Summary of Workshop Paper on the topic :

Subject :- **1) Proof of documents and procedure to be followed.**

2) Concept of partition in Hindu Law in view of Section 6 of the Hindu Succession Act 1956.

1) Proof of documents and procedure to be followed.

Introduction :-

'**Document**' means any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means intended to be used, or which may be used, for the purpose of recording that matter. A writing, printing, photograph, map, a plan, an inscription on a metal plate or a stone, a plaque, a caricature etc. are documents. '**Documentary Evidence**' means the documents produced for inspection of Court.

2) There are two types of documentary evidence one is primary evidence and another is secondary evidence. Party must produced the best evidence in possession or power of the party. Best evidence means a primary evidence i. e. the document itself. Document itself means original document.

3) As per provision of Section 61 of the Indian Evidence Act, the contents of the documents may be proved either by primary or secondary evidence.

Primary Evidence -

4) As per provision of Section 62 - Primary evidence

means the document itself produced for the inspection of the Court. Primary evidence is the original document or piece of evidence. If primary evidence is available with the party, then it has to be produced by the party as evidence. If primary evidence is not available, party may present reliable substitute for it by sufficiently establishing its unavailability.

Secondary Evidence -

5) As per provision of Section 63 of the Indian Evidence Act, secondary evidence means certified copies or copies made from original or compared with original or counterparts of the documents or oral accounts of the contents of a document given by a person who seen it.

6) Without proof of document, it cannot be read in evidence. There is procedure to be followed to prove the documents. Part-II and Chapter V of the Indian Evidence Act deals with proof of documentary evidence. The production of documents in courts is regulated by the Code of Civil Procedure and Criminal Procedure.

7) The purpose of production of documents in a proceeding before the court is to rely upon the truth of the statements contained therein. This involves the examination of three questions :

i) Is the document genuine ?

ii) What are its contents ? and

iii) Are the statements in the document true ?

8) The genuineness of a document or the

truthfulness of its contents is proved by oral evidence as per Section 59 of the Evidence Act. Whereas, the contents of the document are to be proved either by primary evidence or secondary evidence in view of Section 61 of the Evidence Act.

Proof of document -

9) Mere production of document in proceeding is not enough. Party has to prove the document in accordance with the provisions of Indian Evidence Act.

10) The Hon'ble Bombay High Court in case of **Bama Kathari Patil V/s Rohidas Arjun Madhavi**[1] observed that, "Document is required to be proved in accordance with the provisions of the Evidence Act and merely for administrative convenience of locating or identifying the document, it is given an exhibit number by the Court. Exhibiting a document has nothing to do with its proof though as a matter of convenience only the proved document is exhibited. If a document is duly proved, but mistakenly for otherwise is not exhibited, still it can be read in evidence. Even if a document is marked as an exhibit without its proof, it can be challenged at the time of arguments and even in appeal or revision".

11) Only because the documents are produced on record it cannot be read in evidence unless it is proved in accordance with the provisions of the Indian Evidence Act. The documents admitted in evidence becomes the part of judicial record and constitutes evidence.

12) The contents of documents must be proved either

1. 2004(2)Mh.L.J.752

by the production of the document which is called primary evidence or by production of its copies i. e. secondary evidence. When the documentary evidence is available the oral evidence is not having any weight.[2] Secondary evidence of the content of a document cannot be admitted without the non production of the original being first accounted for. It is incumbent on the person who tenders in the secondary evidence to show that it is admissible evidence. Secondary evidence cannot be accepted unless sufficient reason is given for non production of the original. **[State Bank of India V/s Allibhoy Mohammed]**[3].

13) Section 65 was amended in the year 2000 and Sections 65-A and 65-B have been inserted in the Evidence Act w.e.f. 17.10.2000. These Sections contain special provisions as to evidence relating to electronic record. Certificate under Section 65-B is a must for the admissibility of electronic record as evidence in any trial. After some cases, the law settled by the Hon'ble Supreme Court in **Anwar P. V. V/s. P. K. Basheer**[4] that the certificate under Section 65-B is not dispensable. If the electronic record is not accompanied by the certificate under Section 65-B then such evidence is liable to be discarded.

14) As per provision of Section 65-A of the Indian Evidence Act, the contents of the electronic record may be proved in accordance with the provision of Section 65-B. As

2. (AIR 1978 SC 300)

3. AIR 2008 Bom.81

4. AIR SC 180

per Sub-Section (1) of Section 65-B of Indian Evidence Act any information contained in electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (i. e. computer output) shall be deemed to be also a document. Said electronic record is admissible in any proceeding without further proof or production of the original, if the condition mentioned in Section 65-B of Indian Evidence Act are satisfied in relation to the information and computer in question.

15) As per provision of Section 66 of the Indian Evidence Act a notice must be given before secondary evidence can be received. Notice is required in order to give the opposite party a sufficient opportunity to produce the document and thereby secure the best evidence of its contents.

How to prove the document.

16) Section 67 of Evidence Act requires proof of signatures and handwriting of the person alleged to have signed or written the document produced. Mere admission of execution of a document is not enough but the proof that the signature of the executant is in his handwriting is necessary. Therefore, this provision mandate that the signature and handwriting of a person on a written document can be proved only by examining the concerned person. As per provision of Section 67-A, except in the case of a secure

digital signature, if the digital signature of any subscriber is alleged to have been affixed to an electronic record the fact that such digital signature is the digital signature of the subscriber must be proved.

17) The mere production of registered deed is not sufficient to prove it. The identity of the executant has to be established by oral evidence before the deed can be taken to have been proved. Section 67 mandates that the signature and handwriting of a person on a written document can be proved only by examining the person concerned.

18) The Hon'ble High Court in case of **Mohammad Yusuf V/s D and Anr.** [5] observed that, “The evidence of the contents contained in the document is hearsay evidence unless the writer thereof is examined before the Court. An attempt to prove the contents of the document by proving the signature or handwriting of the author thereof is to set at naught the well recognized rule that hearsay evidence cannot be admitted.

Even if the entire document is held formally proved, that does not amount to a proof of the truth of the contents of the document. The only person competent to give evidence on the truthfulness of the contents of the document is the writer thereof”.

19) As per provision of Section 68, if a document is required by a law to be attested, it shall not be used as evidence until one attesting witness at least called for. The

5. AIR 1968 Bombay 112

sections prohibit the proof of execution of a document otherwise than by the evidence of an attesting witness if available.

20) A will cannot be used in evidence unless one of attesting witnesses, if he is alive and is capable of being examined, is examined for purpose of proving execution and such procedure need not be followed in respect of other documents even if such documents are required to be attested provided such document is registered in accordance with provisions of Registration Act.

21) If no attesting witness can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person. As per provision of Section 71 of Indian Evidence Act, if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. Aid of Section 71 can be taken only when the attesting witness, who have been called, deny or failed to recollect the execution of the document to prove it by other evidence. Section 71 has no application to a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the will and other attesting witness though are available to prove the execution of the same, for reasons best known, have not been summoned before the court. **[Janki Narayan Vs. Narayan Namdeo].**[6]

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6. (2003) 2 SCC 91.

22) Section 72 of the Evidence Act states that, an attested document not required by law to be attested may be proved as if it was not attested. As per provision of Section 77 public documents or parts of the public documents may be proved by producing its certified copies. Other official documents may be proved as per modes prescribed in Section 78 of the Indian Evidence Act.

23) Mere filing of document itself does not constitute the part of judicial record. Secondly, as soon as document admitted in evidence becomes part of the judicial record and Court may read it as evidence. Lastly, as per Section 3 of Evidence Act when, documents held to be proved, not proved or disproved, after considering the matters before it, Court has to apply its mind.

24) **Conclusion -** Thus, proof of document plays vital role in day today judicial proceeding. The documents cannot be read in evidence unless it is proved as per the provisions established by law. Where there is a specific provision covering the admissibility of document, it is not open to Court to call into aid other general provisions in order to make a particular document admissible.

25) **Following are some landmark cases on proof of documents.**

In the case of **Bipin Shantilal Panchal *v.* State of Gujarat**[7]. The Hon'ble Supreme Court observed that,

1. Whenever an objection is raised during evidence

7. (2002) 10 SCC 529

taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment.

2. If the court finds at the final stage that the objection so raised is sustainable the judge or magistrate can keep such evidence excluded from consideration. There is no illegality in adopting such a course.

3. However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.

4. The above procedure, if followed, will have two advantages. First is that the time in the trial court, during evidence taking stage, would not be wasted on account of raising such objections and the court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior court, when the same objection is re-canvassed and reconsidered in appeal or revision against the final judgment of the trial court, can determine the correctness of the view taken by the trial court regarding that objection, without bothering to remit the case

to the trial court again for fresh disposal.

5. This measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.

26) The Hon'ble Supreme Court in case of N.M.A. **Abdul Mithalif V/s Syed Bibi Ammal And ors.**[8] observed that, “There is no presumption that attesting witness knows the contents of the documents”.

27) The Hon'ble Supreme Court in case of **Malay Kumar Ganguly V/s Dr. Sukumar Mukherjee and ors.**[9] observed that, “It is true that ordinarily if a party to an action does not object to a document being taken on record and the same is marked as an exhibit, he is estopped and precluded from questioning its admissibility thereof at a later stage. It is, however, trite that a document becomes inadmissible in evidence unless author thereof is examined; the contents thereof cannot be held to have been proved unless he is examined and subjected to cross examination in a Court of law.

The document which is otherwise in admissible cannot be taken in evidence only because no objection to the admissibility thereof was taken”.

28) The Hon'ble Supreme Court in case of **P. C.**

8.1980 Supp (1) SCC 771; 1979 (ii) UJ 545 SC

9. AIR 2010 SC 1162

Purushothama V/s S. Perumal[10] observed that, “Once a document is properly admitted, the contents of that documents are also admitted in evidence, though those contents may not be conclusive evidence”.

29) The Hon'ble Supreme Court in case of **R. V. E. Venkatachala Gounder V/s Arulmigu Viswesaraswami and V. P. Temple and Anr.**[11] observed that, “A document not admissible in evidence, though brought on record, has to be excluded from consideration”.

30) The Hon'ble Supreme Court further held that, “The objections as to admissibility of the documents in evidence may be classified into two classes : (i) an objection that the document which is sought to be proved, is itself in admissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence, but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the later case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or the mode adopted for proving the document is irregular cannot be

10. AIR 1972 SC 608
11. (AIR 2003 SC 4548)

allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular".

31) The full bench of our Hon'ble High Court in case of **Hemendra Rasiklal Ghia V/s Subhodh Mody**[12] observed that, "Objection to the document sought to be produced relating to the deficiency of stamp duty must be taken when the document is tendered in evidence and such objection must be judicially determined before it is marked as exhibit.

32) Objection relating to the proof of document of which admissibility is not in dispute must be taken and judicially determined when it is marked as exhibit.

33) Objection to the document which in itself is inadmissible in evidence can be admitted at any stage of the suit reserving decision on question until final judgment in the case".

(3) M/S K.B.Saha And Sons Pvt. Ltd vs M/S Development Consultant Ltd.[13]

The Hon'ble Supreme Court held that - From the principles laid down in the various decisions of this Court and the High Courts, as referred to hereinabove, it is evident that :-

12. [2008(6) Mh.L.J.886]

13. (2008) 8 SCC 564

1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.

2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.

3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.

4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immovable property of the value of one hundred rupees and upwards.

5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose.

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2) Concept of partition in Hindu Law in view of Section 6 of the Hindu Succession Act 1956.

INTRODUCTION

34) Partition means a division of property between co-owners or coparceners, resulting in individual ownership of the interest of each. It is not necessary under the Hindu Law that the partition should be executed by a registered instrument. Even a family settlement between the coparceners would be sufficient to effect a partition and by virtue of that they become entitled to individual share and use thereof.

35) Partition can also take place by an act or transaction of coparceners, by which there could be an indication of the separation of his interest. It is settled law that a member of joint Hindu Family can bring about a separation and status by a definite declaration of his intention to separate himself from the family and enjoy his share in severalty.

36) The Hon'ble Supreme Court in case of **Kallooman Tapeswari Prasad (HUF) V/s Commissioner of Income Tax, Kanpur**[14] observed that, “Under Hindu Law partition may be either total or partial. A partial partition may be as regards persons who are members of the family or as regards properties which belong to it. Where there has been a partition, it is presumed that it was total one both as to the

14. (AIR 1982 SC 760)

parties and property but when there is a partition between brothers, there is no presumption that there has been partition between one of them and his descendant. It is, however, open to a party who alleges that the partition has been partial either as to persons or as to property, to establish it".

Section 6 of the Hindu Succession Act.

Devolution of interest in coparcenery property.

37) The preamble of the Hindu Succession Act 1956 signifies that an Act to amend and codify the law relating to intestate succession among Hindus. It laid down a uniform and comprehensive system of inheritance and applies to those govern by the Mitakshara and Dayabhaga School as well as other (Marumakkattayam, Aniyasantans and Nambudri) schools. The Hindu Succession Act reformed the Hindu personal law and gave women greater property rights, allowing her ownership rights instead of limited rights in property.

38) The daughters were also granted property rights in their father's estate. In the matter of succession of property of a Hindu male dying intestate, the Act lays down a set of general rules in Section 8 to 13. Section 15 and 16 of the Act contains separate general rules affecting succession to the property of a female intestate.

39) As per the schedule of Hindu Succession Act, 1956, son, daughter, widow and mother are the class-I heirs.

Section 6 of the Act (prior to Hindu Succession (Amendment) Act 2005) recognizes the rule of devolution by survivorship among the members of the coparcenery. According to proviso if the deceased had left a surviving female relative specified in class-I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara Coparcenery property shall devolve by testamentary or intestate succession under the Act and not by survivorship.

40) This means that before Amendment of 2005 in Section 6 of the Act female could not inherit ancestral property as like male. If a joint family gets divided, each male coparcener takes his share and females get nothing. Only when one of the coparceners died, a female gets share of her interest as an heir to the deceased. Though the phrase “notional partition” has not been used in the Act, it is the creation of proviso to Section 6 (before Hindu Succession (Amendment) Act 2005). The purpose of effecting notional partition is only to ascertain the share of the deceased coparcener and that too only for determining the share of daughter.

41) The Hon'ble Supreme Court in case of **Uttam Vs. Saubhag Singh and ors.**[15] observed that, “The law, therefore, in so far it applies to joint family property governed by the Mitakshara Coparcenary, prior to the amendment of 2005, could therefore be summarized as

15.(AIR) 2016 SC 1169

follows:

(i) When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara Coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (vide Section 6).

(ii) Two propositions (I), an exception is contained in Section 13 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, a interest of a male Hindu in Mitakshara Coparcenary property is property that can be disposed by him by will or other testamentary disposition.

(iii) A second exception ingrafted on proposition (i) is contained in the proviso to Section 6, which states that, if such a male Hindu had died 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 surviving him, then the intestacy of the deceased in the Coparcenary property would devolve by testamentary or interested succession and not by survivorship.

(iv) In order to determine the share of the Hindu male coparcener who is governed by Section 6 proviso, a partition is effected by operation of law immediately before his death. In this partition, all the coparcerner and the male Hindu's widow get a share in the joint family property.

(v) Only application of Section 8 of the Act, either by

reason of the death of a male Hindu leaving self acquired property for by the application of Section 6 proviso, such property would devolve only by intestacy and not by survivorship.

(vi) On a conjoint reading of Section 4, 8 and 19 of the Act, after joint family property has been distributed in accordance with Section 8 on principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it as they hold the property as tenants in common and not as joint tenants.

Amendment in the year 1994.

42) As per the Hindu Succession Maharashtra (Amendment) Act, 1994 which came into effect from 22/06/1994 the preferential right to acquire property in respect of interest in any immovable property of intestate or in any business carried on by him or her was also given to the daughter. However, said amendment is not applicable to the daughter married before commencement of the Hindu Succession Maharashtra (Amendment) Act, 1994 which came into effect from 22/06/1994.

Section 6 of the Hindu Succession Act, after the Hindu Succession (Amendment) Act 2005.

43) The object of amendment in Section 6 by Hindu Succession (Amendment) Act 2005, is to remove the discrimination by giving equal rights to daughter in the

Hindu Mitakshara Coparcenery property as the sons have. Section 6 of the Amendment Act has an overriding effect, so far as the constitution of coparcenery, partition of coparcenery property and succession of interest of deceased male or female member are concerned.

44) After the Amendment Act 2005, on and from the commencement of the Act 2005 in joint Hindu Family governed by Mitakshara Law the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same right in the coparcenery property as she would have had if she had been a son, subject to the same liabilities in respect of the same coparcenery property as that of a son. As per the proviso to subsection (1) of section 6 of the Act, coparcenery right given to a daughter shall not affect or invalidate any disposition or alienation including partition or testamentary disposition of property which had taken place before the 20th December 2004. As per provision of Sub-Section (2) daughter who becomes coparcener as per sub-section (1) is capable of to dispose of her coparcenery interest by testamentary disposition. As per sub-section (3) where Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of Joint Hindu Family governed by the Mitakshara Law, shall devolve by testamentary or intestate succession, under this Act and not by survivorship.

45) Thus, a daughter of coparcener in a joint Hindu Family governed by the Mitakshara Law now becomes a coparcener in her own right and thus enjoys rights equal to those hitherto enjoyed by a son of a coparcener. Since a daughter now stands on an equal footing with a son of a coparcener, she is now invested with all the rights, including the right to seek partition of the coparcenery property. As a result of the new provision, she could also become Karta of the Joint Hindu Family.

46) The Hon'ble Supreme Court in case of **Ganduri Koteshwaramma and Anr. V/s Chakiri Yanadi and Anr.**[16] held that, "The new Section 6 provides for parity of rights in the coparcenery property among male and female members of a joint Hindu Family on and from September 9, 2005. The legislature has now conferred substantive right in favour of the daughters. According to the new Section 6, the daughter of a coparcener become a coparcener by birth in her own rights and liabilities in the same manner as the son. The declaration in Section 6 that the daughter of the coparcener shall have same rights and liabilities in the coparcenery property as she would have been a son is unambiguous and unequivocal. Thus, on and from September 9, 2005, the daughter is entitled to a share in the ancestral property and is a coparcener as if she had been a son".

47) Full Bench of Hon'ble Bombay High Court in case

16. [AIR 2012 SC 169]

of **Badri Narayan V/s Om Prakash**[17] held that, “New section 6 (1)(a) is prospective in operation where are section 6(1)(b) and (c) as well as Section 6(2) are retroactive in operation. Retroactive means the rights under Section 6(1)(b) and (c) and Section 6(2) are available to all daughters living on the date of coming into force of Amendment Act of 2005 i. e. on 09/09/2005 though born prior to 09/09/2005. The daughters born on or after 09/09/2005 held to be entitled to get the benefits of amended Section 6(1)(a). In other words, the heirs of daughters who died before 09/09/2005 do not get the benefit of new section 6. It also held that, new section 6 applies to daughters born prior to 17/06/1956 and thereafter in between 17/06/1956 to 08/09/2005 provided they are alive on 09/09/2005. Furthermore, the case of coparcener who died before 09/09/2005 would be governed by pre-amended section 6(1) of the Act. It is only in case of death of a coparcener on or after 09/09/2005 that the amended section 6(3) of the Act would apply”.

48) The Hon'ble Supreme Court in case of **Prakash and ors. V/s Phulavati and ors.**[18] held that, “The text of the amendment itself clearly provides that the right conferred on a 'daughter of a coparcener' is 'on and from the commencement of Hindu Succession (Amendment) Act, 2005'. Section 6(3) talks of death after the amendment for its applicability. In view of plain language of the statute, there is

17. [2014 (5) Mh.L.J.434]

18. [AIR 2016 SC 769]

no scope for a different interpretation than the one suggested by the text of the amendment and amendment of a substantiative provision is always prospective unless either expressly or by necessary intendment it is retrospective".

"Notional partition, by its very nature, is not covered either under proviso or under Sub-section (5) or under the explanation."

"Accordingly, we hold that, the rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born".

Conclusion -

49] Amendment in Section 6 is prospective in operation. In amended provision of Section 6, there is no scope for notional partition. As held by Hon'ble Supreme Court in case of Prakash V/s Phulavati[19] the amendment is applicable only to living daughter of living coparceners as on 9th September, 2005 irrespective of when such daughters are born.

19.[AIR 2016 SC 769]