A Study Family Law in Indian Sense Testamentary Succession

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Abstract

The Indian Succession Act of 1865 was previously controlled in India. This Act was based principally on English Laws and was the rule in effect for all forms of will and testamentary succession, subject to certain exceptions. The exceptions, however, were so broad that all Indians were exempt. The Hindu Wills Act was also enacted in 1870. This Act provided that certain sections of the Act of Indian Succession extend to all Hindus's wills and codicils. In 1881, the Act was adopted and this Act was made applicable to Hindus as well as to Muslims. The Act was passed in 1881. The 1925 Indian Succession Act consolidates the earlier 1865 Act, the Hindu Will Act, the Act on the Probation of the Indians and on the Act on Administration and even the Act on Succession of the Indians. The Preamble of the Act states the intestate and testamentary succession legislation is to be modified. This encapsulates the code of English law to a large extent. As far as things that do not fall under this Act are concerned, the Hindus and Moslems are regulated by their Personal law in the Hindu Succession Act of 1956. To order to protect their personal law, the majority were controlled by Indians, including Hindus, Buddhists, Jains or Sikhs, by the Indian Succession Act, 1925. Such special clauses are now included in the Indian Law of Estate itself. The Hindu law of will is therefore to be sought and examined under the testamentary rule of the Indian Succession Act.

Keywords: *Family Law, Indian Succession, Hindu Wills, Testamentary.*

1. INTRODUCTION

The Hindu Succession Act deals mainly with Intestate Succession and not wills. Only section 30 of the Hindu Succession Act, 1956 provides the course and procedure of law as to Wills to be followed by Hindus. Muslims of India are governed by the Islamic law of wills, of Sunni and Shia Schools, or by local customs, relating to wills. The rules of Islamic law of wills applicable to the Muslims of India are those derived from the classical texts. The sources from antiquity regarding the customs and usages of the pre-lslamic Arabs seem to establish abundantly that testamentary dispositions were not unknown among the pagan tribes of the peninsula. But it is difficult to say, from the material available, what were the conditions which regulated the validity or invalidity of Wills made by them. The Rabbinical Law which was in force among the Jewish tribes prohibited the testator from depriving his lawful heirs from succession; it also precluded him from constituting a stranger as an heir. But when a disposition was effectuated by the immediate delivery of possession, the Rabbinical Law apparently regarded it as valid. A Will could be made either verbally or in writing, but, generally speaking, the first mode was considered as the more preferable of the two.

The Qoran expressly sanctioned the power of making a testamentary disposition, and regulated the formalities and conditions to which it is subjected.4 “Wills,” says the Heddya, “are lawful on a favourable construction. Analog would suggest that they are unlawful, because a bequest signifies an endowment with a thing in a way which occasions such endowment to be referred to a time when the property has become void in the proprietor (i.e. the testator), and as an endowment with reference to a future period (as if a person were to say to another,

'I constitute you proprietor of this article on the morrow'), is unlawful, supposing even that the donor's property in the article still continues to exist at that time, it follows that the suspension of the deed to a period when the property is null and void (as at the decease of the party), is a fortiori unlawful. Under the Islamic Law, a testator cannot by a testamentary disposition deprive his lawful heirs of their share in the inheritance nor dispose of more than one third of his estate.5 A bequest to an heir is under no circumstance valid, though bequest in favour of a non-heir is valid to the extent of a third of the estate of the testator, although the heirs of the testator may not give their assent thereto.

There has been no legislative reform of this law in Indian and no major judicial decision under Muslim law of wills contains any element of radical reform. Christians, Parsis, Jews, Hindus, Buddhists, Jains and Sikhs, find their law of wills almost wholly in this Act, while Muslims are governed by the Islamic law of wills but same procedural rules of the Indian Succession Act 1925 may be followed by the testator. Succession, both 'intestate' and 'testamentary1 2 3 4 5 , under the Indian modern law is governed by Indian Succession Act, 19256. The Act is, merely, consolidating and not an amending one7. It consolidated and repealed a number of prior Acts8, and, in turn, was, also, amended by some of other subsequent ones. The Act consists of eleven (xi) Parts with 392 Sections and nine (ix) Schedules. The testamentary Succession, which is the subject of this research, is, mostly dealt with by Part Six (vi) of the Act which consists of 23 Chapters with 133 Sections (57-190). in Parts 8th and 9th of the Act we find some Sections which also deal with the Execution and Administration of will. These two Parts consist of six Section (211 to 216) AND 151 Sections (218 to 369), respectively. If in the other Parts of the Act, there were some Sections, somehow related to our topic i.e. testamentary Succession, we have, also noticed them. The Act came into operation on the day on which it received the assent of the Governor-General, i.e. on 30th September of 1925. It was held that the Act had no retrospective effect and did not apply to a will executed in 1890 (i.e. prior to 30.09.1925)9. It may in these pages be referred to as the "ISA 1925" or only "ISA".

Likewise, the Indian Succession Act, 1865 was not retrospective and did not apply to wills executed before it came into operation10. A question may come to the mind that the vast majority of Indians are either Hindus or Muslims and we know that they are, in the matters of personal affairs such as Succession, governed by their own personal laws. Then, what is the use of the Indian Succession Act? In answer, it is mentioned that when the British settled down to govern India, they were faced with the task of ascertaining the nature and incidents of the laws to be administered. Though, with reference to the two main communities inhabiting the country, namely, the Hindus and Muslims there was no much difficulty in the matter, because, as stated before, each of these communities had its own personal laws embodied in its sacred texts, but there were other smaller sections of the population which belonged to neither of these communities and in those cases it was not proper to administer the laws of a religion to which they did not owe any adherence or commitment. Amongst such minor communities were the Christians, Parsis and Jews. It was, then, thought that the enactment of a law of succession mainly based on the English world Law meet the requirement and that with suitable modifications and safeguards the same might be embodied in statute11. Thus, the Indian Succession Act of 1865 came into force which was based on English Law12 and was declared to constitute, subject to certain exceptions13, the law of British India applicable to all classes of intestate and testamentary succession. A very important change was made by the Hindus Wills Act, 1870, which inter alia enacted that the certain portion of the Indian Succession Act should apply to all wills and codicils made by any Hindu on or after the 1st day of September 1870. A Parsi Succession Act was separately enacted earlier in 1865.

The Probate and Administration Act, 1881, was applied to Hindus and Muslims as well. The I.S.A. 1925, inter alia, reproduces the Act of 1865 the Hindu Wills Act, the Probate and Administration Act and the Parsi Intestate Succession Act and embodied to a large extent the rules of English Law. On the coming into force of the Hindu Succession Act, 1956 (HSA), succession to property of a Hindu is governed by its provisions except to the extent excluded by Sec. 5 therein14. Clause (i) of this Section relates to succession to property of Hindus whose marriage is solemnized under the Special Marriage Act, 1954, (SMA)15 and to the property of the issue of such marriage. Clauses (ii) and (iii) of the section relate to immovable property held by the persons specified therein. Succession to the properties of all such persons is regulated by the Indian Succession Act, 1925. The Succession Act, broadly, divides succession into 'intestate' and 'testamentary succession16. While the provisions of Act relating to intestate succession are applicable to particular classes or communities of people leaving the personal law, statutory and otherwise, of the two major communities in India, namely, Hindus and

Muslims untouched, the provisions of the Act dealing with testamentary succession are generally made applicable to everyone in India except those exempted under the Act and a few others.

Section 30 says:

"Any Hindu may dispose of, by will or other testamentary disposition, any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian succession Act, 1925, or any other law for the time being in force and applicable to Hindus."

The Explanation under Sect. 30 of H.S.A., enumerates some exceptions to that Section. Unlike any other statute the Indian Succession Act, 1925 does not contain any specific provision for the extent of the Act. The Act extends to certain States and Union Territories by subsidiary legislation in addition to States (formerly Provinces of India) by virtue of specific provisions in respect of certain subjects. The provisions of this Act shall also apply to the Union Territory of Dadar and Nagar- Haveli by Regulation 6 of 1963 and the union territory of Pondicherry Act 10 of 1980. Nothing contained in this Act shall apply to the Reno cants of Union territory of Pondicherry20

2. TO WHOM THE INDIAN SUCCESSION ACT 1925 APPLIES

(1) Europeans by birth or descent domiciled in India. As regards other Europeans and English subjects if they die possessed of immovable properties in India, then under Sec. 521 succession to such properties shall be regulated by the law of India, i.e., if such person died intestate, his heirs would be ascertained according to the rules of intestate succession in Part V of this Act, and if he left a will, the will must be executed according to rules laid down in Chapter III of Part VI Sec. 63-64, and probate of such wills will be necessary.

(2) Persons of mixed European and Native blood and East Indians.

(3) Indian Christians: For the purposes of the Indian Succession Act, a Christian is a person who professes any form of the Christian religion22. Section 33 A of the Act is not made applicable to them.

(4) Jews: After the Indian Succession Act 1865 was passed it was held that the Jews were governed by that Act and the personal laws of the Jews were not recognized as regards testamentary and intestate jurisdiction23. The Bombay High Court in a suit for dissolution of marriage by the wife held that Jewish law was applicable and gave relief24. This decision, however, has not been approved by Calcutta High Court in a subsequent case25. But Bombay High Court following Benjamin V. Benjamin26 applied Jewish law in similar cases27.

(5) Parsis: All Sections of Part VI of the Act, relating to testamentary succession, apply to Parsees.

(6) Hindus: The word "Hindu" is used in the Act in a theological sense as distinguished from a national or racial sense. It includes Arya Samajis28, Brahmos29 and Makkathayee Ezhavas of the erstwhile Cochin State to whom the Customary law; the daughters are not entitled to a share in the father's property, was established30. A person of non-Hindu origin can become a Hindu by conversion and the provisions of this Act applicable to Hindus will apply to such a person31. Section 30 of the Hindu Succession Act, 1956, also, made testamentary laws of the Act (i.e. the Indian Succession Act, 1925), applicable to Hindus.

(7) Jains: Although Jains are governed by Hindu Law ordinarily32, yet they possess the privilege of being governed by their own peculiarities and customs33. Nonetheless, the term Hindu includes Jains too34.

(8) Sikhs: the terms Hindu, it was held that, includes Sikhs too35. But Sikh converts to Christianity are governed by this Act and not by laws and customs of the community to which they belong36.

(9) Buddhists: It was held that Burmese known as Kalias who married Burmese women were governed by this Act37. But a Chinaman who is Buddhist comes within term and the succession and inheritance to his property is governed by the Buddhist law of Burma38. But Chinese Buddhist (domiciles in Burma) was prior to separation of Burma from Indian governed by this Act39.

There is no statutory law authorizing testamentary disposition for a Buddhist in Sikkim. But the provision relating to the execution, interpretation or effect of wills in the Indian Succession Act, 1925, including the provisions relating to grants of Probate and letters of Administration and also appeals and other proceedings there-from shall apply to Sikkimese Buddhists, because the Indian Succession Act, 1925 has become the law of Sikkim40. Sections; 60, 65, 66, 69, 72, 91 to 94, 97,100,118 and 191 do not apply to wills and codicil made by any Hindu, Buddhist, Sikh or Jains, subject to the provisions of Sec. 57 of the Act41. Also, Sec. 118 of the Act, in the State of Bombay only does not apply to them.

3. TO WHOM THE INDIAN SUCCESSION ACT 1925 DOES NOT APPLY

(1) Crown: The Act did not apply to the Crown before India became a Republic42. Even when the property vests in the Crown (now the President) the Act does not apply but the creditor of the deceased whose property is escheated to the Crown has the right to apply for letters of Administration under section 21843.

(2) Armenians: Armenians were held to be governed by English Law44.

(3) Portuguese: They are governed by English law45. Ma Lait v. Maung Chit, 48 T.A. 553; 49 Cal. 310 Tan Ma Shwe v. Kdo Soo Chong, (1939) Rang. 548 Man San v. Ma Chit, A.I.R. (1930) R. 219; Phan Tiyok v. Lir. Kym, 8 Rand 57 (F.B.) SonamTopgyal v. Gompu, A. 1980 Sikkim 33. See texts ofthe Sections Secretary of State v. Girdbarilal, 54 A11.226. Akileswarv. State ofBengal, 59 C.W.N. 240. Nicholas v. Aspar, 24 Cal. 216 10

(4) Brahmos: A brahmo was not governed by the Act, 1865 but the Probate and Administration Act, 1881, as a Brahmo did not cease to be a Hindu by merely becoming a Brahmo46.

(5) Renoncants: the provisions of this Act shall not apply to the Renoncants of the Union Territory of Pondicherry47. As far as Parts of the Act, other than Part VI are concerned Sections: 4 to 19 (domicile), 20 to 22 (marriage), 23 to 28 (consanguinity), 29 to 49 (intestate Succession), also, do not apply to any Hindu, Buddhist, Sikh or Jains. The Hindu succession Act, 1956 applied to the intestate succession to any person who is a Hindu, Buddhist, Sikh or Jains, under Sec. 2 of the Hindu Succession Act 1956. The latter Sections mentioned above, and Secs. 57 to 191 (i.e. testamentary Succession) do not apply to Muslims. That is the other Sections are applicable to Muslims too. But, as reminded before, those persons who have married under the Special Marriage Act, 1954, succession to their properties and to the properties of the issues of such marriage shall be regulated by the provisions of the Indian Succession Act, 1925, though those persons might belong to certain communities, such as Muslims, Hindus etc. who have their own personal laws to regulate the succession to their properties.Sec.21 of S.M.A. has, clarified the matter48. We know in India, conversion from one religion to another one was very prevalent due to some reasons therefore another question which may arise is that which laws and regulations must prevail in case of succession of a convert?

The law applicable to converts before the passing of the Succession Act x of 1865 was not in a settled condition. The question came before the Privy Council49 in Abraham v. Abraham50, and their Lordships made in opinion thus: “That upon the conversion of a Hindu to Christianity, the Hindu law ceases to have any continuing obligatory force upon the convert. He may renounce the old religion. The profession of Christianity releases the convert from the trammels of the Hindu law, but it does not, of necessity, involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his right and interest in, and his power over property.” Thus, native Christians and such other native tribes, as are not governed either by the Hindu or by the Mohammedan Law, would be governed by the law which they have adopted by the course of their conduct or by the customary law which they had observed from times immemorial51. But since the enactment of the Act 1865 the decision in Abraham’s case has lost its force and in other subsequent cases52, it was held that this Act and the rules of inheritance prescribed by it applied to Hindus who become Christians and the evidence to show that they and the community to which they belonged retained the Hindu customs was inadmissible. It was held the decision in Abraham’s and Sri Gajapathi’s cases as being the decisions before the passing of the Succession Act of 1865 and held that if a Hindu converted to Christianity died a Christian he was governed by that Act.

He has not right to elect that he is governed by Hindu law of inheritance53. In next step, we try to explain the impact of conversion on rights of three persons' (1) rights of a convert in the joint family property, (2) rights of a Hindu relation of the convert to the convert's property, and (3) rights of a convert relation to the property of his Hindu relations. According to Hindu Law every coparcener takes by birth a vested interest in the joint family property. This Act (i.e. I.S.A. 1865) does not affect the right of coparcener ship as between those to whom it applies. The Act does not take away any vested right of a coparcener54. It was, also, held that right of survivorship of a coparcener was contingent right. Therefore, if A and B, being brothers in a coparcenary own property jointly and if A becomes a Christian and if B dies after passing of the Succession Act, the right of A to succeed to whole property by survivorship is gone55. This decision, however, has been disapproved in subsequent case56 where it was held that the succession Act did not affect the rights of coparcener ship.

In another case57 it was held that upon the conversion of a member of a joint Hindu family to Christianity the member continued to hold the ancestral property as joint owner and he was entitled to recover possession of his share on the basis that there was a dissolution of the family at the date of his conversion, that he was not liable to satisfy the debts of his father incurred and charges upon ancestral property subsequent to the date of his conversion, but was liable for debts incurred prior to conversion. In a case58 when a Hindu became a Muslim and married a Muslim wife, a son was bom to the wife, and the son's Hindu uncle dies leaving property, the son filed the suit claiming the property as the heir of his uncle and his claim was allowed. But this decision was disapproved by Privy Council in Mitar Sen's case59. When a Christian became a Muslim, it was held that the succession to his property was governed by Muslim Law and not by this Act60.

4. CONCLUSION

The Indian Succession Act of 1865 was previously controlled in India. This Act was based primarily on English Laws and was the rule in effect for all forms of will and testamentary succession, subject to some exceptions. Section 30 of the Hindu Succession Act provides that any Hindu may dispose of by will or other testamentary disposition, any property, which is capable of being so disposed of by him, in accordance with provisions of the Indian Succession Act, 1925 or any other law applicable. These provisions deal with the legal capacity to make a Will and who can and who cannot make a Will. Explanation (1) to section 59 of Indian Succession Act, 1925 clarifies what can be disposed of by Will by a married woman and states that any property which she could alienate by her own act during her life can be disposed of by Will. It follows that married woman who cannot alienate a property by her own act during her life, cannot dispose of the property by a Will.18 Section 30 of the Hindu Succession Act does not prohibit a gift by a coparcener of his undivided interest in the coparcenary to another coparcener or even to a stranger.19 Under Hindu law, a sole surviving coparcener can bequeath his joint family property as if it were his separate property. A Will executed by a coparcener can only challenge by another member of the coparcenary.20 Coparcenary property can be bequeathed by a surviving coparcener. The disability of a coparcener in disposing of his undivided interest in property by Will or other teatamentary document under the old Hindu law is removed by section 30 of the Act.21 Properties acquired by the Karta of joint family with aid of joint family nucleus or from out of income derived from properties inherited from forefather are to be treated as joint family properties and not self-aquired properties. The burden to prove that such properties are self-acquired properties is on the coparcener making such assertion or claim. Divisions of properties under a Will appeared to be dividing family properties among his children and the properties being joint family properties, not right whatsoever vested in him to bequeath the said properties under a Will without the consent of other coparceners. Therefore, the will is not binding on them.22 The mere fact that some first class heirs were ignored in the Will would not make the Will invalid. A validly executed Will which is proved by proper evidence before the court cannot be ignored merely in this basis.

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