TESTAMENTARY & INTESTATE SUCCESSION

The law of Succession is divided into the law of Testamentary Succession and the Law of Intestate Succession. The law of **Testamentary Succession** regulates the devolution of property of a person who dies leaving behind a Will. The law of **Intestate Succession**, on the other hand, regulates the devolution and distribution of the property of a deceased person who dies without making a Will.

While in ancient times devolution by Will was only an exception and devolution on intestacy was the norm, advanced communities today have come to regard succession under a Will as the normal and natural course to be followed except in cases of sudden and unexpected death. Dispositions by Will, however take effect only on the death of the owner, over property belonging to him on the date of his death. Till the death of the testator, his Will has no legal existence or effect. It is kept secret and is capable of being amended, altered, modified and revoked. In character from the date on which it is made till it takes effect on the death of the testator, the Will is compendiously described as “Ambulatory”. It is a mere expression of intention of the person at the time it is made. It may be changed by him from time to time. Any clause or declaration that a particular Will is ‘the last Will and testament of the testator’ does not take away the right to revoke/ alter/ amend it. So long as the Testator is alive he may at any moment cancel his Will and make a totally different disposition of his property.

The **Indian Succession Act, 1925** is an Act consolidating the law applicable to Testamentary Succession in India. However, Testamentary and Intestate Succession among Muslims is governed by

their own personal law, which is known as Muslim Personal Law (Shariat). It is based on the Holy Book of the Muslims 'the Koran'. Accordingly, Muslims are excluded from the operation of the Indian Succession Act. Christians and Parsis in India are governed by the provisions of Indian Succession Act, subject to conditions and limitations provided therein. As far as, Intestate Succession among Hindus is concerned, the Hindus, which include persons belonging to Buddhist, Jaina or Sikh religion are governed by **Hindu Succession Act, 1956**. It may be noted that though uniform civil code throughout India has been included as one of the Directive Principle of State Policy in our Constitution, consensus has not developed for its implementation. Some communities, particularly the Muslims, consider a uniform civil code as an infringement of their right of religious freedom. In such a situation, there is well grounded apprehension that uniform civil code would create alarm and discontent among various communities and they should be allowed to have their personal laws of succession.

Section 2 (h) of the Indian Succession Act, 1925 defines '**Will**' as – "the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death". Therefore, the three **essentials of a Will** are:-

1. It must be a legal declaration of the intention of testator, i.e. the person who makes the Will. The document must be signed or thumb marked by the Testator in the presence of two or more attesting witnesses.
2. The declaration of intention must be with respect to the testator's property.
3. The document should express a desire that his intention must be carried into effect after his death.

What is a '**Codicil**'? A Codicil is similar to a Will and is governed by the same rules as a Will. A document is called a Codicil if it is supplementary to a Will and adds, varies or revokes the provisions of a Will. Section 2 (b) of the Indian Succession Act, defines 'codicil' as "Codicil means an instrument made in relation to a Will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the Will".

In view of Section 57 (c) of the Indian Succession Act, 1925 no oral Will can be legally made, even by Hindus. At present, even Wills by Hindus, must be in writing, signed and attested by atleast two witnesses. However, under Muslim personal law an oral Will is recognized. A Will in the handwriting of the Testator is called **Holographic Will**. But in order to be valid it must also satisfy all statutory requirements of a valid Will. Therefore, a Holographic Will stands on the same footing as any other Will when it comes to proving it in the Court of law.

The law of Succession differs from country to country. In modern times it is possible for a person to reside in several countries in the course of his life, acquire properties and die as the owner of properties in several countries. All rights over immovable property are governed by the law of the country where the property is situated. It follows that it is the law of the locality where the property is situated that governs execution, attestation and interpretation of the relevant Will. However, as regards succession of movable property, the law of the country where the deceased was domiciled at the time of his death shall apply. The reason for the distinction between movable and immovable property in the law of succession is stated to be that the movable

property has no locality and follows the owner wherever he moves, but immovable property has a fixed locus and irremovable by the owner wherever he moves.

INTESTATE SUCCESSION

Intestate succession, as stated earlier, is governed by Hindu Succession Act, 1956. Section 6 of the ibid Act provides for devolution of interest in coparcenary (joint hindu family) property. Where a Hindu (including Jaina, Buddhist and Sikh) dies after the commencement of Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act. Similarly, Hindu Succession Act, 1956 has over-riding effect over marumakkattayam, nambudri or aliyasanthana law in respect of tarwad, tavazhi, illiom, sthanam properties as per the provision of Section 7 of the ibid Act.

Coming firstly to the Rules of devolution of property of a **Hindu Male** dying intestate under the Hindu Succession Act, 1956 are as follows:-

(i) Firstly, upon the Class I legal heirs of the deceased. There are a total of 16 Class I legal heirs defined in the Schedule of the Act, which includes Son; daughter; widow, mother; son of pre-deceased son; daughter of a pre-deceased son; son of a predeceased daughter; daughter of a pre-deceased daughter; widow of a pre-deceased son; son of a pre-deceased son of a pre-deceased son; daughter of a pre-deceased son of a pre-deceased son; widow of a pre-deceased son of a pre-

deceased son; son of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased son of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased son.

All the Class I legal heirs get one share each. If there is even a single Class I legal heir, then the legal heirs in other Classes do not get any share. If there is no Class I legal heir, the property devolves on Class II legal heirs, who get it as per the following rules.

(ii) As per the Schedule of Hindu Succession Act the following are Class II legal heirs:-

I. Father

II. Son's daughter's son, son's daughter's daughter, brother, sister.

III. Daughter's son's son, daughter's son's daughter, daughter's daughter's son, daughter's daughter's daughter.

IV. Brother's son, sister's son, brother's daughter, sister's daughter.

V. Father's father, father's mother.

VI. Father's widow, brother's widow.

VII. Father's brother, father's sister.

VIII. Mother's father, mother's mother

IX. Mother's brother, mother's sister.

Out of the legal heirs mentioned above, the ones in the first entry are preferred to the legal heirs in second entry and

so on in succession. The legal heirs in each entry get equal share. In case a Hindu dies intestate, without leaving any Class I or Class II legal heir, his property devolves firstly upon his agnates (relative related to the deceased wholly through males). If the deceased has no agnate, then on his cognates (relative not related to the deceased wholly through males). In case, a Hindu dies without leaving any legal heir as per the preceding rules, his property devolves upon the Government - **escheat**.

As far as intestate succession of a Hindu female is concerned, after the enactment of Hindu Succession Act, 1956, any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, shall be held by her as full owner and she shall have the power to dispose it off intestate or by Will. The rules of intestate succession in case of a Hindu female are that her property shall devolve firstly upon her son, daughter (including the children of predeceased son or daughter) and husband, who shall take one share each. If she dies without leaving behind a son, daughter or husband, then the property will devolve on the relatives of her husband. If she does not leave behind any relative in the above two categories, then upon her father and mother. If she does not leave behind any relative in the above three categories, then upon the heirs of her mother. Any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter, not on the heirs referred to above but upon the heirs of her father.

TESTAMENTARY SUCCESSION

Who can make a Will? Section 59 of the Indian Succession Act, 1925 lays down that every person of sound mind and not being a minor may dispose of his property by Will. As per Section 2(e) of the Indian Succession Act, a person is a major if he has attained the age of 18 years. However, where a guardian has been appointed by order of court other than a guardian for suit, the age of minority extends to completion of 21 years as per Section 3 of the Indian Majority Act.

Apart from soundness of mind, a testator must also have the capacity to dispose of property by way of a Will. For example, a coparcener does not have the capacity to dispose of joint family property by making a Will. Similarly, ancestral property cannot be disposed of by making a testamentary disposition and on the death of the testator his property will devolve by inheritance and not by way of testament. A person can only bequeath his self acquired property or divided interest in joint family property by making a testamentary disposition.

A testament may be proved in two ways, either in common form or in solemn form. When it is sought to be proved in common form, the executor merely presents the Will before the Judge, and without citing the interested parties, produces the proof affidavits of one or more of the attesting witnesses, and the Judge after satisfying himself on the foot of the affidavits that the testament exhibited is true, proceeds to annex his probate and seal to the Will. The grant of probate in common form leads to pernicious results. On the contrary, when the Will is to be proved in solemn form, the widest publicity is given to the proceedings,

and all parties, who have an interest in the subject matter of the proceedings, appear in Court and furnish valuable contemporaneous evidence which enables the Court to render justice. It is intended to give an opportunity to any person having the slightest and even the bare possibility of an interest in the proceedings to challenge the genuineness of the Will and place before the Court all the relevant circumstances before a grant *in rem* is made in favour of the person claiming the probate.

How to prove a Will?

The following are the important elements to be proved by a Propounder of a Will:-

(i) The Will in question is the legal declaration of the intention of the deceased,

(ii) The testator when executed the Will was in a sound and disposing state of mind, and

(iii) The testator had executed the Will of his own free will, meaning thereby, that the making of the Will has not been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator – Section 61, Indian Succession Act.

The onus of proof rests squarely on the person propounding a Will and in the absence of any suspicious circumstances surrounding its execution, the proof of testamentary capacity and testator’s signature as required by law would normally suffice in discharging the onus. Where, however, suspicious circumstances are found to exist, the propounder of the Will must explain them and dispel all the suspicions to the

satisfaction of the Court before it is accepted as genuine. This would be so even in those cases where such a plea has not been raised and on proved circumstances had given rise to doubt. In such cases also, it is for the propounder to satisfy the conscience of the Court. What are suspicious circumstances must invariably be judged in the facts and circumstances of each particular case. If, however, propounder takes prominent part in the execution of the Will which confers substantial benefits on him that itself is a suspicious circumstance.

A Will is a sacrosanct document which comes into force after the death of the executant. This special document requires a special mode of proof, as required by Section 63 of the Indian Succession Act, 1925 read with Sections 67, 68 and 69 of the Evidence Act. In addition, the propounder of the Will is also expected to remove all suspicions attached to its execution. However, if the execution of the Will and attestation is admitted, but the Will is challenged only on legal aspects, such as, the validity of the bequeathment of certain properties, special mode of proof, as required under Section 68 of Evidence Act is not required.

Requisites of a valid Will

As per Section 63 of the Indian Succession Act, the requisites of a valid Will are:-

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear

that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

As per the provision of Section 68 of the Evidence Act, the execution of the 'Will' will have to be proved by calling in at least one of the attesting witnesses and attestation itself will have to be proved in the form in which Section 63 (c) of the Indian Succession Act, requires. Under the provisions attestation has to be proved by the attesting witnesses admitting attestation as also proving that they signed the Will in the presence of the testator. It is true that the evidence insisted by law is that of the attestors. But that is not to say that other kind of evidence is shut out by law. If there is anything suspicious in the signature, evidence of an attestor, it can certainly be corroborated or contradicted by expert opinion.

Expert Witness to prove handwriting/ finger-print

Under Section 67 of the Evidence Act, if a document is alleged to be signed by any person, the signature of the said person must be

proved to be in his handwriting. For proving such handwriting, the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant under Section 45 and 47 of the Evidence Act. However, evidence of an expert cannot override the positive evidence of the attesting witnesses where there are no suspicious circumstances surrounding the execution of the Will.

Effect of registration of a Will?

The registration of a document is a strong circumstance that proper parties had appeared before the registering officer and the latter had attested the same after ascertaining their identities. As per Section 18 of the Registration Act, a Will need not be compulsorily registered. Registration of a Will is optional. Even if a Will is registered, it will have to be proved as per the provisions of Section 67, 68 and 69 of the Evidence Act and Section 59 and 63 of the Indian Succession Act. A certified copy of a registered Will is not admissible in evidence, and the original Will has to be produced in Court, except where the original has been lost or is shown to be in possession of opposite party.

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