

Both to determine the  
order of succession.



Both the systems are based upon the text of Manu which reads: 'to the nearest Sapinda the inheritance next belongs, after them, the Sakulyas, the preceptor of the Vedas, or a pupil.' The difference between the two systems arises from the fact that, while the doctrine of religious efficacy is the governing principle of inheritance under the Dayabhag School, the rule of consanguinity has been regarded as the guiding principle under the Mitakshara system. The basic difference between the two schools arose on their different modes of interpretation of the term 'sapinda'. To Mitakshara it meant the nearest in blood, the rule of consanguinity or proximity of blood relationship became the basis of determining the line of succession. The characteristic feature of Mitakshara law of succession is the principle of propinquity with this most important qualification that no cognate excepting a daughter's son can succeed in preference to an agnate.

This system does not mention the rule of religious or spiritual efficacy as the basis of succession, although the Virmitrodaya formulates and makes use of it in finding a position for the great grandson among the direct mail descendants of the deceased on whom the property devolves before the widow and the rest can claim succession.

**Agnates are Preferred to Cognates:**

The Dayabhag system interprets the above text of Manu differently.

According to the author of Dayabhag one who is competent to offer oblation to the males is sapinda and thus the doctrine of religious or spiritual benefit has emanated to determine the order of succession. Thus, according to Mitakashara the preferential right to inherit is determined by family relationship or community of corporeal particles, while in the Dayabhag it is

determined by the capacity of a person to perform funeral rites. It may happen that in some instances the same person would be preferential heir, whichever test is applied, but in others the two tests do not point to the same person. But in Mitakshara, while holding that the right to inherit does not spring from the right to offer oblation does not exclude it from consideration as a test of propinquity or nearness of blood when a question of preference arises in doubtful cases. It also did not lay down any rules to govern the inheritance of the separate property of male who died an undivided member of joint family without leaving male issue of his own. The Privy Council observed that in *Katitma Nachiar v.*

Raja of Shivaganga, that the rule of inheritance stated in the Mitakshara, should, on principle, be extended to the separate property of a man when he died an undivided member of a joint family but without leaving male issue. Accordingly, in the Mitakshara areas the law of succession followed the nature of . property; where the property was coparcenary property it followed the rules laid down by the law of partition and where the property was separate property it followed the rules laid down by the law of inheritance strictly so called. Thus, in the case of a male Hindu governed by the Mitakshara there was no unity of succession; and there could be two courses of devolution of his property.

### **Modes of Devolution of Property:**

The Mitakshara system recognises two modes of devolution of property, namely (a) Devolution by survivorship, (b) Devolution by succession, The rule of survivorship applies with respect to joint family property or coparcenary property whereas the rules of succession apply with respect to property held

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in absolute severality by the last owner. The Dayabhag recognises only one mode of devolution namely, succession.

It does not recognise the rule of survivorship nor a distinction between joint family property and separate property. The reasons, according Mulla, is that while every member of a Mitakshara joint family has only an undivided interest in the joint property, a member of a Dayabhag joint family holds his share in quasi-severality, so that it passes on his death to his heir's as if he was absolute owner thereof, and not to the surviving coparceners as under the Mitakshara law.

**Applicable Only To Separate Property:**

The Mitakshara did not lay down any rules of inheritance, strictly so called, with respect to the interest of a deceased person of coparcenary property.

The reason is obvious. When an undivided member of a coparcenary died, the coparcenary did not die, and his death did not open any inheritance to his interest in coparcenary property capable of being taken by an heir; therefore, the devolution of that kind of property was governed by the law of joint family and partition; it would only in respect of his separate property, if he left any, that the question of inheritance arose.

**Inheritance Never in Abeyance:**

Whenever a Hindu dies, his nearest heir becomes entitled at once to the property left by him.

The right of succession vests in him immediately on the death of the owner of the property. It cannot under any circumstances remain in abeyance in

expectation of the birth of a preferable heir. Where on the death of a Hindu, his property vests in a person who is his nearest heir, it cannot be divested except either by the birth of a preferable heir such as son or daughter who was conceived at the time of his death, or by adoption in certain cases of a son to the deceased.

**Males Take Absolutely, Females Only Limited Estate:**

Males succeeding as heirs from males take absolutely whereas females succeed as heirs either from males or from a female take a limited estate in the property inherited by them, except in certain case in the state of Bombay.

**Spes Successionis:**

The right of a person to inherit as heir on the death of a Hindu is a mere spes successionis, i. e., a bare chance inheritance. It is not a vested right.

He therefore cannot make a valid transfer of it. It is on account of this fact that any agreement entered into by him in respect of inheritance cannot bind persons who actually inherit when succession opens.

**Doctrine of Representation:**

Under this principle, the son, grandson whose father is dead and a great grandson whose father and grandfather both have died, stepped in the shoes of their ascendant so as to take his share in the property. The reason is that a grandson represents the rights of his father to a share and great grandson represents the right both of his father and grandfather. Except in the case of

sons, grandsons and great grandsons the right of representation does not apply and Manu's rule of proximity alone will apply.

Thus the son of predeceased brother of the deceased cannot represent the deceased one and succeed along with the deceased's living brother.

Similarly the son of a predeceased daughter cannot succeed along with the daughter of the deceased. The doctrine also does not extend beyond three degrees reckoned from the deceased. It also does not extend to an illegitimate son of a predeceased son to represent his father when inheritance opens.

On partition among the sons, grandsons and great grandsons they take per stirpes and not per capita.

### **Illustrations:**

(1) Male Hindu, dies leaving a son B, a grandson Ñ and a great grandson D and a great great grandson M. In the above diagram, on the death of A, his property shall devolve on B, Ñ and D. M is excluded from getting any share for he is more than three degree removed from A and the right of representation does not extend beyond the three degrees from A. In the diagrams Ñ represents his father S (deceased), D represents his father and grandfather S<sub>2</sub> (deceased).

If any one of three dies his share will pass on the survivors. Here the property of A shall be divided into three equal shares, each getting one share. (2) A dies leaving, one son B, two grandsons Ñ and D and three great-grandsons Ê, M, N, as shown below: Here 'C' and 'D' will represent their father 'S' (deceased) and 'Ê', 'M', and 'N', will represent the their

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grandfather (S1) (deceased) or their father's ' S2' deceased. On the death of A, his entire estate will be divided into three shares, taking one share, Ñ and D taking one share together and Ê, M, N taking one share together. This is a division of the estate per stirpes. Thus will get one third; Ñ and D will get 1/6 each and Ê, M, N will get 1/9 each.

**Succession per Stirpes and per Capita:**

In per stirpes succession, the several heirs belonging to different branches get their share only from that property which is available to the branch to which they belong. The following heirs take the property per stirpes: (1) Sons, grandsons and great grandsons of a deceased male Hindu. (2) Son's son, daughter's sons and daughters daughter succeeding to stridhan. In succession per capita property is divided equally among all the claimants from one branch. Here the succession is according to the number of heirs, and the property is equally divided.

**Full Blood to be Preferred to Half Blood:**

A sapinda of full blood is preferred to a sapinda of the half blood. This preference, however, is confined to sapinda of the same degree descended from the common ancestor. It does not apply to sapinda of different degrees.

This rule applies to relatives in the Mitakshara system. Thus a paternal nephew of full blood is entitled to succeed in preference to paternal nephew of half blood, they being sapindas of the same degree of descent. In *Shalikram Urkuda Chambare & others v. Pandurang Konda Chatukhodpe & others*, the court held that under Succession Act, full blood is preferred to half blood.

The female heirs of full blood would exclude male heirs of half blood. This preference, however, is confined to sapinda of the same degree descended from the common ancestor.

**Nature of Property Vis-a-Vis Obstructed and Unobstructed Heritage:**

Property may be either (1) joint family property, or (2) separate property of the last owner. Joint family property is synonymous with coparcenary property. It devolves by survivorship and not by succession while under the Dayabhag law it devolves by succession. Thus Mitakshara divides property into two classes, namely, *apratibandha daya* or un-obstructed heritage, and *sapratibandha daya* or obstructed heritage.

Property in which a person acquires an interest by birth is called unobstructed heritage. It is called unobstructed because the accrual of the right to it is not obstructed by the existence of the owner. On the other hand a property, the right to which accrues not by birth but on the death of the last owner is called obstructed heritage. Thus property inherited by a person from his father, father's father or father's father's father is unobstructed heritage as regards his own son, grandson and great grandson. His male issues acquire an interest in it from the moment of their birth. The property which devolves on nephews, brothers daughter's sons etc.

upon the death of last owner is obstructed heritage. Their relatives do not take a vested interest in the property by birth. Their right on the other hand arises only, on the death of last owner of the property who dies without any male issues. The above distinction of property, between obstructed heritage and unobstructed heritage is peculiar to Mitakshara only. According to



Dayabhag heritage is always obstructed. Dayabhag does not recognise unobstructed heritage.