LAW WITH RESPECT TO WILLS IN INDIA

MAY 2020

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LAW WITH RESPECT TO WILLS IN INDIA

I. INTRODUCTION

A Will[1] , as defined under The Indian Succession Act, 1925 (hereinafter referred to as the "Act"), can be referred to as 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. Such declaration, as regards the disposal of the property, takes effect only after the death of the testator. The Act is the governing law in case of Wills and Codicils with respect to Hindus, Buddhists, Sikhs and Jains. The Mohammedans on the other hand can dispose off their property as per the Muslim Personal Law. It is to be noted that if a Mohammedan solemnizes marriage under the Special Marriage Act, 1954 then trights and duties arising out of marriage are governed by the Special Marriage Act and the succession would be governed by the Act of 1925, and not by the personal laws.[2]

II. ESSENTIAL CHARACTERISTICS OF A WILL

1. Legal Declaration:

   The documents purporting to be a Will in conformity with law. The declaration should take effect only after the death of the Testator.

2. Disposition of Property:

   The declaration should relate to disposition of the self-owned and acquired property, whether movable or immovable, of the testator.

3. Capacity of the testator:

   A person in order to be competent to make a Will should be:-

[1]The Indian Succession Act, 1925, No. 39, Sec. 2(h).
[2] Mohd Atique Vs. Aparajita Atique, 248 (2018) DLT 466.

i) of sound mind, and

ii) not a minor

As per the provisions of the Act[3]:-

i) A married woman may also dispose of by Will any property which she could alienate by her own act during her life.

ii) Persons who are deaf, dumb or blind are not incapacitated for making a Will if they know the nature of their act.

iii) A person who is ordinarily insane may make a Will during the intervals in which he is of sound mind.

iv) No person can make a Will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause if he does not know the nature of his act.

4. Beneficiary under a Will:

Any person capable of holding property can be a beneficiary under a Will. Thus, a minor, lunatic, a corporation, a Hindu deity, or any other juristic person can also be a beneficiary.

5. Intention:

The intention of the testator should be clear and unambiguous from the Will itself by reading of the Will.[4]

[3]The Indian Succession Act, 1925, No. 39, Sec. 59.
[4]Gnanambal Ammal v. T. Raju Aiyar,AIR1951 SC 103; Bhura v. Kashi Ram,(1994)2SCC111; Navneet Lal v. Gokul &Ors., (1976)1 SCC 630.

III. CODICIL

A Codicil is an instrument made in relation to a Will; explaining, altering or adding to its dispositions, and shall be deemed to form a part of the will.[5] The purpose of a codicil is to make certain modifications or alterations in the Will, which have already been executed. For instance, if the testator wants to make changes in the names of the executors, a Codicil in addition to the Will can be made to do so.

The codicil must be in writing and signed by the testator along with attestation by two witnesses. It is also the duty of the court to ascertain the intention of the testator by reading the Will and all the codicils.

IV. FORM AND FORMALITIES OF A WILL

1. Form and language of a Will:

There is no prescribed form of a Will. It needs to be duly signed and attested. A Will can be written in any language. However, the wording or language of the Will must be clear and unambiguous so that the intention of the testator can be ascertained.[6] A will should be signed by the Testator. If the testator is unable to affix his signature, then the testator may execute the Will by putting a thumb impression/mark.[7]

Under Mohammedan Personal Law, no particular form of Will is prescribed. A few prominent provisions of testamentary succession in Muslims are discussed in subsequent paragraphs of this article.

[5]The Indian Succession Act, 1925, No. 39, Sec. 2(b).
[6]The Indian Succession Act, 1925, No. 39, Sec. 74.
[7]The Indian Succession Act, 1925, No. 39, Sec. 63(a); Jagdish Chand Sharma v. Narain Singh Saini (Dead) Through LRs., (2015) 8 SCC 615.

2. Stamp Duty:

No stamp duty is required to be paid for executing a Will or a codicil.

3. Attestation:

A Will must be attested by two witnesses who should see the testator executing the Will.[8] The witnesses should sign in the presence of each other and in the presence of the testator. Further and importantly, attestation requires *animus attestandi*, i.e. a person should affix his signature on a document with the intent to attest it as a witness. If a person puts his signature on a document only to discharge a statutory duty, he may not be considered as an attesting witness. Therefore, any such scribe or an advocate who has drafted the document may not be the attesting witness.[9]

In the case of Hindus, though a witness can be a beneficiary,[10] however, it is advisable that a will should not be witnessed by a beneficiary. The courts have held that where the beneficiary has himself taken a prominent part in the execution of the Will which confers on him substantial benefit that in itself is one of the suspicious circumstances.[11]

In the case of Parsis and Christians the legacy to an attesting witness to a Will is void under Section 67 of the Indian Succession Act. However, Section 67 of the Indian Succession Act, 1925 is not applicable to Wills of Hindus by virtue of Section 57 read with Schedule III of the Indian Succession Act. Moreover, the hon'ble Kerala High Court held that where the plaintiff legatee had put the signature in the Will not with *animo attestandi* but only in token of his consent to

[8]The Indian Succession Act, 1925, No. 39, Sec. 63.
[9] Dharam Singh v.Aso&Anr., 1990 Supp (1) SCC 684; Raj Kumari v. Surinder Pal Sharma, 2019 SCC Online SC 1747; 2020(1)RCR(Civil)729.
[10] Anand Burman vs State on 2012 (3) CLJ 652 Delhi.
[11] Surendra Pal & Ors. v. Saraswati Arora & Anr., 1974 SCC (2) 600.

discharge the obligations under the Will and in such a situation, the presumption that the legacy is void cannot be drawn.[12]

4. Registration:

The registration of a will is not mandatory.[13]Registration is advised because it proofs that proper parties appeared before the Registrar who attested the Will after ascertaining their identity. The registration of the Will by the testator himself evidences the genuineness of the Will. Once a Will is registered, it becomes final and no changes can be made to it except by the Testator himself.

5. Procedure for Registration:

There is no time limit for Registration of a Will. To register a Will, the testator, or after his death any person claiming as executor or otherwise under a Will, may present it to any Registrar or Sub-Registrar for registration.[14]

V. REVOCATION AND AMENDMENT IN CASE OF WILLS

As per Section 62 of the Act, a Will can be revoked, changed, or altered by the testator at any time when he is competent to dispose off his property.

Section 67-73 of the Act deal with the circumstances with respect to Revocation and Amendment of Wills. As per the said provisions, a person can revoke, change, or alter his Will by:-

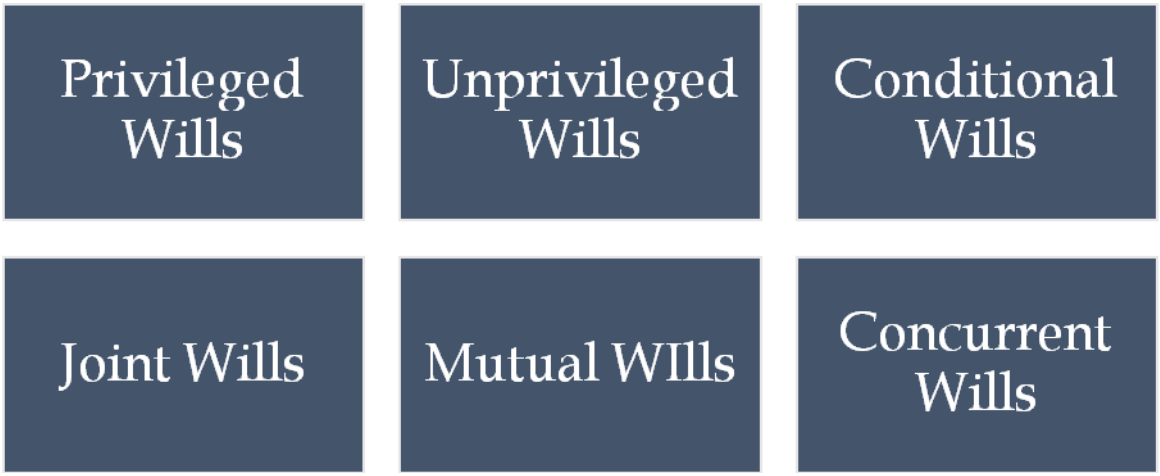
i) Executing a new Will,
ii) Revoking an earlier Will,
iii) Registering a new Will (if the old Will is registered),
iv) Destroying an old Will, or

[12] Jose v. Ouseph AIR 2007 Ker 77; conjoint reading of The Indian Succession Act, 1925, No. 39, Sec. 58 and Sec. 67.
[13] The Indian Registration Act, 1908, No.16, Sec. 17.
[14]The Indian Registration Act, 1908, No.16, Sec. 40.

v) By making a codicil.

Section 71 of the Act is applicable to alterations made after the execution of the Will. Any obliteration, interlineations or any other alteration in a Will made after its execution would be inoperative unless such alterations are executed as per the requirements of Section 71 of the Act. The alterations, if duly executed, would be read as part and parcel of the Will itself. However, if the requirements as enumerated under the above-mentioned provision are not fulfilled, then the alterations would be considered to be invalid and probate would be issued without taking the alterations into consideration. The signatures of the testator and the attesting witnesses must be with respect to the alterations made.

VI. KINDS OF WILLS



1. Privileged Wills:

Privileged Wills according to Section 65 of the Act, refers to a Will made by a soldier, an airman or a mariner, when he is in actual service and is engaged in actual warfare. Section 66 of the Acttalks about the rules related to the making

and execution of privileged Wills. Section 65 and 66 of the Act are special provisions with respect to privileged Wills and other general provisions andare supplementary to Sections 65 and 66 of the Act.

2. Unprivileged Will:

The rest of the Willa under the Act can be referred to as an Unprivileged Wills. In other terms, any Will created by a person who is not a soldier employed in an expedition or engaged in actual warfare or a mariner at sea is known as an unprivileged Will.

3. Conditional Wills:

A Will made to take effect on the happening of a certain condition or an event is a Conditional Will. The bequest is therefore contingent on the happening or non-happening of a specified condition. Section 124 of the Act provides that where the Will is silent on a time and only specifies the condition of an uncertain event then the legacy can take effect only on happening of that contingency. A bequest dependent upon an impossible condition is void.[15]

Such condition can either be precedent or subsequent. In case of precedent conditions, the condition must be performed before the legacy takes effect whereas in the case of condition subsequent, the condition must be performed after the vesting of the right.

4. Joint Wills:

When two or more persons collectively make a Will, it can be termed as a joint Will. The joint Will is intended to take effect after the death of both andis not admitted to probate during the life time of either of them. A joint Will can be

[15]The Indian Succession Act, 1925, No. 39, Sec. 12.

revoked at any time by either of them during their joint lives or after the death of the survivor.

5. Mutual Wills:

Two or more persons may agree to make a Mutual Wills i.e. to confer on each other reciprocal benefits. The testators confer benefit on each other but if the beneficiaries and testators are distinct, it is not a mutual Will. Mutual Wills are also known as reciprocal Wills and its revocation is possible during the lifetime of either of the testators. But if a testator has obtained some benefit, then the claim against his property will lie. In general terms, Mutual Wills are separate Wills of two persons.

6. Concurrent Wills:

Concurrent Wills are those Wills which are written by one person only but deal with different aspects with respect to the disposal of property. For instance, one Will could deal with the disposal of immovable properties of the testator while the other might deal with the disposal of all movable properties.

VII. PERSONAL LAWS

1. Hindu Personal Laws

i) A Will of Hindu Testator is not revoked upon his/her marriage as provision of revocation of Will by Testator's marriage as provided in Indian Succession Act is not applicable upon Hindus and there is no such provision in Hindu Personal Laws.[16]

ii) The executor can also be the witness to the Will and can also be a beneficiary under the Will.[17]

[16]The Indian Succession Act, 1925, No. 39, Sec. 57, 58 and Sec. 69.
[17]Anand Burman v. State, 2012 (3) CLJ 652 Delhi.

iii) Section 30 of the Hindu Succession Act, 1956authorizes a coparcener to dispose off his Hindu undivided coparcenary interest by way of a Will.[18]

2. Parsis and Christians:

i) Once the Parsi or the Christian testator gets married, his/her Will stands revoked.[19]

ii) a Will or a Codicil shall not be deemed to be insufficiently attested by reason of any benefit therebygiven to any personattesting it, or to his or her wife or husband. But the bequest orappointment in such a legatee or his spouse shall be void.[20]

3. Muslim Personal Law

As a rule, the provisions of the Indian Succession Act do not apply to a Muslim testator unless Muslim has married under the provisions of Special Marriage Act. The law with respect to Wills is governed by the Muslim Customary Law.

i) Under Mohammedan Law,[21]form of Will is immaterial, and it may be made either orally or in writing.[22] No special form or solemnity for making or attesting a will is prescribed. It is sufficient if a will can be proved to have been really and truly the will of the testator.[23]

ii) A bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator. Any single heir may consent so as to bind his own share.

[18] Radhamma & Ors. v. H.N. Muddukrishna & Ors., Supreme Court, (Civil Appeal No. 7092 of 2010); Pavitri Devi & Anr. v. Darbari Singh & Ors. (1993) 4 SCC 392.
[19]The Indian Succession Act, 1925, No. 39, Sec. 69 & Sec. 70.
[20]The Indian Succession Act, 1925, No. 39, Sec. 58 and Sec. 67.
[21]Principles of Mahomedan Law by Dinshah Furdunji Mulla.
[22]Abdul Manan Khan v. Murtuza Khan, AIR 1991 Pat 155.
[23]Auliya Bibi v. Ala Uddin, 1906 28 All 715.

iii) There is a limit of testamentary power. A Mohammedan cannot by Will dispose off more than one-third of the surplus of his estate after payment of funeral expenses and debts. Bequests in express legal terms cannot take effect unless the heirs consent thereto after the death of the testator.[24]

VIII. INVALID WILLS

Any part of Will which has been caused not by free will but was made and caused by fraud or coercion or undue influence, the will would be void and the Will would be set aside.[25]

IX. VOID WILLS

A Will can be declared void due to many reasons such as:-

1. Due to Uncertainty:

   Any Will which is not expressive of definite intention is void for uncertainty i.e. if the object or subject of the Will is uncertain it would be void.[26] However, such uncertainty must go to the very root of the matter. For instance, from the Will the intention of the Testator is not clear as to what he intended to give and/or to whom has he intended to be given.

2. Due to Impossibility of Condition:

   Any bequest by a Will upon an impossible condition or a condition, fulfillment of which is contrary to law or to morality is void.[27]

[24]. Asma Beevi v. M. Ameer Ali, 2008 (6) MLJ 92..
[25]The Indian Succession Act, 1925, No. 39, Sec. 61.
[26]The Indian Succession Act, 1925, No. 39, Sec. 89
[27]The India Succession Act, 1925, No. 39, Sec. 126, Sec. 127.

X. PROVING A WILL IN THE COURT OF LAW

The propounder should demonstrate that the Will was signed by the testator and at the relevant time, testator was in a sound and disposing state of mind and had understood the nature and effect of the dispositions, that he had put his signature on the testimony of his own free will and at least two witnesses have attested the Will in his presence.[28]

A Will can be proved by examining at least one attesting witness. According to Section 63 of the Act, a Will needs to be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the Will and further, each of the witnesses to the Will should have signed the Will with the requisite intention to attest. However, according to Section 68 of Indian Evidence Act, 1872, a document required by law to be attested has to be proved by calling for the purpose of proving its execution at least one attesting witness.

As per the conjoint reading of Section 63 of the Indian Succession Actand Section 68 of the Indian Evidence Act, a Will is required to be proved by examining at least one attesting witness. A presumption regarding documents which is 30 years old as is provided under Section 90 of the Indian Evidence Act, 1872, does not apply to a Will. A Will has to be proved in terms of Section 63 (c) of the Indian Succession Act, read with Section 68 of the Indian Evidence Act, 1872.[29]

Special circumstances with respect to proving a Will

1. Where one attesting witness examined to prove the Will fails to prove the due execution of the Will:

[28] Surendra Pal & Ors. v. Dr. (Mrs.) Saraswati Arora &Anr., 1974 2 SCC 600.
[29] Bharpur Singh & Ors v. Shamsher Singh, (2009) 3 SCC 687.

Where one attesting witness examined to prove the execution of the Will as per Section 68 of the Indian Evidence Act, 1872 then, the other available attesting witness can be called upon by the court to prove the execution of the Will.

2. When both the attesting witnesses to the Will are dead or cannot be found:
In case both (or all) the attesting witnesses to the Will are dead or cannot be found, then the Will is to be proved by proving that the attestation of at least one attesting witness to the Will is in his handwriting, and that the signature of the testator on the Will is in his own handwriting and a recourse is provided under Section 69, Indian Evidence Act, 1872[30] to prove the Will.

3. If the attesting witness denies or is not able to recollect the execution of the Will:
Section 71 of the Indian Evidence Act, 1872 provides that if the attesting witness denies or is not able to recollect the execution of the document, its execution may be proved by some other evidence. The said provision is applicable where it is not possible to prove the execution of the Will by calling the attesting witnesses, though alive. In such cases, the court may permit any other evidence to be produced to prove the due execution of the Will.

It is to be taken note that such situation may raise suspicious circumstances and the propounder has to explain these circumstances and has to remove the suspicion of the court so that the Will can be validly executed. The presence of suspicious circumstances makes the burden heavier on the propounder of the Will and thus in such cases, the propounder must remove all legitimate suspicions before the document can be accepted as the last Will of the testator.[31]

4. If the attesting witness is unable to see the Testator sign the Will:

[30]Indian Evidence Act, 1872, No. 1, Sec. 69; Jagdish Prasad v. State, (2015) 218 DLT 690 (DB); Babu Singh & Ors. v. Ram Sahay @ Ram Singh, (2008) 14 SCC 754.
[31]Bharpur Singh & Ors. v. Shamsher Singh, (2009) 3 SCC 687.

In case the attesting witness is unable to see the testator sign the Will, then the witness should receive an acknowledgement from the testator of his signature made in the Will. Section 63 (c) of the Succession Act requires an acknowledgement of execution by the testator followed by the attestation of the Will in his presence. The provision gives certain alternatives and it is sufficient if conformity to one of the alternatives is proved. The acknowledgement may assume the form of express words or conduct or both, provided they unequivocally prove an acknowledgement on part of the testator. Where a testator asks a person to attest his Will, it is a reasonable inference that he was admitting that the Will had been executed by him. There is no express prescription in the statute that the testator must necessarily sign the will in presence of the attesting witnesses only or that the two attesting witnesses must put their signatures on the will simultaneously at the same time in presence of each other and the testator.[32]

If the witness appearing before the court is only able to prove the attestation of will by him but fails to prove the attestation by the other witness or the testator, it would be considered that he is not able to prove the validity and legality of the Will and the other witness will also have to be produced in the court.[33]

XI. PROBATE AND LETTERS OF ADMINISTRATION

1. Probate

Probate is granted in case of both, registered and unregistered Will, in which an Executor has been appointed. Probate can be referred to as the copy of a Will certified under the seal of a Court of Competent Jurisdiction, holding the grant of

[32]Ganesan (D) Through Lrs. v. Kalanjiam & Ors, AIR 2019 SC 5682.
[33] Janki Narayan Bhoir v. Narayan Namdeo Kadam, 2003 (2) 2003 SCC 91.

administration to the estate of the testator, and it validates all intermediate acts of the executor.[34]

Executor derives his title from the Will and becomes the representative of the deceased even without obtaining probate. Probate just makes his title certain. The grant of Probate is not a condition precedent for filing a suit in order to claim a right as an executor under the will.[35]

2. Letters of Administration

Letter of Administration is granted in the following cases[36]:-

i) When the deceased has left both Immovable & Moveable properties, but no will,

ii) When a Will has been left without the appointment of an Executor of the Will,

iii) When the executor is deceased after proving the Will but before administration,

iv) When the executor does not have the legal capacity, and when the executor dies before the testator and another executor is not appointed.

XII. ENFORCEMENT OF WILLS

A Will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.[37]

Wills in India can be enforced by two ways:-

[34]The Indian Succession Act, 1925, No. 39, Sec. 2 (f).
[35]The Indian Succession Act, 1925, No. 39, Sec. 211; FGP Limited v. Saleh Hooseini Doctor & Anr., (2009) 10 SCC 223.
[36]The Indian Succession Act, 1925, No. 39, Sec. 234.
[37]The Indian Succession Act, 1925, No. 39, Sec. 61.

1. Probate

Section 213(1) of the Indian Succession Act prohibits recognition of rights as an executor or legatee under a will without production of a probate and sets down a rule of evidence and forms, however the limitations thereof are provided in Section 213(2) of the Act. The bar as provided in Section 213(1) of the Act is to the establishment of the right only in a court of justice and not for being referred to in other proceedings before administrative or other Tribunal.

The exceptions to the applicability of Section 213(1) of the Act as provided in Section 213(2) are as under:

i) is inapplicable in case of a will made by Muhammadans;

ii) Inapplicable to the Wills coming under Section 57(c) of the Act i.e. all wills and codicils made by any Hindu, Buddhist, Sikh or Jain, on or after the first day of January, 1927 which does not relate to:

   a. immovable property situated within the territory formerly subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary civil jurisdiction of the High Courts of Judicature at Madras and Bombay; or

   b. in respect of property within those territories.

iii) As a consequence, a probate will not be required to be obtained by a Hindu in respect of a will made outside those territories or regarding the immovable properties situated outside those territories.[38] As such, Probate of Will is only compulsory in the cities of Bombay, Calcutta and Madras or for properties situated in the cities of Bombay, Madras and Calcutta though the Will may be executed outside the three cities.[39]It is not necessary to seek probate or letter of

[38] Clarence Pais & Ors v. Union Of India, (2001) 2 SCR 43.
[39]Harvinder Singh & Anr. v. Smt. Ranjit Kaur, MANU/DE/0459/2011.

administration in respect of a Will in terms of Section 213 of the said Act in the National Capital Region of Delhi.[40]

It may be noted that Delhi High Court Rules, however prohibit a Civil Court from passing or executing a decree in a suit by or upon the application of a person claiming to be entitled to recover a debt or decree in favour of any person deceased, without the procedure of a probate or letters of administration, or a succession certificate granted under the Succession Certificate Act of 1889, or the Indian Succession Act of 1925, or a certificate granted under the Administrator-General Act, III of 1913. As per rules, the grant of a probate, letters of administration or a succession certificate is not, however, an essential condition precedent to the institution of a suit, but the requisite probate, letters or certificate must be produced before the passing of a decree.[41]

In case of Parsis, when a Will of a Parsi is not probated then no legatee can claim right by means of the same and such testator is treated to have died interstate.[42]

Effect of grant of probates:

A probate granted by a competent court is conclusive evidence of the validity of a Will until it is revoked, and no evidence can be admitted against it except in a proceeding to revoke the probate. However, it only establishes the legal character of the executor i.e. his right to represent the estate of the Testator and does not decide the title or the existence of the property devised.[43] The grant of a probate is also conclusive evidence with respect to the testamentary capacity of the

[40] The Indian Succession Act, 1925, No. 39, Sec. 57 r/w Sec. 213; Vishnu Ramchandra Undage v. Ganpati Ramchandra Undage 2005 (4) MhLj 1108; Pradeep Bhalla v. Sangeeta, 2007 (94) DRJ 548, Sanjay Gupta v. Ved Kanti Gupta, 1994 (4) AD (Delhi) 330; Kanta Yadav v. Om Prakash Yadav, AIR 2019 SC 5556.
[41] Part B, Chapter-6, Volume-II, Delhi High Court Rules.
[42] Gaiv Dinshaw Irani & Ors. v. Tehmtan Irani & Ors., (2014) 8 SCC 294.
[43] FGP Limited v. Saleh Hooseini Doctor & Anr., (2009) 10 SCC 223.

Testator. Once a probate is granted, a suit for a declaration that the Testator was not competent to make a Will is barred.

Grant of Probate:

Under the Indian Succession Act, a probate can be granted only to an executor appointed under a Will. It cannot be granted in favour of a minor, a person of unsound mind, or to an association of individuals. No probate of a will shall be granted until after the expiration of seven clear days from the day of the testator or intestate's death.[44]

Revocation of grant of Probate:

If a revocation is sought for grant of probate or letters of administration, the period of three years under Article 137 of the Limitation Act, 1963 shall be applicable. The said period would commence from the date when the probate is granted, as once a probate is granted, the same operates in rem.

2. Letters of Administration

The Letters of Administration may be granted by the court instead of probate in some cases. It is granted to a beneficiary in respect of either the whole estate or a part of it that remains to be administered.

Under the Indian Succession Act, 1925, Letters of Administration can be granted to any person entitled to the whole or any part of the estate of the deceased person. It cannot be granted in favour of a minor, a person of unsound mind, or to association of individuals. No letters of administration shall be granted until

[44]The Indian Succession Act, 1925, No. 39, Sec. 293.

after the expiration of fourteen clear days, from the day of the testator or intestate's death[45] .

The objective of the application for seeking Probate or Letter of Administration is to obtain the Court's permission to perform a legal duty created by a Will or for recognition of a right as a testamentary trustee. It is a continuous right which can be exercised at any time even after the death of the deceased as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed.

XIII. LIMITATION

Limitation[46] period to obtain a probate of a Will is governed as per Article 137 of the Limitation Act, which provides for a period of three years. The period of limitation commences from the time when the right to apply for probate accrues to the petitioner.

It has been however held that the right to apply would accrue when it becomes necessary to apply which may not necessarily be within 3 years from the date of the deceased's death. Delay beyond 3 years after the deceased's death would arouse suspicion and greater the delay, greater would be the suspicion and accordingly such delay must be explained, but cannot be equated with the absolute bar of limitation and once execution and attestation are proved, suspicion of delay no longer operates.

XIV. TESTAMENTARY TRUST

The importance of a Will in life of an individual can be appreciated with a concept of Testamentary Trust, which is now used as an instrument of succession

[45] *Ibid.*
[46] The Limitation Act, 1963, No. 36, Art. 137.

planning. In brief the concept of Testamentary Trust can be understood in the following manner:

There are situations when a person wishes to bequeath his or her properties for the benefit of a person(s) but either due to incapacity of such beneficiary on account of being minor or having certain disabilities, physical or mental is unable to do so, a Private Trust can be set up by a Will for managing the estate properly. Testamentary trust is also settled for the purpose of assets protection or for the purpose of charity.

Indian Trusts Act, 1882 is the governing law in case of Trusts however when a Trust is set up by a Testament, the testamentary laws are also applicable and as such the Testamentary Trust comes into existence after the death of Testator.

The essential element for a testamentary trust is that it must be created by a valid Will fulfilling all the essentials enumerated under the Indian Succession Act, 1925. As such, a Will creating a Trust must:-

i) have an unequivocal and unambiguous intention of Testator to create a trust;

ii) clearly define and specify the property forming subject-matter of the trust;

iii) specify the beneficiaries in whose favour the trust is to be created.

Further, the Will must clearly set out the purpose/objects for creating the trust and should name the trustees for managing the affairs of trust/assets bequeathed in trust.

The distribution of assets or benefits therefrom to or among the beneficiaries can also be spelled out in the Will. In such a form, the trustees have no discretion on distribution of the assets contrary to event the cases where the distribution is left at discretion of Trustee. It is advisable that if the distribution of assets is left at

the discretion of the Trustee, the Testator should set out the heads for which the Trustee should use the assets e.g. education, health-emergency etc.

A testamentary trust can be revoked by the testator by simply revoking or amending the Will during his lifetime. The trust usually expires on the happening of a specific event, such as the beneficiary reaching a certain age, or the purpose of the trust having been achieved.

The Testator continues to have full control on the assets intended to be bequeathed in a trust since the Testamentary trust can come into existence only after the death of Testator. Since the Trust so created does not fall within the exemptions provided for the applicability of Section 213 of the Indian Succession Act as such the existence of Testamentary Trust is subject to completion of legal formalities of Probate of Will.

The Testamentary Trust come into existence after the death of Testator and generally associated with the welfare of beneficiary and it is advisable that while deciding for Trustees, the Testator should take into consideration their interests in the welfare of beneficiaries as well as discuss and take consent of proposed Trustee during his lifetime. The proposed Trustee can also be named as an Executor of Will though not mandatory.

The Testamentary Trust are also settled for the protection of assets. Generally this takes place when the Testator either has apprehension that his assets would be spoiled away for one or other causes attributable either to the beneficiary or other factors and the beneficiary would not be able to enjoy the fruits thereof. Few such instances may be:-

i) to avoid the benefits to pass on the creditors of beneficiary; or

ii) to avoid the benefits passing to the spouse of beneficiary when the beneficiary is having matrimonial discord and etc.;

iii) to avoid casual, irresponsible management of asset considering the nature and capabilities of beneficiary.

One of the other benefits of the testamentary trusts is that no stamp duty is payable to transfer the assets from the owner to the trust. It also carries significant tax advantages as the beneficiaries of the individual trusts will not be taxed for the devise. Only the trust as a whole is taxed. Such trusts are therefore, created for managing and investing funds, thereby securing the interests of the beneficiaries.

XV. CONCLUSION

With the passage of time the acceptance and recognition to the 'WILL'is increased in Indian Society and so the development has taken place in the law of same. The succession laws in India are now well developed with appropriate regard to the Personal Laws of various religions as 'The Indian Succession Act, 1925' applies extensively to Wills and codicils made by Hindus, Buddhists, Sikhs, Jains(except as provided under Schedule-III of Indian Succession Act) and to Parsis and Christians (with inclusion of specific provisions in Indian Succession Act) while Mohammedans are largely covered by Muslim Personal Law (Shia's and Sunni's).

Mr. Shankar Pai has rightly said,

> *"A will is a sensitive topic to open up to. People are not comfortable discussing a Will in India. There is a misconception that if someone tells you to make a will, the person thinks that indirectly you are telling him that his end is near or that you are eyeing his property. However, all apprehensions disappear when I tell them the consequences of not making a will."*

Will is an instrument which enables a person to distribute his hard earned assets as per his own desire and not by Laws enacted by Government as in absence of Will, one's properties get distributed as per respective Personal Laws, irrespective to the wish and desire of a person who has/had acquired the same or of the condition of the beneficiary.

* * *

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