Notes on Wills and Succession

1. Definition of Will:

- What you do not desire but are compelled to do.
- Your willingness to do with regard to one's estate.
- Therefore, what you are willing, after your death, that is a Will.
- A Will or a testament is defined in Section 2(1) of the Indian Succession Act, 1925 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.
- Testamentary document is of two types (i) a testament or a Will and (ii) a Codicil.
- Every disposition taking effect after death is not necessarily a Will. A deed of gift "mortis causa" which is made in contemplation of death is not a Will (Section 191). A disposition which is to take effect on the happening of a certain event or a voluntary disposition with power of revocation is not a Will.
- When a Will is proved, the Original must be deposited in court registry and a copy thereof is made under the seal of the Court and delivered to the executor together with a Certificate of it having been proved and such a copy and certificate are usually styled as the probate.

2. Definition : Intestacy:

- Intestacy is when a person dies without leaving a Will or if a Will is left behind, it is not capable of taking effect if he has bequeathed his whole property for an illegal purpose or if the subject matter of the bequest is not existing when the Will is made. Where there is a complete failure by lapse of all beneficial interest under a Will and the executor also predeceased the testator, it is a case of intestacy.
- Intestacy is of two kinds – total or partial. A man may die partly testate and partly intestate, e.g. where the Will contains several bequests to several legatees but there is no disposition of the residue, he dies intestate as regards the residue.

3. Definition of Codicil:

- A codicil is defined in Section 2(b) of the Indian Succession Act, 1925 as an instrument made in relation to a Will and explaining, altering or adding to its disposition and shall be deemed to form a part of the Will.
- A Codicil, unlike a Will is not an independent document but is an appendage to the main document i.e. Will. A Codicil is a document which alters any one or more provisions in the Will or adds any provision to the Will or rectifies the mistakes, if any in the Will.
- A Codicil is of a similar nature to a Will as regards both its purposes and formalities relating to it, but in general, it is supplemental to and considered as an annexure to a Will previously made being executed for the purpose of adding to, varying or revoking the provisions of that Will or some of them.
- A Codicil must be executed in the same way as the Will. All the requirements of a Codicil are the same as that of a Will.

4. Definition of "Next of kin":

- "Next of kin" refers to the person or persons of kin and most nearly related to a particular person at the death of the Testator or such other time as indicated by the Testator.

5. Persons competent to make a Will including Will made by Muslims ;

- Every person of sound mind not being a minor (not completed the age of 18 years) may dispose of his property by Will.
- If at the time when he makes a contract, he is capable of understanding it and forming a rational judgment as to its effect, then that person is said to be of sound mind. (Section 12 of the Indian Contract Act).
- A recital in the Will mentioning the age of the testator at the time of its execution is admissible to prove the testator's age (Section 32 of the Indian Evidence Act).
- The testator must be capable of disposing of his property with understanding and reason.

- The question of sound and disposing mind is a question of fact and of degree of mental capacity in each case.
- As a general rule, until the contrary is proved or established, a testator is presumed to be sane and to have a mental capacity to make a valid Will.
- However, no person can make a Will while he is in a state of mind arising from intoxification or from illness or from any other cause such that he does not know what he is doing – Section 59 of the Indian Succession Act.
- Even persons who are deaf or dumb or blind can make a Will provided they are aware of what they do.
- Further, person who is ordinarily insane, may make his Will during the interval in which he is of sound mind.
- A Mohammedan can by Will dispose of not more than 1/3rd of his estate after payments of debts and the balance 2/3rd of property devolves according to the applicable Shariat Law.
- However, the testator may bequest more than 1/3rd of his property provided heirs consent to such bequest only after the testator's death.
- If the testator has no heirs, he may bequest the whole of his property to a stranger.
- So far as matters such as power to make a Will, nature of the Will, execution and attestation thereof are concerned, the Muslims are governed by the Muslim personal law.
- Under that law, a Muslim can make a Will orally or in writing and no particular form is required for such writing.
- Even a verbal declaration is a Will so long as the intention of the testator is sufficiently ascertained.
- If it is in writing, it need not be attested nor Probate thereof is necessary.
- A Muslim may change his Will during his life time or cancel any legacy.
- Though under the Hindu Law, a mother can appoint a testamentary guardian for her illegitimate child, under Muslim law, no parent of an illegitimate child has power to appoint a testamentary guardian.

- A Will may also become void, if the testator after making the Will becomes of unsound mind and continues to be so till his death.
- Similarly, a bequest which is contingent or conditional or in future or is alternative would be void.
- While no planning is involved in intestate succession, estate planning may be made through testamentary documents and Wills.
- A Will or any part thereof, 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 (Section 61 of the Indian Succession Act).
- The standard of proof to establish a Will is not an absolute or a conclusive one but such as would satisfy a prudent man. (Case : Shashi Kumar vs. Subodh Kumar - AIR 1964 SC 529).

6. Essential Characteristics of a Will :

(i) The document must be in accordance with the requirements laid down under Section 63 of the Indian Succession Act i.e. executed by a person competent to make a Will and attested as required under the Act;

(ii) the declaration should relate to the properties of the testator, which he wishes to bequeath;

(iii) the declaration must be to the effect that it shall operate after the death of the testator and is revocable during his life time; and

(iv) Wills (except by Mohammedans) should be made in writing as Muslims can orally pronounce a Will and it is valid.

7. Construction of Will including Essential Clauses in Will :

- **S. 74:** It is not necessary that any technical words or terms of Art are to be used in a Will but only that the wording be such that the intentions of the testator can be known therefrom.
- The intention of the testator as expressed in the Will has to be given effect to.
- A Testamentary document requires no special form of words. A Will may be made in any form and in any language. S. 74 lays down that no technical words or terms of Art are required to be used in making a

Will. But if technical words are used by the testator, he will be presumed to use them in their legal sense, unless, the context indicates a clear contrary intention.

- Initial onus is on the propounder to prove execution of the Will and thereafter it shifts to the party alleging undue influence or coercion in execution of the Will to establish its case.
- The onus on the propounder can be discharged on adducing satisfactory evidence that the Will was signed by the testator who was at that time in a sound and disposing state of mind that he understood the nature and effect of the disposition and signed of his own free Will.
- Where a Will contains several clauses and the latter clause is inconsistent with the earlier clause, in such a situation, the last intention of the testator is given effect to and it is on this basis that the latter clause is held to prevail over the earlier clauses.
- This principle is also contained in Section 88 of the Act which states that “where two clauses of gifts in a Will are irreconciliable so that they cannot possibly stand together, the last shall prevail.”
- The true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the Will as a whole with all its provisions and ignoring none of them as redundant or contradictory.
- Further, where one of the two reasonable constructions would lead to intestacy, that should be discarded in favour of a construction which does not create any such hiatus.
- Effect should be given as far as possible to every testamentary intention contained in the Will.
- While drafting a Will, the provisions of the Indian Succession Act, 1925 and particularly, Sections 74 to 111 should be borne in mind.
- If Will is made in the language not known to the testator, care should be taken to interpret and explain the provisions of the Will in the language of the testator by himself or through some official translator.

- Extraordinary care should be taken in getting the Will executed and attested, if the testator is practically on his death bed and if possible, such a situation should d be avoided.
- It is preferable to have a doctor certify that the testator is of sound mind and under no influence of alcohol when he made the Will.
- There is no maximum limit prescribed under the Indian Law as to their number unlike English law where the maximum limit prescribed is four under Section 160 of the Supreme Court of Judicature (Consolidation) Act, 1925.
- As far as possible, the no. of executors should not exceed 3.
- A Will has no standard form but generally the contents of a Will fall under the following heads viz. i) name, address, age, occupation and community of the testator; ii) clause revoking all previous Wills and other testamentary documents; and iii) clause appointing executors and trustees iv) then will come the clause mentioning specific bequests, followed by 2 clauses (a) one containing general bequest and (b) the second containing residuary bequest; v) a clause is also inserted stating that the testator is in sound health and proper state of understanding though that clause does not have much value; vi) the last clause is about the testimonium and attestation and vii) date of the Will can be given in the beginning or at the end, the latter being the standard practice.
- Under the English Law, the testimonium and attestation clauses are necessary to raise a presumption of valid execution, otherwise the Will is required to be proved before granting probate.
- In India, however, that is not the law and a Will is always solemnly required to be proved as provided in Sections 59 and 63 of the Succession Act r/w Sections 67 and 68 of the Evidence Act.

8. Execution and Attestation of Will :

- The execution of the Will can be proved by approved circumstantial evidence. If one attesting witness fails to prove the due execution, the other attesting witness must be called although he may be adverse witness.

- Will must be proved in terms of the provisions of Section 63© of the Indian Succession Act, 1925 and Section 68 of the Evidence Act, 1872.
- A Will must be attested by two or more witnesses.
- Each witness must have seen the testator sign or affix his mark, or each witness must have seen some other person sign the Will in the presence of and by the direction of the testator, or if the Will is already signed, each witness must have received from the testator a personal acknowledgement of his signature or mark or of the signature of such person signing for him. – Sec. 63(c).
- As section 68 contemplates execution must be proved by at least one of the attesting witness, if an attesting witness is alive and subject to the process of the Court and capable of giving evidence.
- Section 68 of the Evidence Act does not say that a document required to be attested by two witnesses shall be proved by the evidence of all of them.
- If one witness who is called is in a position to depose to all that is required by section 63 (c) of the Evidence Act that would be sufficient proof of the due execution of the Will.
- Examination of attesting witnesses is required to prove the due execution of the Will.
- Propounder has to explain by leading evidence, surrounding suspicious circumstances to prove due execution and genuineness of the Will.
- A Will can be attested by any person including a minor – Section 118 of the Indian Evidence Act. It is not necessary that he should know the contents of the Will which he is attesting.
- The executor named in the Will is competent to attest a Will.
- But any legacy or bequest given to a person who attests the Will or to his wife or her husband or to any person claiming under either of them shall be null and void. As per the explanation, a legatee under a Will does not lose his legacy by attesting a Codicil which confirms the Will – Section 67.
- The legacy to a person who attests a Will may be made operative by a Codicil attested by other witnesses, which has the effect of republishing

and incorporating the Will. But if he receives the benefit under a Codicil, the gift is void.

- Section 67 does not apply to Hindus. Hence, the attesting witness to the Will of a Hindu does not lose the legacy given to him by the Will.

  Example :

  (i) A left a Will giving a legacy to B who is an attesting witness. A afterwards executes a Codicil confirming the legacy to B to which codicil B was not an attesting witness. B is entitled to the legacy by virtue of the Codicil.

  (ii) A by his Will gives Rs. 1000.00 to B. The Will is attested by C and D. B afterwards marries C. Is the legacy of Rs. 1000 to B void? No. Marriage after attestation does not affect the bequest or legacy.

- Even if he is a legatee who is not a Hindu, Buddhist, Sikh or Jain or Mohammedan, the bequest made to him or his wife or husband or any person claiming under him, will be void, if he is an attesting witness.
- Section 69 of the Indian Succession Act is a corollary to the last section. An executor appointed by the Will is a competent attesting witness and there is no objection to his proving the Will and acting as an executor.
- The attestation must be animus testandi. The words used in this section are that the two witnesses shall attest and each of the two witnesses shall sign the Will. The attestation is to be made in the presence of the testator.
- Attesting is more than a mere signing of the Will. It means signing a document for a particular purpose, the purpose being to testify to the signature of the executants.
- An attesting witness signing as such, before executants putting his thumb mark on the Will cannot be said to be valid attestation.
- Section 69 of the Evidence Act provides for cases where neither of the attesting witness can be found or both are dead – in such a case, any person who in fact saw the execution may be called or the Will can be

proved by proving the handwriting of one of the attesting witnesses and the signature of the testator.

- Merely because an attesting witness chooses to deny the attestation of a document, the propounder of the Will should not be without any remedy.
- When the court is satisfied that witness deliberately and falsely denied that they attested the Will, the Court is entitled to look into other circumstances and the regularity of the Will on the face of it and come to the conclusion on the question of attestation.

9. Preservation of Will : -

- There are 3 ways in which the Original Will can be dealt with by the testator to prevent it from being destroyed or tampered with by any interested party, viz.
  - i) he can keep it in a sealed cover with himself or person of his confidence or in a safe deposit with any bank, the last being more safe.
  - ii) In the alternative, under section 40 of the Registration Act, he can register the Will with the Registrar or Sub-Registrar of Assurances and
  - iii) is provided under Section 42 of the Registration Act, under which the testator or his authorized person can deposit the Will in a sealed cover with the Registering Officer, as in the Section provided.
- When so deposited, the Registering Officer will make a note of it and keep the envelope in a fire proof box.
- Such a Will can be withdrawn by the testator, if he so desires at any time on an application under Section 44 of the Registration Act.
- The procedure therefore, is when the testator who has deposited the Will with the Registering Authority, dies, the executor applying for probate or in his absence, the person applying for Letters of Administration with the Will annexed, may apply to the Court for an order for its production in Court and on such order being served upon the Authority, he will send the signed Will to the Court to enable the

Applicant to proceed with the Petition for Probate or Letters of Administration.

10. Revocation of Will :

- A Will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by Will (Section 62 of the Indian Succession Act). This section lays down that if a maker, whether man or woman of a Will marries after making the Will, the Will is revoked. This is revocation by operation of law.
- There must be on the part of the person marrying sufficient capacity to contract a marriage. If a man who undergoes a marriage ceremony is too old or too feeble to comprehend what he is undergoing, it is no marriage and the Will is not revoked.
- To revoke a Will, the marriage must be valid by the laws of the country. A marriage ceremony may be presumed to have taken place though no certificate can be found and such a marriage will revoke the Will.
- Section 70 of the Succession Act provides that no unprivileged Will or Codicil nor any part thereof shall be revoked (a) by operation of law otherwise than by marriage as provided in section 69 and by acts of parties (i.e. by another Will or Codicil or by some writing giving instruction to revoke the same and executed in the same manner in which an unprivileged Will is required to be executed or by 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 it).
- So, if a Will is proposed to be revoked by a writing, the writing must be signed by the testator and also attested by two or more witnesses, as in the case of a Will.
- If there are two Wills and if they are not inconsistent with each other, then they will be treated as one Will.
- Further, a Will which is revoked can be revived by re-execution or by execution of a Codicil showing an intention not to revoke.
- However, when a Will has been revoked by a subsequent Will, the revocation of the latter does not revive the first Will.

- A registered Will can be revoked only by a registered document in writing, showing its clear intention and by executing the instrument in the manner in which the Will is executed, namely, the executor has either to sign the revocation deed in the presence of the attesting witnesses or to acknowledge its execution before them though the two attesting witnesses need not be present at the same time. This is cancellation of Will.
- A Will is cancelled by drawing lines across it and also by cancelling the signature of the testator and of the attesting witnesses. But that is not enough, if the Will is not torn.
- The cancellation must be signed by the testator and attested by two witnesses.
- Mere denial of the testator of having executed any Will would not amount to its revocation.
- Just as mutual wills or a joint will cannot be made irrevocable, a Will cannot be rendered irrevocable by an express contract not to revoke it. Such a contract however, if made for a valuable consideration is binding and though it cannot be specifically enforced, damages may be recovered for the breach of it.
- The deed of revocation of a Will has to be executed in the same manner as a Will.
- All persons who are entitled to contest the Will may also apply for revocation of the grant.
- Persons seeking to revoke the grant of Probate or LOA must prove that they have an interest in the estate of the deceased sufficient to entitle them to a locus standi in the Court.
- There is no limitation period fixed for an application for revocation of a grant and the application for revocation can be made at any time.
- Mere delay in applying for revocation is immaterial, if it does not lead to an inference of waiver. Long delay in making the application may however debar the person in making such an application.
- An Order revoking or refusing to revoke a grant is appealable u/s 299 of the Indian Succession Act. An appeal also lies from an Order

rejecting the application of a person on the ground that he has no interest.

- An executor after receiving notice of intended application for the revocation of a Probate must stay his hands.
- Revocation cannot be made retrospectively.
- Refer S. 263 of Indian Succession Act for revocation or annulment of Will for just cause and also for cases where revocation will not be granted, who cannot apply for revocation.

11. Alterations in the Will :

- to be signed by the testator (Sec. 71) which provides that no obliteration or other alteration made in any unprivileged Will after execution thereof, shall have any effect, except so far as the words or meaning of the Will have been rendered illegible or undiscernible, unless such alteration has been executed in the like manner as required for the execution of the Will.
- The alterations, interlineations or obliterations will only be given effect to in the following cases:
    1. If the signature of the Testator and/or the attesting witnesses is made in the margin or on some part of the Will opposite or near to such alterations or
    2. If a Memorandum is signed by the Testator and by the attesting witnesses at the end or some part of the Will referring to such alterations, the initials of the Testator and of the witnesses are sufficient for the said purpose but not the initials of the witnesses alone.
- Marginal notes made by the Testator in his Will which are not signed and attested will not form part of the Will.
- Section 71 speaks of alterations etc. made after the execution of Will and not before.
- Alterations made before the execution of the Will will be admitted to Probate under proof of evidence that the same were made before such execution.

- This applies where the alterations are made after the Will is duly executed and attested. If they are made before the execution, Section 71 will not apply.
- S. 261 of the Indian Succession Act sets out that errors in the names & descriptions or in setting forth, the time and place of the deceased's death or the purpose in a limited grant may be rectified by the Court and the grant of Probate or LOA may be altered and amended accordingly.
- S. 262 of the Indian Succession Act sets out that if after the grant of LOA with the Will annexed, a Codicil is discovered, it may be added to the grant on due proof and identification and the grant may be altered and amended accordingly.
- But if a Codicil is discovered after the grant of Probate, a separate Probate is granted of that Codicil & the 1st Probate undergoes no alteration or amendment whatever.
- If the appointment of the Executors under the Will is annulled or varied by a Codicil, Probate of the Will must be revoked and a new Probate granted of the Will and the Codicil together (refer Sections 225 & 263 of the Indian Succession Act).

12. Revival of unprivileged Will : (S. 73 of Indian Succession Act)

- No unprivileged Will or Codicil nor any part thereof which has been revoked in any manner shall be revived otherwise then by the re-execution thereof i.e. by it being signed again by the Testator and attested by 2 witnesses. This is called re-publication. Where the Testator cuts off his signature and those of the attesting witnesses but gums the signature again on the same place, the Will is not revived;
- Or by a Codicil duly executed in a manner showing an intention to revive the same. A Will cannot be revived by mere implication. The Will must be in existence. A Will which has been destroyed cannot be revived.
- The distinction between re-publication and revival is that the revival restores a revoked Will or a Codicil, while re-publication merely

confirms an unrevoked Testamentary instrument so as to make it operate as if it were executed on the date of republication.

- When a Will or Codicil which has been partly revoked and afterwards wholly revoked is revived, such revival does not extent to the part first revoked unless an intention to the contrary is shown by the Will or Codicil.

13. Registration and Stamping of Will :

- A Will can be written and executed on any piece of paper. It may be handwritten or typed.
- It does not require any stamp duty and is not required to be registered even if it relates to immovable property.
- Will is a document, registration of which is optional under the provisions of Section 18(e) of the Indian Registration Act.
- Whether registered or not, a Will must be proved as duly and validly executed as required by the Succession Act.
- Though registration does not give any special sanctity or authenticity to the Will, nevertheless registration of the Will by the testator himself prima facie shows the genuineness of the Will.
- Non – registration of a Will would not by itself be a suspicious circumstance surrounding the Will. If there are any suspicious circumstances, it is for the propounder to explain them to the satisfaction of the court before a Will can be accepted.
- Non – registration cannot constitute an inference against the genuineness of the Will, mere registration does not dispel the requirement of proof of Will. Its genuineness cannot be presumed.
- Delhi High Court has observed that it is well settled that once a Will is registered, there is a presumption of its genuineness, until and unless there are very strong reasons which creates doubts about its execution – case of ***Arjan Dev Mitra vs. Sada Nand, AIR 2000 DEL 236***.
- Under certain Rent Control Statutes, like the Bombay Rent Control Act, 1947, a tenancy right cannot be assigned by a Will – case of ***Dr. Anant Sabnis vs. Vasant Pandit, AIR 1986 SC 600***.

14. Types of Will :

- The Succession Act recognizes two kinds of Wills (a) an unprivileged Will and (b) a Privileged Will. (Sections 63 and 64 of the Act).
- A privileged Will is allowed to be made by a soldier or an airman or a mariner employed in an expedition or engaged in actual warfare and enjoying certain privileges, if he has completed the age of eighteen years – Section 65.
- On the other hand, an unprivileged Will is a Will which cannot be a privileged Will that is a Will made by any person who is not a soldier, airman or mariner either on an expedition or engaged in a war.
- However, a soldier in the barracks or an airman on land cannot execute a Privileged Will. In such cases, he must execute his Will according to the rules prescribed for executing unprivileged Wills.
- Section 66 of the Indian Succession Act prescribes modes of making and rules for executing Privileged Wills.
- Under sec. 66 (h) an oral Will becomes null and void at the expiration of one month after the testator has ceased to be entitled to make a privileged will. Therefore, a written Will will remain operative as under the English Law.
- Section 67 of the Indian Succession Act -
- Besides the above, following are some other common forms of Will :

i) **Non – Cupative or Oral Will** :

- Is a Will declared by a testator before a sufficient number of witnesses. There is no scope for this kind of Will under the Indian Succession Act, but in place where the Act does not apply, a Will can be made orally.
- Hindus not governed by the Hindu Wills Act were competent to make Oral Wills but that is not the law now. Mahomedans are still competent to make oral Wills. The onus of establishing an oral Will is very heavy. It is the duty of the person propounding an oral Will to prove the exact words used by the testator.

ii) **Holograph Will** :

- Is a Will which is written by the testator himself. Such a Will is included in the definition of an Unprivileged Will. This Will may show an indication that the testator was fully conscious of what he was doing and will not be easily set aside. In this kind of a Will, there is a presumption in favour of genuineness for the very good reason that the mind of the testator in physically writing his own Will is more apparent.
- In holograph Will, when the testator says that he signed the Will in the presence of attestors and the attestors have signed in his presence and in the presence of each other, it raises strong presumption of regularity in the execution and attestation.

iii) **Mutual Will** :

- A Will is mutual when the two testators confer upon each other reciprocal benefits by either of them constituting the other his legatee, i.e. when the executants fill the roles of both testator and legatee towards each other but it is not always necessary for the second testator to die to have obtained a personal financial benefit under the Will of the first testator.
- The peculiar characteristic of this kind of Will is that they become irrevocable after the death of one of them, if the survivor takes advantage of the provisions made by the other.
- If the survivor has revoked the mutual Will by making a new Will, it is the new Will which is admitted to probate and if he has altered the Will by duly executing a Codicil, the Codicil must be admitted to Probate since the Probate Court is concerned only about the last Will.

iv) **Joint Will** :

- Is a Will made by two or more testators contained in a single instrument duly executed by each testator disposing either of other separate properties or their joint properties. By a joint Will is meant a single instrument by which two persons give effect to their

testamentary dispositions. Such a Will is not a single Will and is revocable at any time by either of them or by the survivor.

- It operates on the death of each testator as his Will disposing of his own separate property and is in effect two or more Wills.
- Such a Will is revocable at any time by any of the testator's during their joint lives and by the survivor after the death of one of them. But if it is not altered or revoked, it will take effect as the Will of the survivor.

v) **Contingent or Conditional Will** :

- Is contingent upon the happening of an event, so that if the event does not happen, the Will has no effect. It will take effect only if contingency happens, if it does not happen, the Will is not entitled to probate.
- A Will may be made conditional on the assent of a third person to its provisions and if that assent is withheld, the instrument is not entitled to probate.

vi) **Living Will** :

- Is a Will which a person in serious illness declares beforehand, how he likes to be treated, such as when he exercises a moral choice not to have a blood transfusion or not to be given a particular drug.

vii) **Duplicate Will** :

- Where the Will is executed in duplicate, one of which the testator retains, while he deposits the other in the custody of another, the destruction of the duplicate in the testator's possession revokes the whole.
- If a Will is made in duplicate, both parts must be lodged on a petition for probate. A duplicate Will is a duly executed document and not to be confused with a copy which is not.
- A duplicate Will, one part of which was signed by testator and the other by the other witnesses was held to be invalid.

viii) **International Will** :

- This Will shall be in writing in any language and signed or acknowledged by the testator in the presence of the witnesses and an

authorized person, who have then to attest the Will in the presence of the testator. The authorized person has to attach to the Will, a Certificate in the form prescribed by the Convention authenticating the Will and its proper execution. The contracting state must recognize it as formally valid.

15. What is Citation?

- Citation is a summons calling upon a party to do something or to see something.
- Citations are issued for the following 4 purposes viz. to produce a Will, to see proceedings, to bring in Probate when improperly granted and to bring LOA when improperly granted.
- It shall be lawful for the judge, if he thinks fit, to issue Citations calling upon all persons claiming to have any interest in the estate of the deceased and to come and see the proceedings before the grant of Probate or LOA.
- Before any citation can be issued in respect of a Will, that Will must have been filed. The parties citing must therefore, have previously obtained possession of the Will or had it filed in the Court.
- A citation answers 2 purposes viz. it either compels a representation to be taken by those who are primarily entitled to it or whether they do not take it, the process provides a substitute for a voluntary renunciation on their part.
- Citation shall be taken out by the Petitioner and served in a manner prescribed by the rules for the issue and service of summons to a Defendant.
- No citation is required when LOA is granted to a universal or a residuary legatee. In the case of ***Soundara Peter reported in AIR 1975 MADRAS 194*** it was held that even in a case where no citation was made as required u/s 235 and 236 of the Succession Act, but if all legatees are before the Court that will be sufficient compliance of the Section.

16. What is a Caveat?

- S. 284 of the Indian Succession Act sets out Caveats against grant of Probate or LOA. This section lays down the procedure to be followed by persons who want to oppose the grant. Any person intending to oppose the issuing of a grant or LOA must file a Caveat.
- A caveat is a caution or a warning entered in the Registry of the Testamentary Court giving notice to the Registrar that Probate or LOA should not be granted without notice to the person who enters it or to the solicitor of a party who has lodged the Caveat.
- After the Caveat is filed, the proceedings take as nearly the form of a regular Suit in which the Petitioner for Probate or LOA as the case may be shall be the Plaintiff and the Caveator shall be the Defendant.
- The entry of the Caveat does not convert the Petition into a contentious proceeding. The Petition becomes contentious after the Caveator files an Affidavit in support of the Caveat.
- A testamentary proceeding is not really a suit but is given the form and trappings of a Suit.
- When Caveats are filed, the propounder of a Will has an option either to contest the Caveator's right to oppose the grant or to concede such a right. Once that option is exercised and the proceedings marked as a Suit, it is not open to the propounder to contend that the Caveator has no locus standi.
- If a Caveat is filed and the Caveator wants to prove the Will in solemn form, his costs are awarded out of the estate.
- Where a person claims a caveatable interest on the basis of any Will executed by the Testator, the same has to be produced before Court without which his Caveat will not be entertained.
- In Probate proceedings, when Caveats are filed, the propounder has an option either to contest the caveatation right to oppose the grant or to concede such a right. Once the propounder exercises the option and allows the proceedings to be marked as a suit and takes further steps in that suit, it is no longer open to him to contend that the caveator has

no locus standi. (See Case Law ***Bankin v/s Kasi reported in AIR 1963 CAL 85***).

- There cannot be an entering of a caveat of any party against the revocation of a Probate. Therefore proceedings instituted for revocation of a Probate cannot be in the nature of a Suit.

17. Applicability of Succession Act to Wills :

- Laws governing the succession of the deceased person at the time of death are dependent upon the nature of persons, which are as under:-
- The Hindu Succession Act, 1956 governs Hindus, Buddhist, Sikh and Jains.
- The Indian Succession Act, 1925 is applicable to others, viz. Christians, Jews, Parsis and the person whose marriage is solemnized under the Special Marriage Act, 1954.
- Mohammedans are mainly governed by their personal law.
- The Hindu Succession Act, 1956 makes a distinction between male and female for distribution of their estates.
- Heirs are defined as Class I, Class II, Agnates and Cognates for the Hindu male. Devolution of property of Hindu male dying intestate, i.e. without making a Will is governed by Sections 6 and 8 and distribution of property of Hindu female dying intestate is governed by Sections 15 and 16 of the Hindu Succession Act, 1956.
- If a Hindu male dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the joint family properties governed by Mitakshara law shall devolve by testamentary or intestate succession and not by survivorship.
- Under Section 6 of the Hindu Succession (Amendment) Act, 2005, the daughter of a coparcener becomes a coparcener by birth in her own rights and liabilities in the same manner as the son.
- Thus, on and from 9th September, 2005, the daughter is entitled to a share in the ancestral property and is a coparcener, as if she had been a son.

- Section 6(5) leaves no room for doubt as it provides that this section shall not apply to the partition which has been effected prior to 20th December, 2004.
- The restriction in enjoyment of right by seeking partition by metes and bounds has also been removed by reason of Section 3 of the Hindu Succession (Amendment) Act, 2005.
- Neither 1956 nor 2005 Amendment Act seek to reopen vesting of a right where succession had already taken place.

18. Types of Succession : Testamentary and Intestate (when no Will is left behind – Intestacy) :

- **Succession includes both testamentary and intestate succession.**
- If a person dies without making a Will, he is said to have died intestate (no testamentary disposition of his assets) and in such a case, the property of an intestate devolves upon the wife or husband or upon those who are of the kindred of the deceased in the order and according to the rules governed by the law of succession which applies to the deceased.
- Or if a person has made a Will but the Will is not capable of taking effect, i.e. when the whole of his property is bequeathed for an illegal purpose or if the subject of the bequest is non-existing.
- Where there is a complete failure by lapse of all beneficial interest under a Will and the executor also predeceased the testator, it is a case of intestacy.
- Intestacy is of 2 kinds – total or partial.
- A man may die partly testate and partly intestate, e.g. where the Will contains several bequests to several legatees but there is no disposition of the residue, he dies intestate as regards the residue.
- The rules of distribution of property of an intestate are laid down in Sections 37 to 40 of the Indian Succession Act when there are lineal descendants.
- If there are no lineal descendants then amongst the kindred of the intestate (i.e relatives who are in the nearest degree of kindred related

to him by blood) in the shares and proportions laid down in Sections 41 to 48 of the Indian Succession Act.

- In case a person dies leaving behind his Will, his property shall be distributed as per the terms of the Will which is known as testamentary succession, which means succession to a property of the deceased in accordance with the provisions in the last Will and Codicil of the deceased.

19. Debts and Liabilities of the Estate of the testator :

- A Will always contains and should contain provision for payments of debts and liabilities of the testator.
- All debts and liabilities are a first charge on the estate. The Succession Act fixes priority in payment of debts :- i) the funeral expenses, ii) expenses for obtaining Probate or other legal representation, iii) the wages for three months prior to death of persons employed by the deceased, and iv) debts according to priority in law.
- Only after, the debts and liabilities are paid in full, the legacies can be paid and if the remaining property is not sufficient to pay all the liabilities, the legacies will abate accordingly as provided in the Act.
- Therefore, while making a Will and providing for legacies, the extent of the estate and the extent of the liabilities are required to be taken into account and then only bequests should be made.

20. Succession Laws and Obtaining Grants to Wills :

- Following are the different grants issued by a Court of competent jurisdiction for administering the estate of the deceased as per his Will or even in Cases where there is no Will left behind, viz.:

- **Probate :**
- Probate is a certificate granted under the seal of the Competent Court certifying the Will as the Will of the testator and granting the administration of the estate of the deceased in accordance with that Will to the executor named under the Will.

- Probate can only be granted in respect of instruments which are of Testamentary nature and executed according to the requirements made down in accordance with law and only in respect of property situated in India and containing the appointment of an executor.
- Probate can be granted of a portion only of the Will to the extent to which the contents are proved, where the other portion is lost.
- Probate can be granted of 2 Wills of different dates, if the 2nd Will does not revoke the first one.
- If the Will is not forthcoming but the Codicil is forthcoming, it may be admitted to Probate.
- When 2 instruments are executed on different dates, both should be admitted to Probate unless the latter revokes the earlier. If both are executed on the same day and it cannot be ascertained which was executed first, both should be admitted to Probate, if they can stand together, if not, neither of them should be admitted to Probate.
- Probate may be granted of a lost Will as in S. 238 of the Indian Succession Act. Probate can also be granted of a portion of the Will, if the other portion is lost.
- The delay in applying for a Probate cannot be a ground for refusing grant of Probate. When attesting witnesses voluntarily prove execution of the Will and the testamentary capacity of the testator, Probate should be granted.
- Probate may be granted of a part of the Will and the other parts omitted, if they are proved to have been prepared under the instructions from the Testator.
- A married woman may be appointed an Executrix and Probate can be granted to her without the previous consent of her husband.
- Codicils should be proved in the Court in which the Probate of the Will has been obtained.
- Grant of Probate is an authentication of the Will of the testator.
- If an Executor has elected to administer the Estate, he may be sued before Probate and cannot afterwards renounce his Office.

- Probate is conclusive to the genuineness of the Will and appointment of Executors. It is not conclusive as to the domicile of the deceased although such question may have arisen in the Probate proceedings.
- Once a Probate is granted, no Suit will lie for a declaration that the testator was not of sound mind.
- Probate is conclusive as to the representative title of the executor against the debtors of the deceased and gives complete indemnity to them as per S. 273 of the Indian Succession Act and also to the right of the Executor or administrator to represent the Estate.
- Probate is conclusive as to the due execution of the Will and as to the genuineness of the Will and the appointment of an executor.
- If the Will is challenged on the ground that it is the forgery or that it was obtained fraudulently, proceedings to revoke the grant should be adopted.
- No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction has granted Probate of the Will under which the right is claimed.
- Jurisdiction of a Probate Court under Sections 266, 268 and 269 of the Indian Succession Act is limited to consider the genuineness of the Will.
- If the grant is refused by a competent Probate Court, the refusal does not necessarily amount that the Will is not genuine. If Probate is granted in solemn form, it is conclusive evidence of the validity and contents of the Will.
- Question of title to property and question of validity of the provisions of the Will cannot be gone into in probate proceedings. All the High Courts have consistently held that it is not the function of the Probate Court to determine questions of title.
- Whether a property could be bequeathed or not cannot be a matter which can be gone into Probate proceedings.
- The Probate Court is not a Court of construction. It should not as a rule constitute the Will. It will only constitute the Will to find out the person

propounding the Will is appointed an Executor either expressly or by implication and whether the document is a Will.

- Probate Court will also not go into the question whether the property disposed off by Will was joint ancestral property or self acquired property of the testator or to find out whether the person making the bequest of certain property had title to the same. The only question which the Probate Court has to determine is whether the document sought to be probated did in fact dispose off the property or not.
- The question whether the bequest is good or bad is also not in the purview of the Probate Court.
- Injunction in relation of property of the deceased cannot be granted in exercise of jurisdiction of Probate Court.
- If a Foreign Will has been proved and is deposited in a competent Court abroad, S. 228 of the Indian Succession Act enacts that LOA with an authenticated copy may be granted and it dispenses with the necessity of proof of Original Will. The expression “properly authenticated copy” does not mean that the copy should be under the seal of the Foreign Court, a notorarilly certified copy of the Will is held to be a properly authenticated copy. S. 228 applies, if the Will is proved in a Foreign Court.
- If a Foreign Probate is obtained, it would be sufficient proof of title of the legatee or the Executor and admissible in evidence in proof of that right u/s 41 of the Indian Evidence Act.
- In the case of grant of LOA, the Probate Court has to see that the person properly entitled to represent estate of the deceased according to the Succession Act has come to the Court. Where it is alleged that the Probate was wrongly granted, the Court which granted the Probate should be approached for its cancellation.
- Party can have recourse to file civil suit for obtaining necessary relief for protection of the property.
- The functions of the Probate Court are to see that the Will was actually executed by the testator in a sound disposing state of mind without coercion or undue influence and that it has been duly attested.

- Its primarily function is to deal with the factum and due execution of the Will.
- The Probate granted by a competent civil court would be conclusive and binds all the parties until the Probate is duly revoked in appropriate proceedings.

- **Administrator** :
- If a person governed by this Act dies without leaving a Will (i.e. intestate), a person is appointed to administer his estate as provided in Sections 218 and 219 of the Indian Succession Act. A person so appointed is called an administrator: he has been granted 'letters of administration' to the estate of the deceased.

- **Letters of Administration :**
- LOA are also granted under Section 232 and can be obtained from the competent court where the testator has failed to appoint an Executor under a Will or where the executor who is appointed is legally incapable or refuses to act or where he has died before or after proving the Will but before administration of the estate. In these cases, LOA with the Will annexed are granted to the person mentioned in that Section.

- **Under the same section, if a proving executor dies without fully administering the estate, LOA with the Will annexed are also granted.**
- These are also other cases when LOA is granted (see Sections 240 – 247, 249 – 254, 256, 258, 260).
- LOA are always necessary where a person who is governed by the Indian Succession Act, 1925 dies intestate.
- An administrator can only be appointed by a competent court as distinguished from an Executor who can only be appointed by a person by his Will or Codicil.
- A Muslim heir can file a Suit for the administration of the estate of his Father without obtaining LOA.

- LOA are not necessary in case of intestacy of Christians since 1901.
- LOA are also conclusive as to the representative title of the administrator and is also a conclusive evidence of the intestacy of the deceased.

- **Succession Certificate :**
- In case, where the grant of Probate or LOA is not compulsory under Section 212 and 213 of the Indian Succession Act, Succession Certificate can be granted by the Court with respect to any debt or security to which a right is required to be established by LOA or Probate.
- Generally, where only movables are left behind by the deceased, then in that event, Succession Certificate is to be applied for.
- Also, when the deceased is an Indian Christian or is a Mahommedan or when the deceased is a Hindu and has left a Will and probate of such a Will is not compulsory under Section 57 of the Indian Succession Act.
- In cases of joint family property under Hindu Law. A member of a joint Hindu family who gets the property by right of survivorship and not as an heir can apply for succession certificate in respect of shares of joint stock companies standing in the name of the deceased coparcener.
- But a Succession Certificate is not necessary to recover debts due to a joint Hindu family.
- After the commencement of the Hindu Succession (Amendment) Act, 2005, no Court shall recognize any right to proceed against a son, grandson or great grandson for the recovery of any debt due from his father, grandfather or great grandfather solely on the ground of the pious obligation under the Hindu Law of such a son, grandson or great grandson to discharge any such debt.
- The Hindu Succession Act, 1956 has amended and codified the law relating to intestate succession amongst Hindus.

- The Act brought about changes in the law of succession among Hindus and gave rights which were till then unknown in relation to women's property.
- The Act applies to every person who is a Hindu by religion in any of its forms or developments or to any other person who is not a Muslim, Christian, Parsi or Jew by religion.
- In the case of a testamentary disposition of a Muslim, Christian, Parsi or Jew by religion, the Hindu Succession Act does not apply and the interest of the deceased is governed by the Indian Succession Act, 1925.
- Law regulating succession to deceased person's immovable and movable property: Succession to the immovable property in India of a person deceased, shall be regulated by the law of India, wherever such person may have had his domicile at the time of his death.
- Succession to movable property of a person deceased is regulated by the law of the country in which such a person had his domicile at the time of his death. A person can have only one domicile for the purposes of succession to his movable property.
- In case of intestacy, the law of domicile at death determines who is entitled to succeed to the movables of the deceased.
- The construction of a Will of movables is to be governed by the law of the testator's domicile at the date of execution of the Will but this presumption can be rebutted by any sufficient indication that the testator intended his Will to be construed according to the law of another country than the country of his domicile.
- The necessity of obtaining a Succession Certificate arises normally only when no Will is executed.
- The grant of a Certificate does not determine any question of title or decide what property does or does not belong to the estate of the deceased; it merely enables the party to whom the certificate is granted to collect any debt or security belonging to the deceased.
- A Succession Certificate may not only include a debt but also include securities. A share is a security under the Act.

- Any person of sound mind and not a minor can apply for Certificate provided he has an interest in the estate of the deceased.
- The only right which entitled a person to a Succession Certificate is the beneficial interest in the debt or security. It is open to anyone who has a beneficial interest to apply for it.
- On the death of the applicant for a Succession Certificate, the proceeding lapses and there can be no substitution of the alleged heirs of the applicant.
- When a Succession Certificate is granted to a minor, it is generally to a guardian of the minor.
- In the case of ***Ram Kuar vs. Sardar Singh reported in 20 All 352***, it was held that a Certificate may be granted to a minor through his next friend.
- Section 223 of the Indian Succession Act mentions that probate cannot be granted to a person who is a minor and Section 236 mentions that Letters of administration cannot be granted to a minor.
- It is nowhere enacted in the Indian Succession Act that a Succession Certificate shall not be granted to a minor. What is required from the applicant is security under Section 375 and the interest of the minor is safeguarded by and under Section 375.
- Section 372 is similar to Section 276 of the Succession Act as regards the contents of the petition for Probate or Letters of Administration.
- Section 383 of the Succession Act provides for instances when a Certificate granted may be revoked.
- There is no period of limitation for an application for revocation of Certificate as in the case of an Appeal.
- Section 383 provides that if a Certificate is revoked under the said section or an appeal under section 384 or by reason of a Certificate already granted or for any other cause, the payments are made to the holder, it will discharge the debtor, provided he has no notice of the invalidity or suppression of the Certificate and acts in good faith.

- **<u>Further Notes :</u>**
  - Although the Jains are governed by Hindu Law ordinarily yet they possess the privilege of being governed by their own peculiarities and customs.
  - It was held in the case of ***Bachebhai vs. Mukhanlal – 3 ALL 55*** and the case of ***Chotay Lal vs. Chunno Lal – 4 CAL 744*** that the term Hindu included Jains.
  - In the case of ***Bhagwan Kaur vs. Jogendra Chandra Bose – 31 CAL 11 (PC)***, it was held that the term Hindu included the Sikhs. But Sikh converts to Christianity are governed by the Indian Succession Act and not by laws and customs of the community to which they belong. – see case of ***Ranber Karam vs. JC Bhattacharji (1940) ALL 100***.
  - The Hindu Succession Act, 1956 applies to the intestate succession of any person who is a Hindu, Buddhist, Sikh or Jain under Section 2 of the said Act.
  - Under modern law, a revocation of the Will does not revoke a Codicil.
  - Where in a Will, the testator did not appoint any executor but granted the whole of his property to a person by testamentary disposition, such a person may be called a Universal Legatee and not an Executor.
  - A Universal Legatee can be legitimately granted LOA in respect of the whole estate of the deceased, if such a prayer is made by him but no Probate can be granted to a Universal legatee in absence of appointment being made in the Will either expressly or by necessary implication by the testator.