Knowledge Consortium of Gujarat
Department of Higher Education, Government of Gujarat
JOURNAL OF MULTI-DISCIPLINARY
ISSN : 2279-0268

Year-1 | Issue-5 | Continuous issue-5 | March-April 2013

Will under the Indian Law

Will is the legal declaration of a person's intention which he wishes to be performed after his death and once the Will is made by the testator it can only be revoke during his lifetime. A person cannot give his ancestors property in the form of a Will but he can make a Will only of his Self-Acquired property. A Will does not involve any transfer, nor affect any transfer inter-vivos, but it is an expression of intending to appoint a person who will look after the properties after his (Testator) death. A Will regulates the succession and provides for succession as declared by the testator.

Historical Background of 'Wills': As the time rolled the emergence of the Will became more popular, Indian Law which is governed under 'Section: 5' of "The Indian Succession Act, 1925" which provides different rules for intestate succession and testamentary succession in India. It applies to all the communities in India except Muslim community. In India there is a well developed system of succession laws that governs a person's property after his death. 'The Indian Succession Act 1925' applies expressly to Wills and codicils made by Hindus, Buddhists, Sikhs, Jains, Parsis and Christians but not to Mohammedans as they are largely covered by Muslim Personal Law.

Statutory Definition of 'Will': The term 'Will' is defined under 'Section: 2(h)' of The "Indian Succession Act, 1925", means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. A testator is authorised with a power to appoint any person as beneficiary of his Will whereas 'Section: 5' deals with the law regulating succession to deceased persons moveable and immovable property.

Meaning of 'will': A Will or testament is a legal declaration by which a person, the testator, names one or more persons to manage his/her estate and provides for the transfer of his/her property at the time of death. A Will can be made by anyone above 21 years of age in India. A Will is a statement made by a testator in the written form stating the manner in which his estate/property must be distributed after his death. A Will being a testamentary document comes into effect after the death of the testator and if the person dies without writing any Will then he is said to be have died intestate. The person in whose favour the testator bestows the benefits called beneficiary or legatee. A Will is otherwise called as Testament.

Features of A Valid 'Will': There are certain characteristics which should be included in the instrument of will such as :-

- The Name of The Testator: The name of the testator should be mentioned accurately without any error in initials, spelling or grammatical mistake so that it will not affect the instrument of Will. The name of the testator can also be clarified by looking into his birth certificate or any school certificates.
- Right To Appoint Legatee: The testator is having absolute right to appoint any person as a legatee or beneficiary of a Will and legatee should execute the Will carefully and in accordance with the law.
- To Take Effect After Death: A testator who is having power to make the Will during his lifetime, but it will take effect only after his death. A gift made by a person during his lifetime and will take effect during his lifetime, cannot be considered as a Will.
- Revocability Under The Law: In general a Will made by the testator can be revoke at any time during his lifetime and testator can choose any other person as his legatee. There may be chances where a testator wishes to bring some alterations in the Will then he can make some necessary amendments in the prepared Will which is otherwise called as Codicil. A third party can not file a civil suit against the testator on the ground of cancellation of the Will. A Will made by the testator may be irrevocable in some cases where an agreement is entered into contrary to the Will, may bind the testator.
- Intention of The Testator supreme: The testator of the Will has right to revoke Will at any time

which can only be proved by the intention of the testator that whether he is intending to revoke the previous testamentary instruments made by him or he can state in his Will that 'This is my last Will' then it can be presumed that all the earlier testamentary instruments has been revoked.

- The Declaration to be 'Last Will': A person as testator has power to make declaration of Will unnumerable times but it is always the last will of testator which will prevail. The words "I declare this to be my last will" need not be stated in the instrument of the Will. Once the Will is made by the testator Inserting of words 'Last and Only will' at the time of death it can be presumed that all the previous Wills will get revoked and fresh Will has to be effected.
- Lost Subsequent 'Will': Mere loss of the original Will does not operate a revocation but it has to be inferring by the stringent evidence to prove its revocability and a testator must show the genuine reasons for the loss of the Will. Once it is proved that a original will is lost then 'Subsequent Will' will be valid.

Kinds of 'Wills': A testator who has right to make a Will for the future benefits of his family members which will take effect after his death, the there are certain types of Wills which has to be looked into:

1. **Privileged 'Wills':** As it can be understood from the word privilege provided to certain persons. A privileged Will is one which is made by any soldier, airman, navy persons, mariner who are willing to dispose of their estate during their course of employment. A soldier includes officers and all other rank officers of service but does not include a civilian engineer employed by the army, having no military status. A soldier while making an instrument of Will must have attained the age of 18 years and where a will made by the soldier is in the oral form, will be valid only for a month though a written Will always remain operative. A privileged Will may be revoked by the testator by an unprivileged Will or codicil, or buy any act expressing an intention to revoke it and accompanied by such formalities as would be sufficient to give validity to a privileged Will, or by the burning, tearing or otherwise destroying the same by the testator.
2. **Unprivileged 'Wills':** Wills executed according to the provisions of 'Section 63' of the 'Indian Succession Act, 1925' are called Unprivileged Wills. An unprivileged Will is one which is created by every testator not being a soldier, airman, mariner so employed. An unprivileged Will like Codicil can be revoked by the testator only by another Will or by some writing declaring an intention to revoke the same and to be executed in the manner in which an unprivileged Will can be executed under the Act or by burning, tearing or destroying of the same by the testator or by some other person in his presence and by his directions with the intention of revoking the same.

Who Can Make 'Will': Every person who is competent to contract may make a will but he must be major, sound mind and willing to write a Will. Any person who is the sole owner of a self-acquired property can bequeath by way of will. A person of unsound mind can also make a will but only in lucid intervals. A Will cannot be made by some persons i.e. minors, insolvent, persons disqualified under any law by the court. A Will executed by a minor is void and inoperative though a testamentary guardian can be appointed for the minor to dispose off the property. A Will can be made by the deaf and dumb person by showing consent through writing or gestures in sign language. Nothing prevents a prisoner or alien in India from drawing a Will.

For Whom The 'Will' Can Be Made: Any person capable of holding property can be a legatee under a will and therefore a minor, lunatic, a corporation, a Hindu deity and other juristic person can be a legatee. Sections 112 to 117 of 'Indian Succession Act, 1925' put some restrictions on the disposition of property by will in certain cases. Dispositions of property by will in some cases have been declared void. If the minor person has been named as legatee by a testator then a guardian should be appointed by the testator himself to manage the bequeathed property.

What Can Be Bequeath In A 'Will': Any movable or immovable property can be disposed off by a will by its owner, that property must be a self acquired property of that person and it should not be an ancestral property of the testator. According to Section: 30 of 'Hindu Succession Act, 1956' provides that any Hindu may dispose off by will or other testamentary disposition any property, which is capable of being so, disposed of by him in accordance with law.

General Procedure To Make A 'Will': A 'Will' should be prepared with utmost care and must contain several parts to make a complete Will though there is no defined format for making a Will but a general procedure should be adopted while writing a Will by the testator which includes:

1. Declaration In The Beginning: In the first paragraph, person who is making a Will, has to declare that he is making this Will in his full senses and free from any kind of pressure and undue influence and he has to clearly mention his full name, address, age, etc at the time of

writing the Will so that it confirms that a person really wishes to write a Will.

2. Details of Property and Documents: The next step is to provide list of items and their current values, like house, land, bank fixed deposits, postal investments, mutual funds, share certificates owned by testator. He must also state the place where he has kept all the documents if the will documents are under safe custody of the bank then testator has to write details about the releasing of the Will from the bank. Here it is the most important duty of the testator to communicate the above matter to the executor of the Will or any other family members, which will make the Will valid after testator death.
3. Details of ownership By The Testator: A testator while making a original Will should specifically mention that who should own his entire property or assets so that it will not affect the interest of the successors after his death. If testator wishes the name of the minor as beneficiary then a custodian of the property should be appointed to manage the property.
4. Attestation of the 'Will' : At the end, once the testator complete writing his Will, he must sign the will very carefully in presence of at least two independent witnesses, who have to sign after his signature, certifying that the testator has signed the Will in their presence. The date and place also must be indicated clearly at the bottom of the Will. It is not necessary that a person should sign all the pages of the Will instrument but he must sign to avoid any legal disturbances.
5. Execution of A 'Will': On the death of the testator, an executor of the Will or an heir of the deceased testator can apply for probate. The court will ask the other heirs of the deceased if they have any objections to the Will. If there are no objections, the court will grant probate .A probate is a copy of a Will, certified by the court. A probate is to be treated as conclusive evidence of the genuineness of a Will. In case any objections are raised by any of the heirs, a citation has to be served, calling upon them to consent. This has to be displayed prominently in the court. Thereafter, if no objection is received, the probate will be granted and It is only after that Will comes into effect.

Registration of 'Wills': According to the Section: 18 of the 'Registration Act, 1908' the registration of a Will is not compulsory. Once a Will is registered, It is a strong legal evidence that the proper parties had appeared before the registering officers and the latter had attested the same after. The process of registration begins when a Will instrument is deposited to the registrar or sub-registrar of jurisdictional area by the testator himself or his authorised agent. Once the scrutiny of Will instrument is done by the registrar and registrar is satisfied with all the documents then registrar will make the entry in the Register-Book by writing year, month, day and hour of such presentation of the document and will issue a certified copy to the testator. In case if registrar refuses to order Will to be registered then testator himself or his authorised agent can institute a civil suit in a court of law and court will pass decree of registration of Will if court is satisfied with the evidence produced by the plaintiff. A suit can only be filed within 30 days after the refusal of registration by the registrar. If the testator willing to withdraw the Will after the process of registration then a sufficient reason has to be given to registrar, if satisfied he will order for the registration of Will.

Revocation of 'Wills': A Will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by Will. A Will can be revoked by testator of the Will at any point of time which can be classified into two aspects such as:-

- Voluntary Revocation: A testator who wishes to revoke his original Will which is made by him on a specified date and time, he can make revocation of the will himself by writing a subsequent Will or codicil duly executed and by destruction of the previous will, means by burning, tearing, destroying or striking out the signature of the original instrument of a Will.
- Involuntary Revocation: According to the Section: 69 of the Indian Succession Act, 1925 which deals with revocation of will by the testator's marriage, however this provision does not apply to Hindus. Section 57 of the Indian Succession Act clearly states that a testator's marriage will not make the Will invalid.

Probate: It is the copy of the will which is given to the executor together with a certificate granted under the seal of the court and signed, by one of the registrars, certifying that the will has been proved. The application for probate shall be made by petition along with copy of last Will and testament of the deceased to the court of competent jurisdiction. The copy of the will and grant of administration of the testator's estate together, form the probate. It is conclusive evidence of the validity and due execution of the will and of the testamentary capacity of the testator. A probate is obtained to authenticate the validity of the will and it is the only proper evidence of the executor's appointment. The grant of probate to the executor does not confer upon him any title to the

property which the testator himself had no right to dispose off which did belong to the testator and over which he had a disposing power with a grant of administration to the estate of the testator. Probate proceedings cannot be referred to Arbitration. The probate court (whether it is the District Court or High Court) has been granted and conferred with exclusive jurisdiction to grant probate of a Will of the deceased.

'Wills' By Muslims Under 'Mohammedan Law': A Will under Mohammedan Law is called as Wasiyat, which means a moral exhortation or a declaration in compliance with moral duty of every Muslim to make arrangements for the distribution of his estate or property. The Mohammedan Law restricts a Muslim person to bequeath his whole property in a will and allows him to bequeath 1/3rd of his estate by writing will, which will take effect after his death. A will may be in the form of oral or written if the will is in writing need not be signed if signed need not be attested. Acc to Shia Law if served bequests are made through a will, priority should be given to determination by the order in which they are mentioned a bequest by way of will. A Will Can be made by a person who is of sound mind, major and possessing a absolute title, in favour of a person who is capable of holding property except unborn persons and heirs. The revocation of will is possible only if the subsequent Will is made by the testator. A Muslim person who is allowed to bequeath 1/3rd of his estate, he can exceed its limit on testamentary power of 1/3rd to 1/4th in case where heirs gives consent or only heir is husband or wife.

Statutes Relating To 'Wills': There are many laws which are dealing with the concept of 'Wills' as follows:

- Indian Succession Act, 1925
- Hindu Law (Hindus Personal Law)
- Muslim Law (Muslims Personal Law)
- Indian Registration Act, 1908

****

Prof.J.D.Vaidya,
Principal I/C
A.M.P.GOVT.LAW COLLEGE,
RAJKOT