

**EVOLUTION OF CURRENT,
SUCCESSION LAW IN INDIA
&
SOME COMMON TOOLS OF
TRANSMISSION**

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1. Evolution of Succession Law in India

Traditionally in India, most property among Hindus was held as joint family property. It is said that the language and dialect in India changes every 100 kms. Similarly, each part of India had a variation of its own succession laws which was based on the custom, equity and influence of that time. However, the key differences between English law and Indian law was the concept of primo-geniture and individual inheritance rights which prevailed in the former, but not the latter where the accent was always on family. With respect to the other two types of inheritance laws prevailing in the world today – Civil law and Sarah law, while both these are based on individual rights (compared to family rights for India), both these types of law are based on forced heirship pre-defining the proportion of inheritance rights, which is quite unlike Indian law where the father/mother can decide the proportions they want to bequeath on their self-acquired property and their coparcenary rights.

The first attempt at codifying Succession laws started happening in 1870s, and there are still quite a few laws (e.g. - Indian Trust Act) which date back to that era.

Currently, India is perhaps unique in itself that it doesn't have a common civil code. With the enactment of quite a few laws, the succession laws are no longer customary but statutory. Even then, we have at least 10 basic succession laws which cover more than 70% of Indian population. An indicative list is provided in the Annexure.

2. General law of Succession:

As shared earlier, India doesn't have one common succession law. In fact, there is a wide variation of succession laws within Hindus as well. The laws of succession in India are divided as follows:

- a. Along geographical lines
- b. Along religious lines

In 1947, in actuality only the British ruled and administered territories were declared independent and handed over to the provisional government formed by INC. Similarly, the territories ruled by kings and noblemen under the patronage of British were declared independent kingdoms and the power was handed back to these kings and nobles (examples - Junagadh, Patiala, Hyderabad etc.). The provisional government spent the next 3 year assimilating these kingdoms and principalities. To do this a host of treaties were entered into. This has given rise to differential application of Indian law across India. Thus, Indian Succession (and quite a few other) laws are not applicable in:

- i) Goa – follows Portuguese law.
- ii) Pondicherry – follows French law.
- iii) Daman & Diu - follow Portuguese law.
- iv) Parts of north east
- v) Note – Post the passing of the J & K Reorganisation Act, 2019 most laws of India have been applicable to J&K. This includes Succession laws as well.

India follows religion-based Succession Laws as covered below.

3. **For Hindus** (as defined in Hindu Succession Act, 1956 this includes, Sikhs, Buddhists, Jains and any other person who is not a Muslim, a Christian, a Parsi, a Jew, unless proven otherwise) the following 4 laws are commonly applicable:

- i) Mitakshara – patrilineal succession governed under Hindu Succession Act, 1956 (plus amendments). This is applicable to most parts of India.
- ii) Dayabhaga – named after Sage Dayabhaga, patrilineal succession law applicable in Bengal, parts of Assam and Odisha primarily with respect to joint family property.
- iii) Marumakattayam & Aliyasantana – governed by Sec 7 of Hindu Succession Act, 1956

4. **The Muslim Succession** is defined collectively under Muslim Personal Law (Shariat) Application Act, 1937. Sunnis and Shia's both have different customs and laws.

- a. Sunni is derived from “Sunna”. The Prophet would usually share his teachings through a discourse, and his close disciples would write down these teachings, encapsulated later into Qoran. Sunni's are those who follow only the direct teachings as written in Qoran. Within Sunnis there are 5 different types of Shariat law – Hanifi, Zaharite, Malliki, Shaifite and Hannibalite. Of these most Sunnis in India follow the Hanifi School. Sunni's have a forced heirship regime and each lineal descendant's share is define in father's property.
- b. Shia's are those who chose to follow Ali, the son-in-law of the Prophet. They believe that their Imams are descendants of Ali, and therefore follow the teachings of these Imams. Over time this has led to formation of multiple schools of Shia's, chief being:

- i. Ismailia's – further sub-divided into Kolas and Boras.
- ii. AthnaAshriya/Imamia
- iii. Zaidiyas

The Shia's are not strict adherents of forced heirship and generally look to the imam for guidance over their affairs.

5. **Christian Succession**—Christian Succession is governed mostly by Indian Succession Act, 1925, as applicable at the time. Heirship is primarily driven through marriage and lineal descendancy. Unless provided for in a Will, Christian Succession, unlike Hindus, doesn't carry survivorship rights.

6. **Nominee** - a nominee is a custodian on whom falls the responsibility of ensuring that the legal heir of the depositor gets the money or securities owned by the deceased. While a nominee may be a legal heir, their status as nominee doesn't bestow ownership rights on them. Various laws in India have defined nomination differently. The key ones are:

- a. Banking Regulation Act, 1949 — Sec 45ZA and 45ZC define nomination for bank accounts and articles left in safe custody of the bank in almost similar terms as follows:

(1) Where a deposit is held by a banking company to the credit of one or more persons, the depositor or, as the case may be, all the depositors together, may nominate, in the prescribed manner, one person to whom in the event of the death of the sole depositor or the death of all the depositors, the amount of deposit may be returned by the banking company.

(2) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of such deposit, where a nomination made in the prescribed manner purports to confer on any person the right to receive the amount of deposit from the banking company, the nominee shall, on the death of the sole depositor or, as the case may be, on the death of all the depositors, become entitled to all the rights of the sole depositor or, as the case may be, of the depositors, in relation to such deposit to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

b. Companies Act, 2013, Section 72 defines Power to Nominate as follows:

1) Every holder of securities of a company may, at any time, nominate, in the prescribed manner, any person to whom his securities shall vest in the event of his death.

(2) Where the securities of a company are held by more than one person jointly, the joint holders may together nominate, in the prescribed manner, any person to whom all the rights in the securities shall vest in the event of death of all the joint holders.

Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of the securities of a company, where a nomination made in the prescribed manner purports to confer on any person the right to vest the securities of the company, the nominee shall, on the death of the holder of securities or, as the case may be, on the death of the joint holders, become entitled to all the rights in the securities, of the holder or, as the case may be, of all the joint holders, in relation to such securities, to the exclusion of all

other persons, unless the nomination is varied or cancelled in the prescribed manner.

c. Bye law 9.11 of NSDL deals with Transmission of securities held under Nomination:

9.11.1 In respect of every account, the Beneficial Owner(s) ("Nominating Person(s)") may nominate any person ("Nominee") to whom his securities shall vest in the event of his death in the manner prescribed under the Business Rules from time to time.

9.11.2 The securities held in such account shall automatically be transferred in the name of the Nominee, upon the death of the Nominating Person, or as the case may be, all the Nominating Persons subject to the other Bye Laws mentioned hereunder.

9.11.3 A minor may be nominated to the interest in an account under these Bye Laws, provided the Nominating Person(s) follow(s) such requirements as may prescribed under the Business Rules, including without limitation, provision of the name and address of the guardian of such minor to the Participant and the Depository

9.11.4 Beneficial Owner(s) may substitute or cancel a nomination at any time. A valid nomination, substitution or cancellation of nomination shall be dated and duly registered with the Participant in accordance with the Business Rules prescribed therefore. The closure of the account by the Nominating Person(s) shall conclusively cancel the nomination.

9.11.5 A Nominee shall not be entitled to exercise any right conferred on Beneficial Owners under these Bye

Laws, upon the death of the Nominating Person(s), unless the Nominee follows the procedure prescribed in the Business Rules for being registered as the Beneficial Owner of the securities of the Nominating Person(s) in the books of the Depository.

9.11.6 A nominee shall on the death of the Nominating Person(s) be entitled to elect himself to be registered as a Beneficial Owner by delivering a notice in writing to the Depository, along with the certified true copy of the death certificate issued by the competent authority as prescribed under the Business Rules. Subject to scrutiny of such election, the securities in the Account shall be transmitted to the account of the Nominee held with any depository.

d. Insurance - As per Section:39 of insurance act, 1938, the holder of a policy on his own life, may nominate a person(s) to whom the money secured by the policy shall be paid in the event of his death.

7. Meaning of Either or Survivor, Anyone or survivor etc. – As per clause 6.1 of Master Circular of RBI no. RBI/2010-11/93UBD.PCB. MC.No:13 /13.01.000/2010-11

In the case of deposit accounts where the depositor had utilised the nomination facility and made a valid nomination or where the account was opened with the survivorship clause ("either or survivor", or "anyone or survivor", or "former or survivor" or "latter or survivor"), the payment of the balance in the deposit account to the survivor(s)/nominee of a deceased deposit account holder represents a valid discharge of the bank's liability provided:

- a) the bank has exercised due care and caution in establishing the identity of the survivor(s) / nominee and the fact of death of the account holder, through appropriate documentary evidence;*
- b) there is no order from the competent court restraining the bank from making the payment from the account of the deceased; and*
- c) it has been made clear to the survivor(s) / nominee that he would be receiving the payment from the bank as a trustee of the legal heirs of the deceased depositor, i.e., such payment to him shall not affect the right or claim which any person may have against the survivor(s) / nominee to whom the payment is made.*

8. **Joint Tenancy in Common** - In case of tenant-in-common, the type of co-ownership is not specifically stated. Each tenant-in-common has a separate fractional interest in the entire property. Although each tenant-in-common has a separate interest in the property, each may possess and use the whole property.

Tenants-in-common may hold unequal interest in the property but the interests held by each are a fractional interest in the entire property. Each one may freely transfer his interest in the property.

9. **Joint Tenancy with rights of survivorship-** Upon the death of one joint tenant, his interests immediately pass on to the surviving joint tenants and not to the deceased's estate. Joint tenants hold a single unified interest in the entire property.

Each joint tenant must have equal shares in the property. Each joint tenant may occupy the entire property subject only to the rights of the other joint tenants.

10. **Concept of Domicile—**

- a. **Citizenship** – Governed by the Indian Citizenship Act, 1955 - A person is said to be a citizen of a country where s/he is normally born or whose passport s/he carries or where s/he is registered as a voter. For India, anybody who falls within the definition of a citizen as given under the Indian Citizenship Act, 1955 (as amended) (Clauses 3-7) is said to be a citizen of India.

b. **Person Resident in India:**

- i. Under Income Tax Act, 1961 (ITA) – This is defined under Section 6 of the ITA. This definition classifies a person as a Tax Resident. All persons classified as such are taxable for their global income in India and can avail the benefit of double tax avoidance treaties entered into by India.
- ii. Under FEMA/ FDI policy – A person resident in India is defined differently under FEMA/FDI compared to ITA. This classification has a bearing on the types of accounts one can hold, or the assets one may be able to purchase in India. It is also possible to be classified as

resident under ITA but NR under FEMA/FDI. Quite a few other laws lean on the definition of person resident in India as provided under FEMA.

- c. Domicile – Unlike the previous two concepts of ‘citizenship’ and ‘resident’, domicile of a person is determined not by statutory actions but his own actions which indicate an intention to stay indefinitely in one place. For example, Mr. A having been born and brought up in Delhi, shifts to Bombay in 2011 for taking up a new job role. His wife and kids move with him where he stays in a rented accommodation. He continues to file his taxes in Delhi, and reports his permanent address as Delhi. In 2019, he buys a house in Bombay, shifts his PAN card and voter registration to Bombay. Here, in 2011 Mr. A shifted his residence to Bombay, but maintained his domicile in Delhi till 2019, post which he would, by his actions, be deemed to have shifted his domicile to Bombay.

Domicile is covered in Indian Succession Act, 1925 under Sections 4-19 in Part II.

Under the Hague Convention, most countries agreed to use the concept of domicile to decide on the following:

- i) Permanent residential status
- ii) Imposition of Estate duty/inheritance Tax.

As per this Convention, the estate duty depends on:

- i) For immovable property – in the country/place where the property is situated.
- ii) For movable property – in the country/place where the holder is domiciled.

ANNEXURE

LIST OF SOME LAWS GOVERNING INHERITANCE IN INDIA

- 1) Indian Succession Act, 1925
- 2) Hindu Succession Act, 1956
- 3) Hindu Marriage Act, 1955
- 4) Hindu Adoptions and Maintenance Act, 1956
- 5) Special Marriages Act, 1954
- 6) Indian Christian Marriage Act, 1872
- 7) Muslim Personal Law (Shariat) Application Act, 1937
- 8) Muslim Women (Protection of Rights on Marriage) Act, 2019
- 9) Foreign Marriage Act, 1969
- 10) Guardians & Wards Act, 1890
- 11) Juvenile Justice (Care & Protection) Act, 2000.
- 12) Indian Contract Act, 1872
- 13) Customary law – Portuguese, French, Jain, Malabar Christians etc.
