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Essential Features of a Will

Bijal Ajinkya & Natasha Baradia,
Advocates

1. Introduction

The law governing wills in India is contained in the Indian Succession Act 1925 (Act). A will is defined as 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[1]. Bequests made under a will take effect only after the lifetime of the author of the will. A wider definition is seen in the General Clauses Act 1897, wherein "will" includes a codicil and every writing making a voluntary posthumous disposition of property[2]. Essentially, a will and a codicil are read together, unless the later of the two (duly executed) is intended to revoke the former.

A will which is written by the testator himself (handwritten will) is called a holograph will[3]. In the case of holograph wills, the presumption of genuineness is all the more, even bordering on actual proof of the date of the execution and attestation of the will[4].

2. Testamentary capacity

The Act provides that every person of sound mind not being a minor may dispose of his property by Will[5]. As to the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory. This phrase, "sound and disposing memory" is often included while drafting a will. Sound testamentary capacity means that the below conditions must exist at one and the same time-

a. The testator must understand that he is giving his property to one or more legatees;

b. He must understand and recollect this extent of this property; and

c. He must also understand the nature and extent of claims upon him both of those whom he is including in his will and those whom he is secluding from the will

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[6].

A corollary to "soundness of the mind" as required of a testator may be drawn from the

1. Section 2(h), Indian Succession Act 1925.
2. K Kannan, The Indian Succession Act (Paruck, 12th edn, Lexis Nexis 2019) 22.
3. BB Mitra, The Indian Succession Act (Sukumar Ray ed, 15th edn, Eastern Law House 2013) 51.
4. *Joigee Primrose Prestor (Nee Vas) vs. Vera Marie Vas (1996) 8 SCC 324.*
5. Section 59, Indian Succession Act 1925.
6. Section 61, Indian Succession Act 1925.

Indian Contract Act 1872, wherein person is said to be of sound mind, if at the time he makes a contract, he is capable of understanding it and of forming a rational judgment as to its effect[7].

Similarly, coercion is the committing or threatening to commit, any act forbidden by the Indian Penal Code 1860 or the unlawful detaining or threatening to detain, any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement[8]. As regards wills, whatever destroys the free agency of the testator constitutes "coercion".

If a person whilst he is of sound mind makes a will and subsequently becomes insane, the will is not revoked by subsequent insanity. A mentally afflicted person may make a will during a lucid interval[9]. While it is advisable for the testator to sign the will in a uniform manner, a signature on each page of the will, where the last page is left unsigned, is not prima facie proof of insufficient execution[10].

Under exchange control laws as applicable for the purpose repatriation of assets, a person should have stayed in India for more than 182 days in the preceding year in order to be resident of India in a given year. Any person not covered in the preceding definition is said to be a non-resident Indian. The Act as such gives no guidance to emerging trends of testamentary and intestate succession that has a foreign element as regards the domicile of testator, propositus, or in relation to property held in a foreign country, or will executed in a foreign country, except in a very limited way[11]. However, under private international law, succession of an immoveable property is governed by the law of the land where it is situated (lex situs). However, it is the law of the testator's domicile at the time of making a will that governs succession of their moveable properties. Thus, NRIs and non-citizens may write a will in India governing the bequests of their assets in India.

3. Execution of a Will

Section 63 of the Act governs the execution of wills. It requires the testator to sign the will and two or more witnesses to attest the will. Further, each attesting witness must sign the will in the presence of the testator. The Supreme Court in *Jagdish Chand Sharma vs. Narain Singh Saini*[12] has reiterated that the will shall have to be attested by two or more witnesses each of whom has seen the testator sign or affix his mark in the presence and on the direction of the testator, or has received from the testator, personal acknowledgement of a signature or mark and that each of the witnesses has signed the will in the presence of the testator. As long as there are two witnesses, there is no requirement that both of them shall sign at the same time or be present at the same time[13].

3.1. Attesting witnesses

A minimum of two witness are required for a will to be validly executed. Any person[14], including a minor[15], can be an attesting witness. However, a person who signs the will on behalf of the testator

7. Section 12, Indian Contract Act 8972.
8. Section 15, Indian Contract Act 1872.
9. Explanation to Section 59.
10. Theobald, Law of Wills, 13th edn, 1971, 112.
11. K Kannan, The Indian Succession Act (Paruck, 12th edn, Lexis Nexis 2019) 2.
12. AIR 2015 SC 2149.
13. *Hari Narayan Khedkar vs. Dwarkabai Pandurand Khedkar 2004 (2) Bom CR 427.*
14. K Kannan, The Indian Succession Act (Paruck, 12th edn, Lexis Nexis 2019) 245.
15. Section 118, Indian Evidence Act 1872.

(who is illiterate) cannot also sign as an attesting witness[16].

It is not necessary that the witness should know the contents of the will which he is attesting. He is merely expected to witness the signature of the testator. All that the law requires is that there shall be two attesting witnesses[17]. Further, the attesting witness need not be present when the will is being written[18].

Section 67 of the Act provides that a will shall not be deemed to be insufficiently attested merely on account of benefit by way of a bequest or by way of appointment given to the person so attesting or to his or her wife or husband. However, the section explicitly provides that such a bequest or appointment shall be void so far as it concerns the person who has attested the will or the husband or wife of such a person, including to the extent of any person claiming an interest in the estate of the deceased through either of them. It must be noted that Section 67 does not apply to wills made by Hindus. Hence, the attesting witness to the will of a Hindu does not lose the legacy given to him by the will[19]. Further it is a settled position that attestation by a beneficiary is no ground to suspect the genuineness of the will[20].

Under the Indian Succession Act, there is no limitation on who can be a witness on account of residency or nationality of the individual. For the purpose of proving the will, testimony of one of the witnesses is required. Secondly, if a will requires a probate (explained below), it is prudent that the will is attested by a person likely to be present in the jurisdiction where the probate proceedings or administration of the will are to be conducted. Hence, it is practical to have an individual who is likely to be present in India for any such testimony or for attesting affidavits at the time of the will taking effect as the witness of an Indian will.

Section 63 of the Act lays down alternatives for execution of a will and it is sufficient to prove conformity with one of those alternatives. The mere fact that the will is registered is of no avail because the endorsement of the sub-registrar cannot be a substitute for attesting evidence[21]. Hence, the role of the witnesses is crucial.

3.2. Doctor's certificate

There is no statutory requirement for a valid execution of a will to be accompanied by a medical practitioner's certificate confirming good health and sound mind of the testator. Conventionally, in England, it was considered to be a golden rule that where a solicitor was drawing up a will for an aged testator or one who has been seriously ill, it should be witnessed or approved by a medial practitioner. There has been a departure from this conventional approach to the modern one where the medical personnel as a witness is not seen as necessary[22]. Therefore, under the current law, attestation as one of the witnesses, or otherwise an approval by a doctor, is not essential to a will.

3.3. Registration and Stamping

Wills are optionally registrable instruments[23]. A will can be rendered invalid on the grounds of forgery of will/signature of testator, coercion

16. *Radhakrishna vs. Suraya 40 Mad 550 (556).*
17. *Arun Kumar Dutta vs. Shankar Kumar Dutta 2006 (2) Hindu L.R 124.*
18. *Purushottam Haribhau Pijgade vs. Ambadas Sitaramji Pijgade 2010 (112) Bom LR 3608.*
19. Supra note 2, 246.
20. *Rur Singh (D) Th Lrs vs. Bachan Kaur (2009) 11 SCC 1.*
21. *Manmohan (deceased) through LR's vs. Baldev Raj 2013 SCC OnLine Del 4568.*
22. *Baker vs. Baker [2008] EWHC 977 (Ch): [2008] All ER (D) 312.*
23. Section 18, Registration Act 1908.

meted out to the testator or that the testator lacked testamentary capacity. A will, drawn up in any of these three situations may well be registered. Registration may take place without the executant really knowing what he was registering[24]. Just as no-registration cannot constitute an inference against the genuineness of the will, mere registration does not dispel the requirement of proof of will[25].

Registration only shows that a particular document exists in the office of the sub-registrar[26]. It is the last will of the testator which must take effect upon his demise. Moreover, a registered will could be revoked by an unregistered will[27]. As regards stamp duty, the law is clear that no stamp duty is chargeable on a will.

3.4. Unequal distribution under will

A will is one of the most solemn instruments known to law. The executant of the will cannot be called to deny the execution or to explain the circumstances in which it was executed[28]. The very application "will" suggests that the document should effect that which the testator would have done; it is his will, his intention to pass his personal and real property in the particular manner outlined in the testamentary document. The foundational testamentary interpretation relating to wills and codicils remain the specific intent expressed in the plain language of the will[29].

In *S. Sundaresa Pai vs. Mrs. Sumangal T. Pai*[30], the Supreme Court has held that a Will providing for uneven distribution of assets is valid. It further held that unequal distribution cannot lead to a conclusion of such a will being "unnatural". Quantum and manner of distribution lies squarely within the pure discretion of the executant of the will.

However, the Supreme Court has held that even though it cannot be said to be a hard and fast rule, yet when disinheritance is amongst heirs of equal degrees and no reason for exclusion is disclosed, then the standard of scrutiny is not the same and if the courts below (subordinate courts) fail to be alive to it, then their orders cannot be said to be beyond review[31]. Therefore, it is only prudent for a testator to explicitly give context to his actions (including exclusions of certain individuals and/or heirs from his estate) under the will. A will is executed to alter the ordinary mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of a natural heir[32]. It may be said to a certain extent that if a person intends his property to pass to his natural heirs in the proportion as specified under his personal laws, there is no necessity at all for executing a will.

4. Executor of a Will

Section 2(c) of the Act defines "executor" to be a person to whom the execution of the last Will of a deceased person is confided by way of the testator's appointment. Appointment of executor is not mandatory under law; however, owing to the crucial role the executor plays in disposing of the estate of a testator in accordance

24. *Dinesh Chandra Mitra vs. Bhawani Prasad Bhowmick AIR 1969 Assam 18.*
25. *Khanda Singh vs. Natha Singh (1994) 107 PLR 472.*
26. *Israel Ali vs. Rajkumar (2014) 144 DRJ 350.*
27. *Sunil Anand vs. Rajiv Anand 2008 (103) DRJ 165.*
28. *Kalyan Singh vs. Chhoti AIR 1990 SC 396.*
29. *Sreedevi vs. Radhakrishnan Nair 2018 (3) KLJ 196.*
30. (2001 (8) SCALE 309.
31. *Ram Piari vs. Bhagwant AIR 1990 SC 1742.*
32. K Kannan, The Indian Succession Act (Paruck, 12th edn, Lexis Nexis 2019) p 216.

with the last will of the testator, it is advisable to appoint an executor by express nomination in the body of the will. Where there is no executor, competent authority appoints a person being the "administrator" for administering the estate of the deceased person[33]. Generally, an executor can derive his office only from a testamentary appointment[34]. However, where a provision in a will confers on a person the power to collect the outstandings, pay the debts and manage the properties, it has been held that he is appointed executor by implication[35].

Unlike an attesting witness (depending on personal laws), the executor may well be a legatee so long as he proves the will or shows intention to act as the executor[36]. Reiterating the statutory requirement, it has been settled that where a legacy is given to a person who is named as executor, whether it is given to him in his character of executor (ie as a remuneration for his care and trouble) or independently of it, he cannot claim the legacy unless he accepts his office[37]. Further, there is no restriction on the no. of executors that may be appointed.

It is advisable to appoint a competent and reliable person who is available at the place where the will is to take effect. Probate is only granted to the executor named and appointed in the Will[38]. No restriction whatsoever exists upon the choice of an executor. Individual(s), partnership firm, a private limited company (provided the memorandum of the company contains a clause permitting it to accept appointment as an executor) or a bank maybe appointed as an executor to a will. From a practical perspective, it is always advisable to entrust an independent and trustworthy person (and one who may be reasonably believed to outlive the testator) with this responsibility, as well as to provide for contingent executors.

4.1. Role of Executor

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[39]. Probate is mandatory in the case of wills made by any Hindu, Buddhist, Sikh or Jaina in the territories which were subject to the Lieutenant-Governor of Bengal, or are within the limits of the ordinary original civil jurisdiction of the high courts of Madras and Bombay or wills pertaining to immoveable assets situated in these territories. The general rule under Section 213 of the Act is that 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. This implies that no probate is necessary to establish right as executor or legatee in the case of other Hindu wills[40]. As stated above, probate is only granted to the executor.

Section 317 of the Act imposes a statutory obligation on executors and administrators to exhibit an inventory containing a full and true estimate of all the property in possession within six months of grant of probate or such other prescribed period. General powers of administration bestowed upon the executor

33. Section 2(a), Indian Succession Act 1925.
34. *Hamabai vs. Bamanji 7 BHCR 64 (ACJ).*
35. *Thenappa Chettiar vs. IO Bank AIR 1943 Mad 743.*
36. Section 141, Indian Succession Act 1925.
37. *Prosonno vs. Administrator-General 15 Cal 83 (87) (per Macpherson, J).*
38. Section 222, Indian Succession Act 1925.
39. Section 2(f), Indian Succession Act 1925.
40. BB Mitra, The Indian Succession Act (Sukumar Ray ed, 15th edn, Eastern Law House 2013) 8.

include his power to lawfully incur expenditure on such acts as may be considered necessary for the proper care or management of any property belonging to the estate being administered by him. Expenditure in lieu of religious, charitable and "other" objects and on such improvements as may be reasonable and proper in the case of the property of the estate requires sanction of the High Court exercising jurisdiction[41]. Further, Section 307 of the Act lays down wide powers of the executor (or administrator) in disposing property of the deceased. In all such acts with regard to the management of the property entrusted to him, he must act with the same degree of care as a man of ordinary prudence would in his own affairs[42]. It has been reiterated that a Hindu executor is entitled to deal with the property of his testator in the same manner as the testator himself would have dealt with it unless his powers are restricted or limited by the terms of the will[43]. Restrictions imposed by the will on the executor's statutory powers to alienate property may be express or implied[44].

4.2. Remuneration to executor

"Executorship expenses" in a will mean the same thing as "testamentary expenses". They are expenses incidental to the due discharge of duty of an executor. However, expenses incurred by the estate of the deceased or by the named legatees (indirectly) prior to taking their legacies on account of remuneration of executors is seen only in the case of corporate executors wherein professionals are appointed as executor to a will. Such remuneration is against their professional, administrative and/or legal services rendered towards the estate of the deceased and in giving effect to the will.

In our quasi-federal set up of the State, both the Union Government and State Governments are empowered to legislate on subjects of wills, intestacy and succession[45]. In 2016, the Goa Assembly cleared The Goa Succession, Special Notaries and Inventory Proceeding Act, 2012 (Goa Act 23 of 2016) ('Goa Act') to replace the Portuguese Civil Code 1867 which was applicable to the state of Goa until then and the same received the assent of the Governor on 19-September-2016. The Goa Act was enacted with an object to consolidate and amend the law of intestate and testamentary succession, notarial law and the laws relating to partition of an inheritance in the state of Goa. It, inter alia, lays down that the office of the executor is gratuitous, unless remuneration is provided for by the testator, in the will[46].

5. Legatee under a will

Any person capable of holding property can be beneficiary under a will. It may be said that a legacy under a will is not a natural right, it is a creature of law. Any person can be legatee, including minor and lunatic[47]. A corporation, a Hindu deity and any other juristic person can take a bequest[48]. This entails that a limited liability

41. Section 308, Indian Succession Act 1925.
42. *Lakhimchand vs. Kuvarbai (1905) ILR 29 Bom 170.*
43. K Kannan, The Indian Succession Act (Paruck, 12th edn, Lexis Nexis 2019) p 1106.
44. Supra note 40.
45. Item 5, List III – Concurrent List, The Constitution of India.
46. Section 265, Goa Succession, Special Notaries and Inventory Proceeding Act, 2012.
47. Nabhi Kumar Jain, How to Make a Will – Law, Procedure and Enforcement with Tax Planning (6th edn, Nabhi Publications, 1999) 21
48. Nabhi Kumar Jain, How to Make a Will – Law, Procedure and Enforcement with Tax Planning (6th edn, Nabhi Publications, 1999) 21.

partnership, a general partnership or a private company can validly take a bequest.

As regards grant of administration[49], courts have held that no administration can be granted in favor of a society, although a society could be a beneficiary under will executed by testator[50]. In *Illachi Devi vs. Jain Society, Protection of Orphans India*[51], emphasis was laid on the fact that a will in favour of a society is not totally unenforceable in law. It was held that a probate or letter of administration with will annexed although may not be granted in favour of a society but may be granted in favour of a person authorized by a society either in terms of the statute or a resolution adopted in this behalf by the society, as the case may be, so that such person may be answerable to the court. Upon grant of letter of administration, the person so nominated by the society shall carry out the wishes of the testator for the benefit of society.

Section 325 of the Act provides that debts of every description must be paid before any legacy is taken or enjoyed. The section lays down the rule of distribution that no legatee is entitled to anything until all the debts left by the deceased are discharged. The executor of a will cannot lawfully distribute the assets of the testator to the legal heirs without first having paid the debts of the testator in full.

5.1. NRIs and non-citizens as legatees

Any person capable of holding property may be a devisee under a will. There is no bar on permitted legatees on account of their residency. Section 6(5) of Foreign Exchange Management Act 1999 (FEMA) provides that a person resident outside India may hold, own or transfer Indian currency, security or any immoveable property situated in India, if such currency, security or property was inherited from a person who was resident in India. Thus, specified properties in India received on inheritance from a person resident in India can be held by a person resident outside India. Inheritance is often treated as a carte blanche exception to ownership of Indian assets.

5.2. Repatriation of inherited assets by NRI and foreign national

A PIO means a citizen of any country other than Bangladesh or Pakistan or such other country as maybe specified by the Central Government if:

a. He at any time held Indian passport; or

b. He or either of his parents or any of his grandparents was a citizen of India; or

c. The person is a spouse of an Indian citizen or of a person referred in (a) or (b) above[52].

Under the Foreign Exchange Management (Deposit) Regulations 2016, NRIs and foreign nationals (under certain conditions) are permitted to hold Non-Resident Ordinary (NRO) accounts in India[53]. Authorised Dealers[54] (AD) may allow NRIs/PIOs (foreign national being PIO), on submission of documentary evidence, to remit up to USD 1 million, per financial year (out of balances in their NRO accounts) acquired in

49. Under Section 2(a), Indian Succession Act 1925, "administrator" means a person appointed by a competent authority to administer the estate if deceased person when there is no executor.
50. Mantha Ramamurti, Law of Wills vol 1 (9th edn, Law Publishers India Pvt Ltd 2013) 382.
51. 2004 (1) HIR 75 at pp 78,80,88 (SC).
52. Regulation 2(xii) of Foreign Exchange Management (Deposit) Regulations 2016.
53. Regulation 5 read with Schedule 3, FEM(Dep) Regulations 2016.
54. A person may be authorised as an authorised dealer under Section 10(1), Foreign Exchange Management Act 1999.

India by way of inheritance/legacy[55]. A person being non-resident widow/widower who has inherited assets from his/her deceased spouse who was an Indian national resident in India may also specifically be permitted to remit assets overseas[56]. The remittance, however, shall not exceed USD 1 million. The remittance shall be subject to payment of applicable taxes, if any, in India[57].

Therefore, an NRI or a PIO may remit through an AD an amount not exceeding USD 1 million per financial year as assets acquired by him by way of inheritance/legacy on production of documentary evidence in support of such inheritance or legacy of assets by the remitter. Such remittance must be made out of the NRO account of the concerned NRI/PIO[58]. Further, from a practical perspective, the NRI/PIO must ensure that:

i. such repatriation, if intended in more instalments than one shall be made through the same AD;

ii. at the time of making such remittance, an undertaking shall be submitted to the AD to the effect that "the said remittance is sought to be made out of the remitter's balances held in the account arising from his/her legitimate receivables in India and not by borrowing from any other person or a transfer from any other NRO account and if such is found to be the case, the account holder will render himself liable for penal action under FEMA".

Remittances within the said USD 1 million cap may be freely remitted to the offshore bank account of the foreign citizen/NRI/PIO. These remittances may also be:

i. In respect of assets acquired under a deed of settlement made by either of his/her parents or a relative as defined in Companies Act, 2013. The settlement should take effect on the death of the settler.

ii. In case settlement is done without retaining any life interest in the property i.e. during the lifetime of the owner/parent, it would tantamount to regular transfer by way of gift and the remittance of sale proceeds of such property would be guided by the extant instructions on remittance of balance in the NRO account

In order to make any remittance exceeding USD 1 million (where the monies are received under bequest/inheritance or legacy), to his foreign bank account the concerned foreign citizen resident outside India, NRI or PIO is mandated to make an application to the RBI seeking its special permission for the same[59].

A grant of probate of a foreign will, proved in a competent court, can be resealed in India. This shall suffice as evidence of the authenticity of the will following which Indian courts are authorised to grant an ancillary probate, i.e., 'reseal' the probate, and grant letters of administration in India. However, it is important to note that although Indian courts do recognise private international law and even actively facilitate its application to foreign citizens/religions, in the event of

55. Master Direction no. 13/2015/16 dated 1-Jan-2016, as amended up to 28-Apr-2016 issued by Foreign Exchange Department, Reserve Bank of India.
56. Regulation 4 (1), Foreign Exchange Management (Remittance of Assets) Regulations 2016.
57. Regulation 8, Foreign Exchange Management (Remittance of Assets) Regulations 2016.
58. Regulation 4(2), Foreign Exchange Management (Remittance of Assets) Regulations 2016.
59. Regulation 7, Foreign Exchange Management (Remittance of Assets) Regulation 2016.

Indian law with respect to immoveable properties in India, will prevail.

6. Testamentary trusts

In several testaments, the word "executor" and "trustee" may be used interchangeably. In such cases, the trustee is regarded as an executor and an executor is regarded as a trustee. Under Section 3 of the Indian Trusts Act 1882 (Trusts Act), a trustee is a person who accepts the confidence declared by the "author of the trust" and under Section 5, a trust of movable and immovable property can be made by the will of the author of the trust. Unlike direct bequests, creation of a trust by way of a will may defer enjoyment of the asset by the intended beneficiary. When a trust is proposed to be created by will, the testator usually appoints his executors to be the trustees of the trust or he appoints executors to administer his general estate and trustees to administer the trust estate. The distinction between an executor and a trustee is that an executor after once accepting the office of the executor cannot retire by appointing someone in his place without fully administering an estate, but a trustee can retire by appointing a new trustee under Section 71 of the Trusts Act. An executor is not bound under law to inform about the legacy bequeathed but it is the duty of the trustee to give information to the cestui que trust.

The Trusts Act applies to a trust created by a will. In case of such trusts, being testamentary trusts, the actual trust is executed by the executor to the will. Where a trust is created by will the instrument need not be registered[60], nor is it necessary to transfer the trust property to the trustee[61]. Section 6 lays down the essentials for creation of trust. It is provided that a trust is created when the author of the trust indicates with reasonable certainty by any words or acts:

a. An intention on his part to create a trust;

b. The purpose of the trust;

c. The beneficiary;

d. The trust-property; and

e. Transferring of the trust property to the trustee.

However, this last condition is not applicable to trusts declared by will.

Section 5 of the Trusts Act lays down that no trust in relation to immoveable property is valid unless declared by the will of the author of the trust or of the trustee, or declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered. This implies that a testamentary trust having immoveable property among other assets does not require registration.

60. Section 5 Indian Trusts Act 1882.
61. Section 6 Indian Trusts Act 1882.

○□○

Learn everything that is good from others, but bring it in, and in your own way adsorb it; do not become others.

– Swami Vivekananda