**CA SUDHIR BAHETI**

**Chartered Accountant**

**Nagpur**

**WILL**

1. **Meaning & Applicability**

Wills are regulated under Indian Succession Act 1925. Applies to whole of India – but not in all cases.

Repealed other Acts

1. Indian Succession Act 1865.
2. Parsi Intestate Succession Act 1874.
3. Hindu Wills Act 1870.
4. Married Women’s Property Act 1874.
5. Probate & Administration Act 1881.
6. Succession Certificate Act 1989.

**Definition of Will**

Sec. 2 (h) of Indian Succession Act 1925 defines Will as

‘Will’ 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.”

“2(b) ‘codicil ’ means an instrument made in relation to a Will, and explaining altering or adding to its dispositions, and shall be deemed to form part of the Will.”

The will has been drawn from Latin word ‘Voluntas’ which was a term used in the text of Roman Law to express intention of the testator.

The mere fact that a document is termed as Will should not be given undue weight and the construction of the document should not, therefore, depend upon its nomenclature but upon the effect arrived at by examining its recitals. The two characteristics of a Will are that it must be intended to come into effect after the death of the testator, and it must be revocable.

1. **Characteristics of a Will** – The two characteristics of a Will are that it must be intended to come into fact after the death of testator and it must be revocable.
2. **Settlement of a Will –** There is little difference between settlement and Will or a gift. The expression ‘Settlement’ means settling the property, right or claim. A ‘Will’ has been defined under section 2(h) of the Indian Succession Act, 1925 as the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. The question whether a particular document is a Will or a settlement has been the subject- matter of a series of decisions and pronouncements by the Court as well as the Apex Court.

In Arunachala vs. Murugananda, the Supreme Court held that if there are no clear words describing the kind of interest which the donee is to take, the question would be one of construction, and the Court would have to collect the intention of the donor from the language of the document taken along with the surrounding circumstances in accordance with the well-known cannons of construction.

“From the various decisions, the Court formulated following broad formula to be applied to find nature of the document:

1. The intention of the executor or executrix has to be found out by reading the entire recitals in the document and the phraseology used therein.
2. The nomenclature (settlement or Will) given in the document is not a deciding factor.
3. The registration of the document and the quantum of stamp paper used also have to be taken into consideration.
4. The recitals regarding the right to revoke or restriction to revoke the document is not a deciding factor with reference to the character of the document.
5. Though actual disposition can be postponed till the lifetime of the settlor or though prima facie it appears that disposition consummates after his death, if there is a present disposition and vesting of right in praesenti, the document has to be construed as a settlement and not as testamentary.
6. If any restriction is imposed on the beneficiaries to encumber or alienate the properties during the lifetime of the executor, the said document is only a testamentary and not a settlement.
7. If the executant is entitled to be in possession of the property and enjoy the benefits during his lifetime with the power to encumber, the document has to be construed only as Will.
8. If the executant imposes self-restriction with reference to sale and encumbrance, though he is in possession of the property after execution of the said document, the document has to be construed only as a settlement and not as a Will.
9. **Genuineness of Will –** Chapter II of part VI of Indian Succession Act, deals with Wills and Codicils. Section 59 deals with the persons capable of making Will. The genuineness of the Will is to be judged, taken into consideration all relevant factors in this regard. The party who set up the Will has to offer a cogent and convincing explanation. It must also be understood that mere registration of the Will by itself is not sufficient to conclude that the Will is genuine. This may be one of the strong factors in favour to conclude the Will to be genuine.

The Apex Court in the case of Smt. Sushila Devi vs. Pandir Krishna Kumar Missir, I observed that the judges cannot impose their own standard on behalf of those who executed the Will. The suspicious circumstances pointed out by the objector have to be dispelled must be remembered that the probate Court is only concerned with the question whether the document put forward is the last Will and testament of the deceased and was duly executed and attested in accordance with law. That at the time of exection the testator had sound disposing mind. Genuineness of the Will is a question of fact depending upon appreciation of evidence.

The burden of proving the sound state of mind of the maker of the Will and execution and attestation etc. of the Will is on its propounder. It is also further necessary for the propounder to dispel all suspicions which surrounded the Will such as genuineness of the signatures of the testator, condition of the testator’s mind, the dispositions made in the Will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that the testator’s mind was not free.

The court is not confined only to the manner in which the witnesses have deposed but it can look into the surrounding circumstances and probabilities so that it may be able to form a correct idea of the trustworthiness of the witnesses.

1. **Persons capable of Making Will –** “Section 59. Persons capable of making Wills– Every person of sound mind not being a minor may dispose of his property by Will.

Explanation 1 – A married woman may dispose by will of any property which she could alienate by her own act during her life.

Explanation 2 – Persons who are deaf or dumb or blind are not thereby incapacitated for making a Will if they are able to know what they do by it.

Explanation 3 – A person who is ordinarily insane may make a Will during interval in which he is of sound mind.

Explanation 4 – No person can make a Will while he, is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.”

A testator of a Will does not have to be found to be in perfect state of health to have his Will declared valid. The only criterion is that the testator was capable of understanding the nature of his act.

1. **Surrender –** A propounder of the will has to prove the due and valid execution of the Will and if there are any suspicious circumstances surrounding the execution of the Will, the proponder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. Appearance of the signature, the condition of the testator’s mind at the relevant time, the nature of the dispositions made in the Will which appear to be unnatural, improbable or unfair, are some of the examples of suspicious circumstances.
2. **Execution and Proof of Will –** Section 63 of Indian Succession Act, deals with execution of the Will.

Section 63 of the Indian Succession Act lays down the formalities required by law for the execution of a valid Will by every testator not being a soldier employed in an expedition or engaged in actual warfare of a mariner at sea.

1. **Suspicious Circumstances–** It is a well settled principle of law that if there is a suspicious circumstance about the execution of a Will, it is the duty of the person seeking relief to prove the validity of the Will and to dispel such suspicious circumstance.

Mere registration of the will does not make its execution genuine particularly.

1. **Execution of the Will –** According to section 63 the Will is to be executed according to the following rules.
2. The testator shall sign or fix his mark to the Will or it shall be signed by some other person in his presence as per his direction.
3. Signature or mark of the testator or of such other person shall be so placed that it would appear that it was intended to give effect to the writing as a Will.
4. The Will shall be attested by two or more witnesses each of whom has seen the testator sign or affixed his mark to the Will or such other person, in the presence and by the direction of the testator.
5. Each such witness shall sign the will in the presence of testator.
6. However, it shall not be necessary that more than one witness be present at the same time and there will be no particular form of attestation.
7. **Codicil –** The term codicil is defined in section 2(b), as an instrument made in relation to a Will and explaining, altering or adding to its disposition and it will be deemed to be part of the said Will.

Codicil, as defined, is an instrument made in relation to a Will. It has the effect of explaining, altering or adding to the dispositions made by a Will. By fiction of law, the codicil, though it may have been executed separately and at a place of time different from the Will, form part of the related Will.

Registration of a document does not dispense with the need of proving the execution and attestation of a document which is required by law to be proved in the manner as provided in section 68 of the Evidence Act. Under section 58 of the Registration Act the Registrar shall endorse the following particulars on every document admitted to registration:

1. The date, hour and place of presentation of the document for registration;
2. The signature and addition of every person admitting the execution of the document, and if such execution has been admitted by the representative, assign or agent of any person, the signature and addition of such representative assign or agent;
3. The signature and addition of every, person examined in reference to such document under any of the provisions of this Act; and
4. Any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution.
5. **Construction of Will –**Chapter VI deals with construction of Wills. Section 74, 75 and 76 being most important sections of this Chapter, are reproduced as under :

74. Wording of Will–it is not necessary that any technical words or terms of art be used in a Will, but only that the wording be such that the intentions of the testator can be known there from.

75. Inquiries to determine questions as to object or subject of Will–For the purpose of determining questions as to what person or what property is denoted by any words used in a Will.

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

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

1. **Mutual Will –** A joint Will is a Will made by two or more testators contained in a single document, duly executed by each testator, disposing either of their separate properties, or of their joint property. It operates on the death of each testator as his Will disposing of his separate property, and is in effect two more Will depending upon the number of testators. In case of mutual Wills, the testators execute their separate Wills but reading of the two Wills would show reciprocity in the matter of bequest, i.e., testators confer, by their respective Wills, reciprocal benefits upon each other. It is reciprocal Will where one testator is the legatee of the other.

“ A Will is mutual when two testators are confer upon each other reciprocal benefits, as by either of them constituting the other his legatee, that is to say, when the executants fill the roles of both testator and legatee towards each other. But where the legatees are distinct from the testators, there can be no question of a mutual Will.”

**Simple Will**

This Will is made/ executed by ABC………………. the testator on this 24th day of August 2014, regarding his estate.

Whereas, the testator is absolute owner in possession of movable and immovable properties, fully detailed in Schedule I and Schedule II.

And whereas, the testator is above 70 years old, though running his good health, however, he do not want that there should any dispute regarding his above said properties between his legal heirs.

And whereas, the testator has apart from his wife, two sons, namely 1……………………. 2………………… and three daughters namely, 1………………………. 2………………… 3…………………………….

And whereas, all the three daughters have already been married and sufficient share out of the estate of the testator had been given to them at the time of their marriage.

Now, in view of the abovesaid circumstances the testator, do hereby bequeath is existing estate as mentioned in Schedules I and II, to and in favour of his wife and two sons namely ………………….. In equal share to have and hold the same as absolute owner to the extent of 1/3 share each after the death of testator.

Following conditions, however, shall be imposed at the time of bequeasting the said properties.

1. During the life time of the testator, the testator will continue to be absolute owner in possession of the entire properties mentioned in Schedule I and Schedule II.
2. The properties shall bequest and vest with said legatees immediately on death of the testator.
3. That during the life time of the testator, the said legatees, will have no right, titled or interest in the said property and the testator will be at liberty to deal with all such properties as may be necessary from time to time.
4. It is made clear that all the properties mentioned in Schedule I and Schedule II are self acquired properties of the testator.
5. It is further made clear that though the list of properties is given in Schedule I and Schedule II, however, the actual properties to bequest in favour of said legatees, will be as are available on the death of the testator.
6. The properties mentioned in Schedule I and Schedule II are subjected to decrease or increase as some properties may be disposed off and some other properties may be procured by the testator.
7. That no other person except the abovesaid legatees shall have any right, title or interest over any part of the abovesaid properties.

The above said Will has been made by the testator in his full senses in the presence of witnesses who have signed in the presence of the testator and the testator has signed in their presence.

In witness hereof the testator has put his hand on this indentures of this Will in the presence of witnesses.

Witnesses:

1……………………………. ABC……………………the testator

2…………………………….

**Will Regarding Ancestral Properties**

This Will is made on this 24th day of August, 2014 by ABC ………………………. the testator regarding his estate fully detailed in Schedule I.

Whereas, the said ABC, the testator is absolute owner in possession of agricultural land, fully detailed in schedule I which is the ancestral property in his hands. He is also absolute owner is possession of two commercial shops, which are detailed in Schedule I and they are self- acquired properties of the testator.

The wife of the testator has already expired and presently he has three sons and one daughter. Though both sons are married, however, the daughter namely ……………….is unmarried.

That the testator is about 60 years old, however, he is patient of heart disease though he is in full senses and in good health otherwise.

Now to safe inheritance of the abovesaid properties of the testator, he has decided to made his last Will so as to avoid any dispute in future regarding his properties amongst his legal heirs after his death.

Now the testator do hereby bequest his abovesaid properties, through this Will in the following manner:

1. The agricultural land detailed in Schedule I, shall completely bequested and vested with his two sons, namely………………………..
2. The commercial shops fully detailed in Schedule II shall vest to and in favour of his daughters, namely …………………….. only for and during her life time, only. Irrespective of her marriage, however, after her death the said shop shall revert back and vest with his abovesaid both sons in equal share, or their legal heirs or legal representatives as the case may be in case of death of any of them.

The abovesaid bequest shall be subjected to following other conditions:

1. During the life time of the testator, the testator will continue to be absolute owner in possession of the entire properties mentioned in schedule I and Schedule II.
2. The properties shall bequest and vest with said legatees, immediately on death of the testator.
3. That during the life time testator, the said legatees will have no right, title or interest in the said property and the testator will be at liberty to deal with all such properties as may be necessary from time to time.
4. It is made clear that all the properties mentioned in Schedule I and Schedule II are self- acquired properties of the testator.
5. It is further made clear that though the list of properties is given in Schedule I and Schedule II, however, the actual properties to bequest in favour of said legatees, will be as are available on the death of the testator.
6. The properties mentioned in Schedule I and Schedule II are subjected to decrees or increase as some properties may be disposed off and some other properties may be procured by the testator. In case, some other properties are purchased by the testator such properties shall bequest to and in favour of his sons only.
7. That no other person except the abovesaid legatees shall have any right, title or interest over any part of the abovesaid properties.

The abovesaid Will has been made by the testator in his full senses in the presence of witnesses who have signed in the presence of the testator and the testator has signed in their presence.

In witness hereof the testator has put his hands on these indentures of this Will in the presence of witnesses.

Witnesses:

1………………………………… ABC…………………….the testator

2………………………………...