Session 4
Wills, Probates, and post Death Formalities

Index

WILLS

A "Will" or "Testament" is a legal document by which a person, the testator, expresses wishes as to how his/her property (movable or immovable) is to be distributed at death, and names one or more persons, the executor, to manage the estate until its final distribution.

Section 2 (h) of the Indian Succession Act, 1925 defines Will.

"A legal intention of the Testator with respect to his property which he desires to be carried into effect after his death."

The Will can however be made only for self-acquired properties and not for ancestral properties. Even future properties can be bequeathed which accrue to the Testator after the execution of the Will. The Will takes effect after the death of the Testator and can be revoked only during his lifetime. A word of caution though is that the Testator cannot bequeath his estate to a charity leaving his family in a state of poverty and thus deprive the family, without giving very good grounds for such disinheritance that would stand the scrutiny of a court of law.

NEED FOR A WILL:

There are quite a few advantages of executing a Will, namely:

1. A well drafted Will helps avoid family dispute regarding the property of the testator and in case a dispute arises, the legatee of the estate has a formidable document in his favour.
2. The law of inheritance does not consider the fact as to whether the deceased wished or did not wish to let any of the family member inherit his property and in what proportion whereas by way of a Will the Testator can apportion the property as per his wish.
3. At times it has been seen that the deceased had properties both immoveable and moveable which his inheritors may not have knowledge about, however a Will ensures that all kinds of property are fairly distributed by the Testator during his lifetime.
4. It is a very standard legal requirement now for transferring real estate, bank deposits, stocks & shares, interest in business. A well drafted & registered will ensures the legal requirements are met.
5. A Will ensures that there are no bogus claims after the death of the Testator.

6. A Will enables a Testator to bequeath his assets to non-family also. This could be an old friend or a care-taker etc.
7. A Will very clearly enunciates all the assets of the Testator, thereby making a clear list of them.

ELIGIBILITY TO MAKE A WILL:

Section 59 of the Indian Succession Act, 1925 deals with the eligibility of making a Will.

1. The Testator should be of a sound and disposing mind.
2. He should be free from any undue influence or coercion.
3. The making of the Will should be a voluntary act.
4. The Testator should be fully aware of the contents of the Will.

Further, a Will can't be made by a person who is intoxicated or ill to a level that hampers his comprehension. Corporate bodies are incapable of making a Will.

ESSENTIAL ELEMENTS OF A WILL:

The following checklist in a will helps ensure its enforceability:

1. The Will should have the details of the Testator, example: name, address.
2. The need for making the Will should be spelt out along with the fact that the Testator is of a sound mind and is making the Will voluntarily and there is no coercion.
3. Use of clear and unambiguous language in bequeathing of the estate.
4. The name of the executor (The person named by Testator to execute the Testator's wishes) should be mentioned.
5. The schedule of properties should be appended and
6. The Will should be signed by the Testator and attested by two witnesses.

TYPES OF WILLS

a) Simple Will: It is a document whereby a person bequeaths both movable and immovable assets in straight forward manner without providing details of all properties.
b) Comprehensive Will: It generally covers all the details related with Executor, property etc.

c) Conditional or Contingent Will: It may be expressed to take effect only in the event of the happening of some consistency and condition and if the contingency does not happen or the condition fails, the Will shall not be legally enforceable. A Conditional Will is invalid if the condition imposed is invalid or contrary to law.
d) Joint Will: It is made by two or more persons in consent whereby both bequest their assets as per their wishes individually or jointly to the person of their choice. Joint will however create liabilities and restriction in case of joint bequest as the execution of the Will is possible only on the demise of both the joint testators. Joint Wills are revocable at any time by either of the testators during their joint lives, or after the death of one, by the survivor. On the death of each testator, the legatee would become entitled to the properties of the testator who dies.
e) Mutual Will: Two testators may confer reciprocal benefits on each other through this instrument. But when the legatees are distinct from the testators, there can be no position for Mutual Wills.
f) Mirror Will: It is mainly advisable in case of family members, joint property, partnership firm or in cases where the clauses and condition regarding two wills are very much similar and whereby the two or more wills are to be generated with slight changes as to bequest and other details.
g) Concurrent Will: This is generally used for disposition properties in different countries. They are to be treated as independent of each other.
h) Privileged Will: Under Indian Succession act a Privileged Will is a Will which is made by any soldiers, air man or navy person during his service period or during the course of his or her employment in the presence of two witnesses.
i) Duplicate Will: Created for safety purposes. One copy stays with the testator and duplicate is with Executor/banker/Trustee. Both copies must be duly signed and attested.

ADVANTAGES OF A WILL

- Only individuals can originate.
- Very Flexible - Easily modifiable.
- Cost efficient way of managing inheritance.
- Ensure how and the proportion of distribution of your assets after you.

- Tax efficient method of transfer
- Appoint a guardian to look after children and the property bequeathed to children. Parents are the natural guardians
- Also allows choice of a person, called an Executor, to manage the distribution of your assets.

LIMITATIONS OF WILL

- Does not provide Bankruptcy remoteness
- No Estate Duty protection
- No protection against forced heirship
- Can be contested under certain circumstances
- Muslims – Can bequeath only 1/3 of their estate by way of a Will – rest is distributed in accordance with the Muslim Law

REQUIREMENT OF REGISTRATION:

Section 17 of the Registration Act, 1908 deals with documents compulsorily needing registration and specifically excludes Wills. Section 18 of the Registration Act, 1908 deals with documents where registration id optional and specifically mentions Wills. A Will can be registered at the office of Sub-Registrar. A person with bodily infirmity, person in jail or pardanashin muslim woman may be exempted from going to the office of Sub-Registrar. Though essentially the Will is not required to be registered and can be drawn on a plain paper also but it is desirable that the Will be registered. The Will can be registered during the life of the Testator or by the executor or legatee after the death of the Testator. Later amendments should also be registered. Registration of the Will ensures that the Will cannot be tampered with, the authenticity of the Will is established, allegations of making the Will under duress can be deflected, probate of the Will may not be required for getting leasehold properties mutated.

Advantages of Registering a Will

a. The Will cannot be tampered, destroyed, lost or stolen.
b. The Will is kept in safe custody by the registrar.

c. No person can access or examine the will without the express permission in writing of the testator until his/ her death.
d. If a registered will is uncontested, it may be possible to get the leasehold property mutated in the name of the legal heirs without obtaining a probate of the will.

Disadvantages of Registering a Will

a. Revocation of a registered will is cumbersome when compared to the revocation of an unregistered will.
b. If a registered will is revoked, the subsequent will made by the person should also be a registered will.

REVOCATION OR ALTERATION OF WILL

A testator who wishes to revoke his original Will which is made by him on a specified date and time, he can make revocation of the will himself by writing a subsequent Will or codicil duly executed and by destruction of the previous will. This means by burning, tearing, destroying or striking out the signature of the original instrument of a Will. Section 62 of the Indian Succession Act, 1925 clearly states that a Will can be altered or revoked by its maker anytime when he is competent to dispose of his property by Will

The following are the modes of revocation/alteration of Will as mentioned from Section 67-73 of the Indian Succession Act:

- By execution of a new Will
- By revocation of the earlier Will
- By registration of the new Will (this is only in case if the earlier Will is registered)
- By destruction of the old Will
- By the inclusion of a codicil
- In case of the marriage of a Parsi or Christain testator, his/her Will stands revoked. However, this does not apply to Hindus, Sikhs, Jains and Buddhists.

EXECUTOR

ROLE OF AN EXECUTOR

Executor is a person(s) named by the Testator to carry out the directions of the Settlor as encapsulated in the Will. An Executor is a legal representative of the deceased testator (who has made a Will) and who is either named or implied as such in the Will. An Executor is the person who disposes of or oversees the settlement of the assets of the deceased person in accordance with the wishes of the deceased testator, as enumerated in the Will.

In case any dispute arises between the beneficiaries and legal heirs, at the time of execution of the Will of the testator, then the executor of the Will is expected to play an important role, i.e. Executor may act as mediator among family members of the deceased testator and ensure a smooth, peaceful and proper disposition of the estate, as also discharge responsibilities of maintaining proper accounts of estate, debts and discharge of liabilities, if any. Executor shall read the Testator's Will in front of your legal heirs / beneficiaries after your demise. He shall also apply and get the Probate/ Succession Certificate as the case may be. Applying for an executor PAN Card, opening an estate bank account / demat account, if required. The Executor shall be responsible for paying off any liability from the Testator's estate. He shall distribute the Testator's assets as per his Will and prevailing law. The Executor shall also be responsible for applying for the transfer of properties to the beneficiaries under the Will at the registrar office and society, if required and distributing the Testator's holdings in his bank account / demat account / Insurance policies / other assets and closing these accounts.

Further, Section 222 of the Indian Succession Act, 1925 also provides for necessity of the Executor. It clearly states that the probate can be only granted to the Executor, the Will can only be effectual if the probate is granted and without Executor, the Will becomes ineffectual as the deceased being intestate.

It is always advisable to appoint a professional executor to make sure the Will is executed properly, and titles transferred as per due process. In any case, the Executor should be younger than the Testator so that he has a fair probability of outliving the Testator.

Challenges in execution of the Will in the absence of an Executor

If there is no Executor, and in case there is no unity among legal heirs of the deceased testator, the process of succession and inheritance of the assets and settlement of debts and liabilities of the testator will be affected.

If there is no Executor, and the Will is challenged, each legal heir claiming any interest or share in the estate of the deceased Testator will have to prove their claim and apply for letters of administration or succession certificate for dealing with the assets of the deceased.

The general law of the land is that unless certain exceptional circumstances can be proved, probate or letters of administration is granted to any or all persons claiming a right to the estate of the deceased, such that the probate or letters of administration are in respect of the complete estate of the deceased and not in fragments or parts.

Further, if no legal heir has filed for probate or letters of administration, a creditor of the testator may also apply for Letters of Administration, and if successful in obtaining the letters of administration, may result in delay in the legal heirs obtaining their rightful share in the estate of the deceased Testator.

Another issue in the absence of an Executor of the Will, is that the assets of the testator which need to be valued and consolidated and collated before a petition for probate or letters of administration can be filed in a court of competent jurisdiction, would become extremely difficult if the legal heirs do not agree on the valuation or appointment of some competent person to collate and declare the value of such assets.

Without a neutral or competent person to manage the estate and fulfil the obligations, responsibilities entrusted by the testator to the executor, the estate may fall into disarray and result in mismanagement of the estate of the deceased.

In the event the Executor declines to perform his obligations, or is unable to perform his obligations for any reason, and no other person is willing or able to act as an Executor, then the competent court may, on an application made by a person competent to make an application, appoint an Administrator to oversee the disposal of the estate (assets).

CONSTRUCTION OF WILLS

Chapter VI of the Indian Succession Act, 1925 deals with the Construction of the Wills. Section 74-111 are the relevant sections which describes broadly all the aspects in relation to how to construct a Will. Few important sections have been enumerated below:

Sec 74. Wording of Will - It is not necessary that any technical words or terms of art be used in a will, but only that the wording be such that the intentions of the testator can be known therefrom.

Sec 76. Misnomer or misdescription of object. –

(1) Where the words used in a Will to designate or describe a legatee or a class of legatees sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect.

(2) A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name.

Sec 77. When words may be supplied - Where any word material to the full expression of the meaning has been omitted, it may be supplied by the context.

Sec 78. Rejection of erroneous particulars in description of subject - If the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the will, but some parts of the description do not apply, such parts of the description shall be rejected as erroneous, and the bequest shall take effect.

Sec 82. Meaning of clause to be collected from entire Will -The meaning of any clause in a Will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other.

Sec 87. Testator's intention to be effectuated as far as possible - The intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

Sec 88. The last of two inconsistent clauses prevails - Where two clauses of gifts in a Will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

Sec 89. Will or bequest void for uncertainty - A Will or bequest not expressive of any definite intention is void for uncertainty.

Sec 95. Bequest without words of limitation - Where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the Will that only a restricted interest was intended for him.

Sec 99. Construction of terms. In a Will – This section describes as to the implications generally attached to various terms used in the Will, e.g. words like, children, grandchildren, issue etc.

Sec 102. Constitution of residuary legatee - A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

Sec 105. In what case legacy lapses -

(1) If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person.

(2) In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

Sec 106. Legacy does not lapse if one of two joint legatees die before testator -If a legacy is given to two persons jointly, and one of them dies before the testator, the other legatee takes the whole.

PROBATE

Probate is a term commonly used about applying for the right to deal with the deceased person's affairs. It's sometimes called "administering the estate". In other words, Probate means copy of the Will certified under the seal of a court of a competent jurisdiction. A probate to be treated as conclusive evidence of the genuineness of a Will. It is defined in Section 2(f) of the Indian Succession Act, 1925. Under the Indian Succession Act, 1925, a Probate can be granted only to the executor appointed by the Will.

Probate refers to a copy of the will that is certified by the seal of a court of competent jurisdiction. Through Probate, rights pertaining administration of an estate is granted to the applicant (who is an executor under the Will). It is a judicial process through which the validity and authenticity of a Will is determined in a court of law. In this process, the executor of the Will, beneficiaries, and value of the estate are determined. Probate helps the executor to receive a certification from the court that he is duly authorized to administer the estate of the testator under the Will.

A probate cannot be granted until the expiration of seven days from the date of the Testator's death. Probate is mandatory for

- Hindus, Sikhs, Jains, Buddhists* ordinarily domiciled and resident** inside the jurisdictions of High Courts at Kolkata, Chennai and Mumbai.

- For persons outside these jurisdictions, if immovable property is held in these jurisdictions.

According to section 223 of the Indian Succession Act, 1925, Probate cannot be granted to any person who is a minor or is of unsound mind. Neither it can be granted to an association of individuals unless it is a company which satisfies the conditions prescribed by rules to be made by notification in the Official Gazette by the State Government in this behalf.

Application for Probate

A probate is issued with reference to Section 57 and Section 213 of the Indian Succession Act. The probates are granted to the executor or executors (in succession, in case more than one is named), by the High Court, with a copy of the Will attached.

Sections 263 to 276 of ISA,1925 deal with the procedure for grant of probate. The application for probate, needs to be made with the help of a lawyer or an advocate, to the District Court or the High Court, as the case may be, under whose jurisdiction the person has a fixed place of abode or under whose jurisdiction the property might fall (Sec 270 and 271). Usually a lower court is empowered to supply a probate for small estates and a probate from a higher court is required for high-value immovable assets.

Documents Required for Probate

While submitting a probate application, you need to submit certain documents that prove that:

- The time of the Testator's death,
- A copy of the Will and testament of the deceased annexed to the petition,
- The amount of assets which are likely to come to the Petitioner's hand, and
- The Petitioner is the executor named in the Will.
- The application for Probate shall be signed and verified by the Executor or the Beneficiary.

Grant of Probate

Once the application is submitted, it will be verified by the authorities and letters (notifications) will be sent out to the nearest kin of the deceased, intimating them of the issue of probate. A general notice is published for the public to view and giving an opportunity for raising any objections to the grant of probate.

The probate is issued if no objections are received from any kin or any general public and is done after the court fees are paid. The court fees depend upon the value of the immovable assets.

Section 213 of the Succession Act lays down the exclusive manner of establishment of a right under the Will which is procedural and not substantive. It does not enact merely a rule of evidence but the exclusive manner in which rights under a Will can be established. Therefore, unless the Will is probated, or the Letters of Administration granted no rights under the Will can be established to defeat the rights of parties in proceedings before the court. A probate is only conclusive as to the appointment of executors and the valid execution of the Will. It does not decide any question of title. The contentions proceeding for grant or refusal of probate and Letters of Administration is not a suit in substance and the order in the said proceeding is not a decree, as it does not fulfil the ingredients of decree as defined under section 2(2), C.P.C. 1908.

A probate granted by a competent court is conclusive of the validity of such Will until it is revoked, and no evidence can be admitted to impeach it except in a proceeding for revoking the probate. It only establishes the legal character of the executor. It in no way decides title or even to the existence of the property devised. Title passed by the Will vests in the legatee only from the date of the testator' death. Where the administrator is already in possession, the grant of delivery of possession to him does not arise. Probate grant decides only the genuineness of the Will and the executor's right to represent the estate.

Probate of Copy of Lost Will etc., or of Lost or Destroyed Will

This section (section 238, Indian Succession Act) may be read as complementary to the previous section and deals with a case of loss or destruction of a Will where there is no copy of draft preserved and the section says that Probate may be granted of its contents if they can be established by secondary evidence should be admitted and accepted with great circumspection only in a situation where the evidence establishes the contents of the Will beyond doubt, and evidence of such nature regarding the lost Will can be accepted, but if the testator is alive for more than two months and the witness does not corroborate the contents of the Will but opines on ability and interest of the testator to execute the Will, the Will cannot be held to have been proved. The provisions in sections 237 and 238 follow the English law. Williams posts:

"Where a Will has been lost and evidence of its contents is supplied by the production of a draft and of the testimony of witnesses who had read the Will, the parole evidence must be placed side by side with the draft and out of them the court will extract the contents of the Will to be proved."

What Errors may be Rectified by Court

The rectification of errors has to be made by the court in probate proceedings. Where in limited grants there are mis-description of the property to be administered or there is a mis-recital of the power under which the Will has been executed these can be corrected by the court. There can be an amendment of name of legate or executor But no amendment can be made of errors in papers of which probate has already been granted. If the amendment is refused the remedy by way of Will is provided in section. Section 261 permits rectification of errors in names and descriptions or in setting forth the time and place of the deceased's death or the purpose in the limited grant. An amendment can be made of errors in the grant, but no alteration can be made in papers of which probate has been granted.

LETTER OF ADMINISTRATION

According to section 234 of the Indian Succession Act, 1925:

- ✓ if the executor, residuary legatee or representative of the residuary legatee doesn't exist,

- ✓ declines, is incapable of acting or cannot be found,

then the person who would have been entitled to administer the estate in case of the deceased dying intestate would be entitled to file an application for the Letter of Administration.

- LOA may also be applied by the heirs of an intestate deceased.

LOA grants the same administrative rights to the beneficiaries that an executor would have enjoyed.

If someone dies interstate before administration of estate is entrusted to someone or when no executor is appointed under the will of deceased or when executor is appointed but he refuses to act, then Letters of administration may be issued to entitle the administrator to all rights required for effective administration of the estate of deceased. An application is to be filed to a civil court of competent jurisdiction which will then appoint the Administrator to dispose of the debts.

Where the Will does not name any executor, or universal or residuary legatee, no probate could be issued, but letters of administration with the Will annexed should be granted to any legatee under section 232 read with section 234. Section 235 is not applicable. So also where an executor is appointed who is legally incapable or refuses to act, or who had died before the testator or before he has proved the Will, or executor dies after having proved the Will, but before he has administered all the estate of the deceased, an universal or residuary legatee may prove the Will and Letters of Administration with Will annexed may be granted to him of the whole estate, or of so much thereof as may he un-administered.

How to apply for Letter of Administration

a) Form for the grant of Letters of Administration is in Schedule VII of Indian Succession Act, 1925, contains the form for grant of Letters of Administration. This application can be made 14 days after the death. The court grants the letter to beneficiary on being satisfied and if no one applies it may be granted to the creditor of the deceased.
b) Will has to be duly executed and petitioner's name must be there. Details like time of death, amounts of assets have to be mentioned.

Hence, when a person dies intestate/ or doesn't nominate an executor under the will, it is then, the *Letter of Administration* acts as a facilitating document. Letter of Administration is granted to the beneficiaries after they apply to a Court of law having competent jurisdiction. Letter of Administration entitles the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death.

According to section 234 of the Act, if the executor, residuary legatee or representative of the residuary legatee doesn't exist, declines, is incapable of acting or cannot be found, then the person who would have been entitled to administer the estate in case of the deceased dying intestate would be entitled to file an application for the Letter of Administration. The same provision under the act empowers any other legatee having a beneficial interest or a creditor to file an application for the Letter of Administration as the case may be.

To whom Letter of Administration cannot be granted

Letters of administration cannot be granted to any person who is a minor or is of unsound mind, nor to any association of individuals unless it is a company which satisfies the conditions prescribed by rules to be made by notification in the Official Gazette by the State Government in this behalf. Section 236 of the Indian Succession Act, 1925 deals with it at length.

Is it mandatory to obtain Probate /Letter of Administration?

- Sec 213(1) of ISA - Mandatory for every legatee or executor to obtain a Probate /Letter of Administration with the Will before they try to execute a will.
- Sec 213(2) r/w Sec 57 of the ISA carves out certain exceptions to Sec 213(1) of the Act.

  A bare reading of Sec 213(2) and 57 of the Act makes it clear that whatever exception contained in Sub-section (1) of Sec 213, has no application in respect of Wills made by any Hindu, Buddhist, Sikh or Jain.

- Sec 218 (1) states that if the deceased is a Hindu, Muhammadan, Buddhist, Sikh, Jains or exempted person, having died intestate, administration of his estate may be granted to any person who would be entitled to.
- Sec 218(2) describes that when several persons apply, the Court may give it to any one or more of such persons.
- Sec 219 states that if deceased, having died intestate, was not a person covered under sec 218, then the people related to him either by marriage or by consanguinity, may be granted LOA.
- Sec 237- It provides that if the Will is lost, destroyed by wrong or accident, the probate can be granted on such copy or draft of the Will, limited until the original or a properly authenticated copy of it is produced.
- Sec 261 -279 deals with alteration and revocation of Probates and LOA and practice in the matter of granting and revoking probates and letters of administration.
- Sec 263 states that the grant of probate or letters of administration may be revoked or annulled for just cause.
- Section 273 inter alia states that a probate or LOA shall have effect over all the properties and estate of the deceased.
- Section 278 states that every application for letters of administration shall be made by a petition in the prescribed form.
- Sec 325 states that debts of every description must be paid before any legacy. Therefore, payment of debts shall take precedence.
- Sec 327 & 328 deal with Abatement of general legacies & Non-abatement of specific legacy when assets sufficient to pay.

- Where all legacies are general, and there is deficiency in the assets, they abate proportionately. All general legatees rate equally, and no preference is made among them with regard to the purpose or object of the legacy.
- Specific legacies abate when the assets are insufficient to pay all the debts. A demonstrative legacy is treated as a specific legacy for purpose of abatement.
- But when assets not specifically bequeathed are also insufficient to pay off debts then specific legacies also will abate.
- Where assets are not sufficient to pay off the debts and the specific legacies, then there will be abatement of specific legacies as well.

SUCCESSION CERTIFICATE

A succession certificate is issued by a civil court to the legal heirs of a deceased person. If a person dies without leaving a Will, a succession certificate can be granted by the court to realise the debts and securities of the deceased. It establishes the authenticity of the heirs and gives them the authority to have securities and other assets transferred in their names as well as inherit debts. It is issued as per the applicable laws of inheritance on an application made by a beneficiary to a court of competent jurisdiction. A succession certificate is necessary, but not always sufficient, to release the assets of the deceased. For these, a death certificate, letter of administration and no-objection certificates will be needed. A Succession Certificate is not granted for dealing in or transmission of title to any immovable property.

A succession certificate, strictly speaking, does not affect adjudication of title of the deceased far less than that of the holder as regards the debts and securities covered thereunder. Yet, simply to afford protection to the parties paying the debts. The grant of succession certificate is conclusive against the debtor. A succession certificate has effect throughout the whole India as per section 380 of The Indian Succession Act, 1925. According to sections 381 and 386 of the Act, a succession certificate is conclusive as against the person/persons liable to whom full indemnity is afforded (make available) for payments made. But, despite the succession certificate is only conclusive of the representative title of the holder thereof as against the debtors, a suit of declaration will not lie that the holder of the certificate is not the legal representative of the deceased.

Grant of Succession Certificate- Certain Restrictions:

Under the following circumstances, no succession certificate can be granted.

i) under section 370 (1) of the Act, as to any debt or security to which a right is required to be established by probate or letters of administration;

ii) that too, if sections 212 of the Act applies;

iii) if section 213 of the Act applies;

iv) that is to say that where law requires probates or letters of administration as mandatory to establish right to property as in the cases of Parsis, Jews, East Indians, Europeans and Americans.

v) Provided that nothing will prevent as to granting a succession certificate to any person entitled to the effects of a deceased Indian Christian or any part thereto pertaining to any debt or security, that the right can be established by letters of administration.

In the event a person dies leaving a Will, a succession certificate may not be required for inheriting the assets of the deceased since the entire estate of the deceased shall vest on the executor of the Will for distribution as per the instructions set forth in the Will. Although Section 370 of the Indian Succession Act, 1925, specifically provides that a succession certificate shall not be granted with respect to any debt or security in cases where a right to such property is required to be established by obtaining letters of administration or a probate, in certain states, a probate and a succession certificate are compulsory to transfer the title of an immovable property. However, this requirement should not be taken as a conclusive proof that the title of the immovable property has been transferred validly. Please remember stamp duty and title mutation is a state subject while Succession is a Central subject and under the scheme of governance as defined under the Indian Constitution, the laws made by Centre supersede that of the states.

Procuring a Succession Certificate

A few important pointers for procuring a succession certificate are as follows:

- The beneficiary/ legal heir is required to approach a competent court and file a petition for a succession certificate.
- The District Judge within whose jurisdiction the deceased ordinarily resided at the time of his death, or, if at that time had no fixed place of residence, the District Judge, within whose jurisdiction any part of the property of the deceased may be found, may grant the succession certificate.
- The petition should mention important details such as the name of petitioner, relationship with the deceased, names of all heirs of the deceased, time, date and place of death. Along with the petition, death certificate and any other document that the court may require should also be attached.
- The court, after examining the petition, issues a notice to all concerned parties and also issues a notice in a newspaper and specifies a time frame (usually one and a half months) within which anyone who has objections may raise them. If no one contests the notice and the court is satisfied, it passes an order to issue a succession certificate to the petitioner.
- If there is more than one petitioner, then the court may jointly grant them a certificate, but it will not grant more than one certificate for a single asset.
- When the District Judge grants a succession certificate, he shall specify the debts and securities set forth in the application for the certificate, and may thereby empower the person to whom the certificate is granted (i) to receive interest or dividends on the securities; or (ii) to negotiate or transfer the securities; or (iii) both to receive interest or dividends or negotiate or transfer the securities.
- With respect to costs involved, the Court typically levies a fixed percentage of the value of the estate as its fees (which is more particularly prescribed under the Court-fees Act, 1870, (7 of 1870)). This fee is to be paid in the form of judicial stamp papers of the said amount. In addition to Court fees, the applicant will also be required to pay requisite fees to its lawyer.

How to apply for Succession Certificate

i. An application should be made to The District Judge under section 372 of Act;
ii. the petitioner must sign and verify the petition;
iii. the residences of the relatives and family of the deceased must be mentioned;
iv. In case of The Hindu Succession Act (Act XXX OF 1956), the names of the heirs must be mentioned in the petition;
v. the right of the petitioner should be mentioned;
vi. Either Ordinary residence of the deceased, at the time of death, or the property of the deceased should be within the limits of the Jurisdiction of the Court concerned;
vii. the debts and securities as to which the succession certificate is applied for should be mentioned;
viii. the absence of any impediment u/sec. Sub section (1) of Section 370 of the Act or any other provisions of the Act or any other enactments to the grant of succession certificate or to the validity of it in case of it was granted, must be mentioned.

What are the effects of a succession certificate?

The holder of a succession certificate

- Has a claim over the property and assets of the deceased person.
- Has the authority to represent the deceased in collecting debts and securities due to the deceased or payable in his name.
- Inherits the debts and other liabilities of the deceased person. The succession certificate is valid throughout India. The Indian Succession Act, 1925 governs the same.

Who can apply for the Succession Certificate?

Following are the person who can apply for succession certificate:

(i) Sound mind person

(ii) Major person

(iii) Person having an interest in estate of deceased

(iv) Secretary of state

(v) Person having beneficial interest in the debt or security of deceased person.

Some relevant case laws:

- **Venkatachala Iyengar v. B.N. Thimmajamma(AIR 1959 SC 443):** Section 67 & 68 of the Indian Evidence Act prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, S. 59 and 63 of the Indian Succession Act are also relevant. The question as to whether the Will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions.
- **Shashi Kumar v. Subodh Kumar (AIR 1964 SC 529):** The mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by S.63, ISA. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus.
- **Benga Behera v. Braja Kishore Nanda (AIR 2007 SC 1975):** "If an authority in performance of a statutory duty signs a document, he does not become an attesting witness within the meaning of S.3 of the Transfer of Property Act and S.63 of the Succession Act. “Animus attestandi" is a necessary ingredient for proving the attestation. If a person puts his signature in a document only in discharge of his statutory duty, he may not be treated to be an attesting witness.
- **B. Venkatamuri v.C.J. Ayodhya Ram Singh and others (2006(1) SCALE 148):** SC upon considering a large number of decisions opined that proof of execution of Will must strictly satisfy the terms of S.63 of the Indian Succession Act. It was furthermore held "It is, however, well settled that compliance of statutory requirements itself is not sufficient as would appear from the discussions hereinafter made."

- **Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao and others (2006 (14) Scale 186)** - In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document."
- **K. Laxmanan v. Thekkayil Padmini (2009) 1 SCC 354)** Suspicious circumstances arise due to several reasons such as with regard to genuineness of the signature of the testator, the conditions of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that the testator's mind was not free. In such a case, the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator
- **Chiranjilal Shrilal Goenka (Deceased) through Lrs. vs. Jasjit Singh and Ors. (1993) 2SCR 454** – SC held that the Probate Court has been conferred with exclusive jurisdiction to grant probate of the Will of the deceased annexed to the petition (suit); on grant of refusal thereof, it has to preserve the original Will produced before it.
- **Inswardeo Narain Singh vs. Smt. Kanta Devi and Ors AIR1954SC280** – The SC held that the court of probate is only concerned with the question as to whether the document put forward is the last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court.
- **Sarla Gupta vs. State & Ors. 2018(168)DRJ644:**
    - It was held that the court, in a proceeding for grant of LOA, is concerned only with, whether the person seeking LOA is a fit person to be granted LOA of the estate of the deceased.
    - The court in proceedings for grant of LOA does not enter into question of title to the property.
    - Proceedings for grant of LOA are summary in nature and complicated questions of title of property (or properties) cannot be appropriately conducted in summary proceedings.

- **Muthia vs Ramnatham, 1918 MWN 242**: It was held that the grant of certificate gives to the grantee a title to recover the debt due to the deceased, and payment to the grantee is a good discharge of the debt."
- **Srinivasa vs Gopalan**: In this case it was held that "The question whether the debt belonged to the deceased is not a matter to be decided on an application for a succession Certificate."
- **Paramananda Chary vs Veerappan, AIR 1928 Madras 213:** It was held that "The grant of succession certificate is conclusive against the debtor. Even if another person turns out to be the heir of the deceased, it does not follow that the certificate is invalid."
- **Ganga Prasad vs Saudan**: It was observed that section 381 of the Act protects the debtors and affords full indemnity to the persons liable to pay the debts and in respect of the securities covered by the certificate as persons having the same paid in "good faith".
- **P K Vishalakshmi v/s Bank of India** – The Kerala HC observed that "*The deeming provision under Section 30 of the Act is for considering the circumstances under which a deceased person could be said to have died intestate. Section 192 to 207 are mainly intended to curb interlopers from meddling with the property of the deceased and are in the nature of summary procedure which is subject to the right of either party to bring a regular suit as saved by Sec. 208 of the Act. Thus, the court below was perfectly justified in declining to grant a succession certificate in respect of the immovable property".*

****