

A STUDY ON SUCCESSION, WILLS, FAMILY ARRANGEMENTS/SETTLEMENTS & HUF PARTITIONS

(Revised Edition, 2011)



**The Direct Taxes Committee
The Institute of Chartered Accountants of India**

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FOREWORD TO THE THIRD EDITION

Under the Income-tax Act, 1961, a Hindu undivided family is assessed to Income-tax as a distinct person and there are separate provisions for the tax computation. The Income-tax Act also contains provisions for clubbing of income of a HUF in the hands of a member in certain cases. Apart from the provisions of Income-tax Act, 1961 there are many issues which arise out of partitions of HUFs, successions, wills and family arrangement/ settlements.

Business in India is largely family oriented which has both positive and negative aspects. Any business can prosper with unity in the family but partition more often leads to disputes and bitterness in the relations. Further, the death of the head of the family without a will also leads to disputes in the family. These disputes can be well settled without moving to the courts if and only if there is awareness of the prevailing law regarding succession, wills etc among the masses. This publication is a humble effort in this direction.

I compliment CA. Jayant Gokhale, Chairman Direct Taxes Committee and all members of the Direct Taxes Committee for bringing out this revised edition of the publication. I am confident that the Direct Taxes Committee would keep up the good work of updating the members in the field taxation.

New Delhi
8th February, 2011

CA. Amarjit Chopra
President

PREFACE TO THE THIRD EDITION

Succession, Wills, Family arrangements/Settlements & HUF Partitions are the topics which are of common interest for every assessee. Death of the head of the family brings with itself a lot of emotional and financial uncertainties for the heirs of the deceased.

The subjects of this publication cover a vast canvas of laws relating to succession (testamentary and intestate), HUF and related topics of partition and family settlement which are extremely important. The economic boom has increased the property and estate held by individuals and HUFs. At the same time, the prevailing social environment is leading to the breakdown of large HUFs and a movement towards nuclear families resulting in a need for arranging the affairs especially in family-owned businesses. Such a publication provides a great public service by making all the relevant information available in a simple and well-organised manner. The value of the publication is significantly enhanced by the updation of the relevant judicial decisions especially in regard to empowerment of women in the traditional Hindu Undivided Family structure.

The basic draft of the said publication was prepared by the Committee on Economic and Commercial laws which forwarded the same for revision to the Direct Taxes Committee as it was felt that the same falls under the jurisdiction of the Direct Taxes Committee. I compliment CA. Anup P. Shah, Mumbai who initiated the revision of the said publication and CA. H. N. Motiwalla, Mumbai who further provided value addition. CA. Amarjit Chopra, President and CA. G. Ramaswamy, Vice-President were guiding force behind the revision. I place on record my sincere thanks to each of them for the efforts taken and guidance provided.

New Delhi
8th February, 2011

CA. Jayant P. Gokhale
Chairman
Direct Taxes Committee

FOREWORD TO THE FIRST EDITION

Succession is a burning issue almost all over the world. The law governing succession is complex but at the same time very relevant for all walks of people. Chartered Accountants are increasingly being consulted on various issues of succession, wills, family disputes, etc. This has widened the scope of the profession significantly. Chartered Accountants can provide various services in these areas.

In the light of this backdrop this publication explains in a lucid and succinct manner the various provisions relating to succession in case a person dies without making a will, provisions relating to making of a will, family settlements/arrangements, HUF partitions, etc.

This publication of the Corporate And Allied Laws Committee would be a good guide to the members as well as others in discharge of their functions.

I compliment the author of the book, Mr. Anup P. Shah, FCA for his efforts. .

The Committee under the Chairmanship of Shri Rajkumar S. Adukia deserves congratulations for their endeavour.

New Delhi
1st February, 2005

Sunil Goyal
President

PREFACE TO THE FIRST EDITION

The Corporate And Allied Laws Committee believes that basic acquaintance and awareness of laws which impact economic activity are essential for Chartered Accountants in practice.

As Chartered Accountants become more and more acquainted with economic laws, they would be in a better position to provide additional services to their clients and broaden the ambit of their service spectrum.

One such area which is very important, especially in a country like India, is the law relating to succession, wills, family arrangements/settlements, etc. With the intention of bringing awareness of such laws amongst chartered accountants and the operating persons the Committee considered Mr. Anup P. Shah, F.C.A., to undertake the task of preparing this publication.

I thank Shri M.K. Bhakta, Advocate and Solicitor for reviewing the book.

I would like to thank the members of the Corporate And Allied Laws Committee for providing invaluable suggestions, namely, Shri Sunil Goyal, President and Shri Kamlesh S. Vikamsey, Vice-President under their dynamic leadership, wisdom and moral support, the Committee was able to undertake many pro-active initiatives and significant achievements.

I also thank my colleagues in the Council and in the Committee S/Shri Manoj Fadnis, H. N. Motiwalla, S. Santhanakrishnan, T. N. Manoharan, Amarjit Chopra, Subhash Chander Vasudeva, Jitesh Khosla, Akhilesh Ranjan and invaluable support given by co-opted members S/Shri Sanjeevkumar S. Shah, Rattan Bansal, Ashok Gupta, R. N. Bansal, K K Gupta, Daniel I. Selvaraj, Rajkumar Agrawal and S. R. Bansal.

New Delhi
1st February, 2005

CA. Rajkumar S. Adukia
Chairman
Committee on Economic,
Commercial Laws

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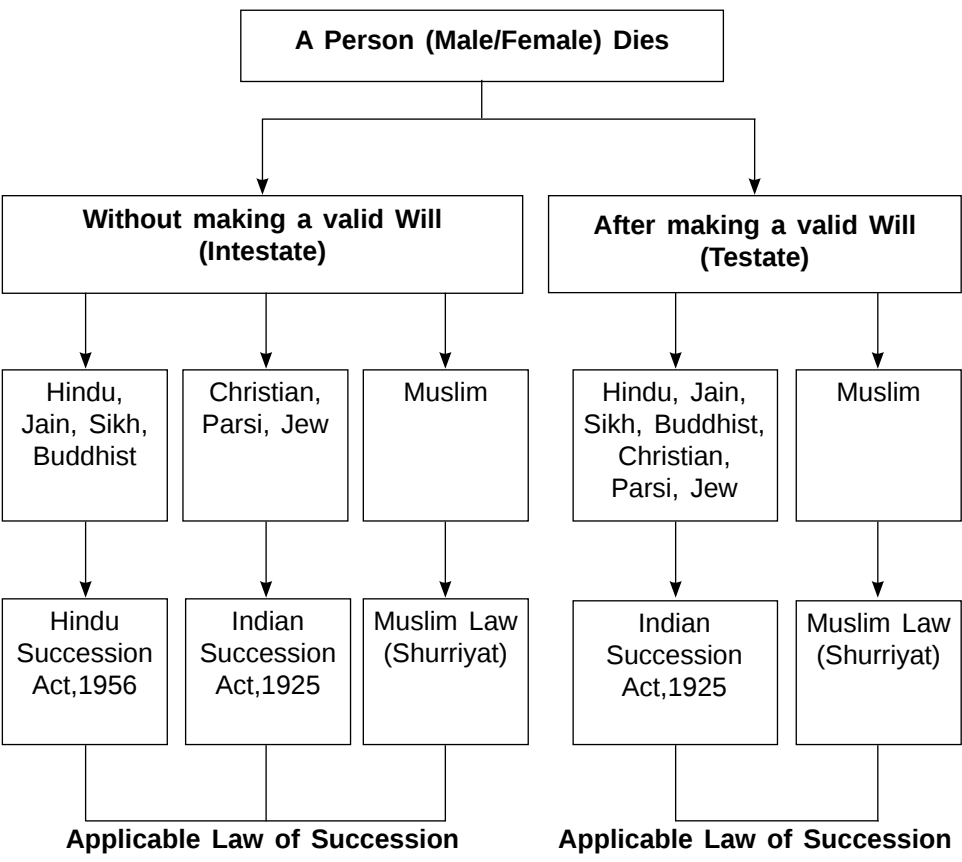
Succession, Wills, Family Arrangements/ Settlements, & HUF Partitions

INTRODUCTION

- 1.1 It is said that “in life, only two things are certain Taxes and Death”. Ironical as it may sound, it is this certainty of death which throws up several uncertainties for the heirs which a deceased may leave behind. One of the biggest burning issues is that of succession or inheritance to the properties, assets and businesses of the deceased. This is especially relevant in a country like India, where many businesses have traditionally been family owned and run, and often when the family patriarch dies, it leads to family disputes over succession issues. These disputes are not just restricted to non-corporate entities but corporate India too has witnessed some of the most bitter succession issues.
- 1.2 The term “succession” ordinarily means the transmission of the property and the transmissible rights and obligations of the deceased. The transmission could either be by way of a will or by the operation of law.
- 1.3 Succession could be testamentary or intestate. When it is by way of a will of the deceased, then it is called a testamentary succession and when it is by operation of law (i.e., when no will is prepared), then it is called intestate succession. Indian laws deal with both types of succession. There are different laws for different communities.
- 1.4 The law on intestate succession for different communities in India is as under:
 - (a) For Hindus, Sikhs, Buddhists and Jains : Hindu Succession Act, 1956
 - (b) For Muslims: Muslim Law (which is not codified and is different for Shias and for Sunnis)
 - (c) For Christians, Parsis, Jews and any community other than Hindus, Muslims, Sikhs, Buddhists and Jains : Indian Succession Act, 1925
- 1.5 It is important to note that succession can never be in abeyance, i.e., it can never lie in a vacuum. The moment a person dies intestate, his heirs (in order of succession) become entitled to succeed to his property. If there is a will, the succession will be as per the will.
- 1.6 The law on testate succession is governed by the Indian Succession Act, 1925 for all communities except Muslims. However, certain sections of this

Act are applicable to testamentary succession by Muslims also. The law in relation to making of wills by Muslims is governed by the relevant Muslim Shurriyat Law as applicable to the Shias and the Sunnis.

1.7 The above position can be better explained with the help of the following diagram:



1.8 Family disputes and rifts are something which are very popular the world over and more so in India because of the joint family system of business. It is not uncommon to see or hear of family arrangements and family settlements on a daily basis. Such arrangements now not only involve family owned assets, but also encompass listed companies which may be controlled by the feuding families. Partition of Hindu Undivided Families are also very common.

- 1.9 The law also places certain restrictions on the powers of the guardian of a Hindu minor. This sometimes becomes a stumbling block in several transactions.
- 1.10 Considering the rapidly growing importance of all the above facets, this book seeks to provide some light on the subject of Succession, Wills, Family Arrangements and HUF Partitions. This book is divided into the following parts:
- (a) Part-A : Intestate Hindu Succession, which deals with the succession to the estate of a Hindu male or female who dies without making a will.
 - (b) Part-B : Testate Succession, which deals with the succession to the estate of a person who dies after making a will.
 - (c) Part-C : Family Settlement / Arrangement, which deals with the family disputes over joint family property and the manner of resolving them by the means of a family settlement or arrangement so as to define the respective rights, ownership, powers and obligations of the family members.
 - (d) Part-D : HUF Partition, which deals with the partition of an Hindu Undivided Family.
 - (e) Part-E : Guardianship of Hindu Minors, which deals with the powers and duties of Guardians of Hindu Minors.
 - (f) Part-F : Adoption of Hindus, which explains the provisions relating to adoption of Hindus.
 - (g) Part-G: Frequently Asked Questions on wills and succession.



PART - A:

INTESTATE HINDU SUCCESSION

HINDU SUCCESSION ACT

I. Introduction

- 1.1 The Act governs the law relating to intestate succession among Hindus. The Act overrides the erstwhile uncodified Hindu Law. Although the Hindu Succession Act, 1956 ("the Act") is not a piece of commercial or corporate legislation, its importance in today's business world is being felt because of family separations and family feuds becoming the order of the day.
- 1.2 At the risk of repetition, it is quintessential to note that this Act would have no application in case of a testamentary succession, i.e., in a case where there is a will. The Act would thus, only apply in a case where a Hindu male or female dies without making a will and leaves behind property.

1.3 Application

The Act applies only in case of intestate succession, i.e., to the following:

- (i) Any person who is a Hindu, Jain, Sikh or Buddhist by religion
- (ii) Any person who is not a Muslim, Christian, Parsi or a Jew
- (iii) Any person who becomes a Hindu, Jain, Sikh or Buddhist by conversion or reconversion
- (iv) Legitimate / illegitimate child whose one or both parents is a Hindu, Jain, Sikh or Buddhist by religion. However, in case only one parent is a Hindu, Jain, Sikh or Buddhist by religion, then the child must be brought up by such parent as a member of his community, family, etc.

The Act overrides all Hindu customs, traditions and usages and specifies the heirs entitled to such property and the order or preference among them. The Act lays down separate rules for succession for males and females.

1.4 Escheat

In case there are no heirs of an intestate who are qualified to succeed to the property in accordance with the provisions of the Act, then such property would devolve upon the Government and the Government would take such property.

II. Male Intestate Succession

- 2.1 **Legal Position :** The rules governing intestate succession of a Hindu male are specified in Sections 8 to 13 of the Act. These rules are the substratum

of the Act as they lay down how the property and the estate of a Hindu male will pass on to his heirs in case he fails to make a will or makes an invalid will – *Manshan vs. Tej Ram (1980) Suppl SCC 367*. The property of an intestate Hindu male devolves on the following heirs in the order specified below:

- (a) Firstly, upon his Class I heirs
- (b) Secondly, if there is no Class I heir, then upon his Class II heirs
- (c) Thirdly, if there is no Class II heir, then upon his Agnates
- (d) Fourthly, if there is no Agnate, then upon his Cognates

2.2 **Order of Succession** : The order of succession is in the order specified above. Thus, if there are Class I heirs, then they take the property in exclusion to all others. If there are no Class I heirs, then the Class II heirs take the property in exclusion to all others. If there are no Class II heirs, then the Agnates take the property in exclusion to all others. Finally if there are none of the aforesaid heirs, then and only then the Cognates take the property.

2.3 **Class I heirs** : The Schedule to the Act specifies the following 12 heirs as Class I heirs:

Son, daughter, widow, mother, son / daughter of a predeceased son/ daughter, widow of a predeceased son, son/daughter/widow of a predeceased son of a predeceased son

The above Class I heirs take the property simultaneously and in priority succession to all other heirs. Amongst themselves the distribution is as follows :

- (i) The intestate's widow and if there are more than one such widow, then all of them taken together, take one share. The widow is permitted to receive this share even if she subsequently remarries. In the case of *Cherotte Suganthan (D) vs. Cherotte Bharathi AIR 2008 SC 1467* it was held that the subsequent remarriage does not divest the widow of her property.
- (ii) The intestate's children, mother and widow each take one equal share. It does not matter whether the daughter is unmarried or married. She gets an absolute share equal to that which the son gets.
- (iii) The heirs in the branch of each predeceased child take one share between them.

- (iv) The distribution of the share among the heirs in the branch of the predeceased son is so made that his widow/s and the sons and daughters each get an equal share. Further, the branch of his predeceased sons also get the same portion.

In case the distribution of the share is to be made among the heirs of the predeceased daughter, then it is so made that the surviving sons and daughters get equal portions.

It may be noted that the terms 'son' and 'daughter' include both those which are natural and those which are adopted.

It is very important to bear in mind that the mother of the deceased also has an equal share as a Class I heir. The mother is entitled to share even if the son is adopted or is illegitimate. Similarly, it must be remembered that the father is not a Class I heir but he is a Class II heir.

In the case of the son who inherits any property from his father the same would be treated as his separate individual property and it would not become the joint family property of the son. This view has been laid down by several Supreme Court decisions, such as *Ram Rakhpal*, 67 ITR 164 (SC).

Illustrations

- (i) A Hindu male dies intestate leaving behind his wife, son and daughter. Each of the three surviving members take a one-third share in his estate.
- (ii) A Hindu male dies without making a will and leaves behind his mother, father, brother, sister, wife, the wife of his predeceased son and son of that predeceased son. His father, brother and sister are not entitled to any share as they are Class II heirs. Thus, his mother, wife and the branch of his predeceased son (i.e., the widow of his son and his grandson) would each take a one-third share in his estate. The widow and grandsons would divide their one-third share equally.

2.4 Class II heirs : The following heirs are Class II heirs –

- I. Father
- II. Son's daughter's children; Brothers; Sisters
- III. Daughter's grandchildren
- IV. Children of Siblings
- V. Father's parents
- VI. Father's widow (step-mother), Brother's widow
- VII. Father's siblings

VIII. Mother's parents

IX. Mother's siblings

Among the heirs specified in Class II, those in the first entry take the property simultaneously and in exclusion to those in the subsequent entries and so on and so forth. Thus, if the father is surviving, he takes the property in exclusion to all other Class II heirs. All the heirs specified in one entry get an equal share in the property.

Illustrations

- (i) A Hindu male dies intestate and leaves behind his 2 brothers, 3 sisters and his mother's parents. Each of his siblings would get a one-fifth share to the exclusion of his maternal grandparents.
- (ii) A Hindu male dies intestate and leaves behind his son's daughter's (i.e., his granddaughter) son and daughter and his daughter's daughter's (again his granddaughter) son and daughter. The children of his son's daughter take the property equally in preference to the grandchildren of the daughter.

2.5 Agnates and Cognates

2.5.1 Two people are called Agnates of each other if they are related (by blood or by adoption) wholly through males. Agnates could be males or females. Thus, a father's brother's daughter is an Agnate but a father's sister's son is not an Agnate because the relation is not entirely through males.

2.5.2 On the other hand, two people are called Cognates of each other if they are related (by blood or by adoption) but not wholly through males. Cognates could be males or females. A mother's brother's daughter or a father's sister's son is a Cognate because the relationship is not wholly through males.

2.5.3 The relationship of Agnates and Cognates does not extend to those relationships which arise because of marriage.

2.5.4 **Order of succession** : Among two or more Agnates or Cognates the order of succession is as follows:

- (i) The heir who has fewer or no degrees of ascent is preferred to the others.
- (ii) If the degrees of ascent are the same, then the heir who has fewer or no degrees of descent is preferred to the others.

- (iii) If neither heir can be preferred to the other, then they take the property simultaneously.

While computing the degrees of ascent or descent, each generation is one degree and it starts from the intestate himself.

Examples:

- (i) A dies intestate. One out of two of his agnates are to be selected. One of these is Z who is A's brother's son's son. The other heir is P who is A's father's brother's son's son. Z would be selected in preference to P because he has fewer degrees of ascent as compared to P.

To explain in detail, Z has 2 degrees of ascent which are computed as follows:

- A would be the 1st degree.
- A's father would be the 2nd degree (a common ancestor is required).

However, P has 3 degrees of ascent which are computed as follows:

- A would be the 1st degree.
- A's father would be the 2nd degree.
- A's father's father, i.e., his grandfather would be the 3rd degree (a common ancestor is required).

Thus, Z has fewer degrees of ascent as compared to P and hence, he is preferred over P.

- (ii) B dies intestate and she leaves behind two Cognates. One of them is W who is her sister's daughter's son and the other is R who is her brother's son's son's daughter. W would be selected in preference to R because he has fewer degrees of descent as compared to R (In this case the degrees of ascent are the same and hence, we consider the degrees of descent).

To explain in detail, W has 2 degrees of ascent and 3 degrees of descent which are computed as follows:

- B would be the 1st degree of ascent.
- B's father would be the 2nd degree of ascent (a common ancestor is required).
- B's sister would be the 1st degree of descent.
- B's sister's daughter would be the 2nd degree of descent.
- B's sister's daughter's son (i.e., W himself) would be the 3rd degree of descent.

However, R has 2 degrees of ascent and 4 degrees of descent which are computed as follows:

- B would be the 1st degree of ascent.
- B's father would be the 2nd degree of ascent (a common ancestor is required).
- B's brother would be the 1st degree of descent.
- B's brother's son would be the 2nd degree of descent.
- B's brother's son's son would be the 3rd degree of descent.
- B's brother's son's son's son (i.e., R himself) would be the 3rd degree of descent.

Thus, W has fewer degrees of descent as compared to R and hence, he is preferred over R.

- (iii) X dies intestate leaving behind two heirs. One of them is S who is his father's brother's son's daughter. The other is T who is his father's brother's daughter's son. Both S and T have the same number of degrees of ascent and degrees of descent. To explain in detail, S has 2 degrees of ascent and 3 degrees of descent which are computed as follows:

- X would be the 1st degree of ascent.
- X's father would be the 2nd degree of ascent (a common ancestor is required).
- X's brother would be the 1st degree of descent.
- X's brother's son would be the 2nd degree of descent.
- X's brother's son's daughter (i.e., S herself) would be the 3rd degree of descent.

Similarly, T also has 2 degrees of ascent and 3 degrees of descent which are computed as follows:

- X would be the 1st degree of ascent.
- X's father would be the 2nd degree of ascent (a common ancestor is required).
- X's brother would be the 1st degree of descent.
- X's brother's son would be the 2nd degree of descent.
- X's brother's son's son (i.e., T himself) would be the 3rd degree of descent.

Thus, both S and T have the same degrees of ascent and descent. Thus, both of them take the property of X simultaneously.

III. Female Intestate Succession

- 3.1 **Absolute Property** : The rules governing intestate succession of a Hindu female are specified in Sections 14 to 16 of the Act. Prior to the coming into force of the Hindu Succession Act, a Hindu widow had a very limited interest in property inherited by her and she had no power on disposition over the said property. This disqualification has been done away with by Section 14 of the Hindu Succession Act, 1956

The Act provides that any property *acquired* by a Hindu female shall be held by her as full owner and not as a limited owner. This includes both movable and immovable property which have been acquired by her:

- (i) by inheritance or device;
- (ii) at a partition;
- (iii) in lieu of maintenance or arrears of maintenance;
- (iv) by gift from any person, who may or may not be a relative, before or after her marriage;
- (v) by her own skill or exertion;
- (vi) by purchase or by prescription;
- (vii) as stridhana before the commencement of the Act;
- (viii) in any other manner whatsoever.

Thus a female Hindu has absolute power to deal with her property and she can dispose of her property by way of a will, gift, etc. Earlier, a female Hindu did not have any power to dispose of her property by will. But now that embargo has been removed by virtue of the statutory provision.

- 3.2 **Exception** : However, in case the property has been acquired by her by way of a gift or under a will or under a decree / order of a civil court or under an award, the terms of which prescribe a restricted estate in such property, then she would not be treated as full owner in respect of such property. Thus, if the instrument by virtue of which she acquires the property specifies any restrictions, then those restrictions would be valid and would override the provisions of the Act.

- 3.3 **Devolution of Property**: Under Section 15(1), the property of an intestate Hindu female devolves on the following heirs in the order specified below :

- (a) Firstly, upon her sons and daughters (including the children of any predeceased children) and husband;
- (b) Secondly, upon the heirs of her husband;

- (c) Thirdly, upon her parents;
- (d) Fourthly, upon the heirs of her father;
- (e) Fifthly, upon the heirs of her mother.

The succession is in the order specified above. Thus, the heirs in the first entry take the property simultaneously and in exclusion to all others and so on and so forth. Thus, the children and husband of a female Hindu take the property in preference to all other specified heirs.

Illustration

- (i) A Hindu female dies intestate and leaves behind her husband, two sons and parents. Her husband and her two sons are entitled to an one-third share each in preference to her parents.
- (ii) A Hindu female dies intestate. She was divorced from her husband and her only other relatives were her parents. Her ex-husband claims to be entitled to her property in preference to her parents. However, a divorce leads to a total severance of relationship. Hence, her ex-husband is no longer entitled to her property. The property would go entirely to her parents.

3.4 Husband's and Father's heirs : If her property devolves upon her husband's heirs, the order of devolution would be as if it was her husband's property and he had died intestate. The rules of intestate succession in the case of a Hindu male, as explained above, would apply. In case all these heirs are absent, then the property would devolve upon the female's parents. If the parents are also not alive, then the fathers' heirs would share in her property. The same principle would apply as regards devolution on her father's heirs. The order of devolution as regards her father's heirs would be as if it was her father's property and he had died intestate. The rules of intestate succession in the case of a Hindu male, as explained above, would apply. If the property devolves upon the mother's heirs, then the devolution would take place as if the mother was a Hindu female who had died intestate and the succession rules laid down in (a) to (e) above would apply.

Illustrations

- (i) A Hindu female dies intestate and leaves behind the following heirs of her predeceased husband: brother and sister's son. The property devolves on her husband's heirs as if it was his property and he died intestate in respect of the same. Since her husband's brother is a Class II heir who is in preference to his sister's son, the brother would take the property entirely.

- (ii) A Hindu female dies intestate. None of her relatives are alive except her father's sister's son and her father's brother's widow. The property would devolve upon the heirs of her father as if it was his property and he died intestate in respect of the same. Thus, her father's sister's son who is a Class II heir in preference to her father's brother's widow, would take the property entirely.

3.5 Exception : Section 15(2) carves out an exception to the order of succession specified above. In the case of a Hindu female dying intestate, without any issue or any children or any predeceased children, any property inherited by her from her parents shall devolve upon the heirs of her father. Such property shall not devolve upon the other heirs specified u/s. 15(1). Thus, property inherited from her parents would not devolve upon her husband or his heirs. It may be noted that the scope of this exception is only restricted to such property which has been inherited by the female from her father.

Similarly, in case a Hindu female dies intestate, without any issue or any children or any predeceased children, then any property inherited by her from her husband or her father-in-law shall devolve upon the heirs of her husband. Such property shall not devolve upon the other heirs specified u/s. 15(1). Thus, property inherited from her husband would not devolve upon her father or his heirs.

It is important to note that both the above provisions of s.15(2) would apply only if the female dies without leaving behind any children or children of any predeceased children. If she has left behind any children, then they would take the property in preference to all other heirs.

Illustrations

- (i) A Hindu female inherits a farmhouse from her father. She dies intestate and issueless leaving behind her husband, father's brother and husband's sister. Her husband and husband's sister would not be entitled to this farmhouse since it is a property inherited from her father. According to section 15(2), the property inherited from her father would devolve equally upon her father's heir, i.e., his brother.
- (ii) A Hindu female inherits certain property from her father. She dies intestate leaving behind her husband, son, father's brother and father's sister. Her husband and son would equally take all her property including the property inherited from her father since she died leaving behind a child. Hence, the normal succession rules apply and section 15(2) has no application.
- (iii) A Hindu female inherits certain property from her father-in-law. She dies intestate leaving behind her brother, sister and her father-in-

law's nephew and niece. Her brother and son would equally take all her property except the property inherited from her father-in-law. The property inherited from her father-in-law would devolve equally upon her father-in-law's heirs, i.e., his nephew and niece. The two of them would equally take the property since both of them are Class II heirs.

- (iv) A Hindu female inherits certain property each from her father, father-in-law, husband and mother. She dies intestate leaving behind her son, brother, sister and her father-in-law's nephew and niece. All her estate including the property inherited by her from her father, father-in-law, husband and mother would devolve upon her son. The exception only applies if the Hindu female does not have any child. In this case, since she has a son all her property would go to him.

IV. Per Capita vs. Per Stripes Succession

- 4.1 One of the questions which often arises both in the case of male as well as female succession, is that if two or more heirs together succeed to the property, then how would they take the property. The law laid down in this respect is that in such an event the heirs take the property per capita and not per stripes, unless it is expressly provided, and they take it as tenants-in-common and not as joint tenants.
- 4.2 In the case of a per capita distribution, each of the heirs gets a share on his own accord or in his own right. Thus, if a male leaves behind three Class II heirs, then they take the property per capita, i.e., each of the three heirs has a one-third share. As opposed to this, under a per stripes distribution, the heirs would take the property on a representative basis, i.e., on behalf of others. Thus, if a male leaves behind his wife and the branch of his predeceased son, then there would be only two shares – one for his wife and the other to be shared by the entire branch of the son. The branch of the son would take the property on a per stripes basis.

V. Interest in HUF Property

- 5.1 **Share in HUF :** On the death of a male Hindu, his interest in a Hindu Undivided Family (HUF) passes by any one of the following two modes:
 - (a) If no will is prepared in respect of the undivided share, then it devolves by survivorship upon the other surviving members and is not governed by the succession rules laid down under the Act. Thus, if a father dies, then his interest in the HUF will devolve by survivorship upon the other HUF members.
 - (b) As per the Hindu Succession Act, 1956 share in the HUF can be willed away. However, it is important to remember that this

provision can only apply if the Hindu has not already disposed of his interest in the HUF by way of a will. Section 30 expressly permits a Hindu to make a testamentary disposition of his HUF interest.

Exception : An exception to the above provision is that in case the deceased has left behind a female relative specified in Class I or a son of a predeceased daughter, then the interest of the deceased devolves by intestate succession under the Act and not by succession.

- 5.2 **Share of Daughter :** An important amendment to the Hindu Succession Act, 1956 has been made in several states, such as Maharashtra, Andhra Pradesh, Karnataka, Tamil Nadu, etc. By virtue of the amendment, a member's daughter would have the same rights in the HUF property as that of a son and she would become a member of the HUF just as a son would become. She would be subject to the same rights and liabilities as a son would in the HUF property. Thus, a Hindu daughter would become a co-parcener in the HUF property. If there is a partition of the HUF, then she would be entitled to a share equal to that allotted to the son. For instance, if in a family there are four members, a father, mother, son and a daughter. Each of them would have a one-fourth share in the states where the amendment is carried out. In case of a pre-deceased daughter eligible for such a share, her share would be allotted to her surviving children.

The property which a female Hindu becomes entitled by virtue of such partition shall be held by her with the incidents of coparcenary ownership. She is also capable of disposing of such property by will.

It is important to note that the above provisions apply only to female Hindus from the date specified in the amendment, for instance, in the state of Maharashtra, it does not apply to female Hindus who are married before 22nd June, 1994. Thus, only those female Hindus who either get married after 22nd June, 1994 or who remain unmarried would be eligible for the benefit of this amendment. Further, if she dies intestate, her interest in such HUF property shall devolve by survivorship upon the surviving members and not in accordance with the provisions of the Act, i.e., Sections 15 and 16.

5.3 **Hindu Succession (Amendment) Act, 2005**

5.3.1 **Central Amendment**

Taking a cue from the states which have tried to neutralise gender biases, the Central Government amended the Hindu Succession Act, 1956 by the 2005 Amendment Act which was made operative from 9th September 2005. This would mark a watershed in Hindu

Law History because covenants laid down by Manusmriti where done away with. Though the legislative intent is indeed laudable, the drafting leaves a lot to imagination and hence, appears to be retrospective in operation and opens up a Pandora's box of unresolved questions. The Amendment alters the succession pattern but also changes the way HUFs were hitherto managed.

5.3.2 New Position of Daughter

Section 6 of the Hindu Succession Act, 1956 has been totally revamped. The new section provides that a daughter of a coparcener shall:

- a) by birth become a coparcener in her own right in the same manner as the son;
- b) have the same rights in the coparcenary property as she would have had if she had been a son;
- c) be subject to the same liabilities in respect of the said coparcenary property as that of a son;

Thus, the amendment has by one stroke put all daughters at par with sons and they can now become a coparcener in their father's HUF merely by being born in that family. She would have all rights and obligations in respect of the coparcenary property, including testamentary disposition. A very vexed situation which has been thrown up is the position of a daughter who gets married. Would they (under the amended s. 6) continue to be a coparcener in respect of her father's coparcenary, even after she ceases to be a member of that family on marriage? It is my submission that the answer is yes.

Similarly, since her rights are same as a son's her children would her children also become entitled to an interest in their maternal grandfather's HUF along with being entitled to an interest in their paternal grandfather's / own father's HUF?

5.3.3 Daughter a Karta?

One would also feel that if her rights and obligations are at par with a son, then the daughter can also become a karta of her father's HUF even after her marriage. Thus, you have a situation wherein a daughter gets married, ceases to be a part of her father's family, does not live in her father's family but yet she would become the karta of her father's HUF. This is a moot point on which unfortunately there is not much clarity. How does one deal with a daughter who becomes a karta before marriage and

then gets married? At this stage one can only throw up questions and hope that the Court's have some answer to these questions.

5.3.4 Retrospective Amendment?

S.1(2) of the Hindus Succession (Amendment) Act, 2005, states that it comes into force from the date it is notified by the Government in the Gazette, i.e., 9th September, 2005. Thus, the amended Section .6 is operative from this date. However, does this mean that the amended section applies to:

- (a) daughters born after this date;
- (b) daughters married after this date; or
- (c) all daughters, married or unmarried, but living as on this date.

If one were to point out one major flaw with this amendment it would be this total lack of clarity on the operation of this Act. The Maharashtra Amendment Act which was enacted in June 1994 very clearly states that it does not apply to female Hindus who are married before 22nd June, 1994. In the case of the Central Amendment there is no such express provision. However, a rational and holistic construction of the amendment tends to show that the intention is retrospective in nature and is intended to cover all daughters, whether married or unmarried but living as on 9th September, 2005. The proviso states that this Amendment would not affect or invalidate any disposition or alienation which has taken place before 20th December, 2004. The absence of specific wordings to the effect found in the Maharashtra Act and the proviso all support the view that the Amendment is retrospective in nature. What happens if no disposition or alienation of her father's HUF has been done prior to 20th December, 2004 and her brother has inherited their father's HUF property since under the old law only he was entitled to it. His sister could now also stake a claim in this property.

Recently, various decisions have upheld the proposition that the amendment to the Central Act is prospective and not retrospective:

- Pravat Chandra Pattnaik and Others vs. Sarat Chandra Patnaik (AIR 2008 Orissa 153)
- Sugalabai vs. Gundappa A. Maradi [2008(2) Kar LJ 406]

- Damalanka Gangaraju vs. Nandipati Vijaya Lakshmi (AP), Judgement delivered on 21st March, 2007
- N Jangi Reddy vs. Yellaram Narsimha Reddy (AP) (Second Appeal No.630 of 1998) Judgement delivered on 3rd October, 2007.

The Supreme Court has also, albeit in the context of a different section of the 2005 Amendment Act, clarified that the 2005 Act does not seek to reopen vesting of a right where succession has already taken place. According to the Supreme Court, “the operation of the Statute is no doubt prospective in nature.... Although the 2005 Act is not retrospective its application is prospective” – G Sekar vs. Geetha (2009) 6 SCC 99.

The above-mentioned High Court judgements have also clarified that the Central Amendment would override the State Amendments (in Maharashtra, Tamil Nadu, AP, Gujarat). A daughter married at any time would be entitled to a share in her father’s HUF provided the HUF has not been partitioned before the specified date. Further, the partition is defined to mean a partition which has been registered with the Sub-Registrar of Assurances. Any unregistered partition, e.g., an oral partition effected before 20th December, 2004 would not be considered.

5.3.5 Pious Obligations

Under the Hindu Law, a son was personally liable for the debts of his father. This was known as the Son’s pious obligation. It was considered that without clearing the debts his father would not have rested in peace. The Supreme Court in the case of *Pannalal vs. Mt. Naraini*, AIR 1952 SC 170, also upheld this theory but held that the liability of the son is limited only to his share in the joint family property or the property inherited by him from his father.

S. 6(4) of the Act has been amended to do away with the theory of pious obligation. Thus, now a henceforth a Hindu son’s share in the joint family property or the property inherited by him from his father would not be liable for recovery of debts. Here interestingly the Act expressly states that “after the commencement of the Hindu Succession (Amendment) Act, 2005 no court shall recognise...”. Thus, debts prior to 9th September, 2005 would yet be covered by the old law.

VI. Unborn Child's Rights

- 6.1 If a child was in the womb of his mother at the time of the death of an intestate and if he is subsequently born alive, then he/she shall have the same inheritance rights as if he/she were born before the death of the intestate. Further, the inheritance would be deemed to have been vested with effect from the death of the intestate. In case the child is a stillborn child, then it cannot be claimed that the property which he was entitled to would devolve upon the heirs of the child, because the condition is that the child must be born alive. However, if the child dies at any time after being born alive, then the property which he was entitled to would devolve upon his heirs.

VII. Pre-emptive Right

- 7.1 If any property devolves upon two or more heirs specified in Class I and one of them proposes to transfer his interest in such property, then the other heirs shall have a pre-emptive right to purchase such interest. Thus, they would be given a preferential right to acquire the share sought to be transferred. This pre-emptive right is akin to the right enshrined in the Articles of Association of a Private Limited Company, where an intending seller must first offer his shares to the other shareholders. It may be noted that although the heirs are those referred to in Class I, it does not mean that these provisions only apply to an Hindu male since only males can have Class I heirs. It refers to heirs specified in Class I, i.e., sons, daughters, mother, etc. Hence, these provisions equally apply to Hindu intestate males and females.
- 7.2 The consideration for the transfer would be as per the agreement between the parties. If the parties cannot reach or do not reach a consensus on the same, then the same would be determined by the Court on an application made to it. If the proposed purchaser does not find the consideration determined by the Court suitable, then he is free to reject the same. However, in such a case, he must pay the costs of the application. The Court before which the application is to be made is that within whose jurisdiction the immovable property is situate or the business is carried on.
- 7.3 If there are two or more heirs specified in Class I who are interested in acquiring the interest of the seller, then preference shall be given to that heir who offers the highest consideration.

VIII. Disqualified Heirs

- 8.1 Under the Act, certain heirs are disqualified from inheriting the property of the deceased. The rules in this respect are as follows:

- (i) Prior to 9th September, 2005, the following female relatives of the intestate were not entitled to succeed in the property of the deceased if on the date the succession opens, she had remarried:

- (a) widow of a predeceased son;
- (b) widow of a predeceased son of a predeceased son; or
- (c) widow of a brother

However, with effect from 9th September, 2005, the above disqualification has been removed.

- (ii) Any person who commits a murder or abets the commission of a murder, shall be disqualified from inheriting both of the following:

- (a) the property of the victim murdered or
- (b) any other property which he /she may get in furtherance of the succession to which he committed or abetted the commission of the murder.

In the case of *Vallikannu vs. R. Singaperumal AIR 2005 SC 2587*, the Supreme Court held that where the only heir, i.e., the son was disqualified since he murdered his own father he cannot inherit his father's property and even his wife who claims through him can have no better claim to property of her father-in-law. Thus, if a person is disqualified on these grounds, then he will be deemed to have predeceased the deceased. The guilty cannot be treated to have any relationship with the deceased. When a son cannot succeed then his wife who succeeds through him also cannot lay a claim to the property of her husband's father.

- (iii) In case any Hindu converts/reconverts his/her religion to any other religion, then any children born to him/her after the conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives. However, if the children or descendants are Hindus when the succession opens, then the disqualification would not apply.
- (iv) An heir would not be disqualified from succeeding to the estate of an intestate, Merely because he/she suffers from any disease or deformity

IX. Dwelling Houses

- 9.1 The Act made a special provision in respect of partition of dwelling-houses which has now been omitted with effect from 9th September,

2005. The Act provided where a Hindu (male or female) intestate died leaving behind both male and female heirs specified in Class I, and his/her property included a dwelling-house wholly occupied by members of his/her family, then, any such female heir could not claim partition of the dwelling-house until the male heirs choose to do so. However, the female heir was entitled to have right of residence in such house. If such female heir was a daughter, then she was entitled to right to residence in the dwelling-house only if she was unmarried or had been deserted/separated from her husband, or was a widow. Thus, the section prevented female members from claiming partition of a dwelling-house till such time as the male members decided to do so. Now this section has been deleted altogether. Now, a daughter of the family will inherit under the provisions of the Act and she can ask for a partition of the house property where the coparceners are residing.



PART - B:

TESTATE SUCCESSION

WILLS

I. Introduction

- 1.1 In the last Part we saw what happens when a person dies without making a will, i.e., he dies intestate. The second mode of succession is through a will. This is known as testate succession. A will is a document which contains the last wishes of a person as regards the manner and mode of disposition of his property. Many people defer preparing their will for a variety of reasons and ultimately it may be too late. In India, especially, the practice of preparing a will is not very prevalent unlike the western world.
- 1.2 Many Indian businesses are family run concerns. Often, after the death of the head of a family, various succession issues crop up giving rise to family disputes. This ultimately may lead to arbitrations, court cases, etc. A lot of succession problems can be reduced if every person prepares his/her Will so that after his/her death there are no succession issues over the businesses, properties, etc.
- 1.3 Wills are governed by the provisions of the Indian Succession Act, 1925 ("the Act"). Some of the provisions of the Act do not apply to wills made by Hindus, Sikhs, Jains and Buddhists. However, the Act does not apply to wills made by Muslims as they are governed by their respective Shariat Laws.

II. What is a Will?

- 2.1 **Meaning** : As the term will indicates, it signifies a wish, desire, choice, etc., of a person. A person expresses his will as regards the disposition of his property. The Act defines a will to mean "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 General Clauses Act, 1897, defines the term will to include "a codicil and every writing making a voluntary posthumous disposition of property". The Indian Penal Code defines a will to denote any testamentary document.
- 2.2 **Characteristics**: The essential characteristics of a will are as follows:
 - (a) It is a legal declaration of the intention of the testator;
 - (b) The declaration is with respect to the testator's property;
 - (c) The intention manifests only after the testator's death, i.e., posthumous disposition of his property. Till the testator is alive, the will has no validity. He can dispose of all his properties in a manner contrary to that stated in the will and such action would

be totally valid. E.g., A makes a will bequeathing all his properties to his brother. However, during his lifetime itself, he transfers all his properties to his son with the effect that at the time of his death he is left with no assets. Such action of the testator cannot be challenged by his brother on the ground that he was bound to follow the will since the will would take effect only after the death of the testator. In this case as the property bequeathed would not be in existence, the bequest would fail.

- (d) The will can be revoked at any time by the testator in his lifetime.

Thus, the will is a testamentary document executed by a living person which takes effect on his death. A will may also be called a 'testament'. A will can never be irrevocable. The very nature of a will is such that it the person making it can change it as often as he likes.

2.3 **Codicil**

A Codicil is an instrument which explains, alters or adds to the disposition of a will and it is deemed to form part of the will. In short, it is a supplement to the will. According to the Act, a Codicil also must be attested and executed like a will. A Codicil is normally used when the alterations to the will are few. If there are a substantial number of alterations to the will, then it would be advisable to execute a fresh will itself. Codicils are attached to the will.

2.4 **Why should a person make a will?**

One often hears this question "why should I make a will?". Every adult individual who owns a reasonable amount of wealth, particularly an immovable property or asset, must make a will. Some of the reasons why a person should make a will are as follows:

- (a) He has complete discretion on how he wants to deal with his property. He can give assets to those persons, whom he wants to and avoid others. If a person does not make a will then the property of the deceased would pass by the relevant succession law and in this case there would be no control over who gets what.
- (b) Several succession disputes regarding the business arise after the head of the family dies intestate. If a valid will is in place, it would reduce all such unpleasant disputes.
- (c) In case a person wants to reward a friend, an old servant, an employee, etc., he can do so. If he does not make a will, then there is no way in which this would be possible after his death.

- (d) Making a will is something which most people keep deferring on some pretext or the other. It is advisable to make a will at an early age because of the uncertainty of life. There is no limit on the number of times a will can be revised.

2.5 Disputed Wills

Making a will does not mean an insurance against succession disputes. A will may be challenged on various counts. Some of the common grounds on which a will is challenged include:

- (a) The will does not comply with the rules laid down under the Indian Succession Act, 1925 in respect of a valid will.
- (b) The will is not genuine, i.e., it has been obtained by fraud, forgery, etc.

From time immemorial, wills have been and will continue to be a source of family disputes. This is true not just in India but also in the west, e.g., USA, England, etc. At last count, there were over 1,000 pending cases of will disputes before the Bombay High Court alone.

It is often said that “where there is a will, there is a legal dispute” or that “where there is a will, there is a disgruntled relative”. In order that these legal disputes are minimised and the claims by disgruntled relatives set aside, it is necessary that the will is a valid will and one which can stand scrutiny in a court of law.

This Book explains the salient features involved in preparing a valid will.

III. Important terms of a Will

- 3.1 Wills are usually associated with a whole lot of jargon which make them appear very complex to the man on the street. However, most of these legal words are used by legal professionals and a person making a will can avoid using all such terms. However, it is beneficial to understand the meaning of these words to understand various things. All or some of the following terms are normally involved in a will :

- (a) **Testator** : A person who makes the will. He is the person whose property is to be disposed of after his death in accordance with the directions specified under the will.
- (b) **Beneficiary/Legatee** : A person to whom the property will pass under the Will. He is the person to whom the property of the testator would be bequeathed under the will.
- (c) **Estate** : The property of the testator remaining after his death. It consists of the sum total of such assets as are existing on the date of the testator's death. The estate may also increase or decrease

after the testator's death due to the actions carried out by the executors. For instance, the executors may carry on the business previously run by the deceased in the name of the estate.

- (d) **Executor/Executrix** : The persons who would administer the estate of the testator after his death in accordance with the provisions of the will. The Executor is normally named in the Will itself. If he fails to accept the responsibility, then the Court may appoint some person as the Executor. An individual, limited company, partnership firm, etc., may be appointed as an Executor. In many cases, a bank is appointed as an Executor of a will. For all legal and practical purposes, the Executor acts as the legal representative of the estate of the deceased. On the death of the testator, property cannot remain in a vacuum and hence, the property immediately vests in the Executor till the time the directions contained in the will are carried out and the property is distributed to the beneficiaries.
- (e) **Bequest** : The property / benefits which flow under the will from the testator's estate to the beneficiary.
- (f) **Bequeath** : The act of making a bequest.
- (g) **Witnesses** : The persons who witnesses the signing of the will by the testator.
- (h) **Life-interest Beneficiary** : A life-interest beneficiary is a very common term which is used in wills. It denotes a beneficiary or a legatee who is entitled to enjoy a property or income from a property bequeathed to him only during his own lifetime. Once he dies, he neither has power of disposal of the property by will nor would it devolve by succession. He can enjoy and use the property only during his lifetime. Such a beneficiary is often created for residences. For instance, a husband may provide in his will that after him his residence would go to his wife for life and after that to his son. In such a case, the wife is a life-interest beneficiary with no power of disposal over the flat. Even if she wants to, she cannot will away the flat. The son would automatically become an absolute owner of the flat with full rights of disposal after his mother's death.

IV. Clearing the Air

- 4.1 **Misconceptions** : Despite the fact that a will is something which everyone is concerned with, there is reluctance to prepare one because of several confusions and misconceptions. A lot of these confusions and wrong notions have been contributed by movies, books, media, etc. A few such false impressions are dealt with and clarified hereunder:

- (a) The preparation of a will does not require any specific legal language. It can be written in any language. There is no specific legal form/format for preparing a will.
- (b) It need not be typed, it could be written in the testator's own/ any other person's handwriting. A handwritten will is known as an Holograph will. However, the will must clearly indicate the testator's last wishes. Section 74 of the Indian Succession Act, 1925 states that it is not necessary that any technical words or terms of art are used in a will.
- (c) A will need not be stamped or written on a stamp paper. No stamp duty is payable on the will. It can be written on a plain paper.
- (d) The registration of a will is not mandatory. However, registration of a will has the following benefits:

- It will not be lost or stolen.
- The authenticity of a will which has been registered cannot be challenged.

But registration does not mean that the will cannot be challenged. Even after a will has been registered a subsequent will may be made.

- It is easier to get the property transferred in the records of the Registrar.
- (e) A person can change/revoke his will as often as he desires. Ultimately, the last valid will prevail over earlier wills, if any, executed by the testator. It is therefore, normally mentioned in every will (except the first one) that "this will revokes earlier will(s)". The Latin maxim for this is *voluntas testatoris est ambulatoria est esque ad mortem* which means that the will of a testator is ambulatory (changeable) until his death.
 - (f) People of all faiths and religions can make a will. However, in the case of Muslims, according to Islamic Law, only 1/3rd of the property can be bequeathed by way of a will and the balance 2/3rd of the property devolves according to the applicable "Shariat Law".
 - (g) In case a person does not prepare a will and dies, his property would devolve as per the applicable succession law, i.e., in the case of Hindus, Jains and Sikhs as per the Hindu Succession Act, 1956; in the case of Christians and Parsis as per the Indian Succession Act, 1925 and in the case of Muslims as per their Shariat Law.

- (h) As per Section 30 of the Hindu Succession Act, 1956 a coparcener can bequeath his undivided share in the Hindu Undivided Family by way of a will.
- (i) A will takes effect only after the death of the person making the will. Till he is alive, it has no effect.

4.2 Precautions : A few precautions to be followed while making a will:

- (a) The testator's immediate family members should be described with names, age, relationship to the testator.
- (b) It may be better to describe who gets what separately for each asset, especially for each major asset.
- (c) Specify reasons for precluding certain family members from the will. This would be helpful in case the will is contested.

V. Who can make a will?

5.1 Eligible persons: A question which often crosses one's mind is "who can make a will?" Questions such as "Can a lady make a will?", "Can a minor make a will?", etc., are quite common. Let us look at the persons who are eligible to make a will. U/s. 59 of the Indian Succession Act, 1925 the following persons can make a will :

- (a) Any major person who is of sound mind;
- (b) An ordinarily insane person can make a will when he is sane / of sound mind;
- (c) A person who is intoxicated or who does not understand what he is doing cannot make a will in that state, e.g., a will made by a person who is heavily drunk and not in his senses is not a valid will;
- (d) Deaf/dumb/blind people can make a will provided they know what they are doing, e.g., a will made by a blind person in Braille script;
- (e) A married woman can bequeath any property which she could dispose of during her lifetime.

5.2 Testamentary Capacity: The testamentary capacity of the testator is paramount in case of a will. If it is proved that he is of unsound mind, then the will would be treated as invalid. What is a "sound mind" is a question of fact and needs to be ascertained in each case. However, the person must be able to understand which properties he is giving and to whom he is giving them. He must also be able to understand the relatives he is excluding and the reason for the same. It may be noted that merely because a person is of old age there is no presumption whatsoever that he

is of unsound mind, e.g., when, say, an 87 years old person makes a will. There is no presumption that he is not of testamentary capacity unless the same can be proved medically. Similarly, it has nothing to do with literacy. An illiterate person can also make a will. However, in this case it must be proved that the person was duly explained the contents of the will in a manner. It may also be noted that merely because a person is suffering from a fatal disease there is no automatic presumption that he is also of unsound mind, e.g., if a person is suffering from last-stage cancer. Even though he may be in tremendous physical pain, his mental faculties may yet be alert and he may be capable of making a will. Thus, soundness of mind needs to be examined in each case.

Practical Tip : Let a doctor be a witness and even record that he is of sound mind.

In case of a lunatic or an insane person, it needs to be clearly established that at the time of making the will, he was of rational mind.

5.3 Will obtained by fraud /coercion, etc.

According to Section 61 of the Indian Succession Act, 1925 if any will or a part thereof has been caused by fraud, coercion or by such importunity by which the free agency and will of the testator is impaired, then such a will is void. For instance, if X fraudulently obtains a bequest of a land in his name from A, then such a bequest is void. However, fraud would have to be proved by the person who challenges the will.

Example of Coercion : If B who is C's son threatens to commit suicide if C does not bequeath all his properties to B. The will is invalid and can be challenged on the grounds of coercion or duress.

If a person executes a will under the undue influence of another, then the will would be invalid. For instance, Z is the lawyer of Mrs. B who is old and feeble and Mrs. B relies upon Z for advice in all matters. Using this undue influence, Z prevails upon Mrs. B to bequeath all her property to him. Such a will is invalid. However, it is essential that undue influence must have been used. Merely because one person is in a position to exercise influence over another due to nearness of relationship and a will is made in his favour it does not make the will invalid. The onus of proving undue influence rests on the accuser.

However, in order that a will is treated as void it is necessary that the will must have been caused by fraud, coercion, etc., and that such importunity must indeed have affected the free agency and will of the testator. For instance, if X is the lawyer of Mrs. A who does not have good relations with any of her heirs. X has excellent relations with Mrs. A. He suggests various modes in which she could dispose of her property under her

will. One of them even includes leaving a good part of the property to X. After considering all the suggestions, Mrs. A uses her own discretion and judgment and takes a decision. It cannot be contended that X used undue influence over Mrs. A merely because he had good relations with her and he was her legal advisor.

VI. What can be bequeathed?

6.1 **Property of Testator** : Often a question arises as to which properties can form part of the will. Any and every property which the testator owns can form part of the will. These properties may be immovable or movable in nature. Thus, the will may include properties such as land, buildings, flats, businesses, shares, bonds, money, personal effects, cars, prized possessions, etc.

6.2 **Transferable Property** : It must be ensured that the properties are transferable in law. For instance, a lessee of a property cannot bequeath his leasehold interest contrary to the provisions of the lease deed and / or the applicable laws.

6.3 **Tenanted Premises** : In case a person is a tenant of a premises, then, the applicable Rent Control Act may provide that he cannot, by his will, bequeath the property, even if he is a protected tenant, i.e., he is protected under the local Rent Control Act. Various local Rent Control legislations have enacted specific provisions to deal with the issue of transfer of tenancy on the death of a tenant. For instance, the Maharashtra Rent Control Act, 1999 provides that on the death of a tenant, the premises shall pass on to his family members who:

- (i) were residing with him at the time of his death in the case of a residential premises; or
- (ii) in the case of a premises let out for education, business, trade, storage, etc., were using the premises with him at the time of his death

In the absence of any such family member, it shall pass to any heir of the deceased tenant, and in the absence of any agreement between the heirs, the Court may decide such heirs of the tenant who shall be named as tenants. In a city like Mumbai where several residential and commercial premises are tenanted and the tenancies in most cases are very valuable, one misconception which people often have is that they can bequeath such properties by their will.

6.4 **Property owned by the testator** : Another fact which needs to be borne in mind while making a will, is that the testator can only bequeath such property which he owns. For instance, a husband cannot give directions

for the disposal of the property held by his wife in his own will. In the case of a co-ownership interest in a property, the testator can only bequeath his share of the property and not the entire property. E.g., the testator may bequeath his interest in a premises/flat to his son. But he may also provide that his daughter and her husband shall be entitled to reside in the flat during their lifetime, if they so desire. Further, their right of residence is a personal right and they or neither of them shall be able to transfer or dispose of the same in any manner whatsoever to any person at any time either during their/his/her lifetime or under a will. Thus, the testator bequeaths his right, title and interest in the flat to his son subject however to the right of residency in favour of his daughter and her husband during their lifetime as provided above. Further, the son or heirs will not be entitled to sell, lease or otherwise dispose of the flat during the lifetime of his daughter and/or her husband in a manner which would prejudice their/his/her right of residence as provided above.

The property could also be foreign property, shares, bank balances, etc., owned by an Indian resident. However, it would have to be verified whether there are any special provisions regarding the bequest of such property in that foreign country.

- 6.5 **Share in an HUF** : Prior to the changes brought about by the Hindu Succession Act, 1956, on the death of a Hindu, his undivided share in the HUF went to the other members of the HUF by survivorship. Now a Hindu can bequeath his share in the joint family property by a will. Earlier, this was not possible under the Hindu law.

As per the Hindu Succession Act, 1956 share in the HUF can be willed away. If there is no will, then it will pass as per the Hindu Succession Act. However, it is important to remember that this provision can only apply if the Hindu has not already disposed of his interest in the HUF by way of a will. Sec. 30 now expressly permits a Hindu to make a testamentary disposition of his HUF interest.

VII. Preparation (Execution) of Wills

- 7.1 **Types of wills** : The act of making a will is known as 'execution'. Wills may be of two types : privileged will, i.e., those executed by a soldier employed in an expedition or engaged in actual warfare, an airman so employed or a mariner at sea. An unprivileged will, is a will executed by people other than those mentioned earlier.
- 7.2 **Execution of a Privileged Will**

- 7.2.1 Privileged wills can be executed by members of the armed forces while they are on an expedition or engaged in actual warfare/ combat. It is necessary that such a person must be of at least

18 years of age, i.e., he must be a major. The facility of making a privileged will is not only restricted to those actually engaged in warfare but also extends to others who may be a part of the expedition, for instance, a military doctor who is accompanying the regiment on the expedition.

7.2.2 The rules in regard to making a privileged will are as under:

- (a) They can be made orally or in writing.
- (b) If the will is a holograph will, i.e., it is in the testator's own handwriting then it need not be signed.
- (c) If it is written by another but signed by the testator, then it does not require attestation by any witnesses.
- (d) Even if the will is neither written by the testator himself nor signed by him, it may yet be deemed to be his will, if it can be shown that it was written by the testator's direction or that he recognised the same as his will.
- (e) Even if it appears from the will, that the instrument was not executed as per the testator's instructions, it may yet be a valid will, if it can be shown that the non-execution was due to reasons other than non-compliance with the specific instructions of the testator.
- (f) In case specific written instructions were given for the preparation of the will and the soldier dies before the will can be made, then the instructions would constitute the will.
- (g) In case specific oral instructions were given for the preparation of the will in the presence of two witnesses, they have been written down in his lifetime and soldier dies before the will can be made, then such instructions would constitute the will, even if the writing may not have been in his presence or read out to him.
- (h) The soldier can also make an oral will in the presence of two witnesses.
- (i) In case the soldier makes an oral will in the presence of two witnesses, then the will shall be null if the soldier is still alive at the expiration of one month after he ceases to be entitled to make a privileged will.

7.3 Execution of Unprivileged Will

The rules in regard to making an unprivileged will are as under:

(a) **Written Will**

Wills made by Hindus, Jains, Sikhs, Christians, Parsis and Jews must be in writing. Muslims, however, can make an oral will because of their personal law. In case of persons other than Hindus, Sikhs, Jains and Buddhists, the wills made before marriage stands revoked by virtue of the marriage of the testator.

(b) **Signature of testator**

The testator must sign the will or affix his mark to the will or someone else must sign in his presence and under his direction. The signature/mark of the testator or some other person shall be so placed that it appears that it was intended to give effect to the writing as a will.

The mark of the testator means his thumb impression if he is unable to sign. The sign or the mark should be so placed that it indicates an intention to execute a will. If there is a mere sign on a document but it does not appear from the face of the instrument that there was an intention to execute a will, then that would not be treated as a valid will.

In case of an incomplete signature of the testator, it needs to be proved that he understood that what he was executing was a will.

Normally, people sign at the beginning or at the end of the will in a manner indicating the execution of the will. Usually, in case of wills executed in the vernacular languages, the testator signs in the beginning of the will. There is no requirement that the person must sign on all pages of the will. However, it is always advisable that a person signs or initials or places his mark on all the pages of a will so that the pages cannot be changed, replaced or altered afterwards.

(c) **Dated**

The will must be dated since it is the last will just prior to the testator's death which takes effect. In case the will is not dated, and if there are two or more wills, then it would not be possible to ascertain whether or not it is the latest will.

(d) **Attestation of the Will / Witnesses to the Will**

Section 63 of the Indian Succession Act, 1925 requires that the will should be attested by two or more witnesses, each of whom has:

- (a) seen the testator sign the will or affix his mark or seen some other person sign the will in the presence of and under the directions of the testator; or

- (b) received from the testator a personal acknowledgement of his signature or of the signature of such other person

Each of the witnesses must sign the will in the presence of the testator. No particular form of attestation is prescribed. It is important to note that the attesting witnesses need not know the contents of the will. All that they attest is the testator's signature and nothing more. Thus, if a testator does not want the witnesses to know the contents of the will, it would be perfectly legal for him to do so. E.g., X prepares a will and afterwards calls two of his trusted employees as witnesses. He signs the will in their presence. The employees would only attest the fact that X has signed the will in their presence. They do not give any additional assurance or surety and hence, do not need to know what is in the will. A person named as an Executor can be an attesting witness.

Normally, the witness and/or his spouse cannot be made a beneficiary under the will as any bequest in their favour would be void. However, the validity of the will and all other bequests made under it continue to remain valid. The Supreme Court has held in the case of Yumanam Ongbi Tampha Devi, (2009) 4 SCC 780 that the attesting witness should speak not only about the testator's signature or affixing his mark but also that each of the witness has signed in the testator's presence.

Exception : These provisions are not applicable to a will made by a Hindu, Sikh, Jain or Buddhist. Hence, if a person of any of these four religions makes a bequest to any of the attesting witnesses to the will, then the bequest would not be void. Thus, these provisions would apply only to wills made by Christians, Jews, Parsis, etc.

Who should be a witness : Normally, a professional such as a lawyer, a chartered accountant or a doctor who is known to the testator is requested to act as a witness. This acts as a barrier against the claims that the testator was mentally unstable when he made the will. In several cases, the doctor certifies that the testator was of sound mind and free of influence of any substances. It is generally advisable to select such witnesses who are of reputable character and of some standing. The witnesses are probably the most important component of a valid will. One of the most common complaints when a will is challenged is that the witnesses have been bought out or that they are lying. Hence, if the witnesses are people against whom it would be difficult to level such allegations, then it would aid the cause of the will.

VIII. Legatees

- 8.1 **Meaning** : As explained earlier, a beneficiary under a will is also known as a legatee. The most important person in a will is the legatee because he is the person for whose benefit the will is made. If there are no legatees then there would not be a will. There is no bar under the Act as to who can be a legatee, it could be a natural person or an artificial person created by law. Any one can be a beneficiary under the will, a relative of the testator, friend, employee, servant, etc. Any person, whether he is a minor, lunatic, artificial person, etc., can be a legatee. The Supreme Court in the case of *Suraj Lamp & Industries P Ltd vs. State of Haryana (2009) 7SCC 363* has held that execution of a will in favour of a company is incongruous and absurd. A person can make a will even in favour of an outsider even if he has near relatives. In whose favour to make a will is a person's choice. A will may even be executed for the benefit of animals – *Krishna Kumar Birla vs. R.S. Lodha (2008) 4 SCC 300*. In the case of a lunatic, a question would arise as to who would manage the estate on his behalf. Hence, it may be advisable to create a trust for the lifetime benefit of a lunatic with specified beneficiaries after him.
- 8.2 **Time of Vesting** : If a bequest is made under a will and the time for taking effect of the bequest is not specified, then the legatee would have a vested interest in the same from the date of the death of the testator. This is because a will speaks from the testator's death. In case a legatee dies without receiving the bequest after having a vested interest, then the same shall pass on to his heirs.
- 8.3 **If a Legatee Dies before the Testator :**
- 8.3.1 In case a legatee dies before the testator dies then he loses his interest in the bequest which was to be made to him and that property once again merges into the estate of the testator and the testator can once again make a bequest of it in favour of some other person. For instance, A makes a bequest in favour of X of his land at Pune. X dies before A. The legacy lapses and the land at Pune merges with the residual estate of X. Now X can make a fresh bequest of this land to any other person. If he fails to do so, then it would pass as intestate succession. Further, if such lapsed share is a part of the general residue bequeathed by the will, then that share would be treated as “undisposed”, i.e., it shall pass according to the law of succession as if the testator died intestate in respect of that share. For instance, if 'A', a Hindu, bequeaths the balance residue of his estate to P who dies in the lifetime of 'A'. Such share would be treated as undisposed and would pass according

to the relevant succession law, e.g., Hindu Succession Act. Even if the testator expressly excludes a heir from his will, he would yet be entitled to claim in the undisposed share under the succession law. For instance, in the earlier example if 'A' leaves behind three sons and under his will he excludes one of them, even then, since the residue interest is deemed to be undisposed and it passes under the Hindu Succession Act, each of the sons gets a one-third share.

Exception : There is an exception to the above rule of lapse of legatee. The legacy would remain valid if all of the four following conditions are satisfied:

- (a) The bequest has been made to a child of the testator or any other lineal descendant of the testator;
- (b) The legatee dies in the testator's lifetime;
- (c) The legatee leaves behind him any lineal descendant who survives the testator; and
- (d) There is no contrary intention appearing in the will.

If all the above conditions are satisfied, then the bequest does not lapse but takes effect as if the legatee died after the testator's death. In order that the legacy remains valid it is very important that all the conditions are fulfilled. For instance, if there is a contrary indication in the will then this provision cannot operate.

- 8.3.2 In all other cases, if the heirs of the legatee want to claim the bequest which was made in favour of the legatee, then it must be proved that the legatee survived the testator. For instance, if the testator and the legatee jointly perish in an accident where it is difficult to ascertain who died first, then the legacy would lapse.

However, if the will indicates that the legacy would go to some other person in place of the legatee, then the legacy would not lapse. E.g., A makes a will to Z or his son. Z dies in the lifetime of A. Z's son survives A. The legacy would not lapse in this case. Further, in case a person has been named as a legatee but only in his capacity as a trustee, i.e., for the benefit of another person, then merely because the trustee dies the legacy does not lapse.

Usually, a properly drafted will provides that the legacy would go to A during his lifetime; if he is not alive, then to 'B'; if 'B' is not alive then to 'B's son. Thus, there is a provision for successive heirs. Hence, in such cases, the question of legacy lapsing does not arise.

8.3.3 If two legatees have been named under the will and one of them dies in the lifetime of the testator, then the other surviving legatee takes the legacy entirely.

8.3.4 There may be situations where a testator makes a will leaving his property to a particular class of people. In such a case the bequest would only pass to such of the legatees, comprised within the class, who are alive as on the death of the testator. E.g., a will is made leaving all property to all the daughters of X. X has three daughters as on the date on which the will is made but one of them predeceases the testator. The property would go only to the two surviving daughters and the heirs of the third daughter would be excluded.

Exception : The exception to this rule is as follows:

- (i) if a property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual;
- (ii) but the possession of that class is deferred until a time later than the death of the testator, because of a prior bequest or otherwise,
- (iii) then the property shall at that time go to such of them as are then alive and to the representatives of any of them who have died since the testator's death.

Example : A makes a bequest of his property to X by making him a life-interest beneficiary. After the death of X, the property would pass on to the brothers of X. At the time of the testator's death, X has two brothers P and Q. Afterwards, he has another brother R. Q dies in X's lifetime. After the death of X, the property would pass on equally to P, R and the representatives of Q.

8.4 Residuary Legatee

A Residuary Legatee is a legatee who takes whatever is remaining in the testator's estate after all the legacies have been effected. The Indian Succession Act, 1925 also refers to such a legatee as an "Universal Legatee". Thus, if the testator makes specific bequeaths and after that leaves the balance/surplus of his property to a certain person, then that person would be known as a residual legatee. E.g., A bequeaths his home to his wife and all that is left over after meeting his funeral expenses and any outstanding debts to X. In that case, X is known as a residual legatee. Thus, the residual legatee would take all such property in respect of which the testator has a power to make a will at the time of his death.

A person may be both, a Specified Legatee and a Residual Legatee.

IX. Executors

- 9.1 **Meaning** : The Executors of a will are very important since they are the persons who carry out the wishes of the testator. They are the organ through which the testator achieves his objectives even after his death. Just as a company functions through its board of directors, the estate of a deceased functions through its executors. The Act defines an executor as a person to whom the execution of the last will of a deceased person, is by the testator's appointment, confided. In case the executor is a female, then she is known as an executrix.

It should be noted that just because a will appoints a certain person as an executor it is not necessary that that person must accept the appointment. Once he is intimated that he has been appointed as an executor, he must as soon as possible communicate his reluctance to take up such appointment, if he is not interested in becoming an executor. Becoming an executor can be like wearing the proverbial crown of thorns if the will is challenged or the heirs are at war since it is the executor who would have to initiate and defend all proceedings instead of the deceased. Thus, a person must accept becoming an executor only if he is willing to carry out all the responsibilities which accompany the same. Various court decisions have held that once a person agrees to become an executor of a will he cannot refuse it subsequently without the permission of the Court.

- 9.2 **Selection of an Executor** : The following factors should be borne in mind while selecting an executor:

- (a) It is advisable to take the executor into confidence before writing his name as an executor in the will. Several times wills are made on the presumption that the person named as an executor would obviously accept the appointment. This may not be true in the light of the numerous duties which he may have to perform. Hence, taking a person's consent to act as an executor is advisable. If this is not done and the executor refuses the appointment, then the will would be administered by an Administrator appointed by the court which could become a long drawn out process.
- (b) It is desirable to appoint a person who is close not only to the testator but also to all or most of the beneficiaries and heirs. In the event of a possible dispute over the will, the executor can try and play a role of a mediator.
- (c) One practical factor to be considered is that the executor himself must not be very old or ill. If he predeceases the testator or dies immediately after the testator, then there would be a problem.

- (d) There is no bar on who can be appointed as an executor under a will, it could be an individual, a firm of lawyers or chartered accountants, a bank, a company, etc. In case of an individual he must be a major. Many people appoint their CAs or lawyers or doctors as executors.
- (e) A testator can appoint his/her spouse, children, brothers/sisters, relatives, friends, etc. as executors.

9.3 **Administrator** : An executor must be distinguished from an administrator as the two are often mistaken for one and the same person. An executor, as the definition suggests, is always appointed by the will of the testator, whereas an administrator is appointed by an authority such as the Court in a case where the will does not appoint an executor.

9.4 **Intermeddler** : A person could also become an executor if he intervenes with the estate of the deceased or he does any act which belongs to the office of an executor, in a case where there is no executor/administrator in existence. Such an executor would become liable to the rightful executor or administrator for any property which comes into his possession. He would be entitled to deduct all payments made by him to the rightful executor or administrator or those payments which he made while administering the estate.

9.5 Powers of an Executor

Since an executor steps into the shoes of the deceased, he is vested with several powers which would enable him to carry out his duties. These include the following:

- (a) The executor can sue and be sued for all matters which the deceased could sue or be sued. He can also sue for recovery of debts and can prosecute or defend all actions/special proceedings against the deceased. However, this would not include:
 - (i) causes of action for defamation, assault, as defined in the Indian Penal Code;
 - (ii) other personal injuries not causing the death of the party;
 - (iii) cases where after the death of the party, the relief prayed for cannot be enjoyed or granting it would be futile.
- (b) All the property of the deceased vests in the executor from the date of the death of the testator.
- (c) The executor has power to dispose of the property of the deceased in the manner specified in the will. In case of an executor of a Hindu, Buddhist, Sikh, Jain the power to dispose of immovable

property is subject to the restrictions specified in the will. However, the restrictions in the will would not apply if a probate has been granted by the court to him permitting him to dispose the property in a manner contrary to the will. The purchaser of the property gets a good title.

However, the administrator has no power to dispose of any immovable property by way of mortgage, sale, charge, gift, exchange, etc. unless he gets the previous permission of the court. Similarly, the administrator cannot lease any immovable property for a period exceeding five years. However, if the administrator does any such act in relation to the immovable property without the prior permission of the court, then the transaction is not void *ab initio*. It is only voidable at the option of the transferee, mortgage, lessee, etc.

- (d) An executor may do all such acts and take all such steps which are necessary for the preservation, maintenance and upkeep of the estate of the deceased. This may include defending it against law suits or filing law suits.
- (e) In case there is more than one executor, then the power of the executors can be exercised by any one of them. However, this is subject to any contrary directions contained in the will.
- (f) Where the will specifies several executors and one of them dies, then the powers devolve upon the surviving executors.
- (g) The assent of the executor is required to complete the legatee's title to the asset bequeathed to him by the deceased. This would be the case even if the bequest is to be made to the executor himself. Once assented by the executor, the bequest takes effect from a retrospective date, i.e., from the death of the testator.
- (h) The executor of a will has a period of one year to complete all formalities within which he must distribute the legacy. During this period he cannot be compelled to pay any legacy. This would be the case even if the will specifies to the contrary. For instance, A's will specifies that the executor must distribute his estate within 5 months from his death. The executor is not bound to do so and can take up to a year from the testator's death to complete the distribution. However, it should be noted that he is not bound to wait for one year. He can distribute the asset within a shorter period, even one month from the death of the testator, if he is comfortable. This is only a beneficial provision for the executor's convenience.

- (i) The executor can take the aid of any number of professionals, agents, servants, etc., in executing his functions.

9.6 Duties of an Executor

- (a) The executor must provide for all funeral expenses and other expenses in connection with the funeral ceremonies of the deceased. The ceremonies should be in a manner conducive to the standard of the deceased. This would include death-bed charges, medical attendance expenses, boarding and lodging for one month prior to his death. However, these expenses must be met from the estate of the deceased. These expenses must be met before all the debts of the deceased are met.
- (b) The executors and the administrators are required to produce before the court an inventory of all movable and immovable property and of all credits and debts due to the estate of the deceased within 6 months from the date of grant of a probate.
- (c) The executor must collect with reasonable diligence the property of the deceased and the debts due to him at the time of his death.
- (d) All the debts of the deceased must be paid equally and rateably from the estate of the deceased. This would even include debts due to the executor.
- (e) If the executor or the administrator purchases any property of the deceased, then the sale is voidable by any other person who is interested in the property. This is to prevent a situation of conflict of interest and duty.
- (f) One of the rules which the executor must follow is that he must clear all debts of the deceased before he makes any bequests.

Before distributing the estate, the executor must first pay off the debts and expenses. This would be followed by the specific legatees. The last in the order of payment would be the general legatees. If the estate is insufficient to pay these general legatees, then the general legacies would lapse or be diminished in equal proportions. The executor cannot select one general legatee over another by giving him a preference.

- (g) If the executor is also a legatee, i.e., a beneficiary of the will, then he must show his intention to act as an executor. Thus, he must do some act which would show his intention to act as an executor. This could even be something as simple such as carrying out the last rites of the deceased in the manner specified in the will.

X. Bequests

10.1 **Meaning** : A bequest may be defined as The property/benefits which flow under the will from the testator's estate to the beneficiary.

Since making a will is all about making a bequest or a legacy, it is important to understand the principles regarding a valid bequest, the time when it vests, etc. Let us look at these important principles.

10.2 Void Bequests

Although a testator can bequeath his property in any manner whatsoever, certain bequests are treated as void under the Act. This is to prevent an embargo upon free circulation of property. These bequests are as follows :

- (a) A bequest made to a person of a particular description who is not in existence at the time of the testator's death: E.g., A bequeaths land to B's eldest son. At A's death, B has no son. The bequest is void. The exception to this rule is as follows:
 - (i) if a property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual;
 - (ii) but the possession of that class is deferred until a time later than the death of the testator, because of a prior bequest or otherwise,
 - (iii) a person answering the description is alive at the death of the testator or he comes into existence when the bequest becomes payable. In such a case the property shall go to that person or to his representatives if he is dead.

Example : A makes a bequest of his property to X by making him a life-interest beneficiary. After the death of X, the property would pass on to the son of X. At the time of the testator's death, X has no son. Later on, X has a son C. X dies and soon after C dies. The property would pass on to the representatives of C.

- (b) A bequest made to a person not in existence at the time of the testator's death subject to a prior bequest contained in the will. In such cases, the latter bequest would be void unless it comprises the whole of the remaining interest of the testator in the property bequeathed. E.g., X bequeaths property to B for life and after B's death to B's son for life. At the time of X's death, B has no son. The bequest made to B's son for life is not for the whole interest that remains with X. Hence, the bequest to B's son is void. This

restriction is similar to that placed under s. 13 of the Transfer of Property Act, 1882.

It needs to be noted that the bequest would be void only if all the following conditions are satisfied:

- (i) A prior life-interest bequest is created in favour of a person;
- (ii) After the life-interest, another interest is created in favour of some other person;
- (iii) That other person is not in existence at the time of the testator's death; and
- (iv) Such interest created in favour of the unborn person is not the entire remainder interest of the testator.

Thus, if any of the four conditions is not satisfied, then the bequest remains valid. For instance, if in the above illustration, B has a son at the time of X's death, then the life-interest bequest in his favour is valid.

- (c) One of the situations where a bequest is void is known as the rule against perpetuity which is almost similar to s. 14 of the Transfer of Property Act, 1882. A bequest made whereby the vesting of the property is delayed beyond the life-time of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom if he attains full age, the thing bequeathed is to belong. E.g., a property is bequeathed to A for his life and after his death to B for his life; and after B's death to such of B's sons who shall first attain 25 years of age. A and B survive the testator. The son of B who attains 25 years may be a son born after the testator's death and he may not attain 25 years till more than 18 years have passed from the death of longer liver of A and B. Thus, the vesting is delayed beyond the lifetime of A and B and the minority of the sons of B. The bequest made after B's death is void.

This is a very important condition which needs to be borne in mind while drafting a will. The essential conditions are as follows:

- (i) The vesting of the bequest must be delayed;
- (ii) The delay must be beyond:
 - (A) the life-time of one or more persons who are alive at the testator's death; and
 - (B) the minority of some person who shall be in existence at the expiration of that period

- (iii) The bequest is to belong to such unborn person if he attains majority.

Thus, the rule against perpetuity prohibits the vesting of a property beyond the maximum period of one or more lives in existence and eighteen years thereafter. So long as the bequest are made to living persons, there could be innumerable bequests. However, the moment the ultimate beneficiary is not in existence on the date of the transfers not only must he be given the whole of the residue of the estate, but also the vesting must not be delayed for a period beyond his minority.

- (d) Where a bequest is made in favour of a class of persons and the bequest to some of the legatees is hit by the conditions specified in paras 10.2 (b) and (c) above, then the remaining legatees would not be hit by such void conditions.
- (e) If a bequest in favour of someone is void because of the conditions specified in paras 10.2(b) and (c) above, then any bequest contained in the same will and which is intended to take effect upon the failure of such prior bequest would also be void. E.g., a property is bequeathed to X for his life and after his death to B for his life; and after B's death to such of B's sons for life who shall first attain 25 years of age and after that, to all the children of that son. Since the bequest in favour of B's son is hit by the rule of perpetuity and hence, is void, the subsequent bequest in favour of his children is also void.
- (f) A will cannot give a direction for the accumulation of the income from a property of the testator for a period longer than eighteen years. In case, a will contains any such direction, then at the end of eighteen years, it would be treated as if there is no such direction and the property and the income would be disposed of. The exception to this rule is applicable for an accumulation made for the following purposes:
 - (i) The payment of the debts of the testator or any person who takes an interest under the will; or
 - (ii) The provision of portions for the children/remoter issues of the testator or any person who takes an interest under the will; or
 - (iii) The preservation or the maintenance of any property bequeathed.
- (g) One of the interesting situations when a bequest would be void is a case of a bequest for charitable or religious uses. If any

person, who is not a Parsi, has a nephew or a niece or any nearer relative, then he does not have any power to bequeath his property for religious or charitable uses, except if the following conditions are satisfied:

- (i) The will must be executed at least twelve months before his death;
- (ii) It must be deposited within six months from its execution in some place provided by law for the safe custody of the wills. The procedure for deposit of the wills is laid down in the Registration Act, 1908.

Thus, this provision seeks to prohibit people who have close relations from bequeathing all their property to charity unless a prescribed procedure is followed. The definition of the term “nearer relative” is open and generally includes a father, mother, son, daughter, brother, sister, grandparents, etc. There is a judicial controversy on whether or not the term includes a person’s widow.

10.3 Vesting of Legacies

The Act also contains specific provisions in relation to the time of the vesting of the legacies. These are as under:

- (a) **Vested Interest** : There may be situations wherein the possession of a legacy is postponed for sometime. In such cases, unless the will demonstrates a contrary indication, the vesting of the bequest is immediate upon the death of the testator, although its possession or payment may be postponed. The consequence of this vesting is that even if the legatee dies without receiving the bequest, his representatives would be entitled to receive the bequest. This is known as a vested interest in a legacy. E.g., A bequeaths a fund to X for life and after him to B. B dies in X’s lifetime but after A. The heirs of B are entitled to claim the fund after X’s death since B had a vested interest. In order that an interest can be said to be vested, it is necessary that there is a present right or interest.

In the case of a bequest made to a class of people who are of a certain age, only those persons who have attained that age can claim a vested interest. E.g., if a will provides for a bequest to all persons above the age of 21, then only those persons who are above 21 have a vested interest.

- (b) **Contingent Interest** : A contingent interest is opposed to a vested interest. In the case of a vested interest, only the possession of the legacy is postponed but in the case of a contingent interest,

the legacy itself is in doubt, i.e., it may or may not come to the legatee. Thus, in a vested interest the vesting is unconditional while in a contingent interest, it is dependent upon the fulfilment of a future uncertain condition. The rules in respect of contingent interests are as follows:

- (i) A legacy which has been bequeathed in case of the non-happening of a specified uncertain event does not vest until that event happens. E.g., a fund is bequeathed to P in case X does not have any son within 10 years of the death of the testator. P has a contingent interest till 10 years. He cannot claim to have a interest till the last day of 10 years has passed since the death of the testator and X does not have any son within this period.
- (ii) A legacy which has been bequeathed to a person subject to the condition of the non-happening of a specified uncertain event does not vest until that event becomes impossible. E.g., a land is bequeathed to X if he does not marry C within 10 years of the death of the testator. C dies within 3 years of the testator's death. The interest vests in X immediately upon C's death.
- (iii) However, if a will gives a fund to a person only after he attains a certain age along with the income arising from that fund before he reaches that age, then the interest of the person in such a case is not contingent. E.g., a fund is bequeathed to S after he becomes a major, however, the income is to be applied for his benefit during his minority. The interest of S is not contingent.
- (iv) If a legacy is made out which is to take effect only if a specified uncertain event occurs and if no time has been mentioned in the will for the occurrence of that event, then the legacy cannot take effect unless that event occurs before the period when the fund is distributable or payable. This provision has no application if the uncertain condition specified in the will must occur within a specified time period.
- (v) If a legacy is made out to certain persons surviving at some specified period but the exact period is not specified, then the legacy shall go to such of them as are alive at the time of payment or distribution. A property is bequeathed to A and B equally or to their survivor. Both A and B survive the testator. In such a case it is uncertain as to the how long should one wait to see which of A or B outlive the other. Thus, the legacy is equally divided between the two of them.

10.4 Conditional Bequests

Conditional bequests are those bequests which take effect only if certain conditions are fulfilled. Conditional bequests should be distinguished from contingent bequests. While contingent bequests are dependent upon the happening of some events, conditional bequests require the doing or abstinence from doing of certain acts. Conditions may be of two types : conditions precedent and conditions subsequent. While conditions precedent must be fulfilled prior to the vesting of the estate, the conditions subsequent can be fulfilled even after the vesting of the estate. If the conditions are not satisfied then the vested estate is divested. Thus, in the first case, the estate does not vest itself till compliance of the condition while in the second case, the estate vests immediately till such time as the condition is broken, after which it is divested. What is a condition precedent and what is a condition subsequent must be ascertained from the wordings of the will as there is no particular format or language required.

The rules in relation to conditional bequests are as under:

(a) Condition Precedent

- (i) A bequest conditional upon an impossible condition is void. E.g., A makes a bequest to P provided he marries his daughter S. S is dead at the time of making of the will. The bequest is void *ab initio* as the condition is impossible to be fulfilled. Thus, if a condition precedent is impossible to be fulfilled, then the bequest is void.
- (ii) If the condition precedent is either illegal or immoral, then it results in a void bequest. E.g., A leaves ₹ 10 lakhs to C under a will if C robs a bank. The condition precedent is illegal and hence, the bequest is void.
- (iii) In the case of a condition precedent, if the condition is substantially complied with, then the condition is treated as complied with. E.g., S bequeaths ₹ 1 crore to W provided he marries with the prior consent of all his 4 uncles. At the time of W's marriage, only 3 uncles are alive, whose consent W obtains. The condition is substantially complied. The bequest is valid.

However, if there is a condition precedent and if it is provided that in case the condition is not complied with, the property passes over to another beneficiary, then the condition must be complied with strictly.

- (iv) If a bequest is made to a beneficiary only if a prior bequest fails, then the latter bequest takes effect upon failure of

the prior bequest even if the failure was not in the manner contemplated by the will. E.g., A makes a bequest to C if she remains unmarried and if she marries then to, X. If C dies unmarried, the bequest to X takes effect.

However, if the latter bequest is only made if the former bequest fails in a particular manner, then the latter bequest does not take effect unless the prior bequest fails in the manner specified.

- (v) Where a particular time has been prescribed for performance of the condition and the same cannot be fulfilled in time due to a fraud, then further time would be allowed to make up for the time lost due to the fraud.

(b) Condition Subsequent

- (i) A bequest may be made to any person with the condition superadded that in case of a specified uncertain event occurring or a specified uncertain event not occurring, the bequest shall go to another person. E.g., a sum of money is bequeathed to C with the condition that if he dies before he attains the age of 40 years, then B will get the estate. In this case, C takes a vested interest which may be divested and given to B in the event that he dies before 40 years. However, in such a case, the condition must be strictly fulfilled; it is not adequate if the condition is substantially complied with. Thus, unlike a condition precedent which is deemed to have been complied with if substantially complied with, a condition subsequent must be strictly complied with in the manner laid down. This is because it divests an already vested interest and hence, deprives a legatee of an estate which he was hitherto enjoying. E.g., a bequest is made to B with the condition superadded that if he does not marry with the consent of all his brothers, the legacy would go to X. B marries with the consent of 3 of his 4 brothers. The legacy to X does not take effect.
- (ii) In the case of a condition precedent, if the condition is void on the grounds of illegality or immorality or impossibility, then the bequest itself fails. However, in the case of a condition subsequent, if the condition superadded is void on any of these grounds, then the original bequest does not fail and it continues. E.g., A gets a bequest with a condition superadded that if he does not murder C, then the legacy would go to P. The condition is void but the bequest continues.

- (iii) One type of a condition subsequent could be a condition requiring a legatee to do something after receiving the bequest, failing which the bequest passes on to another person or the bequest ceases to have effect. However, in many cases, no specific time is specified for performing the act. In such cases, if the legatee takes any steps which either render the act impossible to be performed or indefinitely postpones the act, then the legacy would fail as if the legatee died without performing the act in question. Thus, the act must be completed within a reasonable time. What is a reasonable time is a matter of fact which needs to be ascertained on a case-to-case basis. E.g., A makes a bequest to his niece W with a proviso that her husband would look after his business or else the bequest would go to his nephew X. W becomes a nun and thereby takes a step which renders the act impossible. The bequest goes over to X.
- (iv) Where a particular time has been prescribed for performance of the condition and the same cannot be fulfilled in time due to a fraud, then further time would be allowed to make up for the time lost due to the fraud.

10.5 Directions as to application/enjoyment

There may be bequests which lay down specific directions as to the application or the enjoyment of the fund bequeathed. Such conditions restrict the free usage of the estate bequeathed and thereby act as a clog on the property. Hence, the Act lays down certain prohibitions and certain exceptions relating to such restrictive directions in a will, which are similar to those enshrined in the Transfer of Property Act, 1882

The provisions in respect of directions as to application and enjoyment of an estate are as follows:

- (a) If a fund is bequeathed for the absolute benefit of a person but it contains restrictions on the manner in which it can be applied or enjoyed, then the condition is void and the legatee can enjoy the fund as if there was no such condition. Although, the Act uses the word “fund”, it includes both movable and immovable property within its ambit. However, for the restriction to be void it is necessary that the legatee is absolutely entitled to enjoy the property. If the interest created is not absolute, then the condition is valid. For instance, a father bequeaths a large sum of money to his son which is to be used only for his business. The son buys a house from the money. He is entitled to disregard the restrictive condition. However, if the bequest is not absolute, say, it is a

life-interest, then the condition would be valid. E.g., a property is bequeathed to X for life and after him to his son. The will states that X can use the property only for agricultural purposes. X is bound by the condition if he accepts the bequest since he does not have an absolute interest.

- (b) If a testator leaves a bequest absolutely to the legatees but restricts the mode of enjoyment or application of the property in a certain manner which is for the specific benefit of the legatees, and if the legatee is not able to obtain such a benefit, then the estate belongs to the legatee as if the fund contained no such direction. E.g., A gives a fund to his son for life and after him to his son. The son dies without a child. His heirs are entitled to the fund.
- (c) If a bequest has been made which is not absolute in nature and it is for a specific purposes but some of those purposes cannot be fulfilled, then such portion of the fund would remain a part of the testator's estate. This provision applies only when the interest is not absolute but is, say, a life-interest. In the case of *Sadhu Singh vs. Gurdwara Sahib (2006) 8 SCC 75*, a husband gave his house to his wife under his will for her lifetime with a stipulation that after her lifetime the house would go to his nephews. The wife wanted to gift the house in her life time to a Gurdwara. The Supreme Court rejected this on the ground that once she takes a property under a bequest, she is bound by its terms and conditions. If she had received the property under the Hindu Succession Act, i.e. by way of intestate succession, then the position would be different.

XI. Types of Legacies

11.1 Specific Legacy

When a specific part of the testator's property is bequeathed to any person and such property is distinguished from all other parts of his property, then the legacy is known as a specific legacy. E.g., A makes a bequest to C of the diamond ring which was gifted by his father. This is a specific legacy in favour of C. Thus, the essence of a specific legacy is that it is distinguishable from the other assets of the testator's estate. A specific legacy is distinguishable from a general legacy, e.g., a bequest of all the residue estate is a general legacy. What is a specific legacy and what is a general legacy is a question of fact and needs to be determined on a case-to-case basis. The reason why it is important to note whether a legacy is a specific legacy or not is that if there is deficiency in the estate of the testator to pay off the assets, then a specific legacy is not liable to abate along with the general legacies. If the legacy exists at the time of

the testator's death and his estate is otherwise insufficient to pay off his debts, then the specific legacy must be given to the legatee.

The following are the principles in respect to a specific legacy:

- (i) Usually, a bequest of money, stocks, shares are general legacies. In some cases, a sum of money is bequeathed and the stock or securities in which the money is to be invested is specified in the will. Even in such cases, the legacy is not specific. E.g., A makes a bequest of ₹ 10 crores to his son and his will specifies that the sum is to be invested in the shares of XYZ P. Ltd. The legacy is not specific.
- (ii) Even if a legacy is made out under which a bequest is made in general terms and the testator as on the will date possesses stock of the same or greater amount, the legacy does not become specific. E.g., A bequeaths 8% RBI Bonds worth ₹ 10 lakhs to X. As on the date of the will, A has 8% RBI Bonds worth ₹ 10 lakhs. The legacy is not specific. However, if A were to state that "I bequeath to X all my 8% RBI Bonds", then this would have been a specific legacy.
- (iii) A legacy of money does not become specific merely because its payment is postponed until some part of the testator's estate has been reduced to a certain form or remitted to a certain place.
- (iv) A will may make a specific bequest of some items and a residual bequest of the other. While making a residual bequest, the testator lists down some of the items comprised within the residue. Merely because such items are enlisted they do not become specific legacies.
- (v) In the case of a specific bequest to two or more persons in succession, the property must be retained in a form in which the testator left it even if it is a wasting or a reducing asset, e.g., a lease or an annuity.
- (vi) A property bequest is generally a specific legacy.

11.2 Demonstrative Legacy

A Demonstrative Legacy has the following characteristics:

- (a) It means a legacy which comprises of a bequest of a certain sum of money or a certain quantity of a commodity but refers to a particular fund or stock which is to constitute the primary fund or stock out of which the payment is to be made. The difference between a specific and a demonstrative legacy is that while in case

of a specific legacy, a specific property is given to the legatee, in the case of a demonstrative legacy, it must be paid out of a specified property.

E.g., A bequeaths ₹ 50 lakhs to his wife and also directs under his will that his property should be sold and out of the proceeds ₹ 50 lakhs should go to his daughter. The legacy to his wife is specific but the legacy to his daughter is demonstrative.

- (b) In case a portion of a fund is a specific legacy and a portion is to be used for a demonstrative legacy, then the specific legacy stands in priority to the demonstrative legacy. If there is a shortfall in paying the demonstrative legacy, then it is to be met from the residue of the estate of the testator.
- (c) Similarly, in case a portion of a fund is a specific legacy and a portion is to be used for a demonstrative legacy, and if the testator himself receives a portion of the fund with the result that there is insufficiency of funds, then specific legacy stands in priority to the demonstrative legacy. If there is a shortfall in paying the demonstrative legacy, then it is to be met from the residue of the estate of the testator.

E.g., A bequeaths ₹ 20 lakhs, being part of an actionable claim of ₹ 50 lakhs which he has to receive from B to his wife and also directs under his will that this claim should be used to pay ₹ 10 lakhs to his daughter. During A's lifetime he receives ₹ 25 lakhs himself from B. The legacy to his wife is specific but the legacy to his daughter is demonstrative. Hence, the wife will receive ₹ 20 lakhs in priority to the daughter. Since the balance in the claim is only ₹ 5 lakhs, whereas the daughter has to receive ₹ 10 lakhs, she would have to receive the balance from the general estate of A.

11.3 General Legacy

All legacies which are neither a specific nor a demonstrative legacy are known as general legacies. E.g., A bequeaths all the residue of his estate to B. This is called a general legacy.

XII. Ademption of Legacies

- 12.1 Ademption of a legacy means that the legacy ceases to take effect, i.e., the legacy fails. Ademption of a legacy takes place when the thing which has been legated does not exist at the time of the testator's death. The rules in respect of ademption of legacies are as follows:

- (a) In the case of a specific legacy if the subject-matter of the item bequeathed does not exist at the time of the testator's death or it has been converted into some other form, then the legacy is adeemed. Thus, because the bequest is not in existence, the legacy fails. E.g., A makes a will under which he leaves a gold ring to X. A in his lifetime, sells the ring. The legacy is adeemed. The position would be the same if a stock has been specifically bequeathed and the same is not in existence at the death of the testator.

However, in case the bequest undergoes a change between the will date and the death of the testator and the change occurs due to some legal provisions, then the legacy is not adeemed. E.g., A bequeaths 10,000 equity shares in Z Ltd. to B. Z Ltd. undergoes a demerger under a court-approved scheme of reconstruction and the shares of A are split into 5,000 2% Preference Shares of Y Ltd. and 4,000 equity shares of Z Ltd. The legacy is not adeemed.

Another exception to the principle of ademption is if the subject matter undergoes a change between the will date and the death of the testator without the testator's knowledge. In such a case since the change is not with the testator's knowledge, the legacy is not adeemed. One of the instances where such a change may occur is if the change is made by an agent of the testator without his consent.

- (b) Unlike a specific legacy, a demonstrative legacy is not adeemed merely because the property on which it is based does not exist at the time of the testator's death or the property has been converted into some other form. In such a case the other general assets of the testator would be used to pay off the legacy.
- (c) In some specific bequests, debts, receivables, actionable claims, etc., which the testator has to receive from third parties may be bequeathed. In such cases, if the testator receives such dues himself, then the legacy adeems because there is nothing left to be received by the legatee.

However, where the bequest is money or some other commodity and the testator receives the same in his lifetime, then the same is not adeemed unless the testator mixes up the same along with his general property.

- (d) If a property has been specifically bequeathed to a person and he receives a part or a portion of the property, then the bequest adeems to the extent of the assets received by the legatee. However, it continues for the balance portion of the bequest.

As opposed to this, if only a portion of the entire fund or property has been specifically bequeathed to a legatee and the testator receives a part or a portion of this fund or property, then there is an ademption to the extent of the receipt. The balance fund or stock shall be used to discharge the legacy.

- (e) If a stock is specifically bequeathed to a person and it is lent to someone else and accordingly replaced, then the legacy is not adeemed. Similarly, if a stock which is specifically bequeathed is sold and afterwards before the testator's death, an equal quantity is replaced, then the legacy is not adeemed.

XIII. Interpretation of Wills

- 13.1 Interpretation of wills can sometimes become a very vexed issue. This is because a will is to be interpreted as per the intention of the testator since a will represents the last wish of the testator and to interpret the intention of a person in his absence, i.e., after his death can become quite a complex problem. The estate of the deceased must be administered as per the will. Ascertaining the intention of the testator becomes all the more relevant when the will is challenged by the heirs and the relatives of the deceased. In interpreting a will, the Courts follow the "Armchair Construction Rule", i.e., the Court would step into the shoes of the deceased and try and follow his intention as if it was sitting in the armchair of the testator.
- 13.2 The Act itself has laid down certain principles which would assist the interpretation and construction of a will. However, it must be borne in mind that these rules would only have effect if the language of a will is ambiguous or unclear or confusing and hence, the true intention of the testator cannot be ascertained. Where a will is very clear, these rules would not come into the picture.

The rules specified under the Act in relation to construction of wills are as follows:

- (a) One of the most important principles laid down is that a will need not use any technical words or terms. Thus, a will need not contain legal jargon or technical words. All that a will requires is that the true intention or the last wishes of the testator must be clearly ascertainable from the will. It is for this reason that preparation of a will does not always require a lawyer or a chartered accountant. A person can prepare a will by simply writing down his wishes on a piece of paper (known as a 'holograph will') and the same would be legally valid subject to fulfilment of other conditions.

- (b) In case the Court is faced with questions such as who are the persons or what are the properties covered by the will, then it may make enquiries into every material fact relating to the persons who claim to be interested, the property covered by the will, the circumstances of the testator and his family, and such other facts which may throw light on the words used by the testator.
- (c) In some cases, the will makes an error in the name or description of a legatee or a class of legatees. However, such errors would not invalidate the legacy if the words used in the will can sufficiently show which legatee or class of legatee is intended to be covered. What is essential is that the testator's wordings must show that the person was intended to be covered. E.g., A dies within 1 day of his son's birth. His will bequeaths all his property to his son "X". The son is named "Z" and not "X". A has no other children. The bequest is valid and takes effect even though there is an error in describing the legatee. If the will errs in describing a legatee but the name is correct, then the description would be ignored and similarly, if the will errs in naming a legatee but the description is correct then the name would be ignored.

Sometimes the will specifies a certain number of legatees who are entitled under the will. If the actual number is different than that contemplated by the will, then the actual number takes precedence over that specified under the will. E.g., A bequeaths his property equally to the four sons of his sister B. B has two sons and two daughters. All the four would share equally. Alternatively, if A bequeaths his property equally to the four sons of his sister B and B actually has five sons living on the death of A, then each of them would get a one-fifth share.

- (d) If the will omits any word which in the context of the will is material to the full expression of the meaning, then the same be supplied. Thus, certain ambiguities may be set right to give full effect to the testator's intentions. E.g., A in his will states that "I leave my son all lands referred to in Schedule 1 to the will". Schedule 1 lists down all liquid assets while Schedule 2 lists down lands. The will would be read with the error corrected to read "I leave my son all lands referred to in Schedule 2 to the will".

Similarly, sometimes the will makes certain errors which are obvious when read in the full context of the will. These too may be corrected to give effect to the will. E.g., X in the 2nd paragraph of his will states that he wants to divide all his assets equally among his wife and four sons. One of the assets is a fund of ₹ 50,000. In the last paragraph, the will mentions that X's son P would be given

“₹ 1,000 (Rupees ten thousand) from the fund.” Here the figures are obviously wrong when read in the full context of the will. P would be given ₹ 10,000 and not ₹ 1,000.

- (e) Just as an erroneous description in the object can be set right, an erroneous description in the subject can be ignored if the other parts of the will and description of the properties contained therein can give a sufficient description.
- (f) Where a property bequeathed by a will contains several descriptions, all of which apply to certain property of the testator then the bequest only applies to that property. This would be the case even if the testator has other property which answers to only some of the several descriptions contained in the will. E.g., A bequeaths to his son “all my farm lands at Pune which have orchards”. A also has farm lands at Pune which are not orchards. The bequest would be limited to only those lands which have orchards and not the other lands.
- (g) In certain situations, the Court would admit extrinsic evidence for the construction of a will. This would be the case if the following conditions are satisfied:
 - (i) The wordings of a will are unambiguous;
 - (ii) The description contained in the will applies to two or more subjects or objects; and
 - (iii) The testator intended application only to one.

It needs to be borne in mind that admission of extrinsic evidence in constructing a will is a material departure from the rule of armchair construction. Hence, such a serious departure would only be made in case of latent ambiguities. In case of a patent ambiguity, i.e., one where there is a defect apparent on the face of the will itself, then no external or extrinsic evidence can be admitted. E.g., if A bequeaths his house to _____ thereby leaving a blank for the name, then no extrinsic evidence may be admitted to show the intended beneficiary. This is a case of a patent ambiguity. However, in case X bequeaths to Z his Mercedes car and it turns out that he has two such Mercedes cars, then extrinsic evidence is admissible to show which car did X intend to give.

- (h) A will must be interpreted as a whole and its meaning must be ascertained from the entire instrument. This is a standard principle of interpretation and applies to most documents.
- (i) One of the rules of construction of a will is that sometimes general words may be understood in a more restricted sense than they

denote if it can be showed that the testator intended to use them in such a restricted sense. Conversely, restricted words may be understood in a more general sense than they denote if it can be showed that the testator intended to use them in such a general sense.

- (j) In case the construction of a will leads to two meanings and one of them has some effect while the other does not, then the former is preferred. However, this should only be applied where the will is ambiguous. Merely because a will leads to unpleasant consequences it does not mean that the will is ambiguous.
- (k) If the same words are used in different parts of the will, then it shall be presumed that they occur in the same sense, unless the will denotes a contrary intention.
- (l) If the intention of the testator cannot be given full effect to because of certain reasons, then an effort must be made to give effect to it as much as possible.
- (m) If there are two inconsistent clauses, then the latter one prevails over the former. This is a recognised principle of interpretation. E.g., A in the 3rd paragraph of his will leaves his house to X and in the 9th paragraph leaves it to P and not X. P would get the house.
- (n) A will which is devoid of any definitive intention is void on account of its uncertainty.
- (o) Normally, the property which is the subject-matter of the bequests under the will would be that property which is in existence at the time of the testator's death.
- (p) Where a will lays down objects for whose benefit a property is bequeathed and a person has been specified to nominate the shares of such objects, and if such person does not exercises his discretion, then the property belongs to all the objects covered by the will in equal shares. This would only be the case if the person fails to exercise his power. It is necessary that the will must give the powers of appointment to a certain person. E.g., D settles a property for life on B and gives him directions to divide the property among all the seven nephews of D on B's death. B dies without making any such division. All seven nephews get an equal share.
- (q) When a bequest is made to the "heirs, right heirs, relations, nearest relations, family, kindred, nearest of kin, etc." of a particular person without any qualifying terms and the class forms the direct and

independent object of the person, then in such cases the property bequeathed shall be distributed as if he died intestate in respect of the same and he left assets for the payment of his debts independently of such property. E.g., A leaves his land “to my right heirs”. In such a case since it is not possible to exactly determine which heirs A meant in the will. Thus, the land would be distributed to all of A’s heirs as if died intestate leaving assets for the payment of his debts independent of such property.

Similarly, if a bequest is made to the “representatives, legal representatives” of a particular legatee, then the property shall be distributed as if it had belonged to such person and he died intestate in respect of the same.

- (r) Many a times, a bequest is made in alternative, i.e., it is bequeathed to “A or B”. In such cases, the first named legatee takes the bequest if he is alive at the time when the will takes effect and if he is dead then the second named legatee takes the bequest. E.g., a bequest is made to A or B. A is alive when the testator dies. He takes the bequest.
- (s) Most wills often use relationships to describe legatees. The Act lays down definitions of certain relationships and what these terms denote. The following terms, if used in a will, have been defined in the Act:
 - (i) **Children** : Applies only to lineal descendants in the first degree of the person whose children are spoken of lineal descendants.
 - (ii) **Grand children** : Applies only to lineal descendants in the second degree of the person whose grand children are spoken of.
 - (iii) **Nephews and Nieces** : Applies to children of brothers and sisters
 - (iv) **Cousins, First cousins, Cousin-german** : Applies to children of brothers or sisters of the father or mother of the person whose cousin, first cousins, cousin-german is being spoken of.
 - (v) **First cousin once removed** : Applies to children of Cousins, First cousins, Cousin-german of a parent of the person whose first cousin once removed is being spoken of.
 - (vi) **Second Cousins** : Applies to grand-children of brothers / sisters of the grand-father or grand-mother of the persons whose second cousin is being spoken of.

- (vii) **Issues, Descendants** : Applies to all lineal descendants.
- (viii) If words are used in a will which denote collateral relationships, then they apply equally to relatives of full blood and half blood. Further, if a will uses words which denote a relationship, then they also apply to a child in the womb of his mother and who is born alive afterwards.
- (t) Unless the will denotes a contrary intention, where words are used in a will which express a relationship, such as child, son, daughter, etc., then they are presumed to mean only legitimate relationships. If there is no legitimate relative, then any person who has acquired on the date of the will the reputation of being a relative, would be treated as the relative of the deceased. Adopted children would however, be covered. E.g., A makes a bequest in favour of X's sons. X has three sons of which one is illegitimate. The bequest goes in favour of the two legitimate sons of X.
- (u) Sometimes a will makes two bequests to the same person. This may lead to a certain amount of confusion as to whether the second bequest is in addition or in substitution of the first one. Hence, the Act lays down certain principles in this respect which must be followed when the will is not clear in this respect:
 - (i) If a will bequeaths the same thing twice to the same legatee, either in the same will or both in the will and the codicil, then he is entitled to receive that thing once only. E.g., A makes a will which starts with a bequest of all his shares to X and ends with the same bequest. The bequest to X would only take effect once.
 - (ii) If the same quantity of an item is bequeathed twice, either in the same will or both in the will and the codicil, then the bequest would take effect only once. E.g., a will and a codicil both make a bequest of ₹ 50,000 to X. He would only get ₹ 50,000.
 - (iii) If two legacies of an unequal amount are bequeathed twice to the same person, either in the same will or in the same codicil, then both the bequests would take effect. E.g., a will makes a bequest of ₹ 50,000 to X and another bequest of ₹ 60,000 to X. X would get ₹ 1,10,000.
 - (iv) If two legacies of the same item are bequeathed twice to the same person, one by the will and the other by the codicil, then both the bequests would take effect. E.g., a will makes

a bequest of ₹ 50,000 to X and the codicil makes a bequest of ₹ 60,000 to X. X would get ₹ 1,10,000.

Under the situations specified in (i) to (iv) above, the term 'will' does not include a codicil

XIV. Revocation of a will

- 14.1 **Irrevocable wills** : It is only the latest surviving will before the testator's death which takes effect. A testator can make numerous wills and revoke all of them. One of the biggest misconceptions which people have is that once they make a will, it is final and binding. At the risk of repetition, it would not be out of place to state that a person can revoke as many wills as he likes. Revocation means to call back or cancel. There is no such instrument as an "irrevocable will", even if the will were to state that it is irrevocable.
- 14.2 **Revocation by marriage** : Generally, Every will made by a testator is revoked by his marriage. This is true whether the testator is a male or a female. This is because the conditions and circumstances of the testator undergo a fundamental change after marriage and hence, the state of affairs which existed when the will was made have changed. It needs to be noted that it is not only the first marriage of the testator but every marriage of his which revokes the will. Even the second and subsequent marriages of the testator would revoke the wills made before marriage. However, the provisions relating to revocation of a will on marriage of the testator do not apply to Hindus, Sikhs, Buddhists and Jains.
- 14.3 **Manner of revocation** : An unprivileged will or codicil may be revoked in one or more of the following ways:
 - (a) By marriage of the testator not being a Hindu, Sikh, Buddhist or Jain;
 - (b) By some will or codicil or some revocation declaration which revokes the earlier will. The deed of revocation must be executed in the same manner as a will would.;
 - (c) By burning, tearing or otherwise destroying the will or codicil by the testator with the intention of revoking the same;
 - (d) By burning, tearing or otherwise destroying the will or codicil by some person in the presence of and under the directions of the testator with the intention of revoking the same.

Once an unprivileged will or codicil has been revoked, then it would be revived only by the re-execution of the will. Re-execution means that the will is duly signed once again by the testator and it is attested by two witnesses. It can also be revived by a duly executed codicil, which shows

an intention to revive the earlier will. It is necessary that the codicil must declare its intention to revive the will.

XV. Registration of Wills

- 15.1 **Meaning** : The testator or the executor, after him, may register the will with the Registrar of Sub-Assurances under the Registration Act, 1908. It is not compulsory to register a will. Registering a will does not create any added protection when a will is challenged. Even if a will bequeaths immovable property, registration is not compulsory. In fact, Sec17(1) of the Registration Act, 1908 prescribes those instruments which require compulsory registration and expressly states that only non-testamentary instruments are covered.
- 15.2 **Benefits** : Registration of a will by the testator raises a strong presumption in favour of the genuineness of the will – *Guru Dutt Singh vs. Durga Devi*, AIR 1966 J&K, 75. However, merely because a will has not been registered by the testator, an adverse inference cannot be drawn that the will is not genuine – *Ishwardeo Narain Singh vs. Kamata Devi* AIR 1954 SC 280. Registration of a will helps in establishing the date of registration beyond a doubt. It would go a step in proving whether or not the will is the last will of the deceased. If, after a will has been registered, another will which is unregistered and of a later date is found and is claimed to be the last will, then the registration would go a long way in establishing the earlier date. Alternatively, the testator may get the will attested by a Notary Public.
- 15.3 **Procedure** : The procedure for registering a will is as follows:
- (a) The will is to be registered with the appropriate Registrar of Sub-Assurances. For instance, in Mumbai there are two Sub-Registrars.
 - (b) In case a person other than the testator presents a will for registration, then such other person must satisfy the Registrar that the will was executed by the testator who has since expired, and that the person registering the will is authorised to do so.
 - (c) The other procedures which are applicable for the registration of any document would equally apply to a will also. For instance, after the amendment in the Registration Act inserted in 2001, every document which is to be registered requires the person presenting the document to affix his passport size photograph and also his finger-print.
 - (d) Persons who are exempted from personally appearing before the Registrar, include:
 - (i) A person who is unable to come without risk or serious inconvenience due to bodily infirmity;

- (ii) A person in jail under civil or criminal process;
- (iii) Persons who are entitled to exemption under law from personal attendance in Court.

In such cases, the Registrar shall either himself go to the house of such person or the jail where the person is confined and examine him or issue a commission for his examination.

XVI. Probates

- 16.1 **Meaning** : A probate means the copy of the will certified by the seal of a Court. Probate of a will establishes the authenticity and finality of a will and validates all the acts of the executors. It conclusively proves the validity of the will and after a probate has been granted no claim can be raised about the genuineness or otherwise of the will. A probate is different from a succession certificate. A succession certificate is issued by a Court when a person dies intestate, i.e., without making a will. Thus, a probate is granted by a Court only when a will is in place, while a succession certificate is granted only if a will has not been made.

A Probate is compulsory u/s. 213 r.w. s. 57 of Indian Succession Act in the case of:

- (a) A will made by a Hindu executed within areas under the jurisdiction of the High Courts of Bombay, Madras or Calcutta.
- (b) A will made by a Hindu outside these areas but if it relates to immovable property situated within the above 3 areas.

Thus, Probate is not compulsory in any other cases. E.g., a probate would not be required for the transmission of shares in the case of a will made by a Hindu at Delhi - *Pushpa Vadera v Thomas Cook (India) Ltd*, 87 Comp Cases 921 (CLB).

- 16.2 **Necessity** : According to the Act, no right as an executor or a legatee can be established in any Court unless a Court has granted a probate of the will under which the right is claimed. This provision applies to all Christians and to those Hindus, Sikhs, Jains and Buddhists who are / whose immovable properties are situate within the territory of West Bengal or the Presidency Towns of Madras and Bombay. Thus, for Hindus, Sikhs, Jains and Buddhists who are / whose immovable properties are situate outside the territories of West Bengal or the Presidency Towns of Madras and Bombay, a probate is not required. It also applies to Parsis who are / whose immovable properties are situate within the limits of the High Courts of Calcutta, Madras and Bombay. However, Absence of a probate does not debar the executor from dealing with the estate.

- 16.3 Procedure :** To obtain a probate, an application needs to be made to the relevant court along with the will. The executor has to disclose the names and addresses of the heirs of the deceased. Once the Court receives the application for a probate, it would invite objections, if any, from the relatives of the deceased. The Court would also place a public notice in a newspaper for public comments. The petitioner would also have to satisfy the Court about the proof of death of the testator and the proof of the will. Proof of death could be in the form of a death certificate. However, in the case of a person who is missing or has disappeared, it may become difficult to prove the death. Under s. 108 of the Indian Evidence Act, 1872, any person who is unheard of or missing for a period of seven years by those who would have naturally heard of him if he had been alive, is presumed to be dead unless otherwise proved to be alive.

On being satisfied that the will is indeed genuine, the Court would grant a probate (a specimen of the probate is given in the Act) under its seal. The probate would be granted in favour of the Executor/s named under the Will. The Supreme Court has held in the cases of *Lalitaben Jayantilal Popat vs. Pragnaben J Kataria* (2008) 15 SCC 365 and *Syed Askari Hadi Ali vs. State* (2009) 5 SCC 528, that while granting a probate, the Court must not only consider the genuineness of the will but also the explanation given by the parties to all suspicious circumstances surrounding thereto along with proof in support of the same. The onus of proving the will is on the propounder. The propounder has to prove the legality of the execution and genuineness of the said will by proving absence of suspicious circumstances and surrounding the said will and also by proving the testamentary capacity and the signature of the testator. When there are suspicious circumstances the onus is also on the propounder to explain them to the Court's satisfaction and only when such onus is discharged would the Court accept the will – *K Laxman vs. T. Padmining* (2009) 1 SCC 534.

- 16.4 Opposition :** If any relative, heir of the deceased, other person feels aggrieved by the grant of a probate, then he must file a caveat before the Court opposing the will. Once a caveat has been filed, the Courts would hear the aggrieved party and he would have to prove that he would have a share in the estate of the testator if he had died intestate.

16.5 Why does one need a probate?

Other than the cases where a probate is compulsorily required, one of the questions which almost always arises in the case of a will, is “ why is the probate required?” A probate is a certificate from the High Court certifying the genuineness and finality of the will. It is the final word on whether the

will is genuine or it has been obtained by fraud, coercion, etc. Some of the reasons why a probate is required are as follows:

- (a) It is necessary to prove the legal right of a legatee under a will in a court.
- (b) Some listed / limited companies insist on a probate for transmission of shares.
- (c) Similarly, some co-operating housing societies insist on a probate for transmission of a flat.
- (d) The Registrar of Sub-Assurances would insist on a probate usually for registration of immovable properties.

However, it would not be correct to say that no transfer can take place without a probate. There are several companies, societies, etc., which do transfer shares, flats, etc., even in the absence of a probate. They may, as a precaution, insist upon a release deed from the other heirs in favour of the legatee who is the transferee. Sometimes, the company / society also asks for an indemnity from the legatee in its favour against any possible claims / law suits from the other heirs of the deceased.

16.6 Special Factors : Some of the rules in respect of obtaining a probate are as under:

- (a) For obtaining a probate, the applicable court fee stamp would be payable as per the rates prescribed in different states. For instance, for obtaining a probate in the city of Mumbai, the application has to be made to the Bombay High Court and the court fee rates prescribed under the Bombay Court-Fees Act, 1959 would apply which are as follows:

Situation	Court fees
(a) If the Property value exceeds ₹ 1,000 but is lower than ₹ 50,000	2% of the property value
(b) If the Property value exceeds ₹ 50,000 but is lower than ₹ 2,00,000	4% of the property value
(c) If the Property value exceeds ₹ 200,000 but is lower than ₹ 300,000	6% of the property value
(d) If the Property value exceeds ₹ 300,000	7.5% of the property value subject to a maximum of ₹ 75,000

- (b) A probate cannot be granted to a minor or a person of an unsound mind.
- (c) If there are more than one executors, then the probate can be granted to all of them simultaneously or at different times.

- (d) If a will is lost since the testator's death or it has been destroyed by accident and not due to any act of the testator and a copy of the will has been preserved, then a probate may be granted on the basis of such a copy until the original or an authenticated copy has been produced. If a copy of the will has not been made or a draft has not been preserved, then a probate can be granted of its contents or of its substance, if the same can be proved by evidence.
- (e) A probate petition requires the following contents:
 - (i) A copy of the will or the contents of the will in case the will has been lost, mislaid, destroyed, etc.
 - (ii) The time of the testator's death- a proof of death would be helpful.
 - (iii) A statement that the will is the last will and testament of the deceased and that it was duly executed.
 - (iv) The amount of assets which may come to the petitioner and the value for the purposes of computing the Court Fees.
 - (v) A statement that the petitioner is the executor of the will.
 - (vi) That the deceased had a fixed place of residence or some property within the jurisdiction of the Judge where the application is moved.
 - (vii) It must be verified by at least one of the witnesses to the will. It must be signed and verified by the petitioner and his lawyer.

16.7 Succession Certificate

A succession certificate is a certificate granted by a High Court in respect of any debt due to the deceased or securities owned by him. In case the deceased died living behind a will which only empowered the beneficiaries to collect his debts and securities, then the courts would grant a succession certificate instead of a probate. It merely empowers the grantee to collect the debts owed to the deceased.

XVII. Will vs. Nomination

- 17.1 **Uses** : In several cases, the deceased has made a nomination and he has also made a will. Nomination is something which is extremely popular nowadays and is increasingly being used in co-operative housing societies, depository/demat accounts, mutual funds, Government bonds/securities, shares, bank accounts, etc. Nomination is something which is advisable in all cases even when the asset is held in joint names. A question which often arises is which is superior - the will or the nomination made by the deceased member. This becomes a vexed issue for many.

- 17.2 **Legal Position** : The legal position in this respect is very clear. On the death of a person, his interest stands transferred to the person nominated by him. Thus, a nomination is a facility to provide the society, company, depository, etc., with a face which whom it can deal with on the death of a person. On the death of the person and up to the execution of the estate, a vacuum is created. A nomination aims to plug this vacuum. A nomination is only a relationship created between the society, company, depository, bank, etc. and the nominee. The nomination seeks to avoid any confusion in cases where the will has not been executed or where there are disputes between the heirs. It is only an interregnum between the death and the full administration of the estate of the deceased.
- 17.3 **What prevails** : The nomination continues only till the will is executed. Once the will is executed, the will takes precedence over the nomination. Nomination does not confer any permanent right upon the nominee nor does it create any legal right in his favour. A nominee is for all purposes a trustee of the property. He cannot claim precedence over the legatees mentioned in the will and take the bequests which the legatees are entitled to under the will.

The Supreme Court's decision in the case of *Sarbati Devi vs. Usha Devi*, 55 Comp. Cases 214 (SC), examined this issue in the context of a nomination under a life insurance policy. The Court observed as under in the context of the Insurance Act, 1938:

“..... Wehold that a mere nomination made under the Act does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the assured. The nomination only indicates the hand which is authorised to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them.”

The Bombay High Court in the case of *Gopal Vishnu Ghatnekar vs. Madhukar Vishnu Ghatnekar*, 1981 BCR, 1010, has observed as follows in the context of a nomination made in respect of a flat in a co-operative housing society:

“.....It is very clear on the plain reading of the Section that the intention of the Section is to provide for who has to deal with the Society on the death of a member and not to create a new rule of succession. The purpose of the nomination is to make certain the person with whom the Society has to deal and not to create interest in the nominee to the exclusion of those

who in law will be entitled to the estate. The purpose is to avoid confusion in case there are disputes between the heirs and legal representatives and to obviate the necessity of obtaining legal representation and to avoid uncertainties as to with whom the Society should deal to get proper discharge. Though, in law, the Society has no power to determine as to who are the heirs or legal representatives, with a view to obviate similar difficulty and confusion, the Section confers on the Society the right to determine who is the heir or legal representative of a deceased member and provides for transfer of the shares and interest of the deceased member's property to such heir or legal representative. Nevertheless, the persons entitled to the estate of the deceased do not lose their right to the same.contends that once a person is nominated and the Society transfers the share or interest of the deceased to him, he becomes the owner. If that is to be accepted it will follow that if a Society accepts a person as the heir or legal representative and transfers the share or interest to him, that person will become the owner. That obviously, cannot be the intention of the legislature. Society has no power, except provisionally and for a limited purpose to determine the disputes about who is the heir or legal representative, ft, therefore, follows that the provision for transferring a share and interest to a nominee or to the heir or legal representative as will be decided by the Society is only meant to provide for interregnum between the death and the full administration of the estate and not for the purpose of conferring any permanent right on such a person to a property forming part of the estate of the deceased. The idea of having this section is to provide for a proper discharge to the Society without involving the Society into unnecessary litigation which may take place as a result of dispute between the heirs' uncertainty as to who are the heirs or legal representatives. This being the position, the contentioncannot be accepted. Even when a person is nominated or even when a person is recognized as an heir or a legal representative of the deceased member, the rights of the persons who are entitled to the estate or the interest of the deceased member by virtue of law governing succession are not lost and the nominee or the heir or legal representatives recognized by the Society, as the case may be holds the share and interest of the deceased for disposal of the same in accordance with law. It is only as between the Society and the nominee or heir or legal representative that the relationship of the Society and its member are created and this relationship continues and subsists only till the estate is administered either by the person entitled to administer the same or by the Court or

the rights of the heirs or persons entitled to the estate are decided in the Court of law. Thereafter the Society will be bound to follow such decision. The Plaintiff, therefore, cannot be said to have become the owner of the property qua the other heirs merely by virtue of the nomination..... To repeat, a Society has a right to admit a nominee of a deceased member or an heir or legal representative of a deceased member as chosen by the Society as the member. A person who disputes the right of such person to be a member or continue to be a member of the Society will have to obtain relief in the normal Court against such person and have his rights ascertained and declared and thereafter apply to the Society on the basis of the Court judgment to make him a member of the Society. In case the Society refuses, that person will have to take appropriate proceedings against the Society's refusal.”

The Bombay High Court in another case of *Om Siddharaj Co-operative Housing Society Limited vs. The State of Maharashtra & Others*, 1998 (4) Bombay Cases, 506, has observed as follows in the context of a nomination made in respect of a flat in a co-operative housing society:

“.....If a person is nominated in accordance with Rules, the Society is obliged to transfer ‘the share and interest of the deceased member’ to such nominee. It is no part of the business of the Society in that case to find out the relation of the nominee with the deceased member or to ascertain and find out the heir or legal representatives of the deceased member. It is only if there is no nomination in favour of any person, that the share and interest of the deceased member has to be transferred to such person as may appear to the committee or the Society to be the heir or legal representative of the deceased member....”

The Supreme Court in the case of *Vishin Khanchandani vs. Vidya Khanchandani*, 246 ITR 306 (SC), examined the effect of a nomination in respect of a National Savings Certificate. The issue was whether the nominee of a National Savings Certificate can claim that he is entitled to the payment in exclusion to the other heirs. The Court examined the National Savings Certificate Act and various other provisions and held that, the nominee is only an administrative holder. Any amount paid to a nominee is part of the estate of the deceased which devolves upon all persons as per the succession law and the nominee must return the payment to those in whose favour the law creates a beneficial interest. A similar view was taken recently by the Supreme Court *Ram Chander Talwar v. Devender Kumar Talwar*, (2010) 159 Comp Cas 646 (SC) in the case of in the context of Bank Fixed Deposits.

17.4 Companies Act, 1956

17.4.1 The above position has been modified by Sec 109A of the Companies Act, 1956, which was added by the Amendment Act of 1999. Sec 109A states that any nomination made in respect of shares or debentures of a company, if made in the prescribed manner, shall, on the death of the shareholder/debenture holder, prevail over any law or any testamentary disposition, i.e., a will. Thus, in case of shares or debentures in a company, the nominee on the death of the shareholder/debenture holder, becomes entitled to all the rights to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner. In case the nominee is a minor, then the shareholder/debenture holder can appoint some other person who would be entitled to receive the shares/debentures, if the nominee dies during his minority.

The recent Bombay High Court decision in the case of *Harsha Nitin Kokate vs. The Saraswat Co-op. Bank Ltd & Ors.* 2010 Vol. 112 (5) Bom. L.R. 2014 also seems to suggest accordingly. It held that the nominee would become entitled to all the rights in the shares to the exclusion of all other persons including legal heirs. The intent behind the section 109A of the Companies Act and 9.11 of the Depositories Act is that the nomination is to vest the property in the shares which includes the ownership rights thereunder in the nominee.

17.4.2 Any person who becomes a nominee of such shares /debentures has the following two options:

- (a) He can get himself registered as the holder of those shares / debentures; or
- (b) He can transfer those shares / debentures as the deceased shareholder or debenture holder could have made.

The nominee must make an election and provide such evidence as may be required by the Board of Directors of the company on the death of the shareholder or debenture holder. In case such election is not made by the nominee, then the Board of Directors of the company can give him a notice requiring him to do so within a period of 90 days. On his failure to make an election, the Board can withhold payments of all dividends, bonuses, other money payable in respect of the share/debenture till such time as the requirements of the notice have been complied with.

In case the nominee selects the first option, i.e., he chooses to become the registered shareholder or debenture holder in place of

the deceased, then he must deliver a signed, written notice to the company, informing it of his election, along with a death certificate of the deceased. All the limitations, restrictions and provisions under the Companies Act relating to transfer and registration of the shares /debentures shall apply to this notice as if the deceased had not died and the notice was a transfer also signed by him.

- 17.4.3 The nominee becomes entitled to the same dividends and other advantages which he would have been if he were their registered holder. However, he cannot exercise any rights at meetings of the company till such time as he is taken on the register as the registered shareholder or debenture holder.

XVIII. Wills by Muslims

- 18.1 Wills by Muslims are governed by their respective Shurriyat Law. For instance, Shiyas and Sunnis have different laws. Muslim law is uncodified. The provisions of the Indian Succession Act relating to wills do not apply to Muslims. Only Muslims are permitted to execute an oral will. Other communities must make a will in writing. This is because the Muslim personal law permits such an oral will. Under Muslim law, a will is known as a “Wasiyat”. Under Muslim law, a will can be oral or written but not signed or signed but not attested.
- 18.2 One of the major restrictions on the making of a will by a Muslim is that he can bequeath only one-third of his property under the will. The balance two-thirds passes according to the Shurriyat Law. The one-third is computed after deducting the requisite funeral expenses and debts of the estate. E.g., X, a Muslim, has total assets of ₹ 10 lakhs and debts of ₹ 4 lakhs. He can only bequeath by way of a will, one-third of ₹ 6 lakhs, i.e., ₹ 2 lakhs. If X wants to bequeath more than one-third of the estate, then his heirs need to assent to the same. If they do not assent, then the bequest abets.
- 18.3 He cannot bequest property to any heir unless the other heirs consent to the same after his death. Further, a contingent bequest is void.

XIX. Wills and Other Laws

- 19.1 Although the law relating to wills is dealt with by the Indian Succession Act, 1925 several other enactments also contain provisions which affect a will in some way or the other. These may affect the manner of the bequest, the legatee, etc. Some of the important laws are as under:

(a) Income-tax Act, 1961

- (i) Any transfer of a capital asset under a will is not treated as a transfer under the Income-tax Act. The result of this is that

when the executor transfers a bequest under the will to the legatee in accordance with the will, it does not give rise to any capital gains tax liability.

- (ii) The cost of acquisition of the capital asset received by the legatee under the will shall be deemed to be the cost of acquisition of the previous owner of the asset as increased by the cost of improvement of the asset incurred or borne by the previous owner. In case the previous owner has also received the property under a will, then the cost would be the cost of that owner who has acquired the property otherwise than under a will or by any of the modes specified u/s. 49(1). E.g., X inherits an ancestral land under his father's will. His father received it under his father's will and he, in turn, received it under his father's will. The great-grandfather of X had paid ₹ 1 lakh for the property. The cost of acquisition in X's hand would be ₹ 1 lakh.
- (iii) For computing the period of holding in the hands of the legatee of a capital asset received under a will, the period for which the asset was held by the previous owner would also be included. Thus, say, if a flat is received under a will by a legatee and sold within 6 months but the same has been held by the testator for over 3 years, then the asset would be treated as a long-term capital asset. There was a judicial controversy as to the date from which indexation should be allowed in cases to which s.49(1) of the Income-tax Act. In the cases of *Meera Khare*, 2 SOT 902 (Mum ITAT) and *Mrs. Pushpa Sofat*, 81 ITD 1 (Chd. ITAT), it was held that the indexation benefit is available from the date on which the asset was acquired by the previous owner/testator, i.e., same as in the case of computing the period of holding. The case of *Smt. Mina Deogun*, 19 SOT 183 (Kol. ITAT) directly dealt with indexation available in case of a succession and held that it should be from the date of acquisition by the previous owner. However, in the case of *Kishore Kanungo*, 102 ITD 437 (Mum ITAT), it was held that the indexation benefit is available from the period of holding by the current owner, e.g., the beneficiary. This controversy has now been settled by the decision of the Special Bench of the Mumbai Tribunal in the case of *Manjula Shah* (ITA No. 7315/Mum/2007) wherein the Tribunal held that it is not logical that the cost of acquisition and the period of holding is determined with reference to the previous owner and the indexation factor is determined with reference to the date of

acquisition by the assessee. Such an interpretation will lead to absurdity and unjust results and defeat the purpose of the concept of 'indexed cost of acquisition'. In accordance with the principles of purposive interpretation of statutes, the indexed cost of acquisition has to be computed by taking into account the period for which the asset was held by the previous owner.

- (iv) The income of the deceased is taxed in the executor's hands. If there is only one executor, then he is taxed as if he were an individual. However, if there is more than one executor, then all of them are taxed as if they were an Association of Persons (AOP). Further, the residential status of the executor would be that of the deceased during the previous year in which he died. Thus, if the deceased was a non-resident, then the executor would also be a non-resident. The assessment of the executor would be in addition to and separate from his own personal assessment. Hence, an executor would have two assessments, one in a representative capacity and the other in his own capacity. In the case of *Usha D. Shah*, 127 ITR 850 (Bom), it was held that the assessment in the hands of the executor is mandatory and the Income-tax Department does not have any discretion in this respect.

The assessment in the hands of the executor shall be made for each completed previous year which begins from the date of the death of the deceased and continues till such time as a complete distribution is made to the beneficiaries according to their several interests. While computing the income of the executor, any distribution which has already been effected to a specific legatee shall be excluded from the income of the executor. The same would be taxed in the hands of the specific legatee to whom the distribution was made.

It may be noted that when a person dies, his legal representatives are liable to pay tax, on the income of the deceased up to the date of his death, which the deceased would have been liable to pay if he was alive. The legal representatives are liable to pay tax in the like manner and to the same extent as the deceased. The liability of the legal representatives is limited to the income of the period beginning from the previous year in which the deceased died and ending on the date of the death of the deceased. The income of the estate of the deceased beginning from the date of the death of the deceased till the distribution of

the estate is assessed in the hands of the executor of the deceased. Thus, in the year in which a person dies, there would be two separate assessments, the first assessment in the hands of the legal representatives for the period from the 1st of April of that year and end on the date of the death of the person. The second assessment in the hands of the executors would commence from the date of the death of the person. For instance, X died on 15th November, 2003. His executors completely distributed the estate only on 10th April, 2004. There would be two assessments for X in the Previous Year 2003-04. The first in the hands of the legal representatives would be for the period from 1st April, 2003 up to 15th November, 2003. The second assessment on the executors would be from 16th November, 2003 to 31st March, 2004. This would be the position even if the legal representatives and the executors are one and the same persons.

The term 'executor' is defined in the Act to include an administrator or other person administering the estate of the deceased. The Gujarat High Court in the case of Navnitlal Sakarlal, 125 ITR 67 (Guj) has held that the definition of executor has been given an extended meaning. It would not only include an executor as understood under the Indian Succession Act but also an administrator appointed by the Court and any other person administering the estate of the deceased. The Full Bench of the Madras High Court in the case of P. Manonmani, 245 ITR 48 (Mad), has held that these provisions apply only when a person dies after leaving a will, i.e., they do not apply to intestate deaths.

The executor is entitled to recover from the estate the tax paid by him in his capacity as an executor.

(b) **Foreign Exchange Management Act, 1999 and its Regulations**

The FEMA, 1999 and its Regulations contain certain provisions for legacies involving a resident testator and a non-resident legatee or vice versa. These are as follows:

- (i) A person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such asset was inherited from a person who was resident outside India.

- (ii) A person resident outside India may hold, own, transfer or invest in Indian currency, Indian security or any immovable property situated in India if such asset was inherited from a person who was resident in India or a person who was resident outside India.
- (iii) A Person of Indian Origin or a Citizen of a foreign state who is not a Nepalese or a Bhutanese may have inherited assets in India from a person resident outside India who acquired the assets (being immovable property, securities, cash, etc.) when he was an Indian resident. Such a Person of Indian Origin or a Foreign Citizen can remit an amount not exceeding US \$ 1 million per calendar year if he produces documentary proof in support of the legacy, e.g., a will and an undertaking by the remitter and certificate from a Chartered Accountant in the format prescribed by the Central Board of Direct Taxes.

“Assets” for this purpose include, funds representing a deposit with a bank or a firm or a company, provident fund balance or superannuation benefits, amount of claim or maturity proceeds of insurance policies, sale proceeds of shares, securities, immovable properties or any other asset held in accordance with the FEMA Regulations.
- (iv) A Non-Resident Indian or a Person of Indian Origin, who has received a legacy under a will, can remit from his Non-Resident Ordinary (NRO) Account an amount not exceeding US \$ 1 million per calendar year if he produces documentary proof in support of the legacy, e.g., a will, and an undertaking by the remitter and certificate from a Chartered Accountant in the format prescribed by the Central Board of Direct Taxes. The meaning of the term “Assets” is the same as that under (iii) above.
- (v) In case of a remittance exceeding that specified in (ii) and (iii), an application can be made to the Reserve Bank of India in Form LEG.
- (vi) A person resident outside India may acquire any immovable property in India by way of inheritance from a person resident in India or a person resident outside India who acquired the property in accordance with the prevailing foreign exchange law, i.e., FEMA or FERA.
- (vi) A person resident in India may acquire foreign securities by way of inheritance from a person resident outside India.

(c) SEBI Takeover Regulations, 1997

The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 apply in case of certain transfers in listed companies. If the prescribed threshold limits are breached then the acquirer of the shares has to make a public offer, i.e., an offer to acquire shares from the public. However, the provisions relating to making of an open offer do not apply to shares of a listed company received by an acquirer under inheritance.

XX. The Process of Preparing a Will

20.1 Chartered Accountants are the first point of contact for their clients. They are often contacted by their clients to prepare or assist them in preparing their wills. Hence, they need to be aware of the process involved in preparing a will. When a client approaches a Chartered Accountant for preparing a will, the following steps should be followed:

- (a) Ask the name, age and address of the client who wants to make the will.
- (b) Ascertain the religion of the client, for the simple reason that if he is a Muslim, then he can only bequeath one-third of his property. The balance property would pass as per his relevant Shurriyat law. In case he wants to bequeath more than one-third of his property, then he would require the consent of his heirs.
- (c) Obtain the name, age, address and relationships of the immediate family members of the testator.
- (d) Ascertain the names and relationships of the persons he wants to name as legatees in the will.
- (e) Ascertain the description of all his assets
- (f) Which legatee is to get which asset. This would be the case if there are any specific legacies. However, in case the will is going to have general legatees, then the description of the assets may not be required, e.g., the will may provide that "I leave all my property, movable or immovable to my wife".
- (g) The names of the executor / executrix / executors of the will. Great care and caution should be exercised while selecting the executors. It is always advisable to have executors who are close not only to the testator but also the legatees. It is also desirable that an alternative executor is mentioned in the will. This would take care

of unforeseen circumstances such as the executor dying before the testator or before completing the administration of the estate.

- (h) Whether the client wants to provide any alternative legatees. This is always advisable since one or more of the legatees may predecease the testator. Hence, it is a good practice to provide alternative beneficiaries, e.g., a will may provide *"I leave my house to my wife. However, if my wife predeceases me, then the house mentioned hereinabove shall go to my elder son. If both of them were to predecease me, then the house will go to my younger son."*
- (i) In case the client does not want to leave anything for a close relative who would normally be expected to receive a bequest under the will, then it may be a good idea to expressly mention the fact that the testator does not want to leave anything for that person. This would reduce allegations of fraud, etc. For instance, many wills provide that *"During my lifetime I have given adequate financial assistance to my daughter. Hence, I am not bequeathing anything further to her."*
- (j) Ascertain whether the client has any tenanted premises. Under most local Rent Control legislations, these are non-heritable, i.e., they cannot be willed away. Hence, if the client wants to include them in the will, then he must be cautioned that the same may not be possible.
- (k) Decide upon the witnesses to the will. At the risk of repetition, it must be remembered that witnesses need not know the contents of the will. They only attest the fact that the testator has signed the will in from of them. In case of an old and infirm person, it may be a good idea to have the family doctor/psychiatrist to be one of the witnesses. This would act as a barrier against allegations that the testator was mentally unstable when he made the will. The CA himself could act as one of the witnesses.
- (l) Please ensure that the will is dated. An undated will gives no proof of the time of its execution. In such a scenario, it would be difficult to find out whether the will is the latest will of the testator.
- (m) The testator should sign the will. Normally, people sign the will at the end of the will or at the beginning. It is a good practice to sign/initial each and every page of the will.

XXI. A Specimen Will

21.1 Given below is a specimen of an actual will.

LAST WILL AND TESTAMENT

I, X, aged about sixty-two (62) years, of Mumbai Hindu inhabitant, presently residing at _____, Mumbai 400 0__, do hereby make this my last Will and Testament and hereby revoke all my previous Wills, Codicils and Testamentary instruments, if any.

1. At present, my family consists of my wife Y, my son Z and my unmarried daughter A. My son Z's family consists of himself, his wife W and his minor son P and minor daughter Q. I am also the Karta of my Hindu Undivided Family known as 'X HUF', in which I have one-fourth share.
2. I am the sole and absolute owner of diverse assets, movable and immovable properties held by me in India, including bank deposits, jewellery, shares, securities, mutual fund units, household and other goods, etc., and no one else has any share, right, title, interest, claim or demand whatsoever in and/or against the same. I thus have the full right and absolute power and complete authority to make this my last Will and Testament in respect thereof and any other property or assets, whether movable or immovable, which may be substituted in their place or which may come into my possession in future.
3. I hereby appoint my wife Y and my chartered accountant, CA C as the Executors of this Will. In the event both my Executors predecease me, then my friend Dr. D shall act as the Executor of this Will.
4. I direct my Executors that after my death they shall collect and take possession and custody of all my personal estate, assets and effects due to me, and shall apply the same first towards the payment of all my liabilities, if any, my funeral expenses, and shall administer and distribute the balance of my estate according to this my last Will.
5. I am the owner of a flat situate at _____, Mumbai 400 0__, admeasuring about 200 square metres (carpet area) (hereinafter referred to as "the Flat") and own 5 shares bearing distinctive Nos. 01 to 05 covered by Share Certificate No. 01 in the Home Co-operative Housing Society Ltd. The entire amount for the Flat has been paid by me and I am the exclusive beneficial owner of the same.
6. I am the sole and absolute owner of various life insurance policies, In addition, I have fixed deposits in various banks which stand in the joint names of my wife and myself and I also have jewellery, shares, securities, mutual fund units, Public Provident Fund account, National Savings Certificates, car, etc.
7. I hereby give, devise and bequeath all my right, title and interest in the Flat to my wife Y. If, however, my wife Y predeceases me, then, this Flat shall go to my son Z.

8. I hereby give, devise and bequeath all my right, title and interest in all my movable properties, including investments, PPF, etc., now belonging to me or which I may acquire hereafter or any conversion or variation thereof, to my son Z and daughter Q equally. I also hereby give, devise and bequeath all my right, title and interest in all my immovable properties, other than those specified hereinabove, which I may acquire hereafter or any conversion or variation thereof, to my son Z and daughter Q equally.

If, however, both my son Z and daughter Q predecease me, then, all the assets bequeathed hereby me to them shall go to their respective legal heirs.

9. My wife Y owns various assets which exclusively belong to her.

IN WITNESS WHEREOF, I X, have on each sheet of this my Will set and subscribed my hand at Mumbai this 8th day of August Two Thousand Eight.

SIGNED AND DELIVERED by the withinnamed X as and for his last Will and Testament in the presence of each of us who at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses :	))))))	Testator
CA C	)	
Dr. D	)	
	)	
	)	

XXII. Recent Developments

22.1 The making of wills has witnessed some recent developments. These include the following:

- (a) **Video Will:** In this the entire process of the testator preparing the will in his own handwriting or the testator signing the will and then reading out its contents is videotaped. The advantage of a video will is that it establishes the authenticity of the will beyond a doubt. However, just because there is a videotape of the will it does not necessarily mean that it is the last will. It may be possible that the testator revoked his videotaped will by a subsequent will which was not so videotaped.
- (b) **Digital Will:** The testator bequeaths his digital assets to his legatees. The digital assets could include passwords to various

email IDs, sites, etc. This is very popular in the USA and there are sites dedicated to creating an online digital will. With a good part of business being transacted online, it makes sense to bequeath one's digital assets along with the physical assets.

- (c) **Living Will:** Again a very popular concept in the USA and something which even the US President has endorsed. As opposed to a will which speaks from the grave, a living will is to be used in a person's lifetime. The author of the will gives out a mandate to his relatives and his doctor as to how he should be treated in case he goes into a comma or is unable to use his mental faculties. Thus, it would include instructions as to the period for which the treatment should be continued, under what circumstances should it be stopped, etc. The US Courts have upheld the validity of a Living Will and held that it is not a Suicide Note. Such Living Wills have not yet been tested in Indian Courts.



PART - C:

FAMILY SETTLEMENT/ARRANGEMENT

FAMILY SETTLEMENT

I. Introduction

- 1.1 Maximum disputes take place within family members rather than among strangers. Family fights are something which India has witnessed right from the times of the Mahabharata. The fight between the Kauravas and the Pandavas is something which corporate India witnesses on a regular basis. As family businesses grow, new generations join the business, new lines of thinking originate, disputes originate between family members and gradually it gives rise to a family settlement/arrangement.
- 1.2 Corporate India has witnessed a spate of family feuds in almost all major corporate houses, such as Bajajs, Modis, Birlas, Appollo Tyres, Ranbaxy, BPL, Mafatlals, Thapars, etc. The Reliance dispute is the newest entrant to the fast growing list of family disputes.
- 1.3 A family arrangement is one of the oldest alternative dispute resolution mechanisms which is known. The scope of a family arrangement is extremely wide and is recognised even in ancient English Law. This is because the world over, Courts lean in favour of peace and amity within the family rather than family disputes.
- 1.4 In the last about 50 years, a good part of the law relating to Family Arrangement / Settlement is well settled through numerous court decisions including several decisions of the Supreme Court. It is ironic that in a country where a substantial part of businesses are run and owned by joint families, there is no legislation which governs or regulates such family settlements or arrangements. Hence, the entire law in this respect is case-law made.

II. What is a Family Settlement/Arrangement?

It is important to analyse the basic principles governing family settlement involving properties held mainly by individuals. Various Courts, including the Supreme Court of India, have laid down the basic principles relating to family arrangements.

2.1 Concepts and principles of family arrangements/settlement

From the analysis of the numerous judgments of the Supreme Court, the concepts and principles of family arrangement are summarised below :

- (a) A family arrangement is an agreement between members of the same family intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.

- (b) If the arrangement of compromise is one under which a person, having an absolute title to the property, transfers his title in some of the items thereof to the others, the formalities presented by law have to be complied with since, the transferees derive their respective title through the transferor. If, on the other hand, the parties set up competing titles and differences are resolved by the compromise, there is no question of one deriving title from the other and, therefore, the arrangement does not fall within the mischief of s. 17 read with s. 49 of the Registration Act, as no interest in property is created or declared by the document for the first time. It is assumed that the title had always resided in him or her, so far as the property falling to his or her share is concerned, and therefore, no conveyance is necessary.
- (c) A compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognising the right of the others, as they had previously asserted it, to the portions allotted to them respectively. That explains why no conveyance is required in these cases to pass the title from one in whom it resides to the person receiving it under the family arrangement. It is assumed that the title claimed by the person receiving the property under the arrangement had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary.

It does not mean that some title must exist as a fact in the persons entering into a family arrangement. They simply mean that it is to be assumed that the parties to the arrangement had an antecedent title of some sort and that the agreement clinches and defines what that title is.
- (d) A compromise by way of family settlement is in no sense an alienation by a limited owner of family property. Once it is held that the transaction being a family settlement is not an alienation, it cannot amount to the creation of an interest. For, in a family settlement each party takes a share in the property by virtue of the independent title which is admitted to that extent by the other parties.
- (e) In the usual type of family arrangement, unless any item of property which is admitted by all the parties to belong to one of them is allotted to another, there is no 'exchange' or other transfer of ownership.
- (f) By virtue of a family settlement or arrangement members of a family descending from a common ancestor or a near relation

seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honestly made.

The object of the arrangement is to protect the family from long-drawn out litigations or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family.

A family settlement is a pious arrangement by all those who are concerned. A family settlement is not within the exclusive purview of Hindus, but applies equally to various other communities also, such as Parsis, Christians, Muslims, etc.

- (g) The term “family” has to be understood in a wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have a spes successions.

It is not necessary that the parties to the compromise should all belong to one family. The word ‘family’ in the context of a family arrangement is not to be understood in a narrow sense of being a group or a group of persons who are recognised in law as having a right of succession or having a claim to a share in the property in dispute. If the dispute which is settled is one between near relations then the settlement of such a dispute can be considered as a family arrangement.

Even illegitimate and adopted children would be covered within the broader definition of the term “family”. Thus, a settlement arrived at in relation to a dispute between legitimate and illegitimate children would also be covered within the ambit of a family settlement. Children yet to be born may also be covered.

- (h) Courts have made every attempt to sustain a family arrangement rather than to avoid it, having regard to the broadest considerations of family peace and security. It is not necessary that every party taking benefit under a family settlement must necessarily be shown to have, under the law, a claim to a share in the property. All that is necessary is that the parties must be related to one another in some way and have a possible claim to the property or a claim or even a semblance of a claim on some other ground as, say, affection.
- (i) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence.

- (j) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family.
The bona fides and propriety of a family arrangement have to be judged by the circumstances prevailing at the time when such settlement was made.
- (k) Even if bona fide disputes, present or possible, which may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.
- (l) It is not necessary that there must exist a dispute, actual or possible in the future, in respect of each and every item of property and amongst all members arrayed one against the other. It would be sufficient if it is shown that there were actual or possible claims and counter-claims by parties in settlement whereof the arrangement as a whole had been arrived at, thereby acknowledging title in one to whom a particular property falls on the assumption (not actual existence in law) that he had an anterior title therein.
- (m) The consideration for such a settlement, if one may put it that way, is the expectation that such a settlement will result in establishing or ensuring amity and goodwill amongst persons bearing relationship with one another.
- (n) The family arrangement may be even oral.
- (o) A family arrangement might be such as the Court would uphold although there were no rights in dispute, and if sufficient motive for the arrangement was proved, the Court would not consider the adequacy of consideration.
- (p) If in the interest of the family properties or family peace the close relations settle their disputes amicably, the Court will be reluctant to disturb the same. The Courts lean strongly in favours of family arrangements that bring about harmony in a family and do justice to its various members and avoid, in anticipation, future disputes which might ruin them all.
- (q) The essence of a family arrangement is an agreement on some areas of dispute by the family members. The agreement is for the benefit of all the members. The ultimate aim of the agreement is to preserve amity and goodwill within the family and avoid bad blood. However, every document cannot be styled as a family arrangement. For example, if the patriarch of a family makes

a will under which he divides his personal shares in various businesses and family properties among his family members, then the same cannot be called a family arrangement as it is merely a distribution of the deceased's estate as per his will. One of the key requirements for a family arrangement is the existence of a dispute or a possible dispute. Under a will, there is no consideration for the acceptance of arrangement.

- (r) A family settlement is different from an HUF partition. While an HUF partition must involve a joint Hindu family which has been partitioned in accordance with the Hindu Law, a family arrangement is a dispute resolution mechanism involving personal property of the members of a family who are parties to the arrangement. A partition does not require the existence of disputes which is the substratum for a valid family arrangement. An HUF partition must always be a full partition unlike in a family settlement.
- (s) The question of whether a Muslim family can undergo a family settlement has been the subject matter of various judicial decisions. All of these have upheld the validity of the same.
- (t) If one of the family members voluntarily gives up his share in the joint family property, i.e., he styles a gift deed as a deed of family settlement, then it is not a case of a valid family arrangement. Any settlement which does not envisage a dispute cannot be a settlement.
- (u) If the terms of the settlement are clear and unambiguous nor are they impossible to perform, then the plea of practical inconvenience cannot be raised at the state of implementation. That factor must be considered at the state of entering into the settlement and not later.
- (v) Principles governing a family settlement are different from commercial settlement. These are governed by a special equity principle where the terms are fair and *bona fide* taking into consideration the well-being of a family. Technical considerations like the law of limitation should give way to peace and harmony in the enforcement of settlements. The duty of the Court is that such an arrangement and the terms should be given effect in letter and spirit.
- (w) Consideration is one of the important aspects of any contract. Under the Indian Contract Act, any contract without consideration is null and void. In the case of a family settlement, the consideration is the giving up of mutual claims and rights and love and affection. In India, the Courts do not enquire into the adequacy of consideration as in the case of USA.

2.2 Case Laws

Some of the important cases on the subject of family arrangement are:

- (i) *Maturi Pullaiah vs. Maturi Narasimham*, AIR 1966 SC 1836
- (ii) *Sahu Madho Das vs. Mukand Ram*, AIR 1955 SC 481
- (iii) *Kale vs. Dy. Director of Consolidation*, (1976) AIR SC, 807
- (iv) *Ram Charan Das vs. Girja Nandini Devi*, AIR 1966 SC 323
- (v) *Krishna Beharilal vs. Gulabchand*, AIR 1971 SC 1041
- (vi) *Tek Bahadur Bhujil vs. Debi Singh Bhujil*, AIR 1966 SC 292
- (vii) *S. Shanmugam Pillai vs. K. Shanmugam Pillai*, AIR 1972 SC 2069
- (viii) *Shambhu Prasad Singh vs. Phool Kumari*, (1971) 2 SCC 28
- (ix) *K. V. Narayanan vs. K. V. Ranganadhan*, AIR 1976 SC 1715
- (x) *M.N. Aryamurthi vs. M.L. Subbaraya Shetty*, (1972) 4 SCC 1
- (xi) *Raman Nadar Vishwanathan Nadan vs. S. Rasalamma*, (1969) 3 SCC 42
- (xii) *Hiran Bibi vs. Sohan Bibi*, AIR 1914 PC 44
- (xiii) *Mythili Nalini vs. Kowmari* AIR 1991 Ker. 266

2.3 Extract from Halsbury's Laws of England

An extract from the Classic treatise of Halsbury's Laws of England, 3rd End., Vol. 17 at pp. 215-216, is given below :

"The agreement may be implied from a long course of dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term "family arrangement" is applied. Family arrangements are governed by principles which are not applicable to dealings between strangers. The Court, when deciding the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is most for the interest of families, and has regard to consideration which, in dealing with transactions between persons not members of the same family, would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements."

2.4 Examples of a valid family settlement

- (a) A father has started a business in which he is later on joined by his two sons. All the assets and business interests are jointly owned by the family. After several years, disputes arise between the two sons as to who is in command and who owns which

property. This leads to a lot of bad blood and ill-will within the family. In order to buy peace and avoid unnecessary litigation, the father, the two sons and their families effectuate a family settlement under which all the businesses and properties are equally divided between the two brothers' families. This is a valid family settlement and would be recognised in a court of law.

- (b) A father and son are joint in business. The son has played an active role in the business and in creating the wealth. After many years, the two develop a bitter dispute over various issues with the result that the son wants to opt out of the business. The son gives up all his rights and interest in the family properties and in return for the same the father pays him some money. This is a valid family settlement.
- (c) There are two brothers and two operating companies, which are located in separate offices. The shares of these operating companies are held through investment companies. The offices, in turn, are owned by a property company, the shares of which are held by the two brothers. As a part of the family settlement, it has been decided to give one operating company to each brother and also to give the respective office to the respective brother. This is a valid family arrangement.
- (d) A family settlement is purported to have been executed by all the family members of a particular family. However, the married daughter has not signed the family settlement MOU. In such a case, it cannot be said that the family settlement would bind the daughter – *Sneh Gupta vs. Devi Sawarup* (2009) 6 SCC 194.

III. What properties can be covered?

- 3.1 **Types of properties** : From the various principles laid down regarding valid family arrangements, it is clear that valid family arrangements can relate to self-acquired properties, or other properties of the family. It is neither a pre-requisite nor even a necessary condition that a valid family arrangement must relate to ancestral property only.

An analysis of the various decided Case Laws reveals that even where the property involved in the family settlement was other than an ancestral property, and the family arrangements were held to be valid :

- (a) The family settlement was valid and the transaction was not a transfer for the purposes of the Gift tax. A family settlement entered into bona fide by the parties who are members of a family to put an end to disputes among themselves is not a transfer. It is not also the creation of an interest.

- (b) The property involved was that of the relatives of the partners of a firm, which firm had mounting creditors. These relatives conveyed their properties for the benefit of the creditors of the firm to discharge debts incurred by the firm. It was held that the conveyance amounted to a valid family arrangement and hence was not exigible to gift tax.
- (c) An oral family arrangement, made by father, during his lifetime, under which he directed a larger share to one son out of his self-acquired non-ancestral property was held to be a valid family arrangement.
- (d) The property involved was certain joint family land. Major part of the property was apportioned to the sons of the Karta. It was held that the transaction was a family settlement and no gift tax was leviable.
- (e) Payments promised under a family arrangement to be made to the assessee's son out of the assessee's private property, was held to be a valid family arrangement.

3.2 Case Laws : A list of some of the relevant cases is given below :

- (i) *H. H. Vijayaba, Dowager Maharani Saheb, 117 ITR, 784 (SC)*
- (ii) *S. N. Zaman, 221 ITR 842 (Gau.)*
- (iii) *Ram Kishan 120 ITR 589 (All)*
- (iv) *Narayandas Gattani, 138 ITR 670 (Bom.)*
- (v) *Ziauddin Ahmed, 102 ITR 253 (Gau.)*
- (vi) *Pappathi Anni, 127 ITR 655 (Mad.)*
- (vii) *R. Ponnammal, 164 ITR 706 (Mad.)*
- (viii) *Bandlamudi Subbaiah 123 ITR 509 (AP)*
- (ix) *Shanti Chandran, 241 ITR 371 (Mad.)*
- (x) *M. K. S. Shivrajsinhji, 18 ITD 279 (Ahd. ITAT)*
- (xi) *M. S. Mariappa, 25 ITD 53 (Mad. ITAT)*
- (xii) *Bhupati Veerabhadra Rao, 9 ITD 618 (Hybd. ITAT)*
- (xiii) *Mohd. Haroon Japanwala vs. ITO, 22 ITD 61 (Del. Trib.)*

IV. Capital Gains Tax liability

4.1 Primary Condition : U/s. 45 of the Income tax Act, 1961 "Any profits or gains arising from the transfer of a capital asset" are chargeable to capital gains tax. Thus, the primary condition for levy of capital gains tax is that there must be a "transfer" as defined in s. 2(47) of the I.T. Act. This

primary condition must be satisfied before a tax levy on a capital gain may come in (*C.A. Natarajan vs. CIT*, 92 ITR 347 (Mad.)).

4.2 **No Transfer** : A family arrangement, in the interest of settlement, may involve movement of property or payment of money from one person to another. As explained above in numerous case laws of the Supreme Court, High Courts and Tribunals, there is no “transfer” involved in a family arrangement. Therefore, there is no question of capital gains tax incidence under a family arrangement.

4.3 **Principles** : The following principles emerge from various decided cases:

- (a) The transaction of a family settlement entered into by the parties *bona fide* for the purpose of putting an end to the dispute among family members, does not amount to a “transfer”. It is not also the creation of an interest.
- (b) The assumption underlying the family arrangement is that the parties had antecedent rights in all the assets and this proposition of law leads to the legal inference that the same does not amount to any transfer of title. Section 47 of the I. T. Act excludes certain transfers and since the family arrangement is not held to be a transfer, it would not require to be listed in section 47 unlike a partition which is a transfer and had to be specifically excluded from section 45. Since section 45 can apply only to capital gains arising from transfers, family arrangements fall outside the scope of section 45, in view of the legal position that a family arrangement is not a transfer at all.
- (c) In a family settlement, the consideration for assets received is the mutual relinquishment of the rights in joint property and hence, cost of assets received on settlement is the cost to the previous owner.
- (d) Even a married daughter can be made a party to a family settlement between her paternal family members – *State of AP vs. M. Krishnaveni* (2006) 7 SCC 365. If she surrenders shares held by her pursuant to a family arrangement, then it would not be a taxable transfer – *Mrs. P. Sheela*, 308 ITR (AT) 350 (Bangl).
- (e) A family settlement is analogous to partition attracting section 49(1) hence, in case of property acquired by way of a family settlement dated 1st September, 1997 effective from 31st July, 1992, for the purposes of computing capital gains, deductions has to be allowed on indexed cost of acquisition by taking into account its fair market value as on 1st April, 1981, since the property was acquired by the previous owner before 1981 – *ACIT vs. Baldev Raj Charla & Others* (2009) 121 TTJ 366 (Del.)

V. Whether registration is required?

- 5.1 One of the main issues under a family settlement is that whether the instrument which records the family arrangement between the family members requires registration under the Registration Act, 1908 if it affects the rights or interests in immovable properties. A natural corollary of registration is the payment of stamp duty. Stamp duty is leviable as on rates as applicable on a conveyance. In most states in India, the stamp duty rates on a conveyance are the highest rates. For instance, in the State of Maharashtra, the rate of conveyance on immovable properties is 5%.
- 5.2 As with all principles which involve a family settlement, the law relating to registration of family settlement instruments have been laid down by various Supreme Court and High Court decisions. There are no express decisions on the issue of whether stamp duty is leviable. However, the decisions rendered in the context of the Registration Act are equally applicable. The principles laid down are as under:
- (a) If a person has an absolute title to the property and he transfers the same to some other person, then it is treated as a transfer of interest and hence, registration would be required. If, on the other hand, the parties set up competing titles and the differences are resolved by the compromise, then there is no question of deriving a title from another, and therefore,
 - (b) A family arrangement may be even oral in which case no registration is necessary. The registration may be necessary only if the terms of the family arrangement are reduced to writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement has already been made either for the purpose of the record or for information of the Court for making necessary mutation. In such a case, the memorandum itself does not create or extinguish any rights in immovable properties and is, therefore, not compulsorily registerable.
 - (c) A family arrangement, the terms of which may be recorded in a memorandum, need not be prepared for the purpose of being used as a document on which future title of the parties are founded. When a document is nothing but a memorandum of what had taken place, it is not a document which would otherwise require compulsory registration.
 - (d) A family arrangement as such can be arrived at orally. Its terms may be recorded in writing as a memorandum of what had been

agreed upon between the parties. The memorandum need not be prepared for the purpose of being used as a document on which future title of the parties be founded. It is usually prepared as a record of what had been agreed upon so that there be no hazy notions about it in future. It is only when the parties reduce the family arrangement to writing with the purpose of using that writing as a proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration as it is then that it would be a document of title declaring for future what rights in what properties the parties possess.

- (e) If a document would serve the purpose of proof or evidence of what had been decided between the family members and it was not the basis of their rights in any form over the property which each member had agreed to enjoy to the exclusion of the others, then in substance it only records what has already been decided by the parties. Thus, it is nothing but a memorandum of what had taken place and therefore, is not a document which would require compulsory registration under s. 17 of the Registration Act, 1908.
- (f) Registration is necessary for a document recording a family arrangement regarding properties to which the parties had no prior title. In one case, one of the parties claimed the entire property and such claim was admitted by the others and the first one obtained the property from that recognised owner by way of a gift or by way of a conveyance. On these facts, the Court held that the person derived a title to the property from the recognised owners and hence such a document would have to satisfy the various formalities of law about the passing of title by transfer.
- (g) If the document itself creates an interest in an immovable property, the fact that it contemplates the execution of another document will not exempt it from registration u/s. 17(2)(v) of the Registration Act.
- (h) If the family arrangement agreement is required to be registered and it is not so registered, then the same is not admissible as an evidence under the Registration Act, 1908 in proof of the arrangement or under the Evidence Act, 1872. However, the same document is admissible as a corroborative of another evidence or as admission of the transaction, etc.
- (i) A writing which merely recites that there has been, in the past, a partition, is not a declaration of will, but a mere statement

of fact and it does not require registration. The essence of the matter is whether the deed is a part of the partition transaction or merely contains an incidental recital of a previously completed transaction.

VI. Reorganisation of Companies and Family Settlement

- 6.1 Very often an Agreement of Family Arrangement also seeks to make the family controlled companies (whether public or private) as parties thereto so as to make the arrangement (so far as it relates to family shareholdings in such companies) to be effective and binding. The moot point here is, when there is a family settlement which involves reorganisation of some of the properties of one or more companies in the Group, whether the principles of family settlement would be applicable even to such reorganisation? In other words, when there is a transfer of a property from a company to another company or to an individual as a part of a family settlement, whether it would be correct to say that there is no transfer of the property, and therefore direct and indirect taxes would not apply? There is not much support on this aspect.

A recently reported decision in *Sea Rock Investment Ltd.* 317 ITR 253 (Karn.), dealt with the case of a company owned by the family members which was made a party to the family arrangement and which transferred shares held by it to various family members. The company claimed an exemption from capital gains by stating that it was pursuant to a family arrangement. The High Court disallowed this stand by holding that a company was a separate legal entity distinct from the family members and hence, it was liable to pay tax on this ground.

In the case of *Reliance Natural Resources Ltd v Reliance Industries Ltd*, (2010) 7 SCC 1, the Supreme Court held that a Family Settlement MOU, signed by 2 brothers who were the Chairman-cum-MD and Vice-Chairman-cum-Jt. MD of RIL at the relevant time, did not fall within the corporate domain. It was neither approved by the shareholders nor was it attached to the demerger scheme which demerged various undertakings from RIL. The Court held that technically, the MOU is not legally binding between RIL and RNRL.

It is true that a company is a separate legal entity and has an existence independent from its shareholders and therefore, in normal circumstances, the property of a company cannot be treated as that of its shareholders. However, as pointed out above in various Court judgments, Courts make every attempt to sustain a family arrangement rather than to avoid it, having regard to the broadest considerations of family peace, honour and security. If the principles of family settlement

are confined only to the properties owned by individuals and not to those owned through corporate entities, then it would not be possible to use the instrument of family settlement for settling disputes between the members of the family and it would be necessary to go through the litigations. Thus, it is respectfully submitted that a more liberal construction the narrower interpretation of this principle will defeat the very objective of family settlement particularly in the context of the modern day where the corporate structure is growing. A relook may be needed at the above decisions or else we could have a plethora of family disputes clogging the legal system. In fact, the Supreme Court in the case of *Manish Mohan Sharma vs. Thakur* 131 Comp Cases 149 (SC) has upheld the validity of a Memorandum of Family Settlement which involved the transfer of assets of a Company owned by one of the groups as a part of the MOU.

VII. Stamp Duty on other instruments

7.1 Sometimes, the parties to a family settlement may implement it through other modes, such as a Release Deed, a Gift Deed, etc. Although these are not family settlement awards in the strict sense of the term, but in the commercial sense they would also be a part and parcel of the family settlement. Hence, the stamp duty leviable on such instruments is also covered below.

7.2 Release Deed

A release deed is a document by which a person relinquishes his share or interest in a property in favour of another person. Under Art. 55 of the Indian Stamp Act, 1899 a release attracts duty at ₹ 5. However, various states have enacted their own amendments to this Article. Earlier, a release deed attracted only ₹ 200. For instance, in the State of Andhra Pradesh it is 3% of the consideration or market value whichever is higher.

The Bombay High Court, in the case of *Asha Krishnalal Bajaj* 2001 (2) Bom CR (PB) 629 held that a Release Deed is not a conveyance and only attracted stamp duty as on a release deed. In the case of *Shailesh Harilal Poonatar*, 2004 (4) All MR 479, the Bombay High Court held that a Release Deed with consideration under which one co-owner released his share in favour of another in respect of a property received under a will, was not a conveyance. Accordingly, it was liable to be stamped not as conveyance but as a released deed.

To plug this loophole, in 2005 the duty in the State of Maharashtra was increased on such instruments to ₹ 5 for every ₹ 500 of market value of the property. The 2006 Amendment Act has once again made an amendment in Maharashtra to provide that if the release is in respect

of ancestral property and is executed by or in favour of the renouncer's spouse, siblings, parents, children, grandchildren of predeceased son, or the legal heirs of these relatives, then the stamp duty would only be ₹ 200. In case of any other Release Deed, the duty is equal to a conveyance. Thus, for immovable properties, it would be @ 5% on the market value of the property. What is an ancestral property becomes an important issue. E.g., if a son releases his share in a property acquired by his deceased father, so that his mother can become the sole owner, it would not be a release of an ancestral property.

Similar provisions are found under the Karnataka Stamp Act. The duty on a release deed between family members, i.e., spouse, children, parents, siblings, wife of a predeceased son or children or of a predeceased child, is ₹ 1,000. However, in all cases of release for a consideration it is the duty as on a consideration.

7.3 Gift Deed

7.3.1 S. 2(la) of the Bombay Stamp Act, 1958 defines an "instrument of gift" to include, in a case where the gift is not in writing, any instrument recording whether by way of declaration or otherwise the making or acceptance of such oral gift. The gift could be of movable or immovable property. The term gift has not been defined and hence, one has to refer to the definition given under s. 122 of the Transfer of Property Act, which is "a transfer of certain existing movable or immovable property made voluntarily and without consideration."

An instrument of gift not being a Settlement or a Will or a Transfer attracts duty under Art. 34 of Schedule-I to the Bombay Stamp Act, 1958. A gift deed attracts duty at the same rate as applicable to a Conveyance (under Art. 25) on the Market Value of the Property which is the subject matter of the gift. Almost all States whether under the Indian Stamp Act or under their respective State Acts levy duty at the same rate as applicable to a Conveyance on the Market Value of the Property which is the subject matter of the gift.

7.3.2 The Bombay Stamp Act, 1958 provides for a concession to gifts within the family. Any gift of property to a family member (i.e., a spouse, sibling, lineal ascendant/descendant) of the donor, shall attract duty @ 2% or as specified above, whichever is less. One misconception often faced is the coverage of lineal ascendants – are females covered? Can a grandmother, mother and son be treated as a lineal line? The answer is yes, there is no law that lineal ascendancy or descendancy is limited only to male members.

All that is required is relatives in a straight line. The definition is not as wide as s. 6(1) of Companies Act or s. 56(2) of the Income Tax Act. The relatives covered under s. 56 of the Income-tax Act, 1961 but not under the Stamp Act are spouses of Siblings; Uncles and Aunts; Spouses of one's Lineal Ascendant/Descendant; Lineal Ascendant/Descendant of Spouse and their Spouses. The relatives covered by the Companies Act but not under the Bombay Stamp Act are spouses of children and grandchildren and an express provision for step-brothers and step sisters.

- 7.3.3 The Karnataka Stamp Act also provides for a concession for gifts within the family of the donor. The duty is only ₹ 1,000. However, the family definition is even narrower and only covers, spouse, child, grand children and daughter-in-law. The Rajasthan Stamp Act provides a concessional rate of 5% for gifts of immovable property) made to a real brother, son, grandson, father and husband. There is a very strong bias in favour of the male relatives and they must also be real relatives as opposed to adopted or step relatives.
- 7.3.4 A common misconception is that stamp duty is payable on the Gift-tax Valuation (done under the Gift-tax Act). It must be remembered that duty is always payable on the market value of the property and not on the basis of any valuation report.
- 7.3.5 While on the subject of gifts, one should also bear in mind the recently amended provisions of section 56(2)(vii) of the Income-tax Act, 1961, which treats the value of certain gifts received by an individual/HUF donee as his/its income. The section applies to any gift of cash, immovable property, and certain types of movable property, such as, shares, jewellery, arts and painting, etc. The CBDT is yet to prescribe the methodology for computing the value of the gift.

Any other type of movable property not specifically covered example, machinery, computers, books, etc. would be outside the purview of this section. Further, any other type of assessee, e.g. a company, an LLP, etc., would not be covered. Hence, while effecting a gift where the donee is an individual, the above provisions must be borne in mind or else the value of the gift would become his income.



PART - D:

HUF PARTITION

HUF PARTITION

I. Introduction

- 1.1 A Hindu Undivided Family is a creation of Hindu Law. It is a special feature to be found only in the case of Hindus. An HUF is formed by status and not by contract. Although there is no statutory recognition of an HUF, except under the Income-tax Act, the concept of an HUF is well known and accepted in all walks of life. In addition to Hindus, Jains, Sikhs and Buddhists can also have an HUF. One of the features of an HUF is the commonality of the shares of the members. An HUF is joint in food, worship and property.
- 1.2 An HUF consists of lineal male descendants from a common male ancestor along with their wives and unmarried daughters. However, in certain states such as Maharashtra, married daughters are also included in an HUF in some cases. An HUF can also be a part of the father's larger HUF. For instance the father's HUF may consist of the father, mother and two sons. The sons in turn may have their own families. The families of the sons would form a smaller HUF. Various Supreme Court and High Court decisions have laid down principles as to what constitutes an HUF. It has been held that a male Hindu, his wife and unmarried daughter may constitute an HUF. Further, a widow and her unmarried daughter may constitute an HUF. What is necessary is that two or more members must remain to continue the HUF. Even a husband and his wife may jointly constitute an HUF.
- 1.3 An HUF may be partitioned at some point of time for a variety of reasons, including, family disputes, separation of a family member from the joint family, taxation, etc. Whatever be the reasons for the partition, the effect is the same. Although in recent times, the importance of an HUF as an entity has diminished to a great extent, nevertheless, it is yet very important, especially in the mofussil areas.

II. What is a Partition of HUF?

- 2.1 **Meaning :** A partition involves the severance of the joint and undivided status of an HUF. It is the disintegration of the hitherto joint Hindu family. The general principle is that every Hindu family is presumed to be joint unless the contrary is proved; but this presumption can be rebutted by direct evidence or by course of conduct. It may also be defined as an exercise in defining the shares of the members of the erstwhile HUF, e.g., the father gets a one-half share, the two sons one-eight each, etc. In a Mitakshara system, prior to the partition none of the members know their personal share in the HUF. It is a constantly fluctuating and volatile status

which changes with every entry and exit of a family member. The individual shares in an HUF get determined only on a partition of the HUF. It may be noted that while determining the shares of the members is necessary, it is not important that the property is actually divided by metes and bounds among the members of the HUF. An actual physical division by metes and bounds is a formality in the partition which may or may not be carried out for the purposes of the Hindu Law. Once an HUF has been partitioned, the joint status comes to an end. Partition is the adjustment of diverse rights regarding the whole by distributing them in particular portions of aggregate.

- 2.2 **Authority** : The leading authority on the subject of partition is the Supreme Court's decision in the case of *Kalyani vs. Narayan, 1980 (Suppl) SCC 298*, which has held as under:

"Partition is a word of technical import in Hindu law. Partition in one sense is a severance of joint status and coparcener of a coparcenary is entitled to claim it as a matter of his individual volition. In this narrow sense all that is necessary to constitute partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. Such an unequivocal intention to separate brings about a disruption of joint family status, at any rate, in respect of separating member or members and thereby puts an end to the coparcenary with right of survivorship and such separated member holds from the time of disruption of joint family as tenant-in-common. Such partition has an impact on devolution of shares of such members. It goes to his heirs displacing survivorship. Such partition irrespective of whether it is accompanied or followed by division of properties by metes and bounds covers both a division of right and division of property.A physical and actual division of property by metes and bounds follows from disruption of status and would be termed partition in a broader sense."

After a partition the family members cease to be joint and hold the property as tenants-in-common. The next step is a partition by actual metes and bounds which results in the property being held in the individual names of those who receive it.

- 2.3 **Income-tax** : Since the Income-tax Act, 1961 grants statutory recognition to an HUF, it also recognises the partition of an HUF. S. 171 defines a partition to mean :

- (a) Where the property is capable of a physical division, then the physical division of such property. It must be noted that the physical division of the income without the division of the income-generating asset or property is not treated as a partition; and
- (b) Where the property is not capable of a physical division, then a division in such manner as the property admits to should be made.

However, a mere severance of status does not mean a partition of an HUF for income tax purposes.

2.4 Who is entitled to a share on partition?

Under the Hindu law every coparcener can claim a partition of the HUF. The law in this respect stands as follows:

- (i) Every adult male coparcener is entitled to a share on partition. This would include the father, the sons, the grandsons and the great-grandsons. There is a judicial controversy over whether a son can enforce a partition, if his father is joint with his brothers. In the case of an minor coparcener, a partition can be claimed if the Court is satisfied that the same is for his benefit.
- (ii) The wife of the karta cannot claim a partition of the HUF property. However, if a partition of her husband's HUF takes place, then she would be entitled to a separate share equal to that received by her son.
- (iii) In states which have amended the Hindu Succession Act, daughters married after a certain date become a coparcener in their fathers' HUF. Thus, in states such as Maharashtra, Tamil Nadu, Andhra Pradesh, etc., a daughter would get a share equal to the share which is allotted to the son (i.e., her brother). Now the Central Act has been amended and hence, all daughters would be subjected to the same rights and liabilities as her brother. For a detailed discussion please refer to Part - A on the Hindu Succession Act. The share received by her on partition becomes her personal property and she is entitled to dispose of the same by her will. However, if she dies before a partition of the HUF is effected, i.e., she dies with an interest in the coparcenary property, then her interest would devolve upon the other surviving members by survivorship and it would not follow the succession path laid down under the Hindu Succession Act.
- (iv) The partition could also be unequal, i.e., it is not necessary that each coparcener should get an equal share on the partition. The Supreme Court decision in the case of *Apporva Shantilal Shah vs. CIT*, 141 ITR 558 (SC) supports this view. If the father makes an unequal partition which is agreed to by the sons, then the same is binding.

2.5 How can the partition be effected?

A partition of an HUF can be by any of the following modes:

- (a) Oral Partition : An HUF Partition may also be oral.
- (b) By a Suit : Any member of the HUF may file a suit for partitioning the HUF. It expresses his intention to be separate from others.

- (c) By an Agreement or a Deed of Partition : The family members of the HUF can enter into an agreement regarding the severance of the joint family status. This exhibits the intention of the parties to separate.
- (d) By an Arbitration Award : The parties can also refer the matter to an Arbitrator for dividing the joint HUF property into separate property. An agreement between HUF members to appoint Arbitrators for the partition of an HUF amounts to the severance of the Joint Status from the date of the Agreement - *Kashinathsa vs. Narsinghsa*, AIR 1961 SC 1077. If a reference is made to an arbitrator for an award, then the partition is effected from the date of the reference. Merely because, the arbitrator does not give an award, a negative presumption cannot be drawn that the HUF status continues - *Ram Kali vs. Khamman Lal*, AIR 1928 All 422.

2.6 Partial Partition

The Income-tax Act, 1961 does not recognise any partial partition executed on or after 31st December, 1978 in respect of an HUF 'hitherto assessed as undivided'. Any partition of an HUF which is partial as regards the properties of the HUF and/or the persons constituting the HUF is considered to be a partial partition. For instance, the Karta of an HUF makes a partition under which one of the sons is separated from the HUF but the rest of the family continues united. This is a partial partition and not recognised under the Income-tax Act or the Wealth-tax Act. In case of a partial partition, the HUF would continue to be assessed as if it were a joint family, i.e., no partition had taken place. It is important to note that the section has application only in case of an HUF which was previously assessed as a joint Hindu family. Further, this section only applies in the first year of assessment after the partial partition takes place. Once the joint family concept is broken, even though partially, it ceases to be an undivided family and hence, in subsequent years this section cannot be invoked.

However, it needs to be noted that a partial partition of the HUF is not recognised only under for Income-tax and Wealth-tax purposes. Hindu Law yet recognises a partial partition. Hence, if taxation is not a concern, then a partial partition can still be resorted to.

III. Is Registration required?

- 3.1 The law in this respect is similar to that in respect of a Family Settlement. If the partition agreement itself creates fresh rights in an immovable property by creating a division, then the same would have to be registered. If the agreement merely records what has already happened, then the same does not require registration. An unregistered deed of partition cannot be treated as an evidence in any Court for proving the partition.

However, it can be admitted to prove the intention and the fact of the partition.

3.2 What is the Stamp Duty payable on a Partition?

Stamp duty is payable on an instrument of partition. An instrument of partition is defined under the Indian Stamp Act, 1899 to mean any instrument whereby co-owners of any property divide or agree to divide such property in severalty and includes :

- (a) A final order for effecting a partition passed by any revenue authority or any Civil Court,
- (b) An award by an arbitrator directing partition.
- (c) In addition to the above definition, some states, such as Maharashtra, West Bengal, Rajasthan, Gujarat, Karnataka, Uttar Pradesh, Madhya Pradesh, etc., have added the following additional definition to the term “instrument of partition” :

“Where any partition is effected without executing such instrument, then any instrument signed by the co-owners and recording, whether by way of declaration or partition or otherwise, the terms of such partition between themselves.”

An instrument of partition attracts stamp duty on the separated share of the property. To compute the separated share, the largest share remaining after the property is partitioned shall be deemed to be that from which the other shares are separated. If there are two or more shares of equal value then any one such share would be deemed to be that share from which the other shares are separated. The decisions in the cases of *Venkatappa Naidu vs. Musal Naidu*, AIT 1934 Mad 204 and *Patnaik*, AIR 1928 Mad 1181 support this view. To illustrate:

- (a) A partition of an HUF is made wherein there are four members and each gets an equal share. Stamp duty is levied on the 3/4th value of the property.
- (b) In the case of an unequal partition, the largest share is reduced from the value of the HUF property. In a partition where 3 members are given shares of 3/5th, 1/5th and 1/5th, the stamp duty is levied on the 2/5th value of the property.

The rate of stamp duty is to be applied on the value of the separated share, determined in the manner mentioned above. Some states like Maharashtra expressly mention that the value should be the market value and not just the agreement or book value. The rate of stamp duty as on a partition varies from state to state. For instance, the rate of stamp duty applicable in Maharashtra on an HUF partition is 2%.



PART - E:

GUARDIANSHIP OF HINDU MINORS

GUARDIANSHIP OF HINDU MINORS

I. Introduction

- 1.1 One oft-forgotten piece of legislation is the Hindu Minority and Guardianship Act, 1956. This Act lays down the law relating to minority and guardianship of Hindus and the powers and duties of the guardians. It overrides any Hindu custom, tradition or usage in respect of the minority and guardianship of Hindus. This Act is very important since it places certain restrictions on the property belonging to Hindu minors. These restrictions need to be borne in mind while effecting a family arrangement or other transactions.

1.2 Application

The Act applies to :

- (i) Any person who is a Hindu, Jain, Sikh or Buddhist by religion
- (ii) Any person who is not a Muslim, Christian, Parsi or a Jew.
- (iii) Any person who becomes a Hindu, Jain, Sikh or Buddhist by conversion or reconversion.
- (iv) A Legitimate/Illegitimate child whose one or both parents is a Hindu, Jain, Sikh or Buddhist by religion. However, in case only one parent is a Hindu, Jain, Sikh or Buddhist by religion, then the child must be brought up by such parent as a member of his community, family, etc.

The Act applies to property of a Hindu minor. A minor is defined to mean a person who has not completed the age of eighteen years. The term minor includes a minor male as well as a minor female.

II. Guardians and Natural Guardians

Since the Act deals with the powers and duties of 'guardians' and 'natural guardians' of Hindu minors, it would be relevant to examine the meaning of these two terms.

- 2.1 **Guardian** : A guardian means a person who has the care of the minor or of his property or both. Further, the term also includes, the following :
- (a) A natural guardian
 - (b) A guardian appointed by the will of the minor's father or mother
 - (c) A guardian appointed or declared by a Court
 - (d) A person empowered to act as a guardian under any law relating to any Court of Wards.

The definition of a guardian is an exhaustive as well as an inclusive definition. A guardian could be in charge of the minor himself or his property or both, i.e., the minor and his property. Since the enactment of this Act, a person can be called a guardian of a Hindu minor male or female only if he falls within one of the enumerated categories. A minor cannot be appointed as a guardian in respect of any minor's property. However, a guardian cannot be appointed for the minor's undivided interest in a joint family property if the property is under the management of an adult member of the family. Since the interest in an HUF property is not separate or divisible from the rest of the shares, it is not possible to segregate the interest of one member from another. However, it is expressly provided that the Court can appoint a guardian in respect of such undivided interest in a joint family property.

2.2 Natural Guardian : The term natural guardian is of great significance since most of the provisions of the Act deal with the rights and duties of a natural guardian and hence, it is necessary to know the meaning of this term. A natural guardian of a Hindu minor's person and /or property is defined under the Act to mean the following :

- (a) If he is a boy or an unmarried girl, then the father and after him the mother. In case the minor is below the age of five years, the child's custody ordinarily vests with the mother. However, this could be modified based on the facts and circumstances of each case. The expression, 'after the father' has been a subject of great controversy. The mother could become the natural guardian of the minor not only if the father is dead but even in other circumstances. Even if the father refuses to be the natural guardian the mother can take over as the natural guardian. The rule that first the father would be appointed as the natural guardian can be modified in specific cases as held by various judgments. The Court would be driven by the welfare of the minor since that is the paramount consideration. The decisions of the Supreme Court in the case of *Mohini vs. Virendra Kumar* (1977) 3 SCC 513 and *Surinder Kaur Sandhu vs. Harbax Sing Sandhu* (1984) 3 SCC 698 and various other High Court cases have laid down this proposition.
- (b) In the case of an illegitimate boy or an illegitimate unmarried girl, the mother would be considered the natural guardian and after her, the father.
- (c) In the case of an married minor girl, the husband would be the natural guardian.

The term 'father' and 'mother' do not include a step-father and step-mother. However, in the case of an adopted minor son, the adoptive father is the

natural guardian and after him, the adoptive mother. Thus, the position of an illegitimate minor and an adopted minor son stand on different footings. Interestingly, the Act makes no provision for an adopted minor daughter. However, a reference may be made to the Hindu Adoptions and Maintenance Act, 1956 which now places a legal recognition on the adoption of daughters by Hindu. A combined reading both the Acts would seem to suggest that even in the case of an adopted minor daughter, the adoptive father and after him, the adoptive mother would be the natural guardian.

The following persons are disqualified from becoming natural guardians :

- (a) If the person has ceased to be an Hindu.
- (b) If he has completely and finally renounced the world, i.e., he has become a hermit or an ascetic.

Further, a person cannot be a natural guardian in respect of the undivided interest of the minor in the joint family property. Thus, the Act would not apply to the interested joint family property of a Hindu minor.

III. Powers of natural guardian

3.1 The Act places certain restrictions on the powers of a natural guardian. These restrictions are the crux of the Act. It is the most important provision of the Act, and should be borne in mind in all transactions involving properties of Hindu minors. Thus, if in a family settlement, a Hindu minor's property is to be involved, then the natural guardian needs to consider these provisions. The restrictions on the powers of the natural guardian are as follows :

- (a) The natural guardian of a Hindu minor has the power to do all acts which are necessary or reasonable and proper for the minor's benefit or for the realisation, protection or the benefit of the minor's estate. However, the natural guardian cannot bind the minor by a personal covenant. Thus, the natural guardian of a minor can acquire property, whether by lease or by purchase, for the minor's benefit.
- (b) The most important restriction placed by the Act on the natural guardian relates to his immovable property. A natural guardian cannot without the prior permission of the Court enter into the following transactions, for or on behalf of the minor:
 - (i) Mortgage or charge or transfer, by way of sale, gift, exchange or in any other mode, any part of the immovable property of the minor.

- (ii) Lease any part of the immovable property of the minor for a period exceeding five years or for a term which would extend to a period more than one year beyond his majority.

Even if the above transactions are for the purported benefit of the minor, the natural guardian would require the prior permission of the Court. The permission must be obtained before entering into the transaction. The effect of these provisions is that in all cases where an absolute interest is to be created in the minor's immovable property, the Court permission would be required. However, if a leasehold interest is to be created then the permission is only required if the lease period exceeds five years.

- (c) Any transaction involving disposal of the minor's immovable property without obtaining the Court's prior permission for the purposes mentioned above is voidable at the instance of the minor or any person claiming under him. Thus, the transaction is not void *ab initio* but voidable at the minor's option.
- (d) The Court would only grant the permission to the natural guardian, if it is proved that the disposal is a necessity or it is for an evidence advantage to the minor. If the Court is not satisfied on this count, then it would not grant a permission for the disposal. In granting its permission, the Court would observe the provisions of the Guardians and Wards Act, 1890 and the procedure specified thereunder. The procedure specified under that Act for obtaining a permission from the Court is as under:
 - (i) The Court's order must clearly specify what is the necessity of the disposal or the advantage which would accrue to the minor.
 - (ii) While granting its permission, the Court may attach such conditions as it deems fit, which may include the following:
 - (A) that any sale of the property would require the sanction of the Court or any person appointed by the Court and a prior proclamation of the sale;
 - (B) that any lease shall be on the terms and conditions decided by the Court, including the rent, the duration, the covenants, etc.
 - (C) that the Court may direct that the proceeds or any portion of it would be deposited with the Court either for disbursement or for investing in such securities as the Court may prescribe.

- (iii) Before the Court would grant its permission, it may give a notice to any friend or relative of the minor and invite objections.
- (e) A person cannot dispose of the property of the minor even on the ground that he is the *de facto* guardian of the minor. The earlier Hindu law recognised the concept of a *de facto* guardian which is no longer valid.

IV. Testamentary Guardian

4.1 In the following situations, a testamentary guardian may be appointed for the minor, i.e., a guardian appointed under a will :

- (a) A Hindu father who can act as the natural guardian of his legitimate children, can appoint a guardian by his will. Such a guardian could be for the minor and/or for his property. Such an appointment would be invalid if the father dies before the mother, because in such a case the mother would take over as the natural guardian. However, once the mother dies and if she dies without appointing a person as the guardian under her will, then the father's testamentary guardian would be revived.
- (b) A Hindu mother who can act as the natural guardian of her legitimate children, either because she is a widow or because her husband is not entitled to act as the natural guardian, can also appoint a guardian by her will. Such a guardian could be for the minor and/or for his property.
- (c) A Hindu mother who can act as the natural guardian of her illegitimate children can also appoint a guardian by her will. Such a guardian could be for the minor and/or for his property. It is interesting to note that the father has no right to appoint a testamentary guardian in respect of his illegitimate children.
- (d) The testamentary guardian is subjected to a dual set of restrictions. Firstly, those specified in the will appointing him and secondly, those contained in the Act which apply to natural guardians. Thus, the testamentary guardian is subjected to the restrictions on sale of immovable property just as a natural guardian would be. The rights of the testamentary guardian would be the same as that of a natural guardian.
- (e) In case the minor is a girl, then the rights of the testamentary guardian would end on her marriage.



PART - F:

ADOPTION OF HINDUS

Hindu Adoption and Maintenance Act, 1956

I. Introduction

- 1.1 Although the Hindu Adoptions and Maintenance Act, 1956 ("the Act") is not a piece of commercial or corporate legislation but its importance in today's business world is being felt because of family separations and family feuds becoming the order of the day the Act. With an increasing number of families adopting children, the question often arises as to whether the adopted child is entitled to succeed the father in the business, etc. In several cases questions such as whether the adoption was valid, what happens if the adopted father has subsequently a natural child, etc. are raised. Hence, it becomes essential to examine this Act. This is all the more true in a country such as India where a great number of businesses are family owned or controlled.
- 1.2 Although a great deal of the Hindu Law is based on customs and usages, certain portions have been codified. The Act is one such instance of codified law. It would hence, overrule any text, custom, usage of Hindu Law.

II. Application

- 2.1 The Act applies to :
 - (i) Any person who is a Hindu, Jain, Sikh or Buddhist by religion.
 - (ii) Any person who is not a Muslim, Christian, Parsi or a Jew.
 - (iii) Any person who becomes a Hindu Jain, Sikh or Buddhist by conversion or reconversion.
 - (iv) A Legitimate/Illegitimate child whose one or both parents is a Hindu, Jain, Sikh or Buddhist by religion. However, in case only one parent is a Hindu, Jain, Sikh or Buddhist by religion, then the child must be brought up by such parent as a member of his community, family, etc.
 - (v) Any child, legitimate or illegitimate, who has been abandoned both by his father and mother or whose parentage is not known and who in either case is brought up as Hindu, Buddhist, Jain or Sikh. This is a very important clause which was added by the Amendment Act of 1945. The reason by this amendment was explained that only a Hindu can be adopted. As the religion of an abandoned child or of a child whose parentage is not known

cannot be ascertained, it is proposed to amend the Explanation to section 2(1) of the Act to the effect that a child, legitimate or illegitimate who has been abandoned by both of his parents or whose religion is not known but who in either case is brought up as Hindu will be a Hindu by religion.

- 2.2 The Act does not apply to members of Scheduled Tribes unless the Government so directs.

III. Manner of making adoptions

- 3.1 Any adoption by or to a Hindu must be made in accordance with the provisions of the Act. It is interesting to note that in case the adoption is not in accordance with the Act, then it shall be void. The consequences of a void adoption are :

- (a) it does not create any rights in the adoptive family in favour of the adopted child; and
- (b) his rights in the family of his natural birth also subsist and continue.

Thus, in a case of a void adoption, the adopted child would not be entitled to any inheritance or succession benefits in his adopted family.

- 3.2 The prerequisites of a valid adoption u/s. 6 are as follows :

- (a) the adopter is capable of and has a right of adopting under the Act;
- (b) the adoptee is capable of being taken in adoption under the Act;
- (c) the person giving the adoptee is capable of doing so under the Act; and
- (d) all other conditions specified under the Act have been fulfilled.

IV. Capacity of adopter

- 4.1 A male Hindu is capable of adopting a son or daughter :

- (a) if he is of sound mind;
- (b) if he is a major, i.e., he is above 18 years of age;
- (c) if he has a wife, he shall not adopt except with the consent of his wife, unless she has renounced the world or ceased to be a Hindu or has been declared to be of unsound mind. If he has more than one wife, then the consent of all such wives is required. The wife's consent must be obtained before the adoption and not after it. The proviso mandates the consent as a condition precedent to adoption and hence subsequent consent cannot validate the adoption. In

Kashibai w/o. Lachiram vs. Parwatibai w/o. Lachiram 1995 SCC (6) 213, has held that the wording is mandatory and an adoption without wife's consent would therefore be void.

Now a Hindu can adopt a son or a daughter. Under the old law, adoption of a daughter was invalid except where it was customarily accepted among certain parts of India.

- 4.2 Under the following circumstances the wife's consent is not necessary :
- (i) where the wife completely and finally renounces the word;
 - (ii) where the wife ceases to be a Hindu; and
 - (iii) where the wife has been declared by a court of competent jurisdiction to be of unsound mind. In such circumstances, the husband can do away with the wife's consent.
- 4.3 A female Hindu is capable of adopting a son or daughter :
- (a) if she is of sound mind;
 - (b) if she is a major, i.e., above 18 years of age;
 - (c) if she either is not married or her husband is dead/been declared of unsound mind/has renounced the world/ceased to be a Hindu or her marriage has been dissolved.

Thus, a Hindu married woman whose husband does not suffer from any of the disabilities specified above would not be able to adopt a child on her own without her husband's consent.

V. Capacity of adoptee

- 5.1 A person may be adopted if :
- (a) he is a Hindu;
 - (b) he has not been already adopted;
 - (c) he has not been already married, unless a custom or usage permits married people to be adopted; and
 - (d) he must be below 15 years of age, unless a custom or usage permits persons above 15 years to be adopted.

The above conditions equally apply to females.

One of the most relevant conditions to be borne in mind is that the adoptee must be below 15 years of age.

VI. Capacity of person giving in adoption

6.1 The person giving the child in adoption can do so if he fulfils the following conditions :

- (a) Only the natural father or mother or the guardian of a child can give him in adoption.
- (b) The natural guardian can give consent for adoption to any person including himself, under the following situations :
 - (i) the natural father and mother are dead, have renounced the world, abandoned the child, been declared of unsound mind, etc.;
 - (ii) the City Civil Court has granted permission for the same;
 - (iii) before granting permission the Court will have to be satisfied about the welfare of the child and other factors.

VII. Conditions for a valid adoption

7.1 The additional conditions for a valid adoption are as follows :

- (i) If the adoption is of a son/daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu son/daughter, grandson/granddaughter or great grandson/granddaughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;
- (ii) If the adoption is by a male and the person to be adopted is a female, the adoptive father is at least 21 years older than the person adopted;
- (iii) If the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least 21 years older than the person to be adopted;
- (iv) The same child may not be adopted simultaneously by two or more persons;
- (v) The child to be adopted must be actually given and taken in adoption by the parents or guardians concerned or under their authority with intent to transfer the child from the family of its birth or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up to the family of its adoption.

VIII. Effect of adoption

- 8.1 From the date of adoption the child will be considered to be the natural child of the adoptive family and all the ties with the original family are severed. The 3 exceptions to this Rule are :
- (i) the child cannot marry any person whom he could not have married had he continued in the original family of his birth;
 - (ii) that the adopted child is not deprived of the estate vested in him or her prior to his/her adoption when he/she lived in his/her natural family subject to any obligations arising from such vesting of the estate; and
 - (iii) that the adopted child shall not divest any persons in the adoptive family of any estate vested in that person prior to the date of adoption.
- 8.2 A valid adoption once made cannot be cancelled by the adoptive father or mother or any other person. Further, the adopted child also cannot renounce his adopted parents and return back to his natural family.
- 8.3 The Act also empowers the adoptive parents to dispose of the property of their child either *inter vivos* or by way of a will.



PART - G:

FREQUENTLY ASKED QUESTIONS

FREQUENTLY ASKED QUESTIONS

Q1. Is a person legally required to make a will?

- A. No, there is no compulsion under any law which requires a person to make a will. If a person does not want to make a will, then there is no provision which can compel him to do so.

Q2. What happens if a person dies without making his will?

- A. If a person dies intestate, i.e., without making a will, then his property passes as per the relevant succession law. Hindus, Jains, Sikhs and Buddhists are governed by the Hindu Succession Act; Muslims as per their relevant Shurriyat Law; Parsis, Christians, Jews and others by the Indian Succession Act.

Q3. If a person makes a will, then does it mean that there would be no inheritance disputes?

- A. A will does not mean that there would be no disputes over inheritance issues after the person dies. Relatives and heirs of the deceased could challenge the will in a Court. However, preparation of a will definitely minimises disputes because not everyone is interested in challenging a will in a Court.

Q4. Once a will is made is it final for ever?

- A. This only happens in the movies. A will is revocable as often as the person making it desires. There is no limit to the number of times a will can be modified. Ultimately, it is the last surviving will which takes effect. (Part B, para 4.1(e))

Q5. Can a female make a will?

- A. Yes, a female can make a will.

Q6. Can an insane person make a will?

- A. One of the prerequisites for making a will is that the person must be of sound mind, he must be capable of understanding the contents of the will and what he is doing. A person who is ordinarily insane with intervals of saneness can make a will when he is sane. Similarly, a person who is ordinarily sane with intervals of insanity can make a will when he is sane. A person who is a lunatic or who is always insane cannot make a valid will and thus, he would die intestate in respect of his property. (Part B, para 5.1)

Q7. How much stamp duty is payable on a will?

- A. No stamp duty is payable on a will. A will can be prepared on a simple paper. (Part B, para 4.1)

Q8. What is the legal format of a will?

- A. There is no legal format for a will nor does it require any prescribed clauses. It could even be in the person's own handwriting on a simple paper. All that is required is that the intention of the person who made the will must be clear from the will. (Part B, para 4.1)

Q9. Can a person's share in his HUF be included in the will?

- A. Yes, s. 30 of the Hindu Succession Act, 1956 now expressly permits an Hindu to include his share in the HUF in the will. (Part B, para 6.5)

Q10. Can a person distribute everything he owns before he dies, i.e., can he leave nothing for the will?

- A. Yes, a person may distribute all his property in his lifetime with the effect that he is left with nothing to include in the will. In such a case, he need not make a will because he has nothing to bequeath. However, such an extreme step must be taken only after a lot of thinking because the person would then be left without any resources to sustain himself.

Q11. Can a Muslim make a will?

- A. Yes, a Muslim can make a will but only in respect of one-third of his property. The balance property passes as per the relevant Shurriyat Law. If a Muslim wants to will away property in excess of one-third of his estate, then he needs the consent of his heirs. (Part B, para 18.1)

Q12. Can a person make an oral will?

- A. Only a Muslim can make an oral will. A person belonging to any other community cannot make an oral will. Certain wills, known as privileged wills, which are made by soldiers engaged in a warfare, can be oral provided they satisfy the specified conditions laid down. (Part B, para 7.2)

Q13. If a person cannot sign the will, can he yet make a will?

- A. Yes, he can affix his thumb impression on the will. However, if due to some reasons (e.g., in case a person has lost both his hands), the person is neither able to sign nor affix his impression, then some other person may sign it in his presence and under his direction. (Part B, para 7.3)

Q14. Is it necessary that the will must leave the estate only to one's relatives? Can a person make bequests (i.e., the property which flows under the will) to friends, servants, etc.?

- A. A person who is not a Muslim can leave his estate to any one he desires. This could be his close relatives, distant relatives, friends, employees, servants, etc. There is no restriction on who could be the legatee or a beneficiary under a will. (Part B, para 8.1)

Wills by Muslims are governed by their personal law. (Part B, para 18.1)

Q15. What do you mean by an executor of a will?

- A. An executor of a will is the person who carries out the wishes of the deceased in accordance with the will. He is the person who distributes the estate to the legatees, pays the debts, meets the funeral expenses of the deceased, etc. (Part B, para)

Q16. Can the executor receive a bequest?

- A. Yes, however, he must show his intention to act as an executor. There must be some act on his part which would demonstrate his intention to act as an executor. (Part B, para 9.6(g))

Q17. Do you need witnesses for a will?

- A. Yes, every will must be attested by at least two witnesses. (Part B, para 7.3)

Q18. What factors should you consider while selecting an executor?

- A. Briefly, some of the factors which should be considered while selecting an executor for a will are as follows:
- (a) The executor must always be taken into confidence before writing his name as an executor in the will. Hence, taking a person's consent to act as an executor is advisable. However, the same is not compulsory.
 - (b) It is desirable to appoint a person who is close not only to the testator but also to all or most of the beneficiaries and heirs.
 - (c) One practical factor to be considered is that the executor himself must not be very old. If he predeceases the testator or dies immediately after the testator, then there would be a problem.
 - (d) There is no bar on who can be appointed as an executor under a will, it could be an individual, a firm of lawyers or chartered accountants, a bank, a company, etc. (Part B, para 9.2)

Q19. What factors should you consider while selecting a witness?

- A. The only role of a witness is to attest the fact that the testator signed the will in his presence. Normally, a professional, such as a lawyer, a chartered accountant or a doctor, who is known to the testator is requested to act as a witness. This can act as a barrier against the claims that the testator was mentally unstable when he made the will. An executor of the will can be a witness. It is generally advisable to select such witnesses who are of reputable character and of some standing. (Part B, para 7.3)

Q20. Can the witnesses receive a bequest?

- A. Generally, a witness and /or his spouse cannot be made a beneficiary under the will as any bequest in their favour would be void. These

provisions are not applicable to a will made by a Hindu, Sikh, Jain or Buddhist. Hence, if a person of any of these four religions makes a bequest to any of the attesting witnesses to the will, then the bequest would not be void. (Part B, para 7.3)

Q21. Does one always need a lawyer or a chartered accountant to make a will?

- A. No, one can make a will without any legal /professional help. A will could even be in a person's own handwriting in a language which he understands and in terms which he is familiar with.

Q22. Do the witness need to know the contents of the will?

- A. No, the witnesses only attest the fact that the testator has signed the will in their presence. They do not need to know the contents of the will. (Part B, para 7.3)

Q23. Does a will need to be registered?

- A. No, a will need not be registered. However, registration raises a strong presumption in favour of its genuineness. But at the same time, non-registration does not mean that the will is not genuine. (Part B, para 15.1)

Q24. Should every page of the will be signed?

- A. There is no requirement that every page of the will should be signed. Normally, the last page of the will is signed. Wills prepared in the vernacular language bear the testator's signature in the beginning. However, signing or at least initialing every page is advisable. This would prevent someone from replacing one or more pages of the will.

Q25. Can a will leave everything to charity?

- A. A person may during his lifetime give away all his property to charity. However, the position is different after a person's lifetime. Any person, who is not a Parsi, and who has a nephew or a niece or any nearer relative, does not have any power to bequeath his property to religious or charitable uses, unless the following conditions are satisfied:
 - (i) The will must be executed at least twelve months before his death;
 - (ii) It must be deposited within six months from its execution in some place provided by law for the safe custody of the wills. The procedure for deposit of the wills is laid down in the Registration Act, 1908. (Part B, para 10.2(g))

Q26. Is a will effective during the lifetime of a person?

- A. No, a will only takes effect once a person dies. That is why it is often said that a will speaks from a person's grave. Till a person is alive, it has no

effect and the person can revoke or change it as often as he desires. (Part B, para 2.2)

Q27. Can a will exclude the nearest heirs of a person, e.g., son, wife, etc.

- A. Yes, a will can exclude all near relatives and heirs and bequeath the property to distant relatives or friends or servants.

Q28. Can a person bequeath the property to a minor, lunatic, idiot?

- A. Yes, any person can be a beneficiary or a legatee, including a minor, lunatic, idiot, etc. However, it is advisable to settle the bequest in trust for such a person.

Q29. What happens if a will is obtained at a gunpoint or by fraud?

- A. One of the conditions for a valid will is that it must not be obtained by fraud or coercion or undue influence. Hence, if a will is obtained at a gunpoint or by perpetuating a fraud, then the will is invalid. Firstly, the testator can revoke such a will. Secondly, if he dies leaving such a will and it is proved that the will was obtained by coercion or fraud, then it would be treated as if he died intestate, i.e., without making a will. (Part B, para 5.3)

Q30. Can a tenanted property be given away under a will?

- A. Rent Control Legislations in most states contain a provision that the tenanted property cannot be willed away and they contain a specific provision for their succession. (Part B, para 6.3)

Q31. How can a soldier fighting at a war make a will?

- A. A soldier at war is given certain privileges in making a will and hence, his will is known as a Privileged Will. (Part B, para 7.2)

Q32. Is it possible for an Indian who is abroad to make a will regarding his property in India?

- A. Yes, his will can cover his property in India.

Q33. Can an illiterate make a will?

- A. Yes, an illiterate can make a will provided he understands the contents of the will. He can affix his thumb impression if he cannot sign his name. However, it must be ensured that he understands the bequests, legatees, etc. Thus, the contents of the will must be truly and accurately read out and explained to the testator.

Q34. How does one verify the authenticity of a will, in case two or more wills are produced?

- A. In such a case, the executors of the wills would have to file a probate

application in the Court. The Court would then invite all relatives, etc., hear all objections and decide the validity of the last will.

Q35. Can a will dispute be settled out of court or is it always necessary to fight a case?

- A. A dispute over a will can be settled out of court. This may or may not amount to a family settlement. However, settling the disputes does not mean that the genuineness of the will is proved. If a probate is otherwise required, e.g., for registering a property, then the same would still be required.

Q36. What happens if the Executor dies before the person making the will?

- A. In such a case, the testator would have to name some other person as the executor. Hence, it is a good practice to always provide for alternative executors.

Q37. Can a will be made for any amount, however small it may be, or is there a minimum limit?

- A. A will can be made for any amount or any property. There is no minimum or maximum limit. All that is required is that the person should have some property.

Q38. Does a will need to specifically mention every property of the person making the will?

- A. No, a person can make a will, where he gives only a general description of his property. E.g., a will can be made stating "I leave all my property, movable and immovable to my wife". This is a valid will.

Q39. What prevails, a will or a nomination?

- A. The nomination seeks to avoid any confusion in cases where the will has not been executed or where there are disputes between the heirs. It is only an interregnum between the death and the full administration of the estate of the deceased. The nomination continues only till the will is executed. Once the will is executed, the will takes precedence over the nomination. Nomination does not confer any permanent right upon the nominee nor does it create any legal right in his favour. (See Part B Para XVII for a detailed discussion).

Q40. What is a probate?

- A. A probate means a copy of the will certified by the seal of a court. Probate of a will establishes the authenticity and finality of a will and validates all the acts of the executors. It conclusively proves the validity of the will

and after a probate has been granted no claim can be raised about the genuineness or otherwise of the will. (See Part B Para XVI for a detailed discussion)

Q41. What are the costs involved in obtaining a probate?

- A. Filing a probate application involves payment of Court Fees on the petition according to Court Fees Act applicable in the place where the application is filed. For instance, in Mumbai, the maximum Court Fees for a probate application is ₹ 75,000. In addition, the fees of the solicitors and advocates would be payable.

Q42. What is the tax treatment of an asset received under a will?

- A. Any transfer of a capital asset under a will is not treated as a transfer under the Income-tax Act. The result of this is that when the executor makes a bequest under the will to the legatee in accordance with the will, it does not give rise to any capital gains tax liability. The cost of acquisition of the capital asset received by the legatee under the will shall be deemed to be the cost of acquisition of the previous owner of the asset as increased by the cost of improvement of the asset incurred or borne by the previous owner. For computing the period of holding in the hands of the legatee of a capital asset received under a will, the period for which the asset was held by the previous owner would also be included. (Part B, para 19.1)

Q43. How does the property pass if a Hindu male dies without making a will?

- A. The property would pass according to the Hindu Succession Act. It would go to the heirs of the Hindu male in the order of Class I Heirs, Class II Heirs, Agnates and Cognates. (Part A, para 2.1)

Q44. How does the property pass if a Hindu female dies without making a will?

- A. An intestate Hindu female's property devolves on her heirs as specified below :
 - (a) Firstly, upon her sons and daughters (including the children of any predeceased children) and husband
 - (b) Secondly, upon the heirs of her husband
 - (c) Thirdly, upon her parents
 - (d) Fourthly, upon the heirs of her father
 - (e) Fifthly, upon the heirs of her mother
 (Part A, para 3.3)

Q45. Does a daughter have a share in her father's HUF?

- A. Certain states have made an amendment to the Hindu Succession Act, according to which a daughter married after the date specified in the amendment would be entitled to a share in her father's HUF. She would become a coparcener and would get a share equal to her brother. For example, Maharashtra, Andhra Pradesh, Tamil Nadu, etc. have already made such amendments. An amendment to the Act which would apply to the whole of India has been recently proposed.

Q46. Can a person have a will for some properties and be intestate for the rest?

- A. If a person's will is very specific, i.e., it only covers certain properties without a residuary clause, then the will would apply only in respect of the properties specified therein. For the balance properties, he would be treated as if he died intestate.

Q47. What happens if a will does not have a date?

- A. Ultimately it is the last will of the deceased which takes effect. During the lifetime of the testator, the will is ambulatory, i.e., it keeps changing. The only way to ascertain whether the will is the last will is from the date on the will. If the will is undated it would be difficult to find out whether or not it is the latest will. However, if there is no other will then an undated, uncontested will should not pose a problem.

Q48. Does a will need to be changed because of a person's marriage?

- A. Generally, every will is revoked by the testator's marriage. This is true whether the testator is a male or a female. However, the provisions relating to revocation of a will on marriage of the testator do not apply to Hindus, Sikhs, Buddhists and Jains. It may be noted that there is no impact on a will because of a beneficiary's marriage. Thus, a will made by persons belonging to these communities does not require any alteration. (Part B para 14.2) The law in respect of wills made by Muslims is governed by the Muslim personal law.

Q49. Do the executors need to know the contents of the will before the testator dies?

- A. No. It is entirely the testator's discretion on whether or not he wants to divulge the contents to the executors.

Q50. Is it compulsory for a person to make a nomination?

- A. No, although the same is definitely advisable. There is no legal compulsion to nominate a person for a flat, for shares, etc. (See Part B Para XVII)



NOTE

[illegible]