the burden of proof primarily will lie on the alienee or on the person who has purchased that property.

In case the coparceners are not happy with this alienation and they have expressed a clear dissent to the Karta to alienate property, and in spite of that Karta decides to alienate property, then we have to see what are the various remedies available to the coparcener. When the coparceners do not consent to the alienation, they have two important remedies.

The first remedy can be exercised by them before the alienation is completed and the second remedy can be exercised by them after the alienation is completed.

The first remedy is that when a coparcener does not want to go ahead with the Karta with the intended transfer, he can demand his share in the joint family property and cease to be a member of this family. All that he has to do here is make a clear demand for partitioning to the Karta so therefore the moment he demands a share with the clear intention which is communicated to the Karta, then he becomes incapable of touching his share. He will have to partition the property and give the coparcener his share.

The second remedy available to a coparcener is when the transfer has already been affected. Now If this transfer is affected without the consent of the coparcener, or if they have Voiced a strong dissent towards it then they can challenge this alienation in a court of law. Now here it is the discretion of the court to understand whether the alienation is valid or not valid. That is, whether it falls under the three grounds that I have explained earlier, that is legal necessity, benefit of the state and religious and indispensable duties. If it is proved beyond reasonable doubt that Karta alienated those properties for any of the three grounds, then the court will declare this alienation as valid or if the court is not satisfied, then the court will declare that the alienation as null and void.

Now let us try to understand alienation of separate property. When a division or partition happens in a joint Hindu family and ancestral property becomes self acquired property in the hands of the family member who has received it, then he is then considered as the owner of the property and he can alienate the property without any hindrances.

As I've explained to you earlier, separate property is property which a person or a coparcener acquires through his self exertion. Since he's the sole owner of it and since nobody else can claim any right over it, he has the absolute privilege to alienate the property as per his wishes.

To conclude the topic, I would like to say that from the above analysis it is apparent that the coparcenary relationship exists in a Hindu joint family starting from the senior most male member up to four degrees. such senior most male member is deemed as the Karta of the joint family and has the power to alienate the joint family property with the consent of all other coparceners. Apart from the Karta, the father or a sole surviving coparcener is capable of transferring a joint family property with the consent of other coparceners or by self, as the case may be.

Thank you.