MULUND CA CPE STUDY CIRCLE OF WESTERN INDIA REGIONAL COUNCIL OF THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

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SEMINAR ON DRAFTING OF WILLS AND DOCUMENTS IN RELATION TO H.U.F. AND FAMILY ARRANGEMENT

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Day & Date : Sunday, 30th August, 2015
Time : 10.00 a.m. to 1.00 p.m.
Venue : Mulund College of Commerce, S.N. Road, Mulund (West), Mumbai – 400 080.

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Subject : PREPARATION OF WILL & DOCUMENTS IN RELATION TO HUF & FAMILY ARRANGEMENT
Speaker : SHRI PRAVIN N. VEERA, Advocate & Solicitor

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WILLS - A BIRD'S EYE VIEW*

- Shri Pravin Veera, Advocate & Solicitor

1. INTRODUCTION

Indian Succession Act, 1925 is the main law in India which governs the Wills made by persons other than Muslims. The law relating to Wills is contained in Part VI Chapters 1 to 23 of the Indian Succession Act, 1925. Wills made by Mohammedans are governed by the provisions of Muhammadan Law.

Application of certain provisions of the Indian Succession Act, 1925 Part VI to a class of wills made by Hindus, etc. Section 57 provides that the provisions of Part VI which are set out in Schedule III to the Act shall, subject to the restrictions and modifications specified therein, apply-

(a) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of September, 1870, within the erstwhile province of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such wills and codicils made outside the above territories and limits so far as such wills and codicils relates to immovable property situate within the territories or limits mentioned in (a) above; and

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(c) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of January, 1927 to which those provisions are not applied by clauses (a) and (b) :

Provided that marriage shall not revoke any such will or codicil. Section 58 which deals with general application of Part VI of the Act provides that :

(1) The Provisions of Part VI shall not apply to testamentary succession to the property of any Mohammedan.

(2) Chapter VI applies to Hindus, Buddhists, Sikhs or Jains, to extent provided under Sec. 57.

(3) Chapter VI does not apply to any will made before 1st January, 1866.

(4) Except as above the Chapter VI constitutes the law of India applicable to all cases of testamentary succession.

2. DEFINITIONS OF WILL

'Will' shall include codicil and every writing making a voluntary posthumous disposition of property. **General Clauses Act, S.3 (64)**.

'Will' denotes any testamentary document. **Indian Penal Code, 1860, S.31**.

'Will' means a legal declaration of the intention of a testator with respect to his property, which he desires to be carried into effect after his death. **Indian Succession Act, 1925, S.2 (h)**.

The Will takes effect only after the death of the testator (i.e. the author of the Will). The will is revocable during the life time of the testator.

3. ESSENTIAL CHARACTERISTICS OF A WILL

(i) Legal Declaration : The documents purporting to be a testament or a will must be legal, i.e., in conformity with the provisions relating to the execution and attestation of will as laid down in section 63 of the Act and it must be made by a person competent to make it.

(ii) Revocability : The essence of every will is that it is revocable at any time during the life-time of the testator.

(iii) The declaration should relate to the properties of the testator which he wants to dispose of.

(iv) The declaration as regards the disposal of the properties of the testator must be intended to take effect only after the death of the testator. It may be noted that if the declaration seeks to effectuate the intention of the testator immediately, i.e., inter vivos, then it is a not a will. A will operates from the date of the death of the testator and not from the date of its execution.

4. REASONS FOR MAKING A WILL

(1) If a person desires that there should be no disputes over his property after his death, his property should be peacefully transferred without any dispute and complications to his heirs, relatives, friends etc. in the manner he wishes he should make a Will.

(2) The will is an extremely personal document. A person is able to express his feelings, views and opinions about his relationship with his family members, relatives, friends etc in his will.

(3) A person who makes a will is said to have died testate. If a person does not make a will, he dies intestate and, in that case his property will be inherited by his legal heirs in accordance with the law of inheritance applicable to him. The law of inheritance applicable to the person concerned determines the legal heirs and their share irrespective of whether such heir deserve any share or not.

(4) By making a will a person can :

(a) Provide for the special needs and requirements of the members of his family i.e. a widowed daughter, aged parents, handicapped child etc;

(b) make some provisions for a friend or faithful servant in need of money and so on;

(c) take away the right of a characterless wife or a disobedient son.

(5) In view of increase in unnatural death's, due to motor accidents etc. at young age it is advisable to make a will.

(6) Some tax planning can also be done by making of a will.

5. CONSEQUENCES WHEN NO WILL IS MADE

When an individual dies without making a will he is said to have died intestate and in that case his property will be inherited by his heirs in accordance with the law of succession as applicable to that person. Succession to the property of Hindus is governed by the provisions of the Hindu Succession Act, 1956. Succession to property of Muslims is governed by the Muslim Law. A person other than Hindus and

Muhammedans viz Jain, Sikh or Buddhist is governed by the Indian Succession Act, 1925.

6. GENERAL TERMS RELATING TO A WILL

(1) **Testator** : The person who makes a will is called the testator. If the maker of the will is a Female then she is called 'Testatrix'.

(2) **Legatee or Beneficiary** : The person to whom the testator gives some property or benefits in the will is called legatee or beneficiary.

(3) **Legacy** : The benefit which passes under a will to the beneficiaries is called legacy.

(4) **Executor** : *"Executor means a person to whom the execution of the last will of a deceased person is, by the testator's appointment confided."* **[Sec.2(c)]** In other words an executor is a person appointed by the testator to give effect to his will i.e. to administer his will.

(5) **Attestation** : The act of witnesses placing their signature on the will is called attestation.

(6) **Beneficial interest** : The interest of a beneficiary under a will is called a beneficial interest.

(7) **Administrator** : *"Administrator means a person appointed by competent authority to administer the estate of a deceased person when there is no executor"*. **[Sec.2(a)]** Where the testator does not appoint an executor under the will the court may at the instance of the interested persons appoint a person called the administrator to administer the will.

(8) **Residue** : Residue is that part of the estate of the Testator which remains after paying debts, charges and legacies mentioned in the will.

(9) **Residual legatee** : The person to whom the testator give the residue under the will is called the residual legatee.

(10) **Specific Legacies** : Legacies which are identified in definite terms and descriptions distinguishing them from the general mass or estate are called specific legacies.

(11) **Universal Legatee** : When the testator bequeaths all his estate entirely to a single person only, such a person is called universal legatee.

(12) **Probate** : *"Probate means the copy of a will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator"*. **[Sec.2(f)]** It is a certificate granted by the Civil Court of competent jurisdiction to an entrusted person including an executor or trustee certifying that the will of the testator is genuine and is indeed the last will left behind by the testator.

(13) **Bequest** : The benefit bestowed under a will is called bequest. The bequest may be conditional or contingent. A bequest that is bestowed only upon fulfillment of any stated conditions is called conditional bequest. A bequest that pass only upon occurrence or non-occurrence of an event is called a contingent bequest.

(14) **Codicils** : Amendments made by the testator in his will during his life time are called codicils.

(15) **Letters of Administration** : A letter from the court appointing an administrator of the estate of the testator is called the letter of administration.

(16) **Succession Certificate** : A Succession Certificate is a certificate of succession issued by a Civil Court of competent jurisdiction in respect of the properties of a person who has died intestate i.e. without making a will.

(17) **Vested Interests** : A beneficiary under a will is said to have taken vested interest in the property, if the will states that he/ shall get possession of such property only after a specified time.

(18) **Annuity** : Where it is directed under the will that the beneficiary should be paid a sum of money periodically, such sum is called annuity.

(19) **Demonstrative legacy** : Where the testators directs under the will that legacy should be paid out of any designated primary fund or commodity, such legacy is called demonstrative legacy.

(20) **Devise** : The disposition of immovable property under the will is known as devise.

7. KINDS OF A WILL

The Indian Succession Act mentions to two kinds of Wills - privileged will and unprivileged will. However, there are nine kinds of wills as under.

(1) Privileged Will
(2) Unprivileged Will
(3) Oral or Nuncupative Will
(4) Mutual (or Reciprocal) Will
(5) Joint Will
(6) Contingent or Conditional Will
(7) Holograph Will
(8) Inofficious Will
(9) Duplicate Will

(1) **Privileged Will**: **Section 65 of Indian Succession Act** which deals with Privileged Wills reads as under:

Privileged Wills : Any soldier being employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or any mariner being at sea, may if he has completed the age of eighteen years, dispose of his property by a will made in the manner provided in ***section 66****. Such wills are called privileged wills.*

Illustrations
(i) A, a medical officer attached to a regiment is actually employed in an expedition. He is a soldier actually employed in an expedition, and can make a privileged will.

(ii) A, a soldier serving in the field against insurgents, is a soldier engaged in actual warfare, and as such can make a privileged will.

(iii) A, an admiral who commands a naval force, but who lives on shore, and only occasionally goes on board his ship, is not considered as at sea, and cannot make privileged will.

As the common man is not concerned with the privileged will the same is not discussed in detail here. For the manner in which the privileged wills can be made please refer Section 66 of the Indian Succession Act.

(2) **Unprivileged Will**: All wills made by persons other than mariners, soldiers and airmen are unprivileged wills. **Section 63 of the Indian Succession Act** which deals with execution of unprivileged wills reads as under:

Execution of Unprivileged Wills : Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged or a mariner at sea, shall execute his will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it

shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

(3) **Oral or Nuncupative Will** : An Oral or Nuncupative Will is a will which has been orally declared by the testator making it in the presence of witnesses. It may be noted that the Indian Succession Act does not provide for making of oral or nuncupative will except by the soldiers, mariners and airmen (as provided under Sections 65 and 66).

(4) **Mutual (or reciprocal) Will**: Mutual will is a will under which two testators confer reciprocal benefits upon each other.

(5) **Joint Will** : A joint will is a will whereby two (or more) testators agree to make a conjoint will. Very common example of joint will is the will made by a husband and wife disposing of their property under one will jointly made by both.

(6) **Conditional or Contingent Will**: It is a will which is expressed to take effect only in the event of the happening or non happening of a certain conditions or contingency specified therein.

(7) **Holograph Will**: It is a will written by the testator in his own handwriting.

(8) **Inofficious Will**: It is a will which is not consonant with the testator's natural love, affection and moral duty. Under an inofficious will a testator bequeaths all his property to a stranger or a third party instead of to his children, his wife (or her husband), and other near relatives.

(9) **Duplicate Will**: It is the duplicate of the original will. The duplicate will can be proved and probated if the loss of the original will is proved.

8. **PERSON CAPABLE OF MAKING WILLS:**

Section 59 of the Indian Succession Act which contains provision as to person capable of making wills reads as under:

Person 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 of by will 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.

Illustrations:

(i) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the persons who are of kindred to him or in whose favour it would be proper that he should make his will. A cannot make a valid will.

(ii) A executes an instrument purporting to be his will, but he does not understand the nature of the instrument, nor the effect of its provisions. This instrument is not a valid will.

(iii) A, being very feeble and debilitated, but capable of exercising a judgement as to the proper mode of disposing of his property makes a will. This is a valid will. For making a will a person i.e. a testator should have testamentary capacity and he must be in a sound disposing state of mind. It must be noted that soundless of mind does not depend upon age. A will made by a testator of full capacity is not revoked by the fact that subsequently he became incapable of making a will or insane. What is necessary for the validity of the will is that the person making the will should have been able to comprehend the nature and effect of the disposition and intelligence to form a proper judgement regarding it, and he should have freely decided to make it. The testator must have the knowledge of the contents of the will which he executes. If the testator makes the will without knowing the contents of the will such a will cannot be said to be a valid will. The will must be testators own voluntary act.

9. **WILL OBTAINED BY FRAUD, COERCION OR IMPORTUNITY:**

Section 61 of Indian Succession Act provides that a will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

Illustrations :

(i) A, falsely and knowingly represents to the testator, that the testator's only child is dead, or that he has done some undutiful act and thereby induces the testator to make a will in his (A's) favour; such will has been obtained by fraud, and is invalid.

(ii) A, by fraud and deception, prevails upon the testator to bequeath a legacy to him. The bequest is void.

10. **TESTAMENTARY GUARDIAN :**

According to **section 60 of Indian Succession Act** a father, whatever his age may be, may by will appoint a guardian or guardians for his child during minority.

11. **HOW TO PREPARE A WILL**

(1) Except in case of Muslims in India, disposal of the property by a will must be in writing. However the members of the armed force employed in an expedition or engaged in actual warfare and mariner at sea are permitted to make an oral will.

(2) Under the Muslim Law Muslims are permitted to make an oral will. However if a Muslim makes a will in writing such will is not void.

(3) The law does not prescribed any particular form of will. As long as a will is in writing, it may be in any form and may be in any language. It may be in a formal or informal language, as long as one can gather from the writing the intention to dispose of the property to be operative after the death, in whatever form the same may be written, that would constitute a will.

(4) The language used in the will should be simple and free from technical words. The language of the will should be easily understandable even by a layman. "It is not necessary that any technical words or terms of art be used in a will, but only that the wording be such that the intentions of the testator can be known therefrom" **(S.74)**.

(5) A will can be made in testator's own handwriting using a fountain pen or a ball pen. A will need not be typed. However, if the handwriting of the Testator are illegible it is advisable to get the will neatly typed with margins on both sides of the pages.

(6) As no stamp duty is payable on a will there is no need to prepare a will on a stamp paper. A will can be made on a plain sheet of paper. However the paper used should be of a durable quality.

12. **PRECAUTIONS IN DRAFTING A WILL:**

Drafting of a will requires not only the good knowledge of the law of succession and experience but also the quality of good imagination because the person drafting the will has to consider the circumstances of the testator at the time of drafting the will and he has also to imagine and foresee the circumstances which may prevail at the time of the death of the testator.

Before drafting a will the draftsman should ascertain (i) the domicile of the testator and (ii) the various moveable and immoveable

properties owned by the testator and the geographic locations of such properties.

Before drafting the will it is essential to study carefully the law of the country which is to govern the will of the testator. Usually the disposition of moveable properties is governed by the law of the country where the testator is domiciled and the disposition of immoveable properties in most of the countries is governed by the law of the country in which the immoveable properties are situated.

As such in the case where the testator is domiciled in one country and has immoveable property in another country it would be advisable to draft two separate wills - one will relating to immoveable properties and another will relating to moveable properties.

The following precautions should be taken in drafting a will :-

(1) A list should be prepared of all the assets and properties of the testator which remain after taking into account all debts, liabilities and expenses to get a clear picture of how the testator wishes to distribute his estate.

(2) The will should be drafted in a simple, clear and unambiguous language. There is no need to use any legal or technical words and phrases. It is sufficient if the intention of the testator are clearly recorded.

(3) As far as possible the will should be drafted in the language best understood by the testator so as to give the impression that the contents of the will were fully understood by the testator and the will is the proper expression of wishes and intentions of the testator.

(4) When the testator is an illiterate person the will should be prepared in a language which is usually spoken and understood by the testator and the attesting witness or some third person preferably a lawyer should read out the will to the testator before its execution. In such case the will should be read out by a third person to the testator in the presence of the attesting witnesses.

(5) If the will is prepared in a language which is not usually used by the testator an exact translation of the will should be read out by a third person, preferably a lawyer to the testator before its execution. It is desirable that the translation of the will is read out in the presence of attesting witnesses who understand both the languages. The fact that the will has been read out to the testator in a particular language before execution should be recorded in the will.

(6) If there is any unusual thing in of the will same should be explained and clarified in the main body of the will itself to avoid misunderstanding or doubt about it.

(7) A residuary clause for property and distribution should be included in the will.

13. **MAIN PROVISION IN A WILL**

The main provisions which usually find place in a simple unprivileged will are as follows :

1. Name: The name and description of the testator (i.e. the person making the will) i.e. his age, religion, community etc. so as to determine by which personal law he is governed.

2. Revocation of earlier Wills : A declaration that the present writing (i.e. the particular will) is his last will and testament and that he thereby revokes all other wills, codicils and other disposition of a testamentary nature which are made by him earlier.

3. Appointment of Executors : An executor is a person named by the testator in the will to whom the testator has confided the execution of his will. The testator may also appoint more than one executor. It may be noted that a legatee can be a executor of the will. However, when a legacy or bequest is given to an executor, and it is not the intention of the testator that such legacy or bequest is to be given to the executor in compensation of his service, it should be mentioned in the will that he would be entitled to the legacy or bequest even if he does not accept to act as the executor of the will. If the executor is a professional person such as a Chartered Accountant, an Advocate or a Solicitor then usually a provision is made in the will that such person shall be entitled to the remuneration i.e. his professional fees for the work done by him in his professional capacity. If the sole executor or all the executors are ladies no probate fee is payable.

4. Direction to pay dues: This provision is not compulsory because in any case, the executors of the will are bound to pay the dues of the testator. Usually specific directions are given by the testator as regards the money to be spent on the funeral and obsequial ceremonies of the testator.

5. Legacies and Bequest: These are the most important clauses in the will, because under these clauses the testator makes the disposition of his property.

6. Gift Clause : Sometimes for the sake of clarity a mention is made in the will about the gifts made by the testator during his lifetime, along with a declaration that the estate of the testator has nothing to do with such gifts. This is to avoid confusion or dispute among the heirs/ legatees whether particular items belonged to the deceased or were disposed off during his life time.

7. Trust Clause : When the testator wants to create a trust of his property under the will then this clause is inserted. Under this clause the testator directs for creation of a trust of his property, appoint the trustees for such trust and specifies the names of the persons (i.e. the beneficiaries) for whose benefit such trust is to be created.

8. Residue Clause : It is always advisable to have Residue clause disposing of the residue of the testator's property. i.e., disposition of the remaining properties belonging to the testator at the time of his death which are not specifically disposed of under any other provision of the will. If there is no residue clause such remaining property will go to the legal heirs of the testator. Even the legacy which lapse go back to intestacy if there is no residue clause.

9. Explanation : Some times if necessary clarifications or explanations are made as regards the investments which stand in the joint names of the testator and some other person or persons.

10. Donation of Eyes, Kidney etc. : If the testator is desirous of donating his eyes, kidney, body etc. for medical use a separate clause to that effect should be included in the will and the testator should inform the near and dear ones about the same in advance as otherwise they will never come to know about it. It will be advisable that during his life time the testator should make an affidavit recording his desire to donate his eyes, kidney, body etc. and inform his relatives about the same so that his relatives can act upon it and do the needful. Such affidavit will be very useful as usually the Will is not opened and read immediately on the death of the testator and it takes some time to do so whereas the necessary steps for donation of the eyes, kidney, body etc. are required to be taken immediately upon death of the testator.

11. Testimonium Clause : The Testimonium clause is as under: "IN WITNESS WHEREOF I said Shri A.B.C. have hereunto set and subscribed my hand at Mumbai this _____ day of _____ 200__".

12. Execution Clause : This is the last clause of the will which begins with "Singed and acknowledged by the withinnamed Testator as his last will and Testament.....". The execution clause should be signed by the Testator in the presence of two witnesses who should also subscribed their signatures as witnesses in the presence of the Testator.

14. **REVOCATION OF A WILL**

Section 69 of the Indian Succession Act which contains the provisions relating to revocation of will by testator's marriage reads as under :

Revocation of will by testator's marriage : Every will shall be revoked by the marriage of the maker, except a will made in exercise of power of appointment, when the property over which the power of appointment is

exercised would not, in default of such appointment, pass to his her executor or administrator, or to the person entitled in case of intestacy.

Explanation : Where a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power to appoint such property.

Section 70 of the Indian Succession Act which contains provisions relating to revocation of unprivileged will or codicil reads as under:

Revocation of unprivileged will or codicil : No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same.

Illustrations:
(i) A has made an unprivileged will. Afterwards, A makes another unprivileged will which purports to revoke the first. This is a revocation.

(ii) A has made an unprivileged will. Afterwards, A being entitled to make a privileged will make a privileged will, which purports to revoke his unprivileged will. This is a revocation.

15. **LEGAL REQUIREMENTS FOR MAKING OF A WILL**

(1) The testator must sign or affix his mark to the will, or the will shall be signed by some other person at the direction of the testator.

(2) The signature or mark of the testator, or the signature of the other person signing for the testator shall be placed on the will in such a manner that it shall appear that it was intended thereby to give effect to the instrument as a will.

(3) It is necessary that the will must be attested by two or more witnesses each of whom has seen the testator signing of affixing his mark, to the will or has seen some other person signing the will in the presence of and under the direction of the testator, or has received from the testator a personal acknowledgement of the testator's signature or mark, or of the signature of such other person, and each of the witnesses should sign the will in the presence of the testator. (For the execution and attestation clause of the will please see the Model Wills given at the end).

16. **PLACE OF SIGNATURE**

Signature of the testator is very important for the validity of the will. The signature or mark of the testator or the signature of the person signing for him may be placed anywhere on the will i.e. either at the end or at the beginning of the will but it must be placed in such a manner that it shall appear that it was intended to give effect to the instrument as a will. Usually on the last page of the will i.e. where the will ends the signatures of the testator and of the attesting witnesses are made. One should avoid the signature of the testator and attesting witness on the next page which does not contain any part of the will. It is advisable that testator's signature or thumb impression is placed in the space provided on the last page i.e. at the place where the will ends. Where the will runs into several pages it is not necessary under the Indian Succession Act for the testator to sign on each and every page of the will. However it would be advisable to sign or affix thumb impression on each page of the will. The signature of the testator should preferably be a full signature however initials are also sufficient, provided they are intended to authenticate the whole will and the full signature of the testator is made on the last page where the will ends.

17. **SELECTION OF THE WITNESSES**

Causal selection of the witnesses to the will should be avoided as it may create difficulty in proving the execution of the will in future. It should be kept in mind that the attesting witnesses may on some future occasion be required to appear as a witness in the Court to prove the execution of the will. In selection of the attesting witness the following points should be considered;

(1) The attesting witness as well as his wife or her husband must not be a beneficiary under the will because the bequest in their favour would be invalid. **(Sec. 67 of the Indian Succession Act, 1925.)** However the validity of other bequests made under the will are not affected.

(2) As far as possible select the attesting witnesses selected should be some years younger to testator because in such a case there is every likelihood that atleast one of the attesting witness would survive the testator and would be available for proving the execution of the will by the testator.

(3) If any of the attesting witness dies during testator's life time, it is better to execute a fresh will with new attesting witnesses.

(4) In the event the testator is aged, infirm or suffering from physical illness, it is advisable that the family doctor of the testator should be an attesting witness. It is also advisable that the advocate or the solicitor who has drafted the will should be an attesting witness.

(5) The attesting witnesses should be of integrity and sound status.

18. **REGISTRATION OF A WILL**

(1) **Section 17 of the Registration Act, 1908** which deals with documents of which registration is compulsory does not mention of will as a document compulsorily registrable. Section 18 of the Registration Act mention will as a document whose registration is optional. In other words the registration of a will is not compulsory and as such no inference can be drawn against the genuineness of a will on the ground of its non-registration. The will can be registered with the office of the Sub-Registrar concerned. For registration of the will the attesting witnesses should also go along with the testator for attesting the will. A will can be registered by the testator himself during his lifetime or by the executor of the will or the legatees after the testator's death. The revocation of a will which is registered should also be duly registered in the same manner as has been provided for registration of wills. Once a will has been registered, it is advisable that any subsequent will made by the testator is also be registered.

(2) Though the registration of will is not compulsory under the law for proving the genuineness of the will, registration of a will has following advantages :

(a) A will which is duly registered cannot be tampered with, destroyed, lost or stolen.

(b) When the will is kept in the safe custody in the office of the Registrar it ensures the protection of the will.

(c) Secrecy of the will is maintained because no body can examine the will and copy the contents of it without the express permission in writing or until the death of the testator because as provided under **Section 57(2) of the Registration Act, 1908** the certified copy of a will can be given only to the testator or his agent.

(d) It may be noted that only after the death of the testator a certified copy of the will made by him can be given to any person who applies for it and produces the death certificate of the testator issued by the authority concerned.

19. **SAFE CUSTODY OF WILL**

After the execution of the will it may be deposited by the testator in some safe custody such as with his banker or solicitor or chartered accountant or any other person of his confidence. A person who is not desirous of registering his will is at liberty to deposit the same for safe custody with the Sub-Registrar so that such deposited will can be made available to his executors upon his death by the Sub-Registrar's office. Deposit of the will is also optional.

20. **PROOF OF WILL**

(1) The propounder of the will or a person who produces the will before the Court and wants the Court to rely upon such will has to prove that :

(i) the testator had executed the will when he/ she was in a sound disposing state of mind;

(ii) the will produced by him before the court is the legal declaration of the intention of the deceased;

(iii) the testator had executed the will of his own free will, meaning thereby, he was a free agent when he executed the will; and

(iv) the will is duly signed and properly attested by the attesting witnesses.

(2) It must be noted that the onus to prove the will is on the propounder. He has to satisfy the court that the will was not only the physical act but also the mental act of the testator. In the case where a will is prepared and executed under circumstances which appears to be suspicious to the court, it is for the propounder of the will to remove such suspicion and to prove affirmatively that the testator knew the contents of the will and has approved the same.

(3) Since a will is required by law to be attested by atleast two witnesses it shall not be proved in evidence unless atleast one witness has been called for the purpose of proving its execution, if there is an testing witness alive, and subject to the process of the court and capable of giving evidence.

21. **EXECUTORS**

(1) The Executor has been defined under **Section 2(c) of the Indian Succession Act** as under:
Executor means a person to whom the execution of the last Will of a deceased person is, by the testator's appointment, confided.

An executor is entrusted with the duty and conferred with the power to carry out the directions of the testator contained in the will. The executor has to collect and realise the estate of the deceased, pay the debts of the testator and distribute the legacies as directed under the will.

(2) Points to be considered for Selection of Executors:

(a) It is advisable that the executor should be younger to testator in age so that there is greater possibility of the executor outliving or surviving the testator.

(b) It is preferable if the executor selected live in same city where the testator lived as this will facilitate the process of obtaining probate from the court.

(c) It is advisable that the executor is a person known to the beneficiaries under the will and is their well-wisher.

(d) Executor should be faithful, honest and man of integrity.

(3) There is no restriction placed by law on the number of executors whom a testator might appoint as the executors of his will. It is always advisable to have more than one executor.

(4) When a professional person such as an Advocate or a Chartered Accountant or a Solicitor etc. is appointed as Executor it is desirable to provide in the will that they can charge their usual fees for the work done by them in their professional capacity. If such provision is not made in the will then they cannot charge any professional fees even if they work in their professional capacity.

(5) If the Testator wants to give wide powers of investments to his executors then the testator should do so by specifying the extra powers to be given to the executors. In the absence of such specific extra powers for investments the executors cannot invest anywhere they like but they will have to do so in Trust investments only in accordance with the provisions of the Indian Trust Act.

(6) The executors are not entitled to get any remuneration for the work done by them as executors unless the testator has specifically provided under the will that the executors shall be paid remuneration and specifies the same. Usually well respectable and responsible persons decline to act as executors because they find it encumbersome and many times it is more a liability then a pleasure. In order to overcome such difficulty the testator should provide in the will that the executors of his will not be liable personally so long they act on the expert's advice.

(7) It may be noted that the executors cannot delegate their duties as their appointment is in the nature of the Trustees. If the testator wants the executors to delegate any of their duties then the testator should write so in his will.

(8) There are certain banks like Bank of India, State Bank of India, Central Bank Executor & Trustee Co. who undertake the work of execution of the will and administration of the estate of the deceased and they levy some charges for doing such work. In case such banks are to be appointed as executors of the will such Banks should be contacted first and the testator should obtain their consent in advance as such banks will not act as executors unless certain specific clauses regarding their remuneration etc. are properly incorporated in the will.

(9) It is advisable that an Advocate or a Solicitor or a Chartered Accountant who is going to act as executor under the will and charge his remuneration should not be an attesting witness to the will as it may disqualify such Advocate or Solicitor or Chartered Accountant to get remuneration.

22. **BEQUESTS**

Bequests are mainly of three types: (1) Onerous Bequests (2) Contingent Bequests and (3) Conditional Bequests.

(1) **Onerous Bequests**: Where a bequest imposes as obligation on the legatee, he can take nothing by it unless he accepts it fully. **(Sec.122)**

Illustration :-

A, having share in X, a prosperous joint stock company, and also shares in Y, a joint stock company in difficulties, in respect of which shares heavy calls are expected to be made, bequeaths to B all his shares in joint stock companies; B refuses to accept the shares in Y. He forfeits the shares in X.

Section 122 provides that if onerous and beneficial properties are included in the same bequest the legatee has no choice to elect; the legatee either takes the whole bequest or he takes nothings. In other words the legatee either accepts or rejects the bequest as a whole. It is not open for the legatee to accept the beneficial part of the bequest and to reject the onerous part.

However where a will contains two separate and independent bequests to the same person, the legatee is at liberty to accept one of them and refuse the other, although the former may be beneficial and the latter onerous. **(Sec. 123)**

Illustration :-

A having a lease for a term of years of a house at a rent which he and his representatives are bound to pay during the terms, and which is higher than the house can be let for, bequeaths to B the lease and a sum of money. B refuses to accept the lease. He will not by this refusal forfeit the money.

(2) **Contingent Bequests** : A contingent bequest is a bequest which is effective only on the happening or not happening of a contingency. Where a legacy is given if a specified uncertain event shall happen and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable.

Illustrations :-

(i) A legacy is bequeathed to A, and in case of his death, to B. If A survives the testator, the legacy to B does not take effect.

(ii) A legacy is bequeathed to A, and in case of his death without children, to B. If A survives the testator or dies in his lifetime leaving a child, the legacy to B does not take effect.

(3) **Conditional Bequests** : A conditional bequest is a bequest which depends upon the performance or non performance of a certain condition. A testator is at liberty to attach the conditions to the bequests made by him under the will and such conditions will be given effect provided such conditions are not impossible of performance not unlawful or not contrary to the public policy. The conditions are of two types : (i) Conditions Precedent and (ii) Conditions Subsequent.

It may be noted that the following two types of conditional bequests are void :

(1) A bequest upon an impossible condition. **(Sec.126)**

(Illustration : An estate is bequeathed to A on condition that he shall walk 100 miles in an hour. The bequest is void.)

(2) A bequest upon a condition, the fulfillment of which would be contrary to law or to morality. **(Sec.127)**

(Illustration : A bequeaths 500 rupees to B on condition that he shall murder C. The bequest is void.)

Condition Precedent : Where a will imposes a condition to be fulfilled before the legatee can take a vested interest in the thing bequeathed, the condition shall be considered to have been fulfilled if it has been substantially complied with. **(Sec. 128)** (Illustration : A legacy is bequeathed to A on condition that he shall marry with the consent of B,C,D and E. A marries with the written consent of B. C is present at the marriage, D sends a present to A previous to the marriage. E has been personally informed by A of his intentions, and has made no objection. A has fulfilled the condition.)

Condition Subsequent : Where there is a bequest to one person and a bequest of the same thing to another, if the prior bequest shall fail, the second bequest shall take effect upon the failure of the prior bequest although the failure may not have occurred in the manner contemplated by the testator. **(Sec. 129)** (Illustration : A bequeaths a sum of money to his own children surviving him, and if they all die under 18, to B. A dies without having ever had a child. The bequest to B takes effect.) (For comprehensive study of Conditions Subsequent one may refer to **Sec.129 to 137 of the Indian Succession Act**.)

23. **OF VOID BEQUESTS**

(a) Non existence of the legatee:

Under **Section 112 of the Act** where a bequest has been made to a person by a particular description and there is no person in existence at the testator's death who answers the description, the bequest is void.

For example, if A bequeaths Rs.1000 to the eldest son of B. At the death of the testator, B has no son. The bequest is void.

(b) Bequest to an unborn person:

On reading **Sections 113 and 114** together, the following principles can be laid down. A bequest cannot be made to a person who is unborn at the time of the death of the testator. However, a gift can be given to an unborn person if prior to the legacy given to an unborn person a prior interest is given to a person who is living at the time of the death of the testator. For example a bequest may be given to A and on his death to his son B. If A is living at the time of the death of the testator, but B is not born, but is in existence when A dies the bequest to both A and B would be valid because the bequest to an unborn is preceded by interest given to a living person. However, when the legacy is given to an unborn person, it must be absolute interest in the property, that is, life interest or limited interest or conditional interest cannot be given to an unborn person. After creating the prior legacy when ultimately the property is given to an unborn person, the remaining interest in property must be given absolutely unconditionally to the unborn person, that is limited or qualified interest given to an unborn person is bad in law. It would make such bequest totally void. In addition to the condition of an absolute gift to an unborn person, the condition as regards rule against perpetuity must be satisfied. The property given to a legatee must vest in the legatee not beyond the period known as perpetuity period. Perpetuity period in India is the life time of a living person, and the relative minority period of the unborn person. Whatever is given to an unborn person, not only it should be unqualified bequest but it should vest in unborn person before the unborn person attains the age of majority, that is whenever gift is given to an unborn person, the property must vest in such a person by the time he attains the age of majority. If the vesting of property in unborn person is postponed beyond his minority period, such bequest is against the rule of perpetuity and, therefore bad in law **(S.114) Section 115** provided that if a bequest is made to a class of persons with regard to some of whom it is inoperative by reasons of the provisions of **Section 113 or Section 114**, such bequest shall be void in regard to those persons only and not in regard to the whole class.

(c) Direction for Accumulation of income:

S.117 provides for what is known as effect of direction for accumulation. Direction for accumulation is valid provided it is for a limited period. Section 117 provides that where the terms of a will direct that the income arising from any property shall be accumulated either wholly or in part during any period longer than a period of eighteen years from the death of the testator, such direction shall, be void to the extent to which the period during which the accumulation is directed exceeds the aforesaid period, and at the end of such period of eighteen years the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed. However, the provision of Section 117 (1) shall not effect any direction for accumulation for the purpose of : (i) the payment of the debts of the testator or any other person taking any interest under the will, or (ii) the provision of portions for children or remoter issue of the testator or of any other person taking any interest under the will, or (iii) the preservation or maintenance of any property bequeathed; and such direction may be made accordingly.

(d) Bequest to a charity:

If a person has near relative he shall have no power to bequeath for a charitable or religious purpose, except by a will which is executed twelve months from the date of execution of the will in some place provided by law for the safe custody of the wills of living persons.

It must be noted that this provision does not apply to the wills made by Hindus and Muslims.

23. **LEGACIES**

Legacies are of three kinds: (1) General Legacy (2) Specific Legacy (3) Demonstrative Legacy.

(1) **General Legacy**: General Legacy has not been defined under the Indian Succession Act. General Legacy is a legacy not of any particular or specific things. It is a legacy of something which is to be provided out of the general estate of the testator. General legacy is directed to be paid out of the general funds of the deceased. **Section 148 of the Indian Succession Act** provides that where property comprised in a bequest to two or more persons in succession is not specifically bequeathed, it shall, in the absence of any direction to the country, be sold, and the proceeds of the sale shall be invested in such securities as the High Court may by any general rule authorise or direct, and the fund thus constituted shall be enjoyed by the successive legatees according to the terms of the will.

Illustration

A having a lease for a term of years, bequeaths all his property to B for life, and after B's death to C. The lease must be sold, the proceeds invested as stated in this section and the annual income arising from the fund is to be paid to B for life. At B's death the capital of the fund is to be paid to C.

(2) **Specific Legacy** : Where a testator bequeaths to any person a specified part of his property, which is distinguished from all other parts of his property, the legacy is said to be specific. **(Sec.142)**

Illustrations:-

(i) A bequeaths to B -

"the diamond ring presented to me by C":

"my golden chain";

"all my households goods which shall be in or about my dwelling house in M. Street in Calcutta, at time of my death";

“my promissory notes of the Central Government for 10,000 rupees in their 4 per cent loan";

Each of the above legacies is specific.

(ii) A, having property at Beneares and also in other places, bequeaths to B all his property at Beneares. The legacy is specific.

(3) **Demonstrative Legacy** : Where a testator bequeaths a certain sum of money, or a certain quantity of any other commodity, and refers to a particular fund or stock so as to constitute the same the primary fund or stock out of which payment is to be made, the legacy is said to be demonstrative. **(Sec.150)**

Explanation :- The distinction between a specific legacy and a demonstrative legacy consists in this, that -

Where specified property is given to the legatee, the legacy is specific;

Where the legacy is directed to be paid out of specified property, it is demonstrative.

Illustrations :

(i) A bequeaths to B 1,000 rupees, being part of a debt due to him from W. He also bequeaths to C 1,000 rupees to be paid out of the debt due to him from W. The legacy to B is specific, the legacy to C is demonstrative.

(ii) A bequeaths to B -

"ten bushels of the corn which shall grow in my field of Green Acre".

"10,000 rupees out of my five per cent promissory notes of the Central Government";

Lapsing of a Legacy:

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

In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he/ her (i.e. legatee) survived the testator. Lapsing of legacy, therefore, is failure of testamentary gift owing to the death of the legatee before the death of the testator. As the will is operative from the date of the death of the testator, the person who claims the legacy must be a person who has survived the testator.

If a legacy is given to more than one legatee which show that the testator intended to give them distinct shares of it, then if any legatee dies before the testator so much of the legacy as was intended for him shall fall into the residue of the testator's property.

However, where a legacy is given jointly to two persons by way of joint tenancy on the death of one of them, the surviving legatee will get the property.

However, to the rule of lapsing there is an important exception where a bequest has been made to any child or lineal descendant of the testator, and the lineal descendant of him survives the testator, the bequest shall not lapse but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears from the will.

25. **CONSTRUCTION OF A WILL**

The primary duty of the Court in construction of a will is to endeavour to ascertain the intention of the testator from the will itself by reading it as a whole without indulging in any conjecture or speculations to what he would have done if he had been better informed or better advised and from the language used by him and in doing so the Court is entitled and bound to bear in mind other matters than merely the words used in the will. The Courts have agreed that in a will the cardinal rule to be observed is to ascertain the real intention of the testator which the will itself by express words or by implication declares and the primary duty

of the court is to ascertain from the language of the entire document what the intentions of the testator are. As held by the courts "the court is entitled to put itself in the testator's armchair."

Section 75 provides for the purpose of determining the question as to what person or what property is denoted by any words used in a will, court shall enquire into every material fact relating to the persons who claim interest under such will, the property which is claimed as the subject of disposition, the circumstances of the testator and of his family, and into every fact a knowledge of which may conduce to the right application of the words which the testator has used.

The meaning of any clause in a will is to be collected from the entire will and all the parts of the will are to be construed with reference to each other.

The intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to the intention of the testator as far as possible.

A will or bequest which is not expressive of any definite intention is void for uncertainty.

26. **PROBATE**

(1) **Section 2(f) of the Indian Succession Act** defines probate as under :

"Probate means the copy of a will certified under the seal of a court of competent jurisdiction with a grant of administration to the estate of the testator"

Once the probate of a will is granted it establishes the will form the death of the testator and renders valid all intermediate acts of the executors done in accordance with the will. The probate of the will establishes conclusively the legal character of the person to whom the grant of the probate is made. Probate is conclusive evidence of the due execution and validity of the will.

(2) **Section 213 of the Indian Succession Act** which deals with the right as an executor or legatee reads as under :

"Rights as executor or legatee when established.:

(1) No right as executor or legatee can be established in any Court of justice, unless a Court of competent jurisdiction in India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.

(2) This section shall not apply in the case of wills made by Muhammadans, and shall only apply -

(i) in the case of wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of the classes specified in clauses (a) and (b) of section 57; and

(ii) in the case of wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962, where such wills are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay and where such wills are made outside those limits, in so far as they relate to immovable property situate within those limits.

(3) Probate is an order issued by the court in respect of a will which certifies and upholds the genuineness of the will. The grant of probate enables the executor (or the beneficiary) to lay his hands on the property of the testator.

(4) Probate can be granted only to the executor/s appointed under the will. Probate can not be granted to a person who is of unsound mind, or a minor.

(5) A petition for probate of the will must be filed in the concerned court alongwith the will concerned. The petition should be filed by the executor/s of the will and in the case where no executor has been appointed under the will the petition should be made by a competent beneficiary. The petition for probate should interalia state :

(i) the time of the testator's death;

(ii) that the writing annexed is the last will and testament of the testator and that it was duly executed;

(iii) the value of the assets which are likely to come to the petitioner's hands and;

(iv) that petitioner is the executor/ beneficiary named in the will.

The petition for probate must be signed and verified by the executor or the beneficiary as the case may be.

27. **LETTERS OF ADMINISTRATION**

(1) Letters of administration with the will annexed may be granted to a universal or residuary legatee in respect of the whole estate, or of so much of the estate of the testator as had not been administered when :

(i) no executor has been appointed by the testator under the will

(ii) the executor appointed under the will is legally incapable or refuse to act as executor, or the executor has died before the testator or before he has proved the will; or

(iii) the executor has died after proving the will but before he has administered all the estate of the testator.

(2) For obtaining letters of administration, the beneficiary has to file the necessary petition in the court. The court after compliance of the procedure and on being satisfied about the proof of valid execution of the will issues letters of administration to the beneficiary. It may be noted that the powers of the administrator are more or less similar to those of an executor.

28. **RECOVERY OF THE DEBTS DUE TO THE DECEASED PERSON**

Under the provisions of S.214,

(1) No Court shall -

(a) pass a decree against a debtor of a deceased person for payment of this debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof, or

(b) proceed, upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except on the production, by the person so claiming, of-

(i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or

(ii) a certificate granted under Section 31 or Section 32 of the Administrator General's Act, 1913 and having the debt mentioned therein, or

(iii) a succession certificate granted under Part X and having the debt specified therein, or

(iv) a certificate granted under the Succession Certificate Act, 1889, or

(v) a certificate granted under Bombay Regulation No.8 of 1827, and, if granted after the first day of May, 1889, having the debt specified therein.

2. The word "debt" in sub-section (1) includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.

29. **SUCCESSION CERTIFICATE**

Under the provisions of **S.370** a succession certificate shall not be granted under the Act with respect to any debt or security to which a right is required under **Section 212** or **Section 213** to be established by letters of administration or probate.

Provided that nothing contained in **Section 370** shall be deemed to prevent the grant of a certificate to any person claiming to be entitled to the effects of the deceased person.

For the purpose of this section security means any promissory note, debenture, security of a Central Government or State Government, any bond, debenture or Annuity charged by Act of Parliament, any stock or debenture of or share in a company or other incorporated institution, any debenture or other security for money issued by, or on behalf of a local authority or any other security which the State Government may, by notification in the Official Gazette declare to be security for this section.

Application for succession certificate will have to be made to the District Judge by a petition signed and verified by or on behalf of an applicant in the manner prescribed by the Code of Civil Procedure, 1908 for the signing and verification of a plaint by or on behalf of a plaintiff, and setting forth the following particulars viz.

(a) the time and death of the deceased

(b) the ordinary residence of the deceased at the time of his death, and if such residence was not within the local limits of the jurisdiction of the Judge to whom the application is made, then the property of the deceased within those limits.

(c) the family or other near relatives of the deceased and their respective residences.

(d) the right in which the petitioner claims

(e) the absence of any impediments under **section 370** or under any other enactment to the grant of the certificate may be made in respect of any debt, due to the deceased creditor or in respect of portions thereof.

Effect of Certificate:

The effect of the certificate is to afford protection to the parties paying the debts is conclusive as against the persons owing such debts or liable on such securities, and shall notwithstanding any contravention of Section 370, or other defect, afford full indemnity to all such persons as regards all payments made for securities to or with the person to whom the certificate was granted.

MODEL WILLS AND CODICLS

MODEL WILLS-
(SIMPLE WILL)

1. I, Shri A.B.C. of Mumbai Indian Inhabitant aged _____ residing at _____ Mumbai- 400 0___ do hereby revoke all former wills and codicils hitherto force made by me, if any, and declare this to be my last Will and Testament.

2. I appoint my brother Shri X.Y.Z. and my wife Smt. P.A.C. to be the Executors and Trustees of this my Will. For brevity's sake they are hereinafter referred to as "my Trustees".

3. There are several shares, securities, fixed deposits, bank accounts and other monies which are standing in the joint names of myself and my wife Smt. P.A.C. I declare that the shares, securities, fixed deposits, bank accounts and other monies which shall stand at the date of my death in the joint names of myself and my wife Smt. P.A.C., my name standing first belong to me absolutely and shall form part of my estate on my death, the name of my wife Smt. P.A.C. having been added thereto for the sake of facility only. However, all shares, securities, fixed deposits, bank accounts and other monies which shall stand at the date of my death in the joint names of my wife Smt. P.A.C. and myself, my wife's name standing first in respect thereof, are and shall be her own property as my name having been added thereto only for the sake of convenience.

4. I direct my Trustees to spend a sum not exceeding Rs.5,000 for my funeral and obsequial ceremonies. My Trustees shall not be liable to account for such expenses to any person whatsoever.

5. I direct my Trustees to recover all my assets and outstanding and to pay out of my estate all my just debts and liabilities, if any as well as the probate duty and other liabilities, which may become payable in respect of my death.

6. I give, devise and bequeath a sum of Rs.5,000/- (Rupees Five Thousand only) to my daughter Smt. D.E.F.

7. I give, devise and bequeath my ownership office being Office No.22 on the third floor of Yashita Towers, R.H.B. Road, Mulund (West), Mumbai - 400 080 alongwith the furniture, fixtures and other equipments, office machines etc. therein to my son Shri G.A.C.

8. I give, devise and bequeath all the rest and residue of my property, both movable as well as immovable, of whatsoever nature and kind and

wheresoever situate (hereinafter called "my residuary estate") unto my wife Smt. P.A.C. absolutely.

9. In the event of my wife Smt. P.A.C. predeceasing me or dying simultaneously with me or within a period of six months from the date of my death, then and in such case, notwithstanding anything contained in the last preceding clause of this Will, no part of my residuary estate shall vest in or otherwise belong to my wife Smt. P.A.C. and she shall have no interest in such property or the income thereof nor be entitled to the beneficial interest thereof, and in such case my residuary estate shall go and belong, as from the date of my death to my son Shri G.A.C. and my daughter Smt. D.E.F. as tenants-in-common in equal shares absolutely.

IN WITNESS WHEREOF I the said Shri A.B.C. have hereunto set and subscribed my hand at Mumbai this _____ day of _____ 2002.

SIGNED AND DECLARED by the abovenamed Testator SHRI A.B.C.as and for his last Will and Testament in the presence of us both, both being present at the same time who at his request and in his presence and in the presence of each other have hereunto set and subscribed our names as witnesses :

(Signature of A.B.C.)

1.

(Signature of First Witness)

2.

(Signature of Second Witness)

CODICIL FOR CORRECTING MISTAKES IN A WILL

1. I Shri P.Q.R. of Mumbai Indian Inhabitant aged ____ residing at _____ Mumbai - 400 0__ hereby declare this to be the First Codicil to my last Will and Testament dated 1st January, 1997.

2. I declare that my said Will dated 1st January, 1997 shall stand corrected as follows :

(1) In the second line in clause 4 on page 2 of my said Will, the word and figure "Rs.50,000/- (Rupees Fifty Thousand only)" shall be

substituted for the word and figure "Rs.5,000/- (Rupees Five Thousand only)".

(2) In the second line in clause 5 on page 2 of my said Will the name "DILIP" shall be substituted for the name "DEELEEP" appearing therein.

(3) In the forth line in clause 7 on page 3 of my said Will, the words "and situated at Ganesh Gawde Road" shall be substituted for the words "and situated at Sevaram Lalvani Road".

(4) I direct that my said Will shall, except as hereinabove altered and amended, be valid and operative and I hereby confirm the same.

IN WITNESS WHEREOF I, Shri P.Q.R. have set my hand to this Codicil this 5th day of February, 1999.

SIGNED AND DELIVERED by the)
Testator SHRI P.Q R. as the First)
Codicil to be annexed to his last Will)
and Testament dated 1st January,1997)
and to be treated as part thereof in the)
presence of us both, both being)
present at the same time who upon his)
request and in his presence and in the)
presence of each other have hereunto)
set and subscribed our names as)
Witnesses:

1.

2.

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FAMILY ARRANGEMENT

Meaning: 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. The agreement may be implied from a long course of dealings, but it is more usual to embody or to effectuate the agreement in a deed to which the term "family arrangement" is applied. *Kale v. Dy. Director of Consoliation (1976) 3 SCC 119, AIR 1976 SC 807*

Essentials of a family arrangements are:

(1) There must be an agreement amongst the members of the family intended to be generally and reasonably for the benefit of the family.

(2) The agreement should be with the object of compromising doubtful or disputed rights, or for preserving the family property, or for maintaining the peace and harmony among the family by avoiding litigation, or for saving its honour.

(3) The Family Arrangement being an agreement, there is consideration for the same, the consideration being the expectation that such an agreement or settlement will result in establishing or ensuring amity and goodwill amongst the relations. *M.N. Aryamurthi v. M. L. Subbaraya Shetty AIR 1972 S.C. 1279*

(4) 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.

(5) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence.

(6) The family arrangements may be even oral in which case no registration is necessary. *Kale v. Dy. Director of Consolidation AIR 1976 SC 807, 812*

Title: It is not necessary to establish an antecedent title to the person who sets up family arrangement and that it is sufficient if it is shown that there were disputes among the members and the agreement was arrived at by way of settlement of all the disputes between the parties. *Mythili Nalini v. Kowmari, AIR 1991 Ker 266. Also see Kisto Chandra Mandal v. Lt. Anila Bala Dasi, AIR 1968 Pat.487; Shambhu Prasad Singh v. Phool Kumari AIR 1971 SC 1337.*

Ordinarily, in case of a 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. *Sadhu Madho Das v. Mukand Ram AIR 1955 SC 481*.

Meaning of family and binding nature of family arrangement :

Courts give effect to a family settlement upon the broad and general ground that its object is to settle existing or future disputes regarding property amongst members of a family. In the context of a family settlement, the word "family" is not to be understood in a narrow sense of being a group of persons whom the law recognises as having a right of succession for having a claim to a share in the disputed property. *Ram Charan Das v. Girja Nandini Devi AIR 1966 S.C. 323, Krishna Beharilal v. Gulabchand AIR 1971 S.C. 1041*.

A family arrangement or settlement, even embodied in a compromise decree, is binding on all the parties to it. A consideration (which is the expectation that such a settlement will result in establishing or ensuring amity and goodwill amongst the relations) having passed by each of the disputants, the settlement consisting of recognition of the right asserted by each other cannot be permitted to be impeached thereafter. A party who had taken benefit under the transaction is not entitled to turn round and say that transaction was of a kind which the other party could not enter into and was therefore invalid. *Ram Charan Das, v. Girija Nandini Devi, AIR 1966 SC.329*

A family arrangement being binding on the parties to the arrangement clearly operates as an estoppel to preclude any of the parties who have taken advantage under the agreement from revoking or challenging the same. *Kale v. Dy. Director of Consolidation, AIR 1976 SC 807*.

Whether document or registration is required for effecting Family Arrangement ?

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 in writing with the purpose of using that writing as 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 would amount to a document of title declaring for future what rights in what properties the parties possess. *Tek Bahadur Bhujil V. Debi Singh AIR 1966 SC 292 Also see Awadh Narain Singh v. Narain Mishra, AIR 1962 Pat 400 ;*

Mythili Nalini v. Kowmari, AIR 1991 Ker 266 ; Kale v. Dy. Director of Consolidation AIR 1976 SC 807.

It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangment made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of section 17 of the Registration Act and is, therefore not compulsorily registrable – *Kale v. Dy. Director of Consolidation AIR 1976 SC 807.*

The family arrangement will need registration only if it creates any interest in immoveable property in presenti in favour of the party mentioned therein. In case however no such interest is created, the document will be valid despite its non-registration and will not be hit by section 17 of the Indian Registration Act, 1908. *Maturi Pullaih v. Maturi Narasimhan AIR 1966 SC 1836.*

Even a family arrangement, which was registrable but not registered, can be used for a collateral purpose, namely, for the purpose of showing the nature and character of possession of the parties in pursuance of the family settlement. *Kale v. Director of Consolidation AIR 1976 SC. 807, (1976) 3 SCC 119.*

According to the Supreme Court in *Roshan Singh v. Zile Singh AIR 1988 SC 881*, the true principle that emerges can be stated thus: '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 prescribed 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 the 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 section 17 read with section 49 of the Registration Act as no interest in property is created or declared by the document for the first time.

Family Arrangement does not amount to transfer: 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 *Hiran Bibi v. Sohan Bibi, AIR 1914 PC 44*, approving, *Khunni Lal v. Govind Krishna Narain, (1911) ILR 33 All 356 (PC).* It is not also the creation of an interest. For, as pointed out by the Privy Council in *Hiran Bibi's case AIR 1914 PC 44*, 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 party. It is not necessary, as would appear from the decision in *Rangasami Gounden v. Nachiappa Gounden AIR 1918 PC 196*, 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 resemblance of a claim on some other ground as, say, affection. *Ram Charan Das v. Girija Nandini Devi, AIR 1966 SC 323.*

PARTITION

Definition of Instrument of Partition:

Section 2(15) of The Indian Stamp Act, 1899 defines Instrument of Partition as under:

"Instrument of partition" means any instrument whereby co-owners of any property divide or agree to divide such property in severally, and includes also a final order for effecting a partition passed by any revenue authority or any Civil Court and an award by an arbitrator directing a partition.

Section 2(m) of Bombay Stamp Act, 1958 defines Instrument of Partition as under:

(m)"instrument of partition" means any instrument whereby co-owners of any property divide or agree to divide such property in severally and includes---

(i) a final order for effecting a partition passed by any revenue authority or any civil court,

(ii) an award by an arbitration directing a partition, and

(iii) when any partition is effected without executing any such instrument, any instrument or instruments signed by the co-owners and recording, whether by way of declaration of such partition or otherwise, the terms of such partition amongst the co-owners.

Stamp Duty on Instrument of Partition:

46. PARTITION-- Instrument of	[1][Two per cent.] the amount or the market value of the separated share or shares of the property.

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1. These words were substituted for the words " Rupees Ten for every rupees five hundred or part thereof" by The Maharashtra Stamp (Amendment) Act, 2015, s. 20(23).

Note. The largest share remaining after the property is partitioned (or, if there are two or more shares of equal value and not smaller than any of the other shares, then one of such equal shares) shall be deemed to be that from which the other shares are separated.

Provided always that, --

(a) when an instrument of partition containing an agreement to divide property in severalty is executed and a partition is effected in pursuance of such agreement, the duty chargeable upon the instrument effecting such partition shall be reduced by the amount of duty paid in respect of the first instrument, but shall not be less than five rupees;

[2][(b) where the instrument relates to the partition of agricultural land, the rate of duty applicable [3][shall be one hundred rupees).]

(c) where a final order for effecting a partition passed by any Revenue authority or any Civil Court or an award by an arbitrator directing a partition, is stamped with the stamp required for an instrument of partition, and an instrument of partition in pursuance of such order or award is subsequently executed, the duty on such instrument shall not exceed ten rupees.

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2. Clause (b) was substituted for the words "(b) where land is held on Revenue Settlement for a period not exceeding thirty years and paying the full assessment the value for the purpose of duty shall be calculated at not more than fifty times the annual revenue" by Mah. 9 of 1997, s. 14(6)(ii), (w.e.f. 15-9-1996).

3 These words were substituted for the words "shall be 0.5 per cent on the market value of the separated share or shares of the property" by Mah. Tax Laws (Levy, Amendment and Validation) Act 30 of 1997, s. 8(2), (w.e.f. 15-5-1997).

GIFT

Section 122 of The Transfer of Property Act, 1882 defines gift as under:

'Gift' is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

Section 123 of the T.P. Act, 1882 provides that for the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at lease two witnesses.

The gift of movable property can be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

There may be three kinds of gifts, viz.-

(i) gifts inter vivos;
(ii) gifts mortis causa ; and
(iii) gifts by will.

However, Section 129 of the T.P. Act exempts the gifts of movable property from the operation of the provisions relating to gift contained in Chapter VII of the T.P. Act, if they are made in contemplation of death (gifts mortis causa) or if such gifts are made by Muhammadans in so far as the provisions are inconsistant with the rules of Muhammadan Law.

Essentials of valid gifts are as follows:-

(1) existence of the property to be gifted ;
(2) two parties to the gift i.e. the donor and the donee;
(3) volition of the donor ;
(4) absence of consideration ;
(5) transfer; and
(6) acceptance of the gift by the donee during the lifetime of the donor.

When a gift is made, it must satisfactorily appear that the donor knew what he was doing and understood the contents of the instrument and its effect and also that undue influence or pressure was not exercised upon him by the donee- *Phul Chand v Lakkhu, 25 All 358 ; Sarba Mohan v Manmohan, 37 CWN 149.*

The gift must be accepted by the donee or by someone on his behalf. An offer without acceptance by the donee cannot complete the gift, though the donor may in fact believe that it was accepted- *Pudmanand v Hayes, 28 Cal 720 (PC).* Acceptance may be inferred

from acts prior to the execution of the deed of gift - *Jalakanti v. Appalarajugari, AIR 1958 AP 213.*

Instrument of Gift:

Section 2 (la) of the Bombay Stamp Act, 1958 defines instrument of gift as under:

"Instrument of Gift" includes, where the gift is of any movable 2[or immovable property but has not been made in writing, any instrument recording whether by way of declaration or otherwise the making or acceptance of such oral gift.]

Stamp duty: Article 34 of Schedule I to the Bombay Stamp Act, 1958 which provides for stamp duty on instrument of gift is as under:

Stamp Duty on Gift:

34. GIFT, Instrument of-not being a Settlement (Article 55) Will or Transfer (Article 59)	The same duty as is leviable on a Conveyance under clause (a), or (b), [1][or (c), as the case may be, of Article 25, on the market value of the property which is the subject matter of the gift. [2][Provided that, if the property is gifted to a family member being the husband, wife, brother or sister of the donor or any lineal ascendant or decendant of the donor, then the amount of duty chargeable shall be at the same rate as specified in this article or at the rate of rupees ten for every rupees five hundred or part thereof on the market value of the property which is the subject matter of the gift, whichever is less.] [3][Provided further that, if the residential and agricultural property is gifted to husband, wife, son, daughter, grandson, grand-daughter, wife of deceased son, the amount of duty chargeable shall be rupees two hundred.]

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1 These brackets, letters and word substituted for the brackets, letters and words ", (c) or (d)" by Mah. Tax Laws (Levy, Amendment and Validation) Act, 2012, Mah. 8 of 2012, s. 2(f) (w.e.f. 25-4-2012).

2 Proviso added by Mah. 20 of 202, s. 8(d), (w.e.f. 1-5-2002).

3. This proviso was added by The Maharashtra Stamp (Amendment) Act, 2015, s. 20(18).
