WILLS & TESTAMENTS

Estate Planning in CoVID-19

Volume II – Article I

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Part I - INTRODUCTION

As embodied in the Constitution of India, India is a Secular Republic which implies that the objective of the people (Indians) is to ensure equal right to all citizens to practice one's own religion. This culture has been prevalent in the territories of India since time immemorial.

One may ask why this is pertinent to know this with context to the topic at hand. The answer to that is fairly simple. In India, Laws that govern the citizen are enacted by the Government in accordance to the Constitution of India. The preamble and various Articles, *inter alia* Article 19, of the Constitution of India, empower every citizen to practice their own religion as a fundamental right. Ergo, the Laws as enacted by the Government *inter alia* ought to be in line with the Constitution and also such that they are tailored to the religious beliefs of each community.

Individuals during the course of his/her lifetime, intends to acquire, and normally acquires assets/properties.

There are two primary forms of property *viz.* 1. Immovable property and 2. Movable property; these are tangible properties and can be seen and felt, though properties can be intangible too, like accounts receivable, goodwill, patents, etc. Upon the demise of the individual these assets/properties would pass on under the law of succession to which the deceased was governed. Each religion has its own unique way of considering devolvement. It is for this reason that the laws enacted in India, keeping in mind the religious beliefs of different communities, has in its wisdom, empowered the Law to pass on these earthly possession through one of two ways 1. Intestate Succession and 2. Testamentary Succession.

As per the Constitution of India, it is the obligation of the Central Government to primarily enact laws of Succession. However, the State of Goa has sought to have its own Civil Code to govern succession this enactment is known as "The Goa

Succession, Special Notaries and Inventory Proceeding Act, 2012"[1]. Further, a person in India is not bound to marry in his/her own religion. We are not, in this article, going into the various issues and mannerisms of marriage and which of them are legal and permissible and which are not, but are restricting ourselves to the fact that it is possible for inter religious marriages. A marriage may be solemnized, whether of a couple of the same religious belief or of varied religious beliefs or of a person(s) who does not believe in religion or is/are atheist(s) under the Special Marriage Act. The law relating to succession follows accordingly. We are not delving into this aspect either for the purpose of this article, but will touch the same here keeping in mind that the law of Wills (testate succession) may be slightly different in case of a marriage solemnized under the Special Marriage Act.**

Part II – PROPERTY

We all live to improve our standard of living. This is one of the many objectives of civilization. While on our journey of life, most of us undertake some form of commercial activities which in return results in the accumulation of property. Property is also usually referred to as Estate / Assets.

As discussed above, in India property is sub-divided into two major forms:-

a. **Immovable Property** – Those things which are embedded into the earth and/or is permanently fastened to anything that is so embedded into the earth are defined as immovable property. An example of such property is a Building/Flat where the structure is laid with a foundation embedded under the earth. Such structures cannot be moved from one place to another. A better definition may be found at section 3 sub-section 26 of the General Clauses Act, 1897 (Act of 1897).[2]

b. **Moveable Property** – Property which isn't immoveable property. In other words, those things which are not attached to the earth and may be easily moved from one place to another are classified as moveable property. An example of such property is a motor vehicle, gold, jewelry, electrical

[1] http://goaprintingpress.gov.in/downloads/1617/1617-25-SI-EOG-1.pdf
[2] http://legislative.gov.in/sites/default/files/A1897-10.pdf

appliances, etc. A better definition may be found at section 3 sub-section 36 of the Act of 1897 **(supra)**.

Moveable property may further be sub classified into two heads:-

i. **Tangible** – That is physical and may be touched, felt, etc. such as Perfume, Stationery, Motor Vehicle, jewelry, etc.
ii. **Intangible** – That is in the form of a concept, thought, idea, etc. and has no real physical form of its own i.e. which cannot be touched, etc. such as Patents, Copyrights, Trademarks, etc.

Part III – INTESTATE SUCCESSION

The Law is designed to protect the property that we work so hard to acquire. Upon the demise of an individual, his/her assets are passed onto those surviving members of his/her family. At this juncture several questions spring up *viz.* 1. Who decides 2. What goes 3. To whom does it go and 4. What is expected from those who are benefiting?

The answer to these questions depend on the first and foremost question i.e. "Who decides?" Before we can address this question, we need to understand that all that passes on to the heirs, beneficiaries would be as per the law. As discussed earlier the Law with regards to succession is normally based on the religion that the deceased followed. However, if a person is married under the Special Marriage Act, the said persons succession is then governed by the general law of succession and not his personal law based on his religion. Notwithstanding the said position, a person is the master not only of his/her destiny but also has the power to ensure that his estate goes to the person he/she chooses irrespective of his / her religious following and belief. This process of following instructions of the owner is referred to as Testamentary Succession and is the subject matter of this article. Failing making of a legal and binding Will would make the esate devolve by the personal law by which he/she is governed. This process of distribution is referred to as Intestate Succession.

As per the Law in force in India, at present, the distribution of property on the basis of religion is governed by the following Laws:-

a. For Hindus, Parsis, Jains, Sikhs, Christians and any other religion, except Muslims and Goans as specified below, by the **Indian Succession Act, 1925** (Act of 1925).[3]
b. For Muslims by the Mohammedian Personal Law.
c. For those mentioned in section 1 sub-section 4 of the Goa Succession, Special Notaries and Inventory Proceeding Act, 2012 **(supra).**

Part IV – TESTAMENTARY SUCCESSION & ITS ALTERANATIVES

As aforementioned, any person may leave instructions as to whom, how much, in what manner, etc. he/she would like his/her property distributed. This method of distributing property of the deceased individual is referred to as Testamentary Succession. This happens by way of following the instructions of the deceased in a document written by him (though in some cases, even an oral bequest is legal). Unlike other legal documents which come into force immediately on them being executed, a Will comes to life when the person executing the same (testator/testatrix) dies. As a consequence, it can be changed as many times as the testator/testatrix wants. It can also be amended at the wish of the testator/testatrix by a document called a "codicil".

Testamentary Succession is to be carried out in accordance with Law the most common source of Law on this is sections 57 onwards of the Act of 1925 **(Supra)**. Testamentary Succession is a cost effective alternative to transfer of immovable property. Other modes of transfer of property are Gift, Sale, Lease, Leave & License, Surrender, Relinquishment, Exchange, Trust, etc. All these methods attract costs and some even require consideration in return of the transfer of property. The tax man also gets involved in most cases. As per the erstwhile Estate Duty Act 1953, the taxes were as high as 85% (Eighty-Five Percent). However. the Estate Duty Act of 1953 was subsequently abolished in the year 1985. As of the date of this Article, there is no tax payable on devolution of an estate on death of the person whose estate is transferred.

[3] https://www.indiacode.nic.in/handle/123456789/2385?locale=en

Part V – ESSENTIAL ELEMENTS OF A WILL & TESTAMENT

Let us now understand how a Will/Testament is made by breakdown the very essential elements of a Will & Testament:-

a. Form –

As per section 63 of the Act of 1925 (supra) a Will / Testament ought to be in writing. In an interesting case of Hodson V. Barnes[4] a Will written on an empty eggshell was held to be valid. There is no such format prescribed/mandated by Law and no such language in which it must be written.

However, in certain circumstances the Act of 1925 (supra) permits an oral Will such circumstances are where army officers are at war, etc.

As per section 72 of the Act of 1925, it is not necessary for the Will to include any technical wording but what is more important is the intention of the Testator. Furthermore, section 87 of the Act of 1925 also states that the intention of the Testator is what is to be given effect to.

As per Mohammedian Law a Will may be oral.

b. Testator / Testatrix –

As per section 57 of the Act of 1925 (supra) an individual or group of individual who desire on distributing their property. The individual/s must be of sound dispossession of mind which shows their capacity to make rational decisions. An idiot cannot contract and hence cannot make a Will / Testament, however, a lunatic can make a provided that he/she is of sound mind at the time of making the Will / Testament. Additionally the individual must not be a minor i.e. under age of 18 years. It may be noted that a male individual is referred to as the Testator while a female individual is referred to as a Testatrix.

Furthermore, in some cases the personal law, religion, of the Testator/Testatrix plays a vital role for instance if a Will is executed by a person who has attempted to commit suicide, such a Will is contemplated as void under the Shia law. The logic behind this rule is that if a person has

[4] (1926) 43 TLR 71

attempted suicide, he cannot be held in his normal state of mind rather, he is assumed to be mentally unstable and disturbed. For example, a person who takes poison or seriously hurt himself and executes a Will before his death then, the Will is declared as null and void. However, under Sunni law, a Will executed in such circumstances is completely valid. Moreover, both Shia and Sunni law upheld the validity of a Will declared by a legator before attempting to commit suicide. Additionally Khoja Memon while belonging to Sunni Caste is treated as a Modern Hindu for the purpose of Testamentary/Inheritance Law.

c. Property –

In order to make a Will / Testament the Testator must have property may it be immovable and/or movable property. The value of the property is not a deciding factor and as such a property of value as little as Rs. 1/- (Rupees One Only) is sufficient for the Testator to make a Testament. In the case of Vinodcharndra Sakarlal Kapadia V. State of Gujarat[5] the Supreme Court has held that Agricultural Land can only be bequeathed to an Agriculturist and not otherwise.

It is also pertinent to note that as per a catena of cases, *inter alia,* 1. Smt. Sarbati Devi and Anr. V. Smt. Usha Devi[6], 2. Shakti Yezdani V. Jayanand Jayant Salgaonkar[7] and 3. Oswal Greentech V. Mr. Pankaj Oswal & ors.[8] it has been time and again held that the legal heirs are the ultimate owners of the property/shares of the deceased and not the Nominees with an exception to this rule being Section 39 of the Insurance Act. Nominees in general hold the property of the deceased "in trust" until the heirs come forth and set claim on the same. It is always best to ensure that the nominee elected and the beneficiary under a Will are the same person this may help mitigate unwarranted litigation.

[5] Order dated 15.06.2020 in Civil Appeal No. 2573 of 2020
[6] 1984 AIR 346 alternatively 1984 SCR (1) 992
[7] Appeal Nos. 311 of 2015, 313 of 2015 in Notice of Motion No. 822 of 2014 in Suit No. 503 of 2014 in Testamentary Petition No. 457 of 2014 before the Hon'ble High Court of Judicature at Bombay.
[8] Company Appeal (AT) No. 410 Of 2018 Oswal Greentech Ltd v. Mr. Pankaj Oswal & Ors

Generally no person may give what he doesn't own, however, in Will & Testaments there is an exception as captured by a legal doctrine which is the Doctrine of Election wherein a barter of property is permissible if the actual owner of the wishes to barter with the Testator. Virtually this is an Exchange after the demise of the Testator.

It is pertinent to note that under Mohammedian Law only 1/3rd of the property may be bequeathed and the remaining 2/3rd must devolve as per Mohammedian Personal Law. In some cases a consent from the legal heirs may suffice and permit the Testator to bequeath his/her entire estate/property.

d. Legatee / Beneficiary –

The individual/s who are to receive a share in the property of the Testator upon his/her demise. It is pertinent to note that the beneficiary cannot be a witness to the Will/Testament. A Child in the womb, if born alive subsequently, is also eligible to become a legatee under a Will.

e. Executor / Executrix –

The individual who is called upon to discharge the duty of ensuring the Will/Testament is honored in letter and spirit. Thus it is critical that this individual be some most trusted by the Testator/Testatrix. This individual may also be a Witness so long as he/she is not a beneficiary under the same Will/Testament. The individual/executor may also be a beneficiary under the Will but may not simultaneously be a Witness. A male individual is referred to as an Executor while a Female individual is referred to as an Executrix.

f. Witnesses –

A minimum of two attesting witnesses are required for the Will/Testament to be valid and binding. These witnesses are required in order to prove the Will/Testament after the demise of the Testator. Thus logically these individuals should be younger and/or healthier than the Testator so that they have a better chance at out living the Testator and may prove the Will/Testament if and when the time comes. Another aspect which must be consider is the fact of residency/domicile of the Witness as it should be kept

in mind that the person may be summoned before the judiciary for his/her statement and should find it convenient to travel to and fro.

As per section 69 of the Indian Evidence Act, 1872[9] in case of death of all witnesses then the Will/Testament must be proved by proving the Signature of the Testator and at least one signature of the Witnesses. *Babu Singh and Ors. vs. Ram Sahai @ Ram Singh*[10], it was held that a Will is only valid when 2 or more attesting witnesses have executed the Will in presence of each other and the Testator.

Some more, not essential but suitable to have, elements in a Will & Testament are as under:-

g. Family Clause –

This Clause contains the details of the individuals who are the immediate family of the Testator. The names, age, address, etc. to identify the family members is included here. These individuals may be parent/s, spouse, children and grandchildren who are generally mentioned in this clause.

h. Obiter Clause –

This Clause is the story that led upto the creation of a Will/Testament and may speak of the intention of the Testator and also may include an expression of the Testators life.

i. Living Interest Clause –

Have an unsound member in the family or a minor or an elderly? This Clause ensures that while the property is transferred to a third person the benefit to use and enjoy the property and rent earned out of it goes to the welfare of the person who is incapable to derive the benefits on his/her own. This is similar to a Trust.

j. Last Rights / Funeral Wishes Clause –

It is ok to include a Clause with regards to what the Testator has in mind for his funeral and how much of his property he would like to assign to his last rights.

[9] https://www.indiacode.nic.in/bitstream/123456789/2188/1/A1872-1.pdf
[10] (2008) 14 SCC 754

k. **Specific Exclusion Clause** –

In this Clause the Testator categorically mentions those persons who should not receive any property of the Testator and the reason behind such exclusion from the Will. This Clause attempts at ensuring that miscreants fail to discredit the Will and unlawfully gain from the property of the Testator.

l. **Residuary Clause** –

Not always is it possible to cover all of the assets of the Testator and its worth remembering that there are times the Testator may acquire new assets in the future. For such times, this Clause acts as a blanket and transfer all such property which has not been mentioned, due to omission or new acquisitions, in the Will/Testament to the individual/s mentioned in this Clause.

m. **Photograph & Thumb Impression** –

Finally in an attempt to make the document foolproof it would seem prudent to have the Testator/Testatrix affix a photograph along with their thumb impression (of the non-dominant hand). This will help establish a better sense of authenticity. Additionally, affixing signature on all pages is also a wise idea.

Besides the above, it is pertinent to note that the Act of 1925 (Supra), *inter alia* Sections 113, 114 & 115, place certain restrictions on the Testator/Testatrix as to what, to whom, how, etc. property may be bequeathed.

Part VI – AMENDEMENTS / CODICIL

There come times when the Testator may want to make modifications to the already existing Will & Testament at such times the Testator may simple execute a document which is referred to as Codicil and in fact is a continuation/alteration of the existing Will & Testament. This document does not override the entire Will & Testament but is a addition/substitution/modification/alteration of part/s of the existing and binding Will & Testament. Section 62 of the Act of 1925 contains a provision whereby the maker may revoke or alter the Will.

In order to completed revoke or cancel a Will the maker must execute another document expressly stating that this new document (Last Will & Testament) shall be the "Last" one and all previously executed Wills & Testaments are to be revoked and superseded by this document.

It also worth noting that, while there is no specific Law stating as to if Divorce affects a Will and if so how it would affect it, a Will logically should not be affect by Divorce and for the sake of distribution of assets the spouse may be presumed to be deceased as on the date of the divorce Decree.

However, in case of major changes whether in property held or constitution of beneficiaries it would be sensible to re-visit the drawing board and start from scratch as this way it may just be easier and less complex.

Part VII – LEGAL REQUIREMENTS & CHALLENGES

It is absolutely alright to draft a Will & Testament as this is not per say a Legal Document. No government Stamp Duty is levied nor is it required to be registered. It is drawn up on a plain piece of paper and only comes to life on the demise of the maker. However should a Testator desire to register his Will/Testament it would be an added benefit which would only protect the beneficiaries in case of the Will / Testament being challenged. It must be remembers as registration of a Will is not a condition precedent to validating the Will, an unregistered Will that has been executed after a registered Will would in fact supersede the registered Will.

As per section 40 of the Registration Act, 1908[11] it is evident that a Will/Testament may even be registered after the death of the Testator (maker of the Will) by any person *viz.* the Executor, beneficiary, etc. who is claiming any right under the Will.

As stated before the Law requires a Will, in most cases, to be written by a sound person who is a major at the time of making the Will and possess property to be bequeathed. Additionally there is a need for at least two attesting witness.

The heirs/executors named in a Will which has been executed and/or any immovable property of the Testator is located in any of the Presidency Towns *viz.*

[11] https://www.indiacode.nic.in/bitstream/123456789/12230/1/the_registration_act%2C_1908.pdf

Madras, Bombay, and Calcutta require to obtain a probate. A probate is a process of verifying the Will before giving it legal status. A probate does not confer title it merely verifies if the Will was executed with free consent this is what has been held in Delhi Development Authority V. Mrs. Vijaya C. Gurshaney & Anr.[12] Title is conferred by the Will itself and not the probate. If the maker was not capable of bequeathing the property *inter alia* he is not the owner of the property in question then he cannot possibly pass on title of the same. He may only pass on a title as good as what he has.

This process may cost Rs. 90,000/- (Rupees Ninety Thousand only) and above based on facts and circumstances. At present about Rs. 75,000/- (Rupees Seventy-Five Thousand only) is the upper limit on the Court Fees payable in Probate cases. On top of this basic charges there are drafting and filing charges applicable based on experience and average professional fees of Advocates followed by actual cost/s incurred in printing, binding, etc. In some cases, parties involved may be required to issue public notice in 2 local papers which is an additional cost. Finally, time taken to adjudicate these cases are left to the judiciary and range from 6 month to 2 years on an average which gets even longer if the case is contested.

Some fascinating questions which arises is "what happens to the Will & Testament" in case of 1. change of religion of Testator or the legal heirs and/or 2. abandonment of the testator or the legal heirs and/or 3. denouncing of family ties by Testator or legal heirs. We have chosen to take each point and address it independently:-

1. In case Testator changes his religion after execution of the Will & Testament THEN the said change of religion would logically result in nullifying the Will & Testament and would subject the inheritance as per the Laws of intestate succession. However, if any person other than the Testator/Testatrix i.e. it could be the legal heirs/beneficiary/executors/etc. change their religion THIS would not have an impact on the Will & Testament.
2. In case of abandonment, as per the Indian Evidence Act 1872, if a Testator/Testatrix is unheard of for more than 7 (seven) years then the Testator/Testatrix is presumed to be dead and accordingly his/her assets

[12] (2003) 7 SCC 301

may be distributed as per the Will & Testament i.e. after seeking a declaration as to presumption of death from the appropriate forum. In case a legal heirs/beneficiary/etc. is unheard of for more than 7 (seven) years then the legal heir/beneficiary/etc. is presumed to be dead and accordingly the share of the assets to be distributed to him/her as per the Will & Testament shall be dealt with as if said person is dead i.e. after seeking a declaration as to presumption of death from the appropriate forum. In case of executor then the legal heir/beneficiary/etc. will be required to obtain letter of administration dead i.e. after seeking a declaration as to presumption of death from the appropriate forum.

3. Denouncing of family ties by the Testator/Testatrix, if in clear terms mentioned in the Will & Testament and if coupled with exclusion of persons to inherit assets of the Testator would disentitle the persons so mentioned from inheritance.

In addition to this, another concern that should be carefully thought of and duly considered is transfer of property rights such as tenancy right and/or creation of tenancy rights. It would be advisable that no tenancy rights be created in the Will & Testament and the same should be created by a separate Tenancy Instrument so as to avoid unwarranted litigation.

A will irrespective of its registration may be challenged by anyone on the following grounds:-

1. Fraud
2. Coercion
3. Undue influence
4. Suspicious nature
5. Lack of due execution
6. Lack of testamentary intention
7. Lack of testamentary capacity
8. Lack of knowledge and approval
9. Forgery
10. Revocation

Part VIII – OFFENCES WITH REGARDS TO TESTAMENTS

The Indian Penal Code, 1860 (Supra) deal with the various offences that are punishable in India. When it comes to Wills & Testaments a variety of possible crimes may be committed. Some of the crimes that come to mind are:-

a. Cheating
b. Fraud
c. Criminal Intimidation
d. Forgery

Section 467 of the Indian Penal Code, specifically deals with Forgery of a Will. The punishment prescribed by it is imprisonments up to 10 (Ten) years along with fine. Additionally as per the IInd Schedule of the Criminal Procedural Code the offence is not compoundable nor is it bailable. However, a person suspected of committing the offence can not be arrested without a warrant.

Part IX – CONCLUSION

As you might have seen in this Article, it is evident that a layman is entitled to make his own Will & Testament, however, the maker must bear in mind all of the aforesaid so as to safeguard the interest of the legacy and the beneficiaries. Many factors are to be considered while drafting the Will & Testament so as to lift out the intention of the maker and to leave little to the imagination. The maker should qualify the conditions to enable him/her to make a Will and must ensure that the Will is prepared bearing in mind the different Laws in force. It is always prudent to visit an advocate and seek professional guidance in drafting the Will.

The Authors re-iterate, that Wills & Testaments is a complex issue and this article has not and cannot cover all the vital aspects of the Law and given that the Common Wealth Legal System followed in India relies on the ever evolving Laws based on precedents, it is always recommended to have each case assessed on its own facts and circumstances, based on the prevailing laws. This Article is not and shall not be used as Legal Advice/Opinion and is mere issued for private circulation and educational use only.

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