

TESTAMENTARY SUCCESSION

★
M. L. BHAKTA
Advocate & Solicitor

BACKGROUND

Prior to the codification of Hindu Law which was started in 1955, Hindu Law was based on customs, traditions and inscriptions in ancient texts and also on judicial decisions interpreting the same. There were two schools of law, viz., *Mitakshara* and *Dayabhaga*. While *Dayabhaga* school prevailed in Bengal, *Mitakshara* school prevailed in the other parts of India. The Bengal school differed from *Mitakshara* school in two main particulars, viz., the law of inheritance and joint family system.

The rules relating to succession under the uncodified customary and traditional Hindu Law were quite confusing and led to different interpretations by courts. Moreover, enactments by several states and by some princely states added to the problems. The rules regarding succession were codified for the first time by the Hindu Succession Act, 1956 ("the Act") which came into effect from 17th June 1956. Under the Act, the word "Hindu" has been used in a very wide context and includes a Buddhist, a Jain or a Sikh by religion. The Act gives clarity and effects of basic and fundamental change on the law of succession. The main scheme of the Act is to clearly lay down rules of intestate succession to males and females and establish complete equality between male and female with regard to property rights. Moreover, the old notion of what was known as 'limited estate' or 'limited ownership' of women was abolished and the right of a female over property owned by her was declared absolute.

With a view to give clarity, the Act has been given an overriding effect over any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before commencement of the Act as also over any other law in force immediately before commencement of the Act so far as inconsistent with any of the provisions of the Act. After passing of the Act, the rules regarding succession are governed by the provisions of the Act replacing the provisions which were applicable under the uncodified Hindu law.

There are two modes of succession, one is intestate

succession (when the testator dies without leaving a Will) and the other is testate succession (when the testator leaves a Will). The Act only applies when a Hindu male or female dies without a Will. But testate or testamentary succession will be governed by the testamentary document/s, left by the testator.

WILLS OR RULES RELATING TO TESTAMENTARY SUCCESSION

This article being mainly for the chartered accountants readers it is proposed to limit its scope to only give basic understanding of testamentary documents without going into various complexities.

The basic testamentary document for testamentary succession is a Will. Jarman in his treatise on Wills defines a Will as 'an instrument by which a person makes disposition of his property to take effect after his demise and which is in its own nature ambulatory and revocable during his life'. A declaration by a testator that his Will is irrevocable is inoperative. A covenant not to revoke a Will cannot be specifically enforced.

While the Act does not cover testamentary disposition, the same is governed under the provisions of the Indian Succession Act, 1925 and u/s. 57 thereof many of its provisions apply to Wills made by any Hindu, Buddhist, Sikh or Jain. The term 'Will' has been defined in section 2(h) of the Indian Succession Act to mean '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'. It is not necessary that any technical words or particular form is used in a Will, but only that the wording be such that the intentions of the testator can be known therefrom.

(Section 73 of the Indian Succession Act) A 'codicil' is a supplement by which a testator alters or adds to his Will. Section 2(b) of the Indian Succession Act defines the term 'codicil' to mean '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'. Therefore, a Will

is the aggregate of a person's testamentary intentions so far as they are manifested in writing duly executed according to law and includes a codicil.

There is no specific form or legal requirement about a Will nor is it required to be on stamp paper. The only legal requirement is that it should be properly witnessed by not less than two witnesses as explained in detail hereafter.

Every person of sound mind not being a minor may dispose of his property by a Will. A married woman may dispose by Will any property which she could alienate by her own act during her life. Persons who are deaf or dumb or blind can make their Wills if they are able to know what they do by it. It may be interesting to note that even a person who is ordinarily insane may make a Will during interval in which he is of sound mind. A father may by Will appoint a guardian for his child during minority. A Will or any part of it obtained by fraud, coercion or importunity is void. If a bequest is made in favour of someone based on deception or fraud, only that bequest becomes void and not the whole Will.

When a person wants to execute his/her Will, one of the normal questions which is raised is whether it is necessary to register the Will. A Will need not be compulsorily registered. There is no rule of law or of evidence which requires a doctor to be kept present when a Will is executed (See *Madhukar vs. Tarabai (2002) 2SCC 85*).

However, if a Will is to be registered, the Registrar as a matter of procedure requires production of a doctor's certificate to the effect that the testator is in a sound state of mind and physically fit to make his/her Will. It has been held by the Supreme Court that there was nothing in law which requires the registration of a Will and as Wills are in a majority of cases not registered, to draw any inference against the genuineness of the Will on the ground of non-registration would be wholly unwarranted (See *Ishwardeo vs. Kamta Devi AIR(1954) SC 280*). In case of *Purnima Devi vs. Khagendra Narayan Deb AIR(1962) SC 567*, the Supreme Court has observed that if a Will has been registered, that is a circumstance which may, having regard to the circumstances, prove its genuineness. But the mere fact that a Will is registered will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists, without submitting the evidence of registration to a close examination. If the evidence as to registration on a close examination reveals that the registration was made in such a manner that it was brought home to the testator

that the document of which he was admitting execution was a Will disposing of his property and thereafter he admitted its execution and signed it in token thereof, the registration will dispel the doubt as to the genuineness of the Will.

The Supreme Court in *Venkatachala Iyengar vs. Trimmajamma AIR (1959) SC 443* held that as in the case of proof of other documents so in the case of proof of Wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters. Though in the same case, the Supreme Court further held that being the non-availability of the person who signed it there is one important factor which distinguishes a Will from other documents and observed that in case of a Will other factors like surrounding circumstances including existence of suspicious circumstances, if any, should be clearly explained and dispelled by the propounder.

Section 63 of the Indian Succession Act requires that a 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 receive from the testator a personal acknowledgement of his signature or mark. Each witness is required to sign the Will in presence of the testator. Under law it is not necessary that the attesting witnesses should know the contents of the Will.

A person can change or revoke his Will as often as he likes. Ultimately it is the last Will which prevails over earlier Wills. Even a registered Will can be revoked by a subsequent unregistered Will. Moreover, it may be noted that u/s. 69 of the Indian Succession Act, a Will stands revoked by the marriage of the maker and in such a case it will be necessary for the testator to make a fresh Will.

It is open for a testator to give or bequeath any property to an executor and such bequest is valid. If a legacy is bequeathed to a person who is named as an executor of the Will, he shall not take the legacy unless he proves the Will or otherwise manifests an intention to act. However, care should be taken to ensure that no bequest is made to a person who is an attesting witness or spouse of such person as in such a case while validity of the Will is not affected, such bequest shall be void.

The ancient rule of a share in HUF going by survivorship does not now apply. A coparcener in a HUF can bequeath his undivided share in HUF by way of Will.

It may be noted that any bequest in favour of a person not in existence at Testator's death subject to a prior bequest contained in the Will or a bequest in breach of rule against perpetuity is void. A bequest will be in breach of rule against perpetuity if it provides for vesting of a thing bequeathed to be delayed beyond the lifetime of one or more persons living at the Testator's death and minority of a person who shall be in existence at the expiration of that period and to whom the thing is bequeathed on attaining majority.

These days it is normal to use the facility of nomination for ownership flats in co-operative housing societies, depository/demat accounts, mutual funds, shares, bank accounts, etc. Once a person dies, the nominee gets a right on the asset. However, it has been held by courts and the legal position is that although the nominee has easy access to the asset and can get it transferred to his/her name, the nominee holds it only as a trustee and ultimately the asset would go to the legal heirs of the deceased under the testamentary succession or as per applicable rules of the intestate succession, as the case may be.

Although the Indian Succession Act also applies to testamentary succession of Parsis and Christians, Mohammedans are governed by their own law and there are several restrictions in their making a Will.

TIPS FOR DRAFTING

It is known that some chartered accountants have been drafting legal documents and that such practice is not restricted to just simple documents like deeds of partnership or deeds of retirement but now extends to drafting ownership of flat, sale/purchase transactions and even Wills and Trusts. For the benefit of such chartered accountant friends who venture to draft Wills, the following tips may be helpful:-

(1) As mentioned above, there is no specific form or legal requirement about the Will. However, it is advisable to use clear and unambiguous language and where names of beneficiaries are to be given, it would be advisable to give full names, preferably with relationship with the Testator. Again where any asset is subject matter of the Will, the item should be clearly identifiable and proper details of the asset should be given.

(2) Any obliteration, interlineation or alteration should be avoided and in case of any such alteration, the same

should be executed by the Testator and the witnesses in like manner as required for the execution of the Will.

(3) Care should be taken to ensure that the attesting witness is one who or whose spouse is not getting any benefit or bequest under the Will as otherwise the bequest will be void.

(4) Wills containing bequest of any property to religious or charitable uses have certain restrictions and need to be avoided.

(5) Apart from specific bequests and legacies, a Will should also provide for what happens to the rest and residue of the estate of the Testator as otherwise whatever is not specifically included would devolve as per rules of intestate succession i.e. as if there is no Will.

(6) It is normal to appoint some family elders as executors possibly out of respect. However, it is suggested that the executors selected by the testator ought to be persons who are easily available and accessible and who are able to coordinate and co-operate with each other. Preferably, the executors should be people who have interest in the estate as beneficiary/ies.

(7) In case of a Testator who has acquired citizenship of any other country, the draftsman should keep the applicable laws of that country in mind before preparing any Will. For instance, Sharia Law applies to persons who have acquired citizenship in any Middle East country, and some special provisions will have to be added depending on the local lawyer's advice to take care of the legal requirement of each country to make a valid and effective Will based on the personal law (e.g. Hindu Law) applicable to the individual. In the same way, foreign domicile of the Testator who holds Indian citizenship may also need advice from local lawyers.

(8) While drafting a Will for a person who is resident in Goa it should be noted that Goa residents are still governed by Portuguese Law. Therefore, a Will is likely to be challenged if it is not in conformity with the provisions of the local law.

(9) So far as the Will is in simple form, any educated person can draft the same. However, if it is proposed to provide for any complicated provisions for succession planning or any kind of tax planning by way of Trusts, it will be advisable to leave the drafting to a competent lawyer. The reason for this piece of advice is to ensure that the Will does not contain any provision which would in law be void. ■