Will – An Understanding

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Concept of Will

A 'Will' is the legal declaration of one's intention, which one wills to be performed after his or her death, or an instrument by which a person makes a disposition of his/her property to take effect after his/her death. Will is an important testamentary instrument through which a testator can give away his or her property in accordance to his/her wishes. A Will or Testament is a legal document by which a person, the testator, expresses their wishes as to how their property is to be distributed at death, and names one or more persons, the executor, to manage the estate until its final distribution. A Will offers to testator the means of correcting to a certain extent the law of succession, and enabling the persons who are excluded from inheritance to obtain a share in one's property, and recognizing the services rendered by them.

The Will takes effect after the death of the testator and can be revoked only during his lifetime. A Will can be revoked, either impliedly or expressly, either by conduct or by a specific document. A will can be changed a number of times and there are no legal restrictions as to the number of times it can be changed. Thus, the distinguishing feature of a Will is that it becomes effective after the death of the testator and it is revocable. Unlike any other disposition, the testator exercises full control over the property bequeathed till he is alive and the legatee can not interfere in any manner whatsoever in the testator's power of enjoyment of the property including its disposal or transfer.

Will vis-à-vis other related terms

Will and other related terms are generally used interchangeably in common parlance, though, they are distinctive to some extent, e.g. :

Will – Sec. 2(h) of Indian Succession Act, 1925 provides that Will means the legal declaration of the intention of a person with respect to his property, which he desires to take effect after his death.

Codicil – Codicil is a instrument made in relation to a Will, explaining, altering or adding to its dispositions and is deemed to be a part of the Will. The purpose of the Codicil is to make some small changes in pre-executed Will. If the testator wishes to change the names of the executors by adding some other names, or wants to change certain bequests by adding to the names of the legatees or subtracting some of them, a Codicil in addition to the Will can be made to do so.

Probate – According to the Indian Succession Act, 1925 a Probate is 'A copy of Will certified under the seal of a court of competent jurisdiction with grant of administration of the estate of testator'. Probates are issued to the executors of a Will, in order to authorize them to legally execute the same through a seal of approval from the Court. A Probate is completely different from a letter of administration, which is allotted when a Will does not name an executor or a Will is not made by the deceased person.

Testament – An antiquated term that refers to the document written by a testator that details what is to happen to property owned by that testator upon death. A Will was historically limited to real property (e.g. land, homes, etc.) while testament applies only to dispositions of personal property (e.g. money, personal items, thing you can hold in your hand, etc.). The history behind this is in old English Law, in which there used to be one set of laws for real property and a different set of laws for personal property. Therefore, to transfer the property at death required two different documents, a Will for real property and a Testament for personal property. This difference no longer exists and there is now one set of laws for all property and one document needed to transfer property at death, called a Will.

Governing Act of Will

The Indian Succession Act, 1925 is the law governing Wills and matters relating thereto . It applies inter alia to Hindu, Buddhist, Sikh or Jain. However, Muslims are not governed by this Act and they can dispose their property according to Muslim Law.

Intestate vis a vis Testamentary Succession

If a person dies intestate i.e. without making a valid Will , his or her assets will be distributed according to applicable Personal Laws. The Hindu Succession Act, 1956 provides for the distribution of assets if a Hindu dies without making a Will. The inheritance of assets of a Muslim should be done as per Muslim Law. The assets of Christians and Parsis who pass away without making a Will are distributed as per the provisions of the Indian Succession Act, 1925.

On the other hand, testamentary succession is division of property after a person's death as per his or her wishes as contained in his or her Will. The testator while preparing the Will is not constrained by the provisions of Personal Laws/respective Law of Succession.

Eligibility of Testator

According to Sec. 59 of Indian Succession Act, every person who is of sound mind and is not a minor can make a Will. That is to say, any person of sound mind who is otherwise competent to contract may make a Will. A person of unsound mind can also make a Will but only in lucid intervals. However, a Will can not be made by the minors, insolvent and person disqualified under any law by the Court. A Will executed by a minor is void and inoperative. A prisoner or an alien in India can also make a Will. The testator should be free from any undue influence or coercion.

Competence of Beneficiary

Any person capable of holding property can be a legatee under a Will. A legatee is a person who inherits under a Will and shouldn't be confused with 'legal heir'. In absence of Will, the person who are entitled to receive the assets of the estate is called 'legal heir' while the person to whom the assets are given under the Will is referred to as 'legatee'.

A minor, a child in its mother's womb, a lunatic, a corporation, a Hindu deity and other juristic person can be a legatee. If the minor person has been named as legatee by a testator then a guardian should be appointed by the testator himself to manage the bequeathed property. Legatee including a child in its mother's womb must be in existence at the time of making of the Will. Thus, a bequest to an unborn person is void.

Bequeathable Property

According to Sec. 30 of Hindu Succession Act, 1956, any Hindu may dispose off by Will or other testamentary disposition any property, which is capable of being so, disposed off by him/her in accordance with law. Thus, any movable or immovable property can be disposed off by a Will by its owner. The fundamental rule is that one can only pass on what one has. A person can make a Will only about the property(ies) which belongs to him/her. In case the testator's right on a property are non-existent, a Will about the property made by the testator will be null and void. Moreover, a person has no right to bequest spouse's property(ies). Even, when the property is jointly owned and the husband pays entirely for the property, the husband can not make a Will about the share of his wife in the jointly owned property.

Notable Elements

1. Legal Declaration : The documents purporting to be a Will must be legal i.e. in conformity with the law and must be executed by a person legally competent to make it. According to Sec. 127 of Indian Succession Act, 1925, a bequest which is based upon illegal or immoral condition, is void. The condition which is contrary, forbidden, or defeats any provision of law or is opposed to public policy, then the bequest would be invalid.

2. Disposition of Property : The disposition must be with respect to the testator's own property. The Will can however be made only for self-acquired properties and not for ancestral properties. A member of Hindu Undivided Family can not bequeath his coparcenery interest in the family property. Future properties, also, can be bequeathed which accrue to the testator after the execution of the Will. If the testator has partial rights on a property, he/she may bequeath only the partial rights. Likewise, if the testator has tenancy or leasehold rights in a property, he/she may bequeath the same.

3. Transfer to Unborn Person : Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers that description, the

bequest is void. Sec. 113 of Indian Succession Act, 1925 provides that for a transfer to an unborn person, a prior interest for life has to be created in another person and the bequest must comprise of whole of the remaining interest of the testator. The facts of the case in Sopher Vs. Administrator General of Bengal AIR 1944 PC 67 was that a grandfather made the bequest to his grandson who was yet to be born, by creating a prior interest in his son and daughter in law. The hon'ble Court upheld the transfer to an unborn person and it was held that since the vested interest was transferred when the grandsons were born and only the enjoyment of possession was postponed till they achieve the age of twenty one , the transfer was held to be valid. In the case of Girish Dutt Vs. Datadin AIR 1934 Oudh 35 , the Will stated that property was to be transferred to a female descendant (who was unborn) only if the person did not have any male descendant. The Court held that since the transfer of property was dependent on the condition that there has to be no male descendant, the transfer of interest was limited and no absolute and thereby the transfer was void. For a transfer to an unborn person to be held valid, absolute interest needs to be transferred and it can not be a limited interest.

4. Transfer made to create perpetuity : Sec. 14 of Transfer of Property Act, 1882 deals with the Rule against perpetuity, also known as 'Rule against remoteness of vesting'. Perpetuity means 'indefinite period' which means this rule is against the transfer which makes a property inalienable for an indefinite period. In other words, the rule against perpetuity provides that the property can not be tied for an indefinite period. The property can not be transferred in an unending way. The maximum time limit for postponing the vesting of interest may be Life or Lives of the last prior interest holder(s) plus minority of the ultimate beneficiary if the ultimate beneficiary is already a born person. An unborn child in the mother's womb during the gestation period i.e. fatal development period (from the time of conception until birth) is a competent transferee. If the last prior life interest holder expires before the birth of unborn person then the maximum period for postponing the vesting interest will be Life of the last prior interest holder plus period of gestation plus minority of the ultimate beneficiary.

   The rule against perpetuity invalidates any bequest which delays vesting beyond the life or lives-in-being and the minority of the donee who must be living at the close of the last life. Sec. 114 of the Indian Succession Act, 1925 provides that no bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some persons who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

5. Transfer to a class : If a bequest is made to a class of persons with regard to some of whom it is inoperative by reasons of the fact that the person is not in existence at the testator's death or to create perpetuity, such bequest shall be void in regard to those persons only and not in regard to whole class.

6. Transfer to take effect on failure of prior transfer : Sec. 116 of Indian Succession Act, 1925 provides that where by reason of any of the rules contained in Sec. 113 (relating to transfer to

unborn person) and Sec. 114 (relating to transfer made to create perpetuity) and bequest in favour of a person of a class of persons is void in regard to such person or the whole of such class, any bequest (contained in the same Will) intended to take effect after or upon failure of such prior bequest is also void. The principle of this section is based upon the presumed intention of the testator that the person entitled at the subsequent limitation is not intended to be benefited except at the exhaustion of the prior limitation. Likewise, a bequest in future is void, and so does a contingent bequest.

However, an alternative bequest of property (i.e. to one or failing him to the other persons) is valid. For example, when a testator provides in his Will that his son if existing at the time of his death will take the bequest, if not in existence, his son's son will, and failing both it will go to charity, is valid.

7. Properties in more than one country : According to Sec. 5 of Indian Succession Act, 1925, as far as immovable properties are concerned, all matters relating to capacity to make Will, revocation of Will, power of disposition and all such related matters are governed by the lex situs i.e. the law of the land where the property is situated.

   In respect of movable property, there are two options for making will, either make a Will as per Indian Law related to Wills irrespective of the location of the movable properties or make a Will as per the law of the foreign land of residence in respect of all movable properties irrespective of the location of the movable properties. However, the Will made as per foreign law must affirm and declare that the testator has chosen his/her country of residence as his/her permanent home and has thus change his/her domicile from India to the chosen country. In essence, deciding domicile is critical for preparing a Will related to movable properties.

Requirement of registration of Will

According to the provisions of Sec. 18 of the Registration Act, the registration of Will is not compulsory. Also the Hon'ble Apex Court in Narain Singh Vs. Kamla Devi AIR 1954 SC 280 has held that mere non-registration of the Will, an inference can not be drawn against the genuineness of the Will. Though a Will is not required to be registered and can be drawn on plain paper also, it is advisable to get it registered in as much as the registration of Will ensures the strong legal evidence of its validity, authencity, etc. A registered Will provides strong legal evidence against challenges about the metal capacity of the testator to make a Will. Registration reduces the chances that the Will may be challenged as being a forgery.

But, other challenges to a registered Will are still open on the ground of fraud, coercion, undue influence, suspicious nature, revocation, etc. If the Will suffers from any defects or lacunae due to wrong or incomplete or absence of attestation, registration will not make the Will valid in any way. A registered Will may not be the last testament. A new will made, even if unregistered, if valid, will trump the registered Will. The mere fact that a Will has been registered will not, by itself, be sufficient to dispel all suspicions regarding it. In short, registration does strengthen the Will in some respects

even though it does not make it cast in stone.

It would not be irrelevant to mention that all post-registration alterations or modifications (Codicils) should also be registered. Any non-registered alterations or modifications or explanations or deletions are not accepted by Courts. However, the testator may make a fresh Will revoking the registered Will and declaring the provisions of the fresh Will as his final desires. Even if the fresh Will of a later date is unregistered, the fresh Will shall prevail over the registered Will.

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Bibliography

(i) General Clauses Act, 1897

(ii) Hindu Succession Act, 1956

(iii) Indian Succession Act, 1925

(iv) Transfer of Property Act, 1882