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Understanding Indian Will Laws: A Detailed Overview

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ABSTRACT

The legal landscape of wills in India has evolved, with statutes like the Indian Succession Act, 1925, shaping testamentary practices. Judicial attitudes, seen in cases such as Tagore. Tagore and Valliammai Achi. Nagappa Chettiar, have clarified principles governing wills. Concepts like probate, codicil, and letters of administration play vital roles. Muslim and Christian laws on wills vary, specifying conditions for valid wills. Legal perspectives, as exemplified in cases like Common Cause. Union of India, illuminate the nuanced interpretation of will-related issues by the Indian judiciary. The concept of living wills, addressed in cases like Aruna Shanbaug. Union of India and Common Cause, signifies a person's right to die with dignity through advance directives.

KEY WORDS: Will, Testamentary succession, Indian succession Act, Hindu Law, Living will, Intestate, Probate.

INTRODUCTION

Life has its certainty—death, the final act. But even after we're gone, we live on through memories. While fond memories are shared without dispute, material possessions often lead to conflicts among the living. That's where a Will comes in. It's a legal document expressing the wishes of the deceased regarding their property, helping prevent disputes among heirs.

Unlike transactions like selling or gifting, a Will is a one-sided declaration made by a person about how their estate should be handled after their death. It's a way to change the usual course of property distribution as per legal rules. Wills were historically used when someone wanted their property distributed differently from customary laws.

In certain traditional laws, like the Dayabhagha law, a person could dispose of their coparcenary interest through a Will. Similarly, for those under the Mitakshara law, changes introduced by the Hindu Succession Act in 1956 allow them to use a Will to determine the fate of their undivided interest in coparcenary property. This shift has given individuals more control over their property even after they're gone.

BACKGROUND

The history of wills in India is unclear, with no explicit texts addressing the subject. Sir Thomas Strange noted the absence of Sanskrit or local terms specifically denoting the concept of a will. Among the seven types of documents described by Sanskrit writers, wills were not expressly mentioned. In ancient times, the orthodox Hindu mindset considered the claims of children and dependents as absolute, leading to a scarcity of wills.

While not entirely absent in Hindu law, the concept of wills was not prominent. The prevalence of gifts, a common practice, eventually gave rise to the idea of wills. The first recorded will was by Omi Chand in 1758, a resident of Calcutta familiar with English laws. Although the probate of his will was granted, establishing the validity of Hindu wills was initially challenging.

In 1786, the Supreme Court recognized the validity of wills in two cases, but by 1791, it held that probate for a Hindu will could not be granted. In 1792, the Sudder Court ruled in favor of a will bequeathing a Zamindari to the eldest son, a decision echoed by the Supreme Court in 1793. The validity of Hindu wills became more accepted, notably in cases involving Raja Naba Kissan and Nemi Charan Mullick in Bengal during 1808 and 1812, respectively.

MEANING AND DEFINITION

The term "Will" originates from the Latin word "Voluntas" in Roman law, signifying a testator's intention. It's interesting that this abstract concept has evolved to represent the document containing the intention, much like other English legal terms such as obligation, bond, and contract, where the concrete meaning supersedes the abstract.

The word "testament" is derived from "testatiomenties," emphasizing its role in testifying to the determination of the mind. A Will is considered a continuous act of gift until the donor's death. Although revocable during the donor's lifetime, it operates as a continuous act of gift until death, ultimately transferring the disposed property to the designated beneficiaries.

In the Indian Succession Act, 1925, Section 2(h) defines a ‘Wil’ 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.”

According to the Judicial Dictionary a will is the legal instrument whereby a man declares what is to be done with his property after his death. Will means the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. The word ‘will’ shall extend to a testament and to a codicil and to an appointment by a will or by writing in the nature of a will in exercise of a power and also to a disposition by will.

Bouvier’s Law Dictionary defines a will as the disposition of one's property to take effect after death. This term, expressing the final disposition of one's property, is specific to English laws and those jurisdictions influenced by them.

VOCABULARY ASSOCIATED WITH WILL

Probate: Probate refers to a certified copy of a Will issued by a Court with authority, along with a grant of administration for the testator's estate. Strictly speaking, "probate" signifies the copy of the Will provided to the executor, accompanied by a court-certified certificate. This probate, serving as the executor's authorization, is retained in the registry, while the original document remains there. In case of discrepancies between the two documents, the Court may refer to the original Will for interpretation.

Codicil: A codicil is a document executed in the same manner as a Will, modifying, changing, or adding to the directions established in the original Will. Similar to how a Will can be revoked by a subsequent Will, a codicil can also be annulled by a subsequent Will or Codicil. Notably, crossing out content on a Will or codicil doesn't constitute cancellation or revocation unless proper procedures are followed, and explicit language is used for that purpose.

Letter of Administration: A Letter of Administration is a certificate granted by the court to an administrator, especially when the deceased's Will authorizes them to manage the estate. If the Will doesn't name an executor, an application can be filed for a Letter of Administration. This legal document allows the appointed person to administer the deceased's estate in line with the Will. The principle guiding the grant of letters of administration is that it follows the interest, meaning it is given to the person with the most significant interest in the testator's estate. The primary choice is the universal legatee, followed by the residuary legatee with the maximum interest.[1]

Testator: The term "testator" refers to a male individual who creates a Will, while a female who makes a Will is known as a "testatrix."

LAWS APPLICABLE TO WILL

The legal framework governing wills in India encompasses several statutes:

The Constitution of India, 1950: According to Entry 5 of the concurrent list in the Indian Constitution, matters related to wills, which were previously governed by personal laws in judicial proceedings before the Constitution's commencement, are covered.[2]

The Indian Succession Act, 1925: Primarily dealing with the general law of testamentary succession, this act is applicable to wills made by Hindus, Buddhists, Sikhs, Jains, Parsis, and Christians, excluding Mohammedans. It consolidates existing laws without making amendments, and its provisions are to be treated with a similar effect as the replaced acts.

The Indian Evidence Act, 1872: For a will to be valid, it must adhere to the formalities outlined in the Indian Succession Act, 1925. The Evidence Act specifies that when a document is presented as evidence in court, at least one attesting witness should be called to confirm the document's execution. This applies only if one of the witnesses is available and subject to court procedures.[3]

The Indian Registration Act, 1908: Registration of a will is optional under this act. It serves as evidence that the involved parties appeared before the registering officers, who then attested the document after verifying their identity. However, the absence of registration does

[1] The Indian Succession Act, 1925, section 232.

2 India Constitution schedule 7 3 Act No. 1 of 1872.

not imply anything about the will's authenticity. If a will is registered, it is securely held by the Registrar.[2]

MUSLIM AND CHRISTIAN LAW ON WILL

Muslim Law: There isn't a codified law governing Wills among Muslims. Wills are made based on religious teachings, and it's important to note that there are differences between Shias and Sunnis in the Muslim Law of Wills. The Indian Succession Act, 1925, does not impact the provisions of Muslim Law concerning testamentary succession. Key sources for Muslim Wills include Hedaya and Fatwa Alamgiri. According to Muslim Law, any mentally sound and legally adult Muslim can make a valid will. However, the power of bequests is limited to one-third of the net assets, and the two-thirds must follow the rules of intestacy unless all heirs unanimously agree to exceed the limit.

The form of a Muslim will is not strictly required to be in writing; it can also be oral. No specific form or signature is mandated, and intention is the primary consideration. If there are no heirs, the entire property can be bequeathed with unanimous consent from all heirs.

Christian Law: Under the Indian Succession Act, 1925, the process for making a will is uniform for all communities except Muslims. Like others, Christians can create a will when of sound mind and free from duress, coercion, or fraud. Mental capacity is essential, and while old age or disease may impair mental power, the testator must comprehend the nature and effect of the disposition at the time of execution. Formalities for a Christian will include being in writing, duly signed or marked by the testator, or signed by someone else under the testator's direction, and attested by two or more witnesses. Simultaneous presence of both witnesses is not necessary.

Christians also have the option to make Privileged Wills if the testator is employed as a soldier engaged in actual warfare, expedition, or air service, and is 18 years old. Privileged Wills may be made orally in specific circumstances, but casual conversation does not constitute a testamentary act. Cogent evidence is necessary to prove the statements made by the deceased after executing the Will to determine its contents.

JUDICIAL PERSPECTIVES ON WILLS

The Indian judiciary has interpreted the provisions related to wills, and some noteworthy cases are discussed below.

In the Tagore v. Tagore[3] case, the Privy Council emphasized that a donor or testator cannot establish a new form of estate or line of inheritance solely to fulfil personal preferences.

[2] Act No. XVI of 1908.

[3] (1872) 9 Beng.LR 377 (India). [6]
AIR 1967 SC 1153(India).

Principles guiding will construction also apply to the interpretation of a gift. Since inheritance is established by the state for public policy reasons, a private individual cannot create an unknown mode of inheritance. Hindu law principles apply, and if a testator grants property with an unconventional mode of inheritance, it fails unless valid as a gift. The net assets must adhere to Hindu law rules, and testamentary power can only exceed one-third with unanimous their consent.

The Valliammai Achi v. Nagappa Chettiar[6] case emphasized that if a person attempts to dispose of something in a will that they have no right to dispose of, the rightful owner can choose to confirm or dissent. In the case of joint family property, a father cannot change its nature through a will. The Hindu Disposition of Property Act (XV of 1916) later altered the rules related to unborn persons in wills.

In Raman Nadar Viswanathan Nadar v. Snehappoo Kasalamma,[7] the Supreme Court held that Although there is no authority in Hindu Law to justify the doctrine that a Hindu cannot make a gift or bequest for the benefit of an unborn person yet that doctrine has been engrafted on Hindu Law by the decision of the Judicial Committee in Tagor's case, 1872. Though the decision is based on wrong reading of the relevant verse in Dayabhaga, yet it has taken roots, may be on the basis of the maxim, "communis error facit Jus". This doctrine has not been altered by further legislative measures by which no bequest shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of testator's death. This rule, however, is subject to the limitations and provisions contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925

In S. Rathinam v. L.S. Mariappan,[8] the Supreme Court clarified that a testator can dispose of property in a will, provided it does not conflict with state laws. The Transfer of Property Act's bar on transfer does not apply to wills, making the will valid.

In B. Rajeogowda v. H.R. Shandaregowda,[4] the Apex Court observed that as per section 3 of the Transfer of Property Act, the essential condition of attesting is 1) two or more persons have seen the executants sign the instrument or have received from him a personal acknowledgment of his signature, 2) with a view to attest or to bear witness to this fact each one of them has signed the instrument in the presence of the executants. It is essential that the witness must have put his signature animoattestandi i.e. for the purpose of attesting that he has seen the executants sign or receive from him a personal acknowledgment of his signature. It is for the attesting witness to see the attesting of the document or must have knowledge of the acknowledgment of the signature of the executant.

In Gurdev Kaur v. Kaki,[5],[6] Supreme Court pointed out that when execution of the Will is fully proved then in order to ascertain the wishes of the testator we have to look to the text of the Will. The intention of the testator has to be discerned from the language used in the Will. If a

[4] AIR 2006 Kant. 48 (India).

[5] 2007 (2) A.L.D. 20 at p. 26 (S.C.) (India).

11 AIR 2013 S.C. 532 (India).

[6] SCLT2446 (India).

Will appears on the face of it to have been duly executed and attested in accordance with the requirements of the Statute, a presumption of due exception and attestation applies.

In Mathai Samuel v. Eapen Eapen,[11] the Supreme Court held that subsequent events or conduct of parties after the execution of the document shall not be taken into consideration in interpreting a document especially when there is no ambiguity in the language of the document.

In Dr. Parkash Soni v. Deepak Kumar,[12] the Apex Court scrutinized a will's due execution and highlighted the importance of removing all legitimate suspicions before accepting a document as the last will. The Court emphasized that suspicious circumstances should be satisfactorily discharged for a will's due execution.

AIR 1970 SC 1759(India).

AIR 2007 SC 2134(India).

In conclusion, these judicial decisions provide valuable insights into the interpretation and validity of wills in India.

CONCEPT OF LIVING WILL

The issue of euthanasia has a long history stretching back to the Ancient Greeks, Romans, and Indians, the right to a death with dignity was brought to the fore recently. Before this right was considered, the arguments surrounding euthanasia related more to morality (as with the Roman Stoics) and religion (for example, JudeoChristian philosophy considered suicide to be irreligious.

In Aruna Ramchandra Shanbaug v. Union of India,[7] the Supreme Court allowed passive euthanasia, but before the case of Aruna Ramchandra Shanbaug v. Union of India, little was clear in India about the law applicable to terminally ill patients who wished to die a natural death by refusing modern medical life-sustaining treatment. The 196th Report of the Law Commission of India had made a study of the law relating to euthanasia and its related facets and had proposed a Bill for its implementation. However, euthanasia was not given legal validity until this landmark judgment.

Common Cause (A Regd. Society) v. Union of India,[14] the Supreme Court declared right to die with dignity was a fundamental right and that an advance directive by a person in the form of living will could be approved. Advance Medical Directive cannot operate in abstraction. There has to be safeguards. They need to be spelled out. We enumerate them as follows:

i) The Advance directive can be executed only by an adult who is of sound mind, and healthy state of mind and in a position to communicate, relate and comprehend the purpose and consequences of executing the documents. ii) It must be voluntarily executed and without any coercion or inducement or compulsion and after having full knowledge or information. iii) It

[7] (2011) 4 SCC 454 (India). [14]
AIR 2018 SC 172 (India).

should clearly indicate the decision relating to the circumstances in which withholding or withdrawal of medical treatment can be resorted to.

It should disclose that the executor has understood the consequences of executing such a document.

The document should be signed by the executor in the presence of two attesting witnesses, preferably independent, and countersigned by jurisdictional judicial magistrate first class so designated by the concerned District Judge.

In the event, the executor becomes terminally ill and is undergoing prolonged medical treatment with no hope of recovery and care of the ailment, the treating position, when made aware about the advance directive, shall ascertain the genuineness and authenticity thereof from the jurisdictional Judicial Magistrate First Class before acting upon the same.

CONCLUSION

Wills are legally recognised documents which enables ones property to be distributed according to his or her desires or wishes. In case where a person dies without making a will usually referred to as intestate situation, various issues may arise. Though writing of a will accrues various benefits, very little people do so. The most commonly types of will embraced by individuals are oral and handwritten wills. In cases where no will was written by the deceased person, the governing law automatically controls and regulates property distribution among the beneficiaries. The improvement in current law relating to wills in India is required to make the present status (framework) more effective like a will should be made video-graphed, the person who is making will should medically examined.

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