A Study Hindu Law of Testamentary Succession

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Abstract

The aim of this study is to the succession between various Indian religions has been performed above in respect of the testamentary succession. Better focus has been placed on various sects, rules and customary laws from the beginning of testamentary succession to the present day. Therefore, the premise, execution and method of the testamentary succession are now being briefly concluded. 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. The exceptions, however, were so broad that all Indians were exempt. The Hindu Wills Act was also enacted in 1870. This Act provided that all sections of the Act of Indian Succession extend to all Hindus' wills and codicils. In 1881, the Act was introduced 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 significant degree. 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. The term "rule" shall constitute any procedural law, electronic law or customs law, "or any law for the time being in effect."

Keywords: Hindu Law, Succession, Testamentary, Consolidates.

1. INTRODUCTION

Succession in India was earlier regulated by the Indian Succession Act, 1865. This Act was based mainly on English laws, and subject to certain exceptions, constituted the law in force in British India, applicable to all classes of testamentary and intestate succession. However, the exceptions were so extensive, that all natives of India were excluded there under. So, in 1870, the Hindu Wills Act was passed. This Act provided that certain portions of the Indian Succession Act would apply to all wills and codicils made by Hindus also. Later in 1881, the Probate and Administration Act was passed, and this Act was also made applicable to both Hindus and Muslims. The Indian Succession Act, 1925, consolidated the earlier Act of 1865, the Hindu Wills Act, the Probate and Administration Act and also the Parsi Intestate Succession Act. The Preamble of the Act indicates that the Act is intended to consolidate the law applicable to intestate and testamentary succession. To a great extent, it embodies the rule of English law. As regards matters not covered by this Act, Hindus are governed by the Hindu Succession Act, 1956 and Muslims by their Personal law. The majority of Indians consisting of Hindus, Buddhist, Jains and Sikhs, are governed in the matter of Wills by the Indian Succession Act, 1925 subject to some special provisions protecting their personal law. These special provisions are now incorporated into the Indian succession Act itself. So the Hindu law of wills is to be found and studied under the law of testamentary succession as laid down in the Indian Succession Act. Our discussion will remain incomplete unless a brief reference is made to the history of testamentary succession. So far as Hindu law is concerned, the origin and growth of testamentary power among Hindus is full of obscurity. The idea of Will was wholly unknown to the authors of the Dharmashastras and the commentators whose work gave rise to the different schools of Hindu law. The old Hindu joint family system was considered inconsistent with any conception of

dominion over property and perhaps this was the reason why no question of testamentary power of a Hindu came to be recognized by the courts established in British India.1 In early times the family property was vested in the family and the members of the family had only the right of usufruct.

That being the position no individual member could conceive the idea of disposing of property by a Will that would operate after the death of the executant. But there are texts of the Hindu law gives which contain the actual germ of a Will, and which could have developed into a complete law regulating testamentary disposition.2 These texts, however, were not taken advantage of for the exercise of testamentary power. The Hindus thought of making Wills only after the establishment of British rule. Wills made by Hindus came to be recognized as a matter of course by the English lawyers associated with the superior courts as Judges, Advocates and Solicitors. The idea of making Will was of spontaneous growth among the Hindus. The rich Hindus of Calcutta and other Presidency-towns had English solicitors for their legal advice, who started preparing Wills for those affluent Hindus. Thus the Hindus imbibed the idea of testamentary disposition from the English solicitors and the legislative enactment already referred to. The idea gradually spread to areas outside the Presidency-towns, and to persons other than Zamindars.

2. SUCCESSION

Succession is the transmission of property vested in a person at his death to some other person or persons. In all countries, Succession is regulated by law. However, legal historians have found that there is no universally common origin to such laws of succession in the various countries; they have not developed on uniform lines all over the world. There are systems in which religion has played a prominent part in the development of the law of succession. The Hindu community is a typical example of that kind. The ancient Hindu Law-giver, Manu stated: "To three libations of water must be given; to three must Pinda be offered the fourth is the giver. The property of a sapinda goes to the nearest sapinda," thereby demonstrating the intimate connection between the duty to offer spiritual benefit and the right to take the property of a deceased Hindu. The Hindu Law of Inheritance and Succession was believed by Hindus to be founded on divine ordinance1. Succession excludes survivorship2. Inheritance means only the acquisition of property by succession and not by devise under a will3. There are again communities in which systems of family rights and communal ownership prevailed, which have been gradually superseded by forms of individual ownership. In regard to these communities, Professor Pluckett has referred to the Law of Succession as "an attempt to express family in terms of property".4

Kinds of Succession

The law relating to succession is only of gradual growth. A Law of Succession is not needed till disputes arise. But the law has developed and at the present day we mean by the Law of Succession as the law which regulates the transmission, after death, of the property of one individual to one or more individuals. The Law of Succession in modern times is divided into the Law of Testamentary Succession and the Law of Intestate succession. The law of Testamentary Succession regulates the devolution of the property of a person who dies having made a will disposing of it. The law of Instate succession, on the other hand, regulates the devolution and distribution of the undisposed property of a deceased person.5 in early communities a will was something very different from what it became in later law. It was generally in the form of a conveyance impending death. Accordingly, it was generally resorted to when a testator desired to distribute the property after his death according to his wishes contrary to the normal mode in which the property would have passed on the basis of the prevailing customary law. This power to divert was not available as against the entirety of the estate owned by a person, but was generally confined to a fraction of the estate. A definite proportion of the inheritance shall always be allowed to devolve on the close relations like the widow and children, traces of which are still to be found in many of the modern laws relating to Wills. At the events, these dependents of the deceased could at least claim provisions for their maintenance from out of the estate devised to third parties.6

Need for Testamentary Succession

"The law of every civilized people concedes to the owner of property the right of determining by his last Will, either in whole or in part, to whom the effects which he leaves behind him shall pass. Yet it is clear that,

though the law leaves to the owner of the property absolute freedom in this ultimate disposal that of which he is thus enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given. The instincts and affections of mankind in the vast majority of instances, will lead men to make provisions for those who are the nearest to them in kindred and who in life have been the objects of their affection. Independently of any law, a man on the point of leaving the world would naturally distribute among the children or nearest relatives the property which he possessed. The same motives will influence him in the exercise of the right of disposal when secured to him by law. Hence arises a reasonable and well warranted expectation on the part of man's kindred surviving him that, on his death, his effects shall become theirs, instead of being given to strangers. To disappoint the expectations thus created and to disregard the claims of the kindred to the inheritance is to shock the common sentiments of mankind, and to violate what all men concur in deeming an obligation of the moral law. It cannot be supposed that in giving the power of testamentary disposition the law has been framed in disregard of those considerations. On the other hand, had they stood alone, it is probable that the power of testamentary disposition would have been withheld and that the distribution of property after the owner's death would have been uniformly regulated by the law itself. But there are other considerations which turn the scale in favour of testamentary power.

Among those who as a man's nearest relatives would be enabled to share the fortune he leaves behind him, some may be better provided for than others; some may be more deserving than others: some from age, or sex, or physical infirmity may stand in greater need of assistance. Friendship and tried attachment of faithful service may have claims that ought not to be disregarded. In the power of rewarding dutiful and meritorious conduct, paternal authority finds a useful auxiliary. Age secures the respect and attentions which are one of its chief consolations. As was truly said by Chancellor Kent in Van Alst v. Hunter7 'it is one of the faithful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected'. The control which the law still gives a man over the disposal of his property is one of the efficient means which he had on protracted life to commend the attentions due to his infirmities. For these reasons, the power of disposing of property in anticipation of death has ever been regarded as one of the most valuable of the rights incidental to property, while there can be no doubt that it operates as a useful incentive to industry in the acquisition of wealth and to thrift and frugality in the employment of it. The law of every country has, therefore, conceded to the owner of the property the right of disposing by Will either of the whole, or, at all events, of a portion of that which he possesses.

3. WHO IS A HINDU AND HINDU PERSONAL LAW

Who is a Hindu?

Till today there is no precise definition of term 'Hindu' available either in any statute or in any judicial pronouncement; it has defied all efforts at definition. However, since Hindu law applies to all those persons who are Hindus it is necessary to know who Hindus, whatever definitional difficulties there might be are. If the question is posed in a different form, viz, to whom does Hindu law apply, it would be easier to state the various categories of persons to whom Hindu law applies. The persons to whom Hindu law applies may be put in the following three categories:

(a) ' Any person who is Hindu, Jain, Sikh or Buddhist by religion, i.e. Hindus by religion.

(b) Any person who is born of Hindu parents (viz, when either the parents or one of the parents is Hindu, Sikh, Jain or Buddhist by religion) i.e. Hindus by birth, and

(c) Any person who is not a Muslim, Christian, Parsi or Jew, and who is not governed by any other law. Under this category two types of persons fall:

(i) Those who are originally Hindus, Jains, Sikhs or Buddhist by religion, and

(ii) Those who are converts or reconverts to Hindu, Jain, Sikh or Buddhist religion.8

Origin of Wills in Hindu Law

The idea of a Will is wholly unknown to Hindu Law of the Shastras.9 The origin and growth of the testamentary power among Hindus has always been a puzzle to Hindu lawyers. There was no name for them either in Sanskrit or in the vernacular languages, Kane says that owing to the joint family system and the custom of adoption, testamentary dispositions did not come into vogue in ancient India.10 Kane in History of Dharma Shastras, page 816, Vol.lll, says: ''But it need not be supposed that the idea had not at all dawned upon the minds of people before the advent of the British. Wills were known among the Muslims and contact with them would naturally suggest the idea of a Will." He also refers to verses 341-359 of the Rajatarangini IV as appearing to embody the political testament of King Lalitaditya of Kashmir in the first half of the 8th century. He cites a text of Katyayana as making a very near approach to the modem conception of a Will. There is a reference to a letter, dated A D1775 by one Naro Babaji, who after referring to his illness, provides on a generous scale for his funeral and shradha expenses and makes dispositions in favour of his daughter-in-law, of another widow, and for the marriage of his Kinsman's sons and the distribution of the balance of his assets.

But subsequent to the commencement of the British rule, by a course of practice long enough to be recognized as approved usage, and by a series of judicial decisions gifts by Will have been held as binding as part and parcel of the general law of India. One of the earliest Wills to come before the British Indian Courts was that of the notorious Umichand who died in A.D.1758. In a Bombay case the Will of a Hindu, made in 1789 is referred to.11 such gifts by will have followed in India the practice of gifts and conveyance inter vivos. In Roman law also testamentary power appears to have been a development of the law gift inter vivos. A gift by Will is intended to take effect upon the death of the donor and it is revocable in his lifetime. Until revoked it is a continuous act of gift up to the moment of death and does then operate to give the property disposed of to the persons designated as beneficiaries. They take the property upon the death of the testator, as they would if he had given it to them during his lifetime. So the Law of Wills was grown up from the analogy furnished by the Law of Gifts: Even if Will cannot be regarded in all respects as gifts to take effect upon death, but the analogies are sound as regards the property to be transferred and the persons to whom it may be transferred.

4. INDIAN SUCCESSION ACT, 1925-STATUTORY LAW

• Scope & Extent of Control over Indian Wills

At present Hindus are governed by the provisions of the Indian Succession Act, 1925 as detailed in section 111 of that Act, with regard to testamentary disposition by them. The provisions of the Indian Succession act are largely based upon the principle of the law of wills as laid down by English Courts, but adapted to suit the different social conditions of this country.

The provisions of consolidator statutes as the Indian Succession Act are binding upon the Courts, as their object is to place the principles of law upon a footing more specific and more certain than the practice of English Courts in such matters. In interpreting those statutory provisions it is our duty specially to guard ourselves against being guided too much by the English cases and too little by the words of the statute. It must not be forgotten that in many matters the Indian statute has departed from the rules and principles adopted in England.34 Section 58(2) of the Indian Succession Act enacts that the provisions of Part V therein shall constitute the law of India applicable to all cases of Testamentary succession. Sub-Section (1) of the said section saves from the operation of the said part-

(1) Testamentary Succession among Muslims.

(2) Wills made by Hindus, Buddhists, Sikhs or Jains, as well as others before the first day of January, 1866.

(3) Under Section 57, it may be noted that Testamentary Succession among Hindus, Buddhists, Sikhs and Jains was brought under statutory control in gradual stages;

(a) Wills and codicils made after 1st September 1879, within the territories then subject to the Lieutenant-Governor of Bengal and within the original civil jurisdiction of the High courts of Madras and Bombay;

(b) All Wills and codicils made outside those territories and limits but relating to immovable property situate within those territories and limits; and

(c) All Wills and codicils on or after the first day of January, 1927 and not included under the former classes.

5. WILLS

Definition & Essentials of a Will

Will means a continuous act of gift up to moment of the donor's death and though revocable in his lifetime, is, until revocation, a continuous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designed as beneficiaries.73 A testament is an institution or appointment of an heir or executor made according to formalities prescribed by law.74 Will in Latin is called 'voluntas' which is used in the texts of Roman Law to express the intention of a testator. According to William's, Wills and Intestate Succession, Will which was originally an abstract obligation concretized into a document. The word 'testament' is derived from 'testatio menties' meaning thereby that it testifies the determination of mind ULPAIN has defined Will as, "Testamentum est mentis nostraejusta contestatio in id sollemniter facta to post martem nostrum valeat". Modastinus also defines it bases on the Latin word 'voluntas' as "Voluntatis nostre just sentential de co quod quis post mortem suam fieri velit". According to Jarman, a Will is an instrument by which a person makes a disposition of his property to take effect after his decease and which is in its own nature ambulatory and revocable during his life. (Nam omne testamentum morte consummatum est; et voluntae testamentoric est ambulatoria usque od mortem). Thus every testament is consumated by death, and until he dies the Will of a testator is ambulatory.75 Lord Penzance,76 has said that "A Will is the aggregate of man's testamentary intentions so far as they are manifested in writing, duly executed according to the statute". In Tagore v. Tagore,77 their Lordships of the Judicial Committee said thus, it means a continuous act of gift up to the moment of death. Such a disposition of property, to take effect upon the death of donor, though revocable in his lifetime, is, until revocation, a continuous act of gift to the moment of death and does then operate to give properly disposed of the persons designated as beneficiaries."

Swin Burne explains that "a testament is the full and complete declaration of a man's mind or last Will of that which he would have thought to be done after his death, by way of disposition of his property (Chep. Touch 399). Will has also been documents, to mean, "every writing making a voluntary posthumous distribution of property".78 In the absence of a statute, a Will may be in any form, oral or in writing. Before the Indian Succession Act became applicable to Hindus, oral Wills by Hindus were recognized as valid. An Oral Will could also be implied; if in writing it need not be signed or attested.79 But to operate as Will, the writing must be complete and operative. A document can be said to be a Will only when it is executed with an intention to regulate succession after death "Varas Patra" or nomination cannot be construed as a Will.80 In the absence of statutory requirements, written instruments have been held to operate as Will, in whatever form or with whatever name they might have come into existence. The petitions addressed to officials, deeds or adoption, declarations in applications for deposit or the recitals in a letter have been held to operate as Will, provided they have the other characteristics of a Will. However, where a party is governed by a statute requiring due attestation for a Valid Will, a mere letter addressed to the authorities declaring an intention by a deceased that on his death without issue, his legally married wife shall be owner of the estate, would not be valid in the absence of attestation.

(i) Statutory Definition of Will Section 2(h), Indian Succession Act, 1925, defines Will 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". The definition follows that of Blackstone and others. A Will is the legal declaration of a man's intention, which he wills, to be performed after his death, or an instrument by which a person makes a disposition of his property to take effect after his death.82

(ii) Essentials of Will There are three essentials to a Will:-

(a) It must be a legal declaration of the intention of testator, i.e., the person who makes the Will. Law prescribes form and formalities to be complied with. Unless those formalities are complied with, there cannot be a legal declaration. The document must be signed; it must be attested as required by law. An unprivileged Will must be in accordance with the provisions of section 63 of the Indian Succession Act, 1925.

(b) The declaration of intention must be with respect to the testator's property. An authority to adopt given by a deceased to his wife to be exercised by her after her death is not a Will. So also a document appointing a guardian to the minor son after the death of the testator. 83 There must be a disposition of property under the document. Where a document called Will by a Hindu testator only gave his wife authority to adopt, without giving her anything else in his properties, the character of a Will is not established. There must be disposition of property.84 Where there is no disposition of the property but a mere appointment of a successor (as a mahant), it is not a Will.85 Under the Hindu Disposition of Property Act, 1916, the bar of transfer in favour of unborn person has been lifted subject, however, to the limitation that the disposition by transfer inter vivos shall be bound by the provisions of Chapter II of the Transfer of Property Act, 1882 and disposition by Will shall be subject to the provisions of sections 113, 114, 115 and 116 of the Indian Succession Act, 1925.86 Sirkar Sastri is unable to justify the capacity of a person to deal with his property after his death. He criticizes the definition of Will under the Indian Succession Act as tainted with the logical defect of the "Fallacy of mutual dependence".?

(c) The document should express a desire that his intention must be carried into effect after his death. The intention of the testator must be expressed in clear words in order that "the same might be given effect to. There must be express words of bequest. However, it might be that a testator inadvertently omits, to express his intention to make a gift, but there may be recitals showing that the testator is under the impression that he has made a disposition in evidence of an intention, in such cases, if the Court is satisfied that there has been a mistake in carrying out the testator's intention, the Court may give effect to such intention if the other provisions of the Will will allow this to be done89 In one case the deceased wrote, "On my demise my wife shall become the full (absolute) owner of my entire movable properties according to law, consequently there is no necessity for any Will in respect of the same also." Referring to the above recitals Horwill, J., observed,90 "It is difficult to conceive of a clearer indication that the deceased did not bequeath his movables under the document.91 It has been held that oral evidence may be let in to show that the dispositions were intended to operate only after the death of the maker of deed.

6. CONCLUSION

In the preceding extensive study and research have been done with respect to the testamentary succession prevailing among various religions in Indian context. The emphasis has been given right from the origin of testamentary succession till the present time vis-a-vis different religions, statutory laws and customary laws. So now a brief conclusion is being given to understand the concept, implementation and procedure of the testamentary succession. Succession in India was earlier regulated by the Indian Succession Act, 1865. This Act was based mainly on English laws, and subject to certain exceptions, constituted the law in force in British India, applicable to all classes of testamentary and intestate succession. However, the exceptions were so extensive, that all natives of India were excluded there under. So, in 1870, the Hindu Wills Act was passed. This Act provided that certain portions of the Indian Succession Act would apply to ail wills and codicils made by Hindus also. Later in 1881, the Probate and Administration Act was passed, and this Act was also made applicable to both Hindus and Muslims. The Indian Succession Act, 1925, consolidated the earlier Act of 1865, the Hindu Wills Act, the Probate and Administration Act and also the Parsi Intestate Succession Act. The Preamble of the Act indicates that the Act is intended to consolidate the law applicable to intestate and testamentary succession. To a great extent, it embodies the rule of English law. As regards matters not covered by this Act, Hindus are governed by the Hindu Succession Act, 1956 and Muslims by their Personal law.

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