FROM:

DINKAR P. BHAVE'S DESK

COMPILATION

OF

MONOGRAPHS

1.Your Wealth, Your Wish
2.Property Held in Joint Names
3.Memorandum of family Arrangement
4.Gst Impact On Housing Societies
5.GST applicability-"Commission" received inconvertible foreign exchange
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30thOCTOBER 2020

अश्विन पौर्णिमा शके१९४२(शरद पौर्णिमा)

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YOUR WEALTH
YOUR WILL
Alias

तथा

आपली संपत्ती,

आपली इच्छा

YOUR WEALTH YOUR WILL

By Adv. Dinakar Parashram Bhave
Mobile: 9820529371

A brief introduction of the author along with

His education, experience and his thoughts

Mr. Dinakar Parashram Bhave was born on 4th February 1935 at Pale Village (Taluka Panvel, Dist. Colaba). His primary, High School education was at Brahaman Sabha, Thane, Ideal English School, Pune and Nutan Marathi Vidyalaya, Pune. He pursued higher studies at Brihanmaharashtra College of Commerce (B. M. C. C.), Pune and Law College, Pune.

He earned the degree of B.Com. in March 1955 ranking 7th in second class. Then he passed the First Chartered Accountant's exam (i.e. the Intermediate exam) in the month of October, 1955.

He vowed to go for further education by dint of own earning since he was aware of the hardships faced by his beloved father and elder brother for financing school and college education. With this determination at heart he began working full time effective 28th November 1955 in the Pune Municipal Corporation's Transport Undertaking (popularly known as "PMT") and at the same time took admission in the Law College, Pune. In due time, he passed first year of LL. B. ranking First in Second Class; and then in October, 1957, he passed the LL.B. examination with First Class and First Rank in Distinction (70% + marks). He scored highest marks to receive two awards in the field of (i) Hindu Law and (ii) The Transfer of Property Act, 1882.

Later on, the then Bombay Public Service Commission had selected him & recommended for direct appointment to the post of Sales Tax Officer, bearing Gazetted Officer status (Class –II) and accordingly, the State government appointed him as the Sales Tax Officer, and he assumed the charge in October 1958. In January 1962, he was appointed as an Additional Government Agent before the Sales Tax Tribunal, which gave him the opportunity of handling for

four and a half year's legal work in Bombay (Maharashtra) Sales Tax Tribunal on behalf of the State Government. This can be considered as a foray into the legal profession.

After this, he was selected in the senior cadre of 'Officer Grade-I' in the Bank of India Ltd., in June 1966. There he was instrumental in bringing justice to two highly placed Officers in their cases of Departmental enquiry by presenting their legal say.

In the year 1969, the Indian banks saw nationalization, privatization and re-nationalization compelling him to accept charge in 'Executive Grade' in the Indian Branch of an American oil company by name Esso Eastern Inc. in January 1970. Then for about twenty three years he took care of all adjudication matters, appeals, second appeals before Tribunals/courts regarding indirect taxation in all States of India and argued the cases himself.

After getting retired on 1st March 1993, he has been functioning as an independent lawyer for the last 22 continuous years, the journey of which began on 2nd April 1993 with his enrollment as an Advocate by the Bar Council of Maharashtra & Goa.

In all these 50 years when he was busy in handling court cases regarding indirect taxation, he used to feel a prick of conscience which goaded him to pay back something to the society at large from whom he has had received so much in abundance. He was tossing an idea how to go about it.

Then his thoughts settled in the direction of writing this monograph. Nobody could be more aware than him of the fact that property, either a guntha of land or pegged at lakhs and crores of Rupees, becomes an unaffordable matter once it enters into a legal war. Now-a-days the expenses towards meeting court fees, Lawyer's remunerations and other peripheral expenses have skyrocketed in such a way that common man gets a traumatizing shock. A common –man is even forced to mortgage or selloff his property to meet these expenses!

Keeping the famous cartoonist Late R.K. Lakshman's pioneering creation: the "common man" in sights, he embarked on writing this monograph. He has endeavoured to show how property can be disposed of without getting engulfed in quagmire of disputes. One's wealth is what one may have received from ancestors and augmented by own hard work, which one has to pass on to the generations next. Surely, everyone wishes that this transition must be smooth sans legal battle among the siblings. A bit of care & caution, would avert many a complications arising out of this will-document, which can be fruitfully used for financial planning as well. He has also decided to spread awareness in the neighbourhood/housing societies by holding small-scale rallies in this context.

He sincerely prays to God most humbly to kindly bestow upon him the health, energy and inspiration to take this project to its fruitful conclusion.

Bandra (East)
Date: 28th November 2015

Adv. Dinakar Parashram Bhave
Mobile: 9820529371

DEDICATION

Most Respectfully

Dedicated to my revered parents:

Late Sau. Seeta Parasharam Bhave &

Late Shri. Parasharam Keshav Bhave

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" The Article was originally written in cejeþe (DeeHeuee meHeÊee, DeeHeuee F®íe),

and was first published in cenejeä ìeFcme in Jan.-March 2015.

All the nine parts are now translated in English.

As is well known, any translation from one language to another has inherent limitations; and subject to that an attempt is made to retain the original sense & flavor of the Article.

WILL –SLUG 1

One may recall the old times when the Postal Department used to provide telegram services. The services were available to all till it was discontinued recently in July 2013. For most of us delivery of a telegram used to be a reason for deep anxiety; because more often than not, the telegram meant news of someone meeting an accident or being seriously ill or even news of someone's sad demise. However, the telegram also used to be a harbinger of good news such as congratulations on some achievement or birth of a son or a daughter, or frequently used code no. 8: "Best Wishes for a long and happy married life". Only one thing has rivalled this disturbing capability of telegram and that is a 'Will' document.

It is a common experience that after a person is no more & the mourning period is over, the close relatives would meet for having a reading a Will document. It may bring happiness to some and sorrow to others. Those relatives who haven't been bequeathed anything become frustrated and they move a Court of law claiming the will being false or being written under duress. Then the battle to get a piece of the pie called property start raging in courts even for a lifetime. On the contrary, our lawyer friends are seen laughing all the way to the bank during this whole time! All this revolves around a legal document called a 'Will' and it is of utmost necessity to at least have a broad understanding of its nature.

There are basically a lot of misunderstandings among people when it comes to the concept of a 'Will'. Several questions come to one's mind regarding the 'Will' such as who should make a Will, when it should be made, how to make a 'Will', whether to make a 'Will' at all or not etcetera. So without making much ado, let's discuss 'Will' in a relatively easy and straight-forward way.

First of all you must bear in mind that you and you alone have all the freedom and every right to make plans about your wealth, property and estate. You do not require anybody's consent or permission to do this. You should take special note of the fact that nobody can violate the rules or framework you have laid down for disposal of your wealth, property or estate. It doesn't matter whether your property is movable or immovable, whether it lies in India or abroad. The judicial machinery takes on all responsibility of carrying out your will to the letter and spirit. However, if we do not avail of this right, then your wealth shall be divided and distributed as per the Hindu Succession Act, 1956. However, the wealth of the persons who are Muslims, Parsis, Christians or Jews by religion is divided and distributed as per the different customs and rules set for that particular religion.

The Appendix-IV hereto annexed indicates the broad principles of distribution of wealth, when a person dies intestate, (having made no legally valid will before death) among the relatives and how succession of wealth happens along with; and an outline of its distribution in brief. Similarly rules applicable to other religions are also mentioned. Also, a specimen format of Will, vide Appendix-I, has been provided as a supplement but it is given only for the sake of a better understanding of the subject. Before proceeding any further & adopting the specimen format, it is advisable that you must seek a Lawyer's advice on this subject as the gravity of this document is quite remarkable.

The chief points which must be given proper attention while bringing this powerful tool in use are:

Important points -

- Will is a legal document declaring a person's wishes regarding the disposal of his property to take effect after his death.
- A Will is required to be in written form. Oral wish is not entertained by the law since it cannot be implemented legally.
- Although it is not necessary to write this document on a stamp paper, it is advisable to write it on a ledger paper (green colour sheets used for Agreements).
- It is also not binding to register the Will document with Sub-Registrar of Assurances.
- Both, the registered or non-registered Will documents hold equal value from legal point of view.
- The document should contain clear mention to the effect that the said Will is your final or Last Will and that you have not made any Will prior to this and that if you have made any will prior, then you are thereby cancelling the same along with its Codicils, if any.
- In case two Will documents do exist at one and the same time, then, the one which is signed last –both by Date & Time is held to prevail and would be acted upon by ignoring the one singed earlier in point of time.
- In order to avoid any sort of confusion, it is recommended that one should keep ONLY one will document at a given point of time. Once a new Will is made, executed by the testator /testatrix, care may be taken to destroy, burn or cut to pieces the previous Will as well as codicils (a supplement to a will intended to alter an already executed will) , if any.

WILL –SLUG 2

Preparation for making a will:

Often it so happens that the family members do not have all the information regarding financial affairs of the earning male or female of the house. In case of the sad & sudden demise of such an earning member, the other family members are left with no clue about his or her financial transactions. However, if such an earning member were to maintain on a routine or regular basis an up-to-date-file containing all documents of his / her financial affairs or dealings, then, it makes the life of the surviving family members a lot easier.

Who can make a Will:

The answer to this question is: – any person with a sound mind who has completed 18 years of age can make a legally valid Will. Even a semi-literate or illiterate person can make a Will. Also, a deaf, mute or blind person can make a Will if they fully understand what they are doing. A delusional person or a person not sound in mind can also sign his / her Will but only when he/she is in a state of sound mind. However, it is necessary to attach with the Will a Medical Certificate declaring him/her as of sound mind at the time of executing the Will with two witnesses. It is noteworthy here that a person who has lost soundness of mind owing to inebriation (A temporary state resulting from excessive consumption of alcohol), illness or reasons like those, cannot make a Will and if he makes it during such mental state, such a Will would not be entertained legally, that is, it would be held as invalid, inoperative.

What preparation is required for making Will:

Generally, people start putting aside a small portion of their income for investment by age of 30. After the age of 40, this investment starts becoming a property. Sometimes loans are taken to acquire property and such loans are repaid when some savings are made. Multiple Accounts are opened in banks and closed. It is very necessary to have all the details of such financial transactions handy maintained with all relevant documents in a file. A detailed analysis must be kept as to how much loan was taken, when repaid and the receipts for such re-payments.

Hence it is very much advisable to prepare an up-to-date-file containing documents related to all properties, investments, bank deposits, receipts thereof, names of the branches of banks along with amounts of money deposited with them, names and addresses of the Companies whose shares have been purchased along with share certificates thereof, purchase deeds, Gift -deeds of immovable assets in original if any, details of loans drawn from a person or institution such as total amount of loan taken and repaid etc.

It is of utmost necessity to compile all the documents of movable or immovable properties. In fact everybody must make such a compilation from time to time. It is advisable to create a separate file containing all such documents maintained date-wise. Non-availability of such information has become a common scenario which should be avoided at all costs. That was all about what it means by preparing for a will.

About which properties a Will can be made:

Generally, property is classified into two categories – movable and immovable properties. Movable properties include cash money, bank accounts, fixed deposits, company shares, gold and silver ornaments or items, jewellery, diamonds, pearls, rubies, home items such as furniture, clothes etc, abstract properties such as trademarks, copyrights, tenancy rights or any other rights and vested interests. Immovable properties include non-movable properties such as land, farms, farm residences, horticultures, buildings, houses, bungalows, flats in Housing societies, commercial shops etc.

The ownership rights of properties are purchased through self- earned money or under the Gift-deeds. Also, ancestral properties received for being a descendant comes under the head of properties too.

A person can make a Will in relation to both the movable & immovable properties which are called self –acquired properties, which include those which are purchased by the person or are received under a Gift-deed of movable or immovable properties. In the case of a woman, her 'stridhan' (m$eeOeve) is her absolute property over which she alone has full ownership rights including right to sell or transfer etc.

The concept of stridhan is now nomen juris—having specific legal meaning owing to the judgment of the Honourable Apex Court. The gist of the judgment is given in the Appendix-III.

Further, while a woman is free to make will regarding self acquired property without any restriction, the man's right is subject to his obligations under the Hindu Adoption & Maintenance Act,1956, more particularly spelt out in the Appendix-VI.

The Self-acquired is in contrast to the Ancestral properties which are inherited by established rules (usually legal rules) of descent. The subject of ancestral or inherited properties would be discussed in detail later in another part. So far as the share in the ancestral property is concerned, the person can make a Will in relation to his undivided share in the Mitakshar coparcenary property, that

is, joint right of succession to an inheritance, as permitted by the Hindu Succession Act, 1956, section 30 thereof which has an Explanation:

> "The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhi, illom, kutumba or kavaru shall notwithstanding anything contained in this Act or in any other law for the time being in force, **be deemed to be property capable of being disposed of by him or by her within the meaning of this [3][section.]**"

WILL –SLUG 3

Equal right of daughters in the ancestral properties:

The Hindu Succession (Amendment) Act 2005 has given women equal rights in ancestral property as the men (including right to demand share in property, called right of partition).

Since ancient times, joint family system prevailed in India in accordance with traditions, customs and religious scriptures. In this system, the right of common properties lay with the head of the family. Family's property used to be distributed among three generations viz. Father, Grand-father & Great –grand-father and Son, grand–son & Great grand-son. All these persons are joint–owners and are collectively referred to as "coparceners". Death of one of the coparceners used to cause increase in other coparceners' share in property. Contrarily, birth of a coparcener decreased the share of other coparceners.

Only coparceners had the right to partition in respect of commonly held property. Women did not have any rights when it came to inheriting property. The scriptures recognized Stridhan (m$eeOeve) as women's own property, completely owned by them. Appendix –III hereto gives more details as to what is "stridhan". As per the scriptures, for a married woman Stridhan falls under two heads: **The saudayika** (gifts of love and affection) – gifts received by a woman from relations on both sides (parents and in-laws). **The non-saudayika**- all other types of Stridhan such as gifts from stranger, property acquired by self-exertion or the mechanical arts. In the context, the Hon'ble Supreme Court of India held that: "a Hindu married woman is the absolute owner of her Stridhan property and can deal with it in any manner she likes and, even if it is placed in the custody of her husband or her in-laws they would be deemed to be trustees and bound to return the same if and when demanded by her".

It may be mentioned that while the un-codified Hindu Law did not confer on women any ownership or property rights, the responsibility to provide for the needs of all the females –food & shelter, clothing etc. (For married, unmarried

or widowed women) in a joint family was entrusted to the Head of the family i.e. the chief member of the family, commonly called "karta" (keÀlee).

The Hindu Succession Act, 1956 proclaimed that with effect from the commencement of the Act all rules, traditions and customs prevailing prior to that date shall cease to have effect in relation to matters provided in the Act. Section 30 gives right to a coparcener to dispose his undivided share in the property through a will. The amendment of 2005 went a step ahead by according equal rights to women in getting share of property (along with the right to demand for such a share—known as "partition".). The disparity between women and men with respect to getting share in ancestral properties has been thus removed.

The new Amendment Act, 2005 brought into effect from 9th September 2005 was the subject matter of judicial scrutiny, and the Apex Court has recently ruled that the daughter's right to ancestral property at par with the son, is conditional in the sense that the amendment cannot be given "retrospective" effect as held by some High Courts, and the new provision shall be prospective and hence the father & the daughter both must be alive on the 9th September 2005; otherwise the daughter would have no right in the ancestral property. Kindly see Appendix-II.

It may be noted that only a person who is complete owner of movable or immovable assets can prepare a will for those properties. Hence generally a will provides for distribution of self-earned property. A person having a share in the ancestral property can make a will with regard to only that share and no other. The rights of other family members with regard to share of the ancestral properties remain uncompromised.

Even a property under the burden of debt can be bequeathed through a Will. However, it is required that the person receiving such property must accept both – the property as well as the burden over it. Naturally, only a burden of debt or amount of loan over a property cannot be bequeathed to other person through Will.

If the person who is named in the Will for receiving a share of the property refuses to accept that share then, such a share again becomes a part of the total property. Sometimes, inadvertently it may so happen that certain property is left out of the Will. To avert such a problem, at the end of the Will one must make a mention of a specific person to receive the "residuary property" which may remain behind after distribution of all the properties as per the Will. This will ensure distribution of all properties held by the will-maker, the Testator or the Testatrix.

The person making a Will can also give away any amount which s/he is expected to receive in future. (e.g. arrears of pension, pension or a part of it sanctioned with retrospective effect, insurance money, amount to be repaid by someone etc.)

Joint will:

When two persons, generally a husband and a wife, sign a single Will document together and jointly give away their property to a single or multiple persons, in such a situation it is termed as a "Joint Will". Such a joint will helps a husband to transfer all of his property to his wife and make provision of its distribution in the event of her death. The wife carries out the same process and bequeaths all her property to her husband and then to others in the event of her husband's death.

It must be noted in this context that, a joint Will thus made cannot be revoked by a husband or wife after the death of the spouse. Thus a joint Will is a joint agreement which cannot be breached after death. Even making alterations to such a Will is not permitted. What is even more noteworthy here is the fact that a husband or a wife who remarries after the death of his/her spouse cannot revoke or change a joint Will once it is solemnly signed. However such a joint will can be altered or revoked jointly till the time both the husband and wife are living. Against all this background, it might be said that a joint Will doesn't serve any special benefit or usefulness.

Nomination and a will:

Many of us submit a nomination form for bank accounts, term deposits, share certificates or residential flat in a housing society. But such a nomination only permits the bank or the concerned institution to transfer the nominated property in the name of the nominee or the nominees. People seldom know that such a nominee/s is never considered as a complete owner of the property received through nomination. Law only reckons such a person as a mere "trustee" of that property who cannot sell, mortgage or transfer the property to any other person without the consent of all the legal heirs. However, one exception to this rule is the nomination made for shares of a company. In case of a company-share, the nominated person is deemed to be a complete owner of the nominated property because the Company Act provides for such an exception. This exception is also upheld by the Mumbai High Court.

Considering the importance of nomination, it is proper to make nominations regarding all properties. However, there must be a clear mention in the will that the Will- maker is giving away all the concerned property to the nominated person along with the full rights of ownership to the exclusion of the legal heirs or other legal heirs, if the Nominee is a legal heir.

In the case of bank accounts and term deposits held jointly, the person whose name is mentioned first in the Account or Receipt –document is deemed to be the owner of the money in such accounts or deposits, as per the Banking law & practice. Hence it is very necessary to make a clear mention in will as to who is going to be the owner of such accounts or deposits. Otherwise, the banks, even in absence of a nomination, may give away all money from such accounts and deposits to the "surviving account-holder" and such a surviving account-holder shall have to accept such accounts and deposits only as a mere trustee! A clear mention in Will with regard to such accounts and deposits is a must to clothe the surviving person as the full owner of the amount in the Account or one specified in the Deposit Receipt.

WILL –SLUG 4

How to draft the will document:

There is no prescribed format for drafting a will document. A will written in a very simple and straight-forward language is acceptable. However the only requirement here is that the will should be drafted in clear and precise terms. When a certain property, movable or immovable, is given away to a person, then, it must be fully and adequately described and it may be clearly mentioned in the will that others will not have any right or claim on the same.

The concerned property should be described in complete details. For example, 'I am giving amount deposited as term deposit in say the State Bank of India (with the name of the Branch) –Receipt number so and so along with the interest accrued thereupon amounting to Rupees so and so, to Mr. /Mrs. / Miss ABC and the said person shall be at liberty to enjoy or dispose of the same as s/he may deem fit. No other person shall have any right or claim over the aforesaid property.'

It may be remembered that one must not commit erasing or overwriting upon letters or figures so as create ambiguity. If any overwriting is there , then all the three persons –the Will-maker and the two witnesses —have to sign nearby and authenticate the correction / overwriting, otherwise it may be construed as 'tampering with the document', making it invalid in law. If the will document is hand-written then it should be written in clearly legible and large sized characters. All numbers should be written clearly. In case you are finding it difficult to write the document by hand, type it or prepare it on computer.

In case a person is unable to write, he / she can get a will drafted by engaging the services of a writer. However, the writer in such cases must make a mention at the end of the Will-document that the text contained in the Will has been written at the behest of the Will –maker; and also that the text has been read out to the will maker and that the Will-maker has understood and accepted the

same as correctly representing what s/he had in his/her mind. Further, the Writer should once again take affirmation about the correctness of the text before signing the will or thumb-printing it, in presence of witnesses and only then it must be signed or imprinted with a thumb-print (for a woman, right-hand thumb).

Mental condition required for making a will:

The will maker must mention it clearly in the will that he is of sound mind. Some people advice to attach a doctor's certificate to this effect or get the will signed by a doctor as a witness. One is not supposed to or required to do so by law. Nonetheless, doing so may give certain strength to the will. The will maker shall clearly mention in the will that s/he has made the Will by his /her own free-will, pleasure and at his/ her own discretion and that he / she is under no duress or force or compulsion to make or sign the Will; because, if it is proved in a court of law that a will has been drafted/signed by use of force, coercion or threat then the court invalidates such a will. Naturally, in such a case, all the property and assets of the deceased person are distributed as per the succession law applicable to the person concerned.

Will maker and witnesses:

The validity of a will depends on the signature of the will maker and signatures made jointly by at least two witnesses along with the Will-maker. Hence care should be taken while signing a will that all the three persons sign the will at the same time and in the presence of each other. This fact should be mentioned in the will clearly. The essential validity of the Will primarily rests on the state of mind of the Will-maker, and his having signed the Will –document in the presence of at least two witnesses, who have to testify that the Will-maker affixed his/her hand in their presence, and in the presence of each other.

It may please be borne in mind that the witnesses need not know the contents of the will document. They only have to depose, if and when required in the Court, the fact that the will was signed by the will maker in their presence. It is also not necessary that a witness should be a lawyer or doctor by profession. Any person who has completed 18 years of age, literate or otherwise, relative or otherwise, or any person who has been given a share from the property or any person who has been appointed as a 'will executor' may act as a witness and sign the will document in that capacity. A will document thus signed is completely valid. However, it is noteworthy here that if a will executor has been given a share in the property then, he must do something as a will executor; otherwise he will not get his share of the property.

It is also advisable to select a young person as a witness so that the heirs could take his/her help comfortably if there arises any court matter to prove the validity of the will at a future date.

WILL – SLUG 5

Will Executor:

It is in the best interests of the will maker to appoint a trusted and faithful person as a will executor since this is very important position. After the death of the will maker, all of his or her property is vested in the will executor in the capacity of a trustee.

A will executor is a person who has been appointed for the purpose of proving the validity of the will document and distribute the will maker's movable and immovable properties in accordance with the will. The will maker clearly mentions this appointment in the will document. In case the appointed will executor becomes unable to discharge his/her duty in future for any reason, then a substitute will executor can be appointed in the will document itself beforehand.

Duties of a will executor:

First of all the will executor needs to obtain a probate of will from an appropriate court of law. A probate of will means a certificate of validity issued by a court for a will. Then the Will-executor needs to get all the properties and money transferred in his/her own name. Later on s/he needs to give away all this property as provided in the will to the appropriate persons named in the will. Then he needs to submit a complete account of the whole properties and their distribution to the court. In case an executor has not been appointed by the will maker then any heir can move a court of law for appointing an executor & obtaining the probate of will. Since this process is a little complex, it is advisable to get this process done through a lawyer.

A small note is given in the Appendix-V clarifying the process involved in obtaining the probate.

When to make a will document and why:

It goes without saying that every person should make his /her will. It can be altered any time and indeed one should go on making alterations in his / her will as circumstances demand. However, for the sake of avoiding doubt, only one will document should be kept in existence at a time. It is advisable to tear off or destroy the old will when the new one is made. Needless to say that will document helps avert unwarranted strifes and quarrels among heirs and relatives and maintain cordial atmosphere among all. It also makes way to give a larger share of property to a son or daughter whose financial status is not satisfactory, or who otherwise needs/deserves it. After all it is the sincere wish of every will maker that the property earned by the sweat of his brow should be passed on to his successors or it should be put to use for a noble cause such as

religious, medical donation or donation to orphanages etc. Nobody wishes for unnecessary expenditure on court cases and mutual discords.

What if will is not made at all:

In a scenario wherein a will has not been made at all, or if a will doesn't exist or has been declared invalid then, distribution of property in such cases is carried out as per the provisions of Hindu Succession Act, 1956 (amended by Act of 2005). This is mainly applicable to people belonging to Jain, Buddha and Sikh religions. The provisions of this Act are not applicable to people belonging to Muslim, Parsi, Christian and Jew religions. Their properties are disposed as per the rules separately laid down for them.

The aforementioned Hindu Succession Act, 1956 has been amended on 9th September 2005 whereby women of the family have been given equal rights in ancestral properties and assets.

Important points in brief:

One can safely conclude from the above discussion that there is no loss or damage in getting a will prepared. Because it can be altered anytime or it can even be revoked. A will adds to one's joy by assuring that one's properties are to go to appropriate and worthy persons. Such a property has good chances of growing further in future. A will, if made with foresight and poised mind, helps maintain cordial relationship among the family members by making proper planning.

WILL – SLUG 6

What exactly is the Hindu Succession Act?

The Hindu Succession Act, 1956 is a law which provides for disposal of properties owned by Hindus. It recognizes property of a woman completely as her own and after the amendment of 2005 (effective 9th September 2005) she has been conferred equal rights as of men. If a woman has not made any will before her death, then all her property is disposed of as provided in the Hindu Succession Act, 1956.

In the absence of any testamentary disposition, the property of a Hindu is passed on to his heirs after his death. Identification of successors and distribution of property to them is carried out under Hindu Succession Act, 1956. The general nature of the rules related to disposal of property, are as follows –

(1) Heirs of a man –

Relatives of male can be categorized mainly as follows –

Heirs falling in Category 1 – Sons, daughters, widowed wife (one or more), mother, son of the deceased son or wife of the deceased son and the a generation next to him – All these persons receive **one part of the property at the same time**. In case no person falling in Category 1 is living anymore, all the property shall pass on to persons falling in Category 2.

Heirs falling in Category 2 – These are classified in following sub-categories. It is to be noted that all persons falling in first sub-category shall share all the property among themselves. In case no person falling in sub-category 1 is alive anymore, the property shall be distributed to heirs belonging to second sub-category and in case no heirs falling in second sub-category is alive anymore then it will be distributed to the heirs falling in third sub-category and so on.

Sub-category 1 – Father,

Sub-category 2 – (a) Son of son's daughter, (b) Daughter of son's daughter, (c) Brother, (d) Sister.

Sub-category 3 – (a) Son of daughter's son, (b) Daughter of daughter's son, (c) Son of daughter's daughter, (d) Daughter of daughter's daughter.

Sub-category 4 – (a) Brother's son, (b) Sister's son, (c) Brother's daughter,

(d) Sister's daughter

Sub-category 5 – (a) Father's father, (b) Father's mother

Sub-category 6 – (a) widowed wife of father, (b) Widowed wife of brother.

Sub-category 7 – (a) Father's brother, (b) Father's sister.

Sub-category 8 – (a) Mother's father, (b) Mother's mother.

Sub-category 9 – (a) Mother's brother, (b) Mother's sister.

Explanation:– The aforementioned terms such as 'brothers' and 'sisters' (full-blooded and step-brother or step-sister) do not include uterine brother/sister.

- If no heir from category 2 exists anymore, then the property shall go to blood-relatives of the man or his adopted son.
- In case such relations do not exist then, it will go to non-blood-relatives and if even such relations do not exist then the property shall be acquired by the Government.

(2) Heirs of a woman –

Since all the property held by a woman is deemed to be owned completely by her and by her alone and since she has been awarded equal rights as of a man by amendment of year 2005, her property, in absence of a will, shall be given to her heirs as follows–

- **First of all**, every living (1) son, (2) daughter, (3) sons and daughters of deceased son/daughter and (4) her husband shall get an equal part.
- **Secondly:** In case where the aforesaid heirs are not alive anymore, the property shall go to husband's heirs,
- **Thirdly:** In case where the aforesaid heirs are not alive anymore, the property shall go to father's heirs,
- **Fourthly:** In case where the aforesaid heirs are not alive anymore, the property shall go to mother's heirs,

Explanation:- Husband's heirs and father's heirs shall be determined in accordance with the rules laid down to decide the man's heirs and mother's heirs shall be determined in accordance with the rules laid down to decide a woman's heirs as given above. In absence of all heirs as given above, the property shall be acquired by the Government.

WILL – SLUG 7

Ancestral Property:

In old times, after the death of the earning male member of the family, his eldest son used to step into his shoes. However this was just a management convenience. The wealth or property of the family was there for every member to enjoy. In recent times, joint families are going out of tradition. Several families have gone nuclear since 30 to 40 years. A duo of husband-wife and a duo of two kids has become the mantra of the nuclear family. (Nowadays even the number of kids has reduced to only one!) However, after the implementation of Hindu Succession Act, 1956, the courts were flooded with cases regarding the scope and expanse of its section 6 and section 8. Similarly, it can't be said with confidence that the members of the older generation have buried their hatchets. Many people are still struggling to answer questions about how to determine whether a property is ancestral or not, how much share do a sister and a brother has in the ancestral property etc. That's why it is essential to have at least a broad understanding of the concept of property.

Property:

A property is classified into two categories – movable and immovable. Movable assets or properties are those which can be moved such as cash money, bank account, term deposits, shares of companies, gold, silver, precious stones, household items, furniture, clothes etc. Even abstract properties like trademarks, copyrights, tenancy rights etc. fall under the head of movable properties.

On the contrary, immovable properties include non-movable properties such as land, farms, farm residences, horticultures, buildings, houses, bungalows, flats located in housing societies, commercial shops etc.

The ownership rights of properties are purchased through self-earned money or under Deed of gift. Also, ancestral properties received by a descendant come under the head of properties too.

Structural fabric of Indian society:

For centuries, the pattern of Indian society was structured, guided and sustained by well fashioned self-manifested Vedas, Shrutis, Smrutis, observations made thereon by sages, their criticism and practices, traditions and customs set by years together. The structure of a joint family, rights of the earning members of a family and rights of the others, their respective duties etc. had been laid down by scriptures, the dominant was the Manusmruti (cevemceIee). As per the customs of those times, five main schools of thought existed regarding family system – Banaras and Bengal Schools of thought took the lead. (Which respectively evolved into Mitakshar and Daaybhag systems later on.) They have taken strong roots in the society since several centuries. The Smruti thesis authored by Sage Yadnyawalkya and a critique written thereon by Sage Vidnyaneshwar is known as Mitakshar. On the other hand, the Sampatti-Vibhaajan (division of property) thesis authored by Sage Jimootvaahan is known as Daaybhag.

Joint Family or a Hindu United Family (HUF):

The Mitakshar system has awarded the ownership rights of properties to three Ancestral generations of father, grandfather and great-grandfather and three descendant generations of son, grandson and great-grandson. A group of all these family members is called “coparceners”. The share of property held by each of these used to increase or decrease as and when any of them died or was newly born.

Any member of the coparceners’ group who is married joined his wife, his grandmother, his great-grandmother to the family while any dead coparcener resulted in joining of his widow, married or unmarried daughters and other close relatives to the family. Daaybhaag system also supported joint family but differed on ownership rights. This will be discussed shortly.

Joint possession of property:

The salient feature of a Hindu joint family is common eating, common prayers and common properties. This feature was acknowledged by both Mitakshar and Daaybhaag schools of thought. In both systems, the right to manage common

properties lay with the head of the family—known as Karta (keâle). After the death of the family head, if the family remained joint, then his eldest son became the head of the family. But it was only a convenience from management point of view, the family property being held in common by the coparceners. The concept of "ownership of property" by an individual did not exist for many centuries.

WILL – SLUG 8

Ownership of property:

Introduction: Descendent children cannot have common ownership in self-earned properties. Since children have no right whatsoever in such property, their father is completely at liberty to dispose of his property as per his own wishes, subject, however, to the provisions of the Hindu Adoption & Maintenance Act,1956—Kindly see Appendix-VI.

The very concept of family's ownership over property dates back to ancient times. It is only when the division of property became necessary due to birth of nuclear family system that the people started thinking about partitioning of property. The Mitakshar and Daaybhaag systems put forth opposing ideas as to when the son of a family-head becomes owner of the common property.

- The Mitakshar system postulates that even in a father's lifetime, his son, his grandson and his great-grandson have equal share in property. However, they do not own their shares individually but they hold it as coparcerners.
- Contrarily, Daaybhaag system postulates that children get ownership of property only after passing of their father.
- As per the Daaybhaag system, the property was only shared between sons and grandchildren but it was not shared between a father and his children and grandchildren. However a father could, if he willed so, distribute his property to children. In short, only those who did not have any living ancestors had ownership rights. In a Daaybhaag system, the members of a family had ownership of the undivided share of the common property.

What exactly is an ancestral property (Court verdicts thereon):

The British Rule established a modern justice system after the year 1860. Sometimes they made laws that supported religious scriptures and sometimes they made laws which brought reformations in the rules laid down by scriptures. The important legal cases were decided through House of Lords / Privy Council in England. Similarly, many benches of the High Courts in India as well as the Honourable Supreme Court have given several verdicts in the last 7 to 8 decades which relate to ancestral property and ownership rights.

The verdicts in these Court cases were given by studying the original concept in the scriptures, critique made by sages over them, opinions of chief observers, authors and vernacular and foreign researchers. A study of all these verdicts clearly underlines fundamental legal concepts and foundational principles applied or used in deciding them.

Following are some of the remarkable verdicts related to Mitakshar school of thought:

1. An ancestral property means the property received as a descendant of three generations (father, grandfather and great-grandfather). The son, grandson and great-grandson used to get birthright in such a property. The property received from great-great-grandfather (4th generation) is not deemed as ancestral.
2. If a father, in his lifetime, gives away his property to his son through a gift-deed and if that gift-deed clearly gives rights of selling and transferring that property to the son, then such a property is not deemed as ancestral. Naturally, grandson and great-grandson does not receive ownership rights in the said property. However, if the gift-deed does not make any such clear mention then, a dispute may arise whether the said property was gifted for enjoying by survivorship system.
3. A property received from any relative except the aforesaid three ancestors (e.g. from paternal and maternal uncles, maternal aunt, grand-mother or some other person) is not deemed as ancestral. Hence sons, grandsons and great-grandsons do not have any rights in the said property and their consent is not required while selling or disposing of such property.
4. If a common property is passed on to a childless coparcener, then such property is also deemed as self-earned and the right to sell such a property lay with such a coparcener. A son, born to such a coparcerner afterwards, gets rights in the property which may remain after selling but he can not object to past selling of the property i.e. concluded sale.
5. After division of an ancestral property, the share received by each of the co-owner is considered as his own property, qua the other co-owners. However, it is deemed to retain “ancestral property tag” from the point of view of sons, grandsons and great-grandsons of the co-owner since the characteristics of the original property does not alter owing to mere partitioning.
6. Based on Mayne’s thesis related to Hindu Law and Customs, the Hon. Supreme Court of India has given a verdict in the matter of Kalyani (deceased), representative (AIR 1980 SC 1173) as follows –

"The father has power to effect a division not only between himself and his sons but also between the sons inter se. The power extends not only to effecting a division by metes and bounds but also to a division of status." Thus, the property received by every co-owner in such a partition, which terminates "joint-status" is deemed as his own and independent property, it shall pass on to his successors as per the Hindu Succession Act, 1956.

7. The children cannot have common ownership in their father's self-earned property. Hence he can dispose of such a property as per his own will, subject to statutory obligations. (Appendix-VI)

WILL – SLUG 9

Difference between ownership:

Let's understand the difference between ownership concepts put forth by Mitakshar and Daaybhaag systems of succession.

Both these systems supported societal structure comprising of joint/united families. However, the conspicuous differences of opinion between the two regarding ownership rights can be shown as follows –

Subject	Mitakshar	Daaybhaag
Share of property	Uncertain, unpoised, changing at every birth and death	Every coparcener's share is fixed
Succession, inheritance	Based on survival since property is owned commonly.	A father can distribute property in his lifetime.
Method of partitioning	By clear intention	Intention not required since shares are already fixed.
Fulfillment of partition	After staking claim	After court delivers verdict.
Partition's implementation	Lies with three generations (father, son, grandson, great-grandson) previous and next and implementation made by demand	No rights to sons, grandsons and great-grandsons.
Widow's rights	No ownership in property. Only rights to food, clothes and shelter.	Ownership rights in property after father's death.

Subject	Mitakshar	Daaybhaag
Nature of ownership	Common ownership	Common possession
Father's ownership	No independent ownership to father alone	Father alone has all ownership rights
Step-mother's rights	One share if she is childless	No rights to step-mother
Principle	Rights by survival	Right by heir-ship
Rights	Birthright	Right on ancestral property after father's demise
Personal property	Property NOT earned using common property (This needs to be proved with evidence.) Also property received through gift deed	No limitation regarding self-earned property.

Secondary status to women:

- Scriptures did not give women any right to demand share in the property. They only acknowledged that the property owned by a woman, called stridhan (m$eeOeve) (ornaments, jewels etc.) is solely, exclusively her property. The concept of stridhan (m$eeOeve) is elaborated in the Appendix-III hereto. Even though the women, did not have any ownership rights in the common family property, the responsibility of providing for the needs like food, shelter, clothing etc. of all the womenfolk of the household (widowed, married or otherwise) laid on the shoulders of the family-head, called the Karta (keÀlee), to be met from and out of the family earnings.
- The Hindu Succession Act, 1956 superseded all the customs and traditions and rights to property were newly laid down. Daughters were given equal rights in property. Section 30 of the said act has given a copercener the right to dispose of his undivided, unspecified ownership rights through a will.
- The Hindu Succession (Amendment) Act, 2005 went a step ahead and gave women equal rights in ancestral property (along with right to demand share in property). This act has made a lot of endeavours in redressing the inequalities between men and women with regard to rights on ancestral property and it's hoped that whatever lacunae still exist in the law shall be remedied through a fresh amendment act. The latest decision of the Honourable Supreme Court puts a caveat, a rider on the ownership rights of women by ruling that the

father & daughter must be alive on the date the Amendment Act 2005 came into force i.e. on the 9th September 2005. –A note is given in the Appendix-II hereto.

A will of self-earned, ancestral property:

The above discussion has made it amply clear that a person can make a will document only with regard to the property (movable and immovable) of which he/she has complete ownership rights. In other words, only self-earned property can be given away through a will. A person having ownership rights only for a share or portion of the ancestral property can make a will only regarding that share or portion of the property. The rights of other family members in the said ancestral property remain uncompromised.

Even a property under the burden of debt can be bequeathed through a will. However, it is required that the person receiving such property must accept both – the property as well as the burden over it. Naturally, only a burden of debt or amount of loan over a property cannot be bequeathed to other person through will.

If the person who is named in the will for receiving a share of the property refuses to accept that share then, such a share again becomes a part of the total property. Sometimes it may so happen that certain property is left out of the will inadvertently. To avert such a problem, one must make a mention of a specific person at the end of the will to receive the "residuary property" which may remain behind after distribution of all the properties as per the will. This will ensure distribution of all properties held by the will maker.

The person making a will can also give away any amount which he is expected to receive in future (e.g. arrears of pension, pension or a part of it sanctioned with retrospective effect, insurance money, amount to be repaid by someone etc.)

Points to ponder:

Even though receiving father's self-earned property and the ancestral property is a birthright of the heirs, it is of utmost necessity on their part to see that the family property is being put to good use. They should always bear in their mind that even though they are heirs for their ancestors, they are also trustees for the generations next that follow. Hence, it is left to one's personal conscience to determine whether to hand over the ancestral legacy with added glory to the future generations or to cause detrimental reductions to it and leave such tainted property by way of legacy to sons, grandsons and so on.

APPENDIX - I

Given below is a specimen of the Will document, which may be adopted by making appropriate additions/modifications to suit individual requirements.

It may please be noted that this is a document which may land-up in a Court of law to ascertain the precise intention of the Will-maker and at that stage various rules of interpretation come into play, with which a common–person may not well versed or aware of, and hence it is strongly recommended that advice of an experienced Advocate may generally be taken and more so when the title to the property is unclear or disposal thereof involves complexities that are uncommon.

LAST WILL AND TESTAMENT

I, ...(name), an adult of Indian Inhabitant aged about _____years presently residing at (full address), hereby revoke any wills and codicils or other testamentary dispositions whatsoever that may have been previously made by me and declare this to be my Last Will and Testament, executed at ..... (Place) on this 15th day of November Two thousand fifteen, (15th November 2015).

1. I declare that all the properties, either movable or immovable of whatsoever nature, wheresoever situate, possessed by me and standing in my name are self acquired properties and that no other person has any right title or interest of whatsoever nature therein.
2. I declare that I have not at any time heretofore done, committed, executed or knowingly suffered or been party or privy to any act, deed, matter or thing whereby I am in any way prevented to dispose of the whole of my respective property by Will as per my wishes.
3. I do hereby appoint my wife ..... (Full name) as the sole Executrix of this Will. The Executrix appointed as aforesaid for the execution of this Will shall do, cause to be done and act upon my Will. I, hereby state that my intention by this will is that the Executrix shall have absolute right to administer the properties moveable and /or immovable in the manner mentioned below.
4. I hereby direct Executrix to take charge, on my demise, of all properties and assets and to recover from all persons, companies, corporations, firms whatever amounts which remain due. The Executrix shall firstly pay all just and my legal debts, to pay out of my respective estate, expenses of my funeral and obsequies ceremonies.
5. I further direct the Executrix to pay all taxes and duties payable in respect of my estate and to pay out of my respective estate all other

outgoings relating thereto and all my lawful debts, if any, outstanding at the time of my death.

6. Amongst properties movable and immovable are as mentioned below, and particularly mentioned in the Schedules A, B, C, &D hereinbelow:

   a) I own a flat being .... (Address) along with the Share Certificate No. ..... and Distinctive No. ..... to .... (Both inclusive).

   b) Following Bank Accounts are standing in my name:

      i) Saving Account No _____with _____Bank, _____Branch, Mumbai.

      ii) Saving Account No _____with _____Bank, _____Branch, Mumbai.

   c) I have my saving deposited as Fixed Deposits with

      i) _____Bank _____Branch, Mumbai.

      ii) _____Bank _____Branch, Mumbai.

   d) I have jointly and severally made various investments in shares, mutual funds, fixed deposits, Insurance policies etc and also hold accounts with various banks. I hereby direct the Executrix to liquidate all such investments / bank accounts as she deems fit and appropriate taking into consideration the market conditions. I direct the executrix to be the beneficiary of such investments in shares, mutual funds, bank accounts, Insurance policies and fixed deposits. It is clearly stated that despite the nominations mentioned in various investments, it is my last will that the beneficiary shall be the executrix only. I hereby clearly express my desire that all investments in shares, mutual funds, fixed deposits, Insurance policies etc and amounts standing to the credit of our respective accounts with various banks shall be bequeath to the executrix.

   e) I further wish that in the event any investments being jointly held with any other person, then in the said event such investments shall be bequeathed to such joint holder absolutely.

   f) In the event there is no nomination, in that event all investments and all such assets be bequeathed to my wife absolutely.

7. I hereby bequeath all the properties as mentioned herein above and all the rest and residue of my estates to Executrix exclusively. In the event of death of both of us, I hereby bequeath the same to my son_____ .

   I do not wish to give any of my property to _____

[Note please fill the details as to how the property is to be distributed]

8. It is my desire that whatever bequeaths have been made by me under this my last will should be gracefully and without any demur or sorrow accepted by all the legal heirs. All should give respect and make utmost efforts to fulfill my aforesaid wishes.

9. Under no circumstances they should step into any court of law for claiming any right which has not been given to them under this Will, and thereby they should avoid lowering my prestige and reputation in the populace.

10. In the event of any heir or any relative or any other person challenges this Will, the said beneficiary shall stand deprived of his/her said bequeathal and the executrix shall be at liberty to utilize the said assets for the benefits of the other legal heirs who respect my last will.

11. I have made this last Will out of my own free will and accord and without any pressure or influence of any nature whatsoever in sound and disposing state of mind memory and understanding while capable of performing any act requiring thought, judgment and reflection.

12. In order to obviate any problem on this count I have asked the Family Doctor to affix a Certificate duly signed by him to testify that at the time of signing this Will I was in sound state of mind & otherwise physically & mentally fit.

13. IN WITNESS WHEREOF, I have set my signature hereunder in the presence of the two witnesses, who have signed in my presence and in the presence of each other at the same time on the day, month and the year first mentioned hereinabove.

Signed by the withinnamed Testator ...) XYZ

In the presence of witnesses,) Testator /Testatrix

In the presence of the Testator and
in the presence of each other have put
their signatures hereunder
As witnesses.) ABC & DEF

Witnesses

(Attach detailed and well described list of all your movable, immovable, cash, investment and share certificates, bonds, proceedings from Insurance policies etc, property as Schedule and give numbers as A, B, C, etc., as suggested in Clauses 5,6,7 etc., for clarity. In fact, you are expected to prepare very detailed table with

property details, jewelry descriptions, folio numbers, certificate no etc and details of bank accounts and cash to make it as clear and unambiguous as possible to avoid any dispute)

SCHEDULE LISTING OF MY PROPERTY AND BELONGINGS

SCHEDULE A

Land and flats, apartments, farm house, bungalows and immovable items etc.

Sr. No.	TYPE	Address/Location	Specific No. bearing, agreement/7/12 record	Bequeathed to
1	Flat	Write address	Index 11 and agree-ment data	Elder Son- Mukesh
2	Land			
3	Bungalow			

SCHEDULE B

Valuables, jewelry, etc.

Sr. No.	Object	Description	Details/specifics	Bequeathed to
1	Gold Chain	30 Gms	If any	Elder daughter-Anu
2	Diamond ring			
3				

SCHEDULE C

Cash, Share certificates, Bank lockers and all other items

DEMAT ACCOUNT –PARTICULARS

Sr. No.	TYPE	Description	Particulars	Bequeathed to
1	Car	SX4	MH12-ET 3435	Son- Umesh
2	Shares	TISCO	Folio No.	

SCHEDULE D (OPTIONAL)

MY PASSOWRDS: FOR BANK, LOCKER, CAR, COMPUTER AND SPECIFIC FILE

APPENDIX - II

Daughters cannot inherit ancestral property if father died before 2005, says the Hon.'ble Supreme Court

The Supreme Court has recently said that a daughter's right to ancestral property does not arise if the father died before the amendment of Hindu law that came into force on 9th September 2005.

In 2005, the Parliament had passed a landmark amendment to the Hindu Succession Act, 1956, granting daughters the right to inherit ancestral property along with their male relatives. But now, a 'small' clause has been added to it.

A daughter can only hold a right to the ancestral property if the father has died after this amendment came into force in 2005, the Supreme Court rules. In other words, the father would have to be alive till September 9, 2005, for the daughter to become a co-sharer of his property along with her male siblings.

Adding that the amended provisions of the Hindu Succession (Amendment) Act, 2005, do not have a retrospective effect, a Supreme Court bench comprising Justices Anil R Dave and Adarsh K Goel held that the date of a daughter becoming coparcener is on and from the commencement of the Act.

The Hindu Succession Act, 1956 originally denied women the right to inherit ancestral property, allowing them only to ask for sustenance from a joint Hindu family.

After the amendment was passed in 2005, the only restriction to remain was that women could not ask for a share if the property had been alienated or partitioned before December 20, 2004, which is the date the Bill was introduced.

But that was until the Supreme Court came up with the latest 'restriction'. Now, the law stands settled; and the High Courts like the Bombay High Court which had taken the view that it being beneficial legislation or gender equality legislation it would have retrospective effect, stands overruled.

APPENDIX - III

What is m$eeOeve ? (Stridhan)

The topic is well discussed in the 60 PAGE Larger Bench decision of the Apex Court: Pratibha Rani Vs Suraj Kumar and Another 12-03-1985 –1985 AIR 628.

Excerpts below:

1.1 The stridhan property of a married woman cannot acquire the character of a joint property of both the spouses as soon as she enters her matrimonial home so as to eliminate the application of section 406 IPC. The position of stridhan of a Hindu married woman's property during coverture is absolutely clear and unambiguous; she is the absolute owner of such property and can deal with it in any manner she likes---She may spend the whole of it or give it away at her own pleasure by gift or will, without any reference to her husband. The entrustment to the husband of the stridhan property is just like something which the wife keeps in a bank and can withdraw any amount whenever she likes without any hitch or hindrance. Ordinarily, the husband has no right or interest in it with the sole exception that in times of extreme distress, as in famine, illness or the like, the husband can utilize it but he is morally bound to restore it or its value when he is able to do so. This right is purely personal to the husband and the property so received by him in marriage cannot be proceeded against even in execution of a decree for debt. [206F; 201D-E]

What is m$eeOeve ?

Earlier referred to in cevemceIee –Now it is mentioned in the judgment -

"113. Manu enumerates six kinds of stridhan:

1. Gifts made before the nuptial fire, exlained by Katyayana to mean gifts made at the time of marriage before the fire which is the witness of the nuptial (adhyagni).
2. Gifts made at the bridal procession, that is, says Katyayana, while the bride is being led from the residence of her parents to that of her husband 201 (adhyavanhanika)
3. Gifts made in token of love, that is, says Katyayana, those made through affection by her father-in-law and mother-in-law (pritidatta), and those made at time the of her making obeisance at the feet of elders (padavandanika).
4. Gifts made by father.
5. Gifts made by mother.
6. Gifts made by a brother."

APPENDIX - IV

Broad nature of provisions made under Hindu Succession Act, 1956 for distribution of property

(1) Heirs of a male –

Relatives of male can be categorized mainly as follows –

Heirs falling in Category 1 – Sons, daughters, widowed wife (one or more), mother, son of the deceased son or wife of the deceased son and a generation next to him – All these persons receive **one part of the wealth at the same time**. In case no person falling in Category 1 is alive anymore, all the property shall pass on to persons falling in Category 2.

Heirs falling in Category 2 – These are classified in following sub-categories. It is to be noted that all persons falling in first sub-category shall share all the property among themselves. In case no person falling in sub-category 1 is alive anymore, the property shall be distributed to heirs belonging to second sub-category and in case no person from second sub-category is alive anymore then it will be distributed to the heirs falling in third sub-category and so on.

Sub-category 1 – Father,

Sub-category 2 – (a) Son of son's daughter, (b) Daughter of son's daughter, (c) Brother, (d) Sister.

Sub-category 3 – (a) Son of daughter's son, (b) Daughter of daughter's son, (c) Son of daughter's daughter, (d) Daughter of daughter's daughter.

Sub-category 4 – (a) Brother's son, (b) Sister's son, (c) Brother's daughter, (d) Sister's daughter

Sub-category 5 – (a) Father's father, (b) Father's mother

Sub-category 6 – (a) widowed wife of father, (b) Widowed wife of brother.

Sub-category 7 – (a) Father's brother, (b) Father's sister.

Sub-category 8 – (a) Mother's father, (b) Mother's mother.

Sub-category 9 – (a) Mother's brother, (b) Mother's sister.

Explanation – The aforementioned terms such as 'brothers' and 'sisters' (full-blooded and step-brother or step-sister) do not include uterine brother/sister.

If no heir from category 2 is available anymore then the property shall go to blood-relatives of the man or his adopted son.

In case even such relations do not exist then, it will go to non-blood-relatives and if even such relations do not exist then the property shall be acquired by the Government.

(2) Woman's heirs –

Since all the property owned by a woman (ornaments, jewels etc.) is deemed to be owned completely by her and by her alone and since she has been awarded equal rights as of a man by amendment of year 2005, her property, in absence of a will, shall be given to her heirs as follows –

- **First** of all, every living (1) son, (2) daughter, (3) Sons and daughters of deceased son/daughter and (4) her husband shall get an equal part.
- **Secondly:** In case where the aforesaid heirs are not alive anymore, the property shall go to husband's heirs,
- **Thirdly:** In case where the aforesaid heirs are not alive anymore, the property shall go to father's heirs,
- **Fourthly:** In case where the aforesaid heirs are not alive anymore, the property shall go to mother's heirs,

Explanation: Husband's heirs and father's heirs shall be determined in accordance with the rules laid down to decide the man's heirs while mother's heirs shall be determined in accordance with the rules laid down to decide a woman's heirs as given above.

- In absence of all heirs as given above, the property shall be acquired by the Government.

(1) Muslims (2) Parsis (3) Christians and (4) Jews

A. Regarding a Muslim person:

1) Islam permits making of a will (Vaseeyat) and it is advisable that a Muslim person should indeed prepare one. However a Muslim person can distribute his property even by expressing his wish either orally or in writing. The written wish is acceptable even without a signature and no signatures of witnesses are required either.

2) Net property of a Muslim person is the property that remains after subtracting loans and funeral expenses and a one third (1/3rd) part of the said net property cannot be given away willingly without the consent of other heirs.

   Ø The concept of property in Muslim religion encompasses all of the properties such as movable, immovable, material, abstract, self-earned and ancestral property.

- Ø The property which remains after keeping aside the aforesaid one third part is required to be kept only for heirs in the family.
- Ø Total twelve persons are recognized as heirs and their shares in the property are laid down in the Islamic scripture.

B. Regarding a Jewish person –

a. Women and men are not treated as equal when it comes to distribution of property.

b. A man's property is distributed among his sons. In absence of sons, property goes to daughters. A wife's property goes to her husband after her death. In case of a widow's death, her property goes to her sons and daughters. If no heirs are alive then, the property goes to father and in his absence goes to brothers/sisters. If even brothers and sisters are no more, then the property goes to their children.

C. Regarding Parsis and Christians –

Heirs are categorized as per the Indian Succession Act, 1925 and their respective shares have also been laid down.

A Note of caution: The aforesaid description **only gives the broad outline** of provisions made in the aforesaid religions with regard to distribution of property. Also amendments being made in the laws relating to aforesaid religions, proposed amendments therein or recent verdicts given by the High Courts and the Supreme Court may have to be considered before taking a firm view on the entitlement in a given case. .

APPENDIX - V

WHAT IS PROBATE?

A probate is a copy of a will certified by a court of competent jurisdiction. It proves that it is the last and final will of the deceased penned on a particular date. A probate is granted with the court seal and has a copy of the will attached to it. An administrator or executor appointed under the will may not be able to administer its provisions without a probate. It may also be necessary when the deceased leaves behind securities with various nominees and there is a dispute on their division. The nominee can only hold the assets in trust till these are divided as indicated in the will after a probate has been obtained. In the absence of a will or nomination, succession laws come into play.

Application

The application for a probate has to be made to the competent court (a pecuniary jurisdiction may require a higher court to issue a probate for high-value immovable assets) through a lawyer.

Documents

The Court usually asks the petitioner to establish the proof of death of testator, proof that the will has been validly executed by the testator, and that it is the last will and testament of the deceased's.

Notification

After receiving the petition or application for probate, the court issues a notice to the next of kin of the deceased to file objections, if any, to the granting of probate. It also directs the publication of a citation in a newspaper to notify the general public.

Fees

The Court may impose a percentage of assets as a fee to issue a probate. In Maharashtra, for example, a court fee of Rs. 25 is payable for assets less than Rs. 50,000; 4% for assets between Rs. 50,000=00 Rs. 2 lakh, and 7.5% for assets over Rs. 2 lakh. There is a ceiling of Rs. 75,000.

Points to note

Under the Indian Succession Act, a probate can be granted only to the executor appointed under a will. If the executor is not available to administer the estate, an application must be made for appointing the same by the court before applying for probate.

A probate is a must when the will is for immovable assets in Mumbai, Kolkata or Chennai.

APPENDIX - VI

Hindu male can will-away entire self-acquired property, subject to statutory obligation towards: wife & minor, dependent children /parents etcetera

The Hindu Adoptions and Maintenance Act was enacted in India in 1956 as part of the Hindu Code Bills.

2. The other legislations enacted during this time include:

- The Hindu Marriage Act (1955),
- The Hindu Succession Act (1956), and
- The Hindu Minority and Guardianship Act (1956).

All of these acts were put forth under the leadership of Jawaharlal Nehru, and were meant to codify and standardise the current Hindu legal tradition.

The Adoptions and Maintenance Act of 1956 dealt specifically with the legal process of adopting children by a Hindu adult, as well as the legal obligations of a Hindu to provide "maintenance" to various family members including, but not limited to, their wife or wives, parents, and in-laws.

Maintenance of a Wife

3. A Hindu wife is entitled to be provided for by her husband throughout the duration of her lifetime. Regardless of whether the marriage was formed before this Act was instated or after, the Act is still applicable. The only way the wife can null her maintenance is if she renounces being a Hindu and converts to a different religion, or if she commits adultery.

4. The wife is allowed to live separately from her husband and still be provided for by him. This separation can be justified through a number of different reasons, including if he has another wife living, if he has converted to a different religion other than Hinduism, if he has treated her cruelly, or even has a violent case of leprosy.

5. If the wife is widowed by her late husband, then it is the duty of the father-in-law to provide for her. This legal obligation only comes into effect if the widowed wife has no other means of providing for herself. If she has land of her own, or means of an income and can maintain herself then the father-in-law is free from obligation to her. Additionally, if the widow remarries then her late husband's father-in-law does is not legally bound by this Act anymore as well.

Maintenance of a Child or of Aged Parent(s)

6. Under this Act, a child is guaranteed maintenance from his or her parents until the child ceases to be a minor. This is in effect for both legitimate and illegitimate children who are claimed by the parent or parents. Parents or infirmed daughters, on the other hand, must be maintained so long as they are unable to maintain for themselves.

Amount of Maintenance Provided

7. The amount of maintenance awarded, if any, is dependent on the discretion of the courts.

8. Particular factors included in the decision process include the position or status of the parties, the number of persons entitled to maintenance, the reasonable wants of the claimants, if the claimant is living separately and if the claimant is justified in doing so, and the value of the claimant's estate and income.

9. If any debts are owed by the deceased, then those are to be paid before the amount of maintenance is awarded or even considered.

PROPERTY HELD IN 'JOINT NAMES' UNDER MAHARASHTRA CO-OPERATIVE SOCIETY

Alias

तथा

संयुक्त नावाने धारण केलेली मालमत्ता

PROPERTY HELD IN 'JOINT NAMES' UNDER MAHARASHTRA CO-OPERATIVE SOCIETY

Appeal by Indrani Wahi (Judgment delivered on 10-3-2016)

By Adv. Dinakar Parashram Bhave
Mobile: 9820529371

1. INTRODUCTION:

A few days back, the Times of India carried a report on the decision of the Honourable Supreme Court in the case of Indrani Wahi vs. Registrar of Coop. Societies & Ors, wherein it had been held that once there is a valid nomination with the society, the society is bound to transfer the share or interest of the deceased member in a cooperative society, to such nominee alone.

Honourable Justices J.S. Khehar and C. Nagappan allowed the appeal filed by Indrani Wahi, and directed the society to transfer the share or interest of the society in her favour.

2. On reading the press report it was not clear why the case so obvious had reached the Honourable Supreme Court. It is a common knowledge that once a Member of the Co-operative Housing Society files a valid Nomination in the prescribed form, then after the member's death if the nominee files the requisite application forms for admission as a member, the Society is bound to admit such nominee and enter his name on its membership roll.

3. When the detailed judgment of the Court delivered on the 10th March 2016 was scrutinized, it was revealed that there were two vital issues involved:

(a) The objection of the brother of Indrani was that on marriage she did not remain a member of "the family" & so the Nomination was invalid,

(b) The Division Bench of the High Court had on Appeal preferred by her mother and brother, held that shares and interest can only be transferred by expressing consent of all the heirs. The Honourable High Court had, inter alia, held:

> "We do not propose to hold that the writ petitioner, in whose favour nomination has been made, shall not be made a member of the said society and having regard to the legislature intent contained in sub-section (4) of Section 69 it may not be possible for us to direct the appellants to be joint members along with the writ petitioner, but to protect the interest of the appellants in the flat which they have inherited, it is necessary for the said Society to record their interest expressly in the share Certificate as well as in its records pertaining to members and, in particular in the register of members so that one of the joint owners merely because of the nomination in her favour cannot transfer either the share, in which she has a part interest, or the allotment, where also she has a part interest, for the same is expressly declared to be transferable and, accordingly, can only be transferred by expressing consent of all the heirs. With the above we dispose of the appeal without, however, any order as to costs."
>
> (Underlining supplied)

4. The aforesaid conclusion & direction to the Society to add in the share certificate expressly the interest of the mother/brother (without adding their names as "joint members"), so that the nominee, one of the joint owners, cannot transfer either the share in which she has part interest or the allotment, without the "consent of all heirs".

The Honourable Supreme Court vacated that direction and asked the Society to transfer the share / interest in the name of the nominee and de-linked the succession, inheritance issue to be agitated separately.

5. This case sparked off an idea of examining the concept of "joint ownership" of the property, and its legal ramifications.

6. On many occasions, one finds that the Bank Deposit Accounts, the Company Share Certificates, the Post Office Accounts or National Savings Certificates and even a Flat in a Co-operative Society being held in "Joint names", which may usually be the husband & wife or the father & son, or the sisters/brothers, or other close relatives like paternal or maternal uncle and at times, in some cases, the property is held jointly by non-relatives.

As long as both the persons, joint-holders of the property, are alive, or they are on good terms, they fully know how they should distribute the income received by way of interest or dividend or the manner in which the liability of maintenance is to be discharged in the case of Society Flat. Such joint-holders may also have a clear idea as to how the proceeds are to be shared on maturity of the Fixed Deposit Receipts or expiry of the other Term Deposits, or on sale / disposal of jointly held property.

But in the event of any dispute or disagreement, the inter-se ownership of the Asset may surface and may even lead to the court of law. Similarly, if one of the persons dies, the question may come-up as to whether the share or interest

of that person is to devolve on his/her legal heirs or whether the joint–holder automatically becomes the sole owner of the entire property.

7. It is, therefore, necessary to examine the matter very critically because there may be some conflicting, contradictory views or opinions floating around, which may not have any sound legal basis.

The Post Office or the Bank or the Company or the Society may either refuse to hand over the property to the persons claiming through the deceased or may saddle the claimant with unwarranted paper work which may be time consuming or costly; and even insist on furnishing documents like indemnity, surety etc. not required as per the law.

8. Lot of ink has been spent in toying with the idea of 'joint ownership' for decades & centuries and many a jurists, legal luminaries have expressed their views convincingly & the statutory rules have been evolved clearly bringing out the dichotomy between the 'joint tenants' and 'tenants-in-common'—the two modes legally recognized for holding the property in "joint names".

9. In this connection a useful reference may be made to the decision of the Honourable Gujarat High Court in the case of Nanalal Girdharlal And Anr. Vs. Gulamnabi Jamalbhai Motorwala [AIR 1973 Guj 131, (1972) GLR 880].

A single Judge made a reference to the Larger Bench posing two questions: one, whether some only out of several co-owners of the property can effectively determine a tenancy by giving notice to quit; and the other, whether a suit to evict a tenant can be filed by one or more co-owners without joining other co-owners in the suit.

The Honourable Court held:

QUOTE:

"2. The first question which falls for consideration is whether in a case where a property owned by two or more co-owners is let out to a tenant, a notice to quit given by some only out of them, is sufficient to determine the tenancy or it is necessary that the notice to quit must be given by or on behalf of all co-owners.

We shall presently examine this question on principle as also on authority but before we do so, we may clear the ground by pointing out **that there are two main forms which co-ownership of property may assume**; one is joint tenancy and the other is tenancy-in-common.

- It is not necessary for the purpose of the present discussion to examine in 'detail the distinctive features of these two forms of co-ownership but we may briefly indicate the principal characteristics of each.

JOINT TENANCY:

- The two main features of a joint tenancy are the right of survivor-

ship and the four unities. **The right of survivorship is, above all others, the distinguishing feature of joint tenancy.** On the death of a joint tenant, his interest in the property passes to the other joint tenants by right of survivorship and this process continues until there is but one survivor who then holds the property as sole owner.

- The four unities of a joint tenancy are unities of possession, interest, title and time. The concept of unity of possession involves that each co-owner is as much entitled to possession of any part of the land as the others. The other three unities, namely, unities of interest, title and time are no doubt essential attributes of a joint tenancy but they are not material and we need not pause to consider them.

TENANCY-IN-COMMON:

- A tenancy in common is quite different. It differs greatly from a joint tenancy. Unlike joint tenants, tenants-in-common hold the property in undivided shares: each tenant-in-common has a distinct share in the property which has not yet been divided amongst the tenants-in-common.
- **There is also no right of survivorship amongst tenants-in-common:** When a tenant-in-common dies, the devolution of his interest is not governed by the right of survivorship but it passes under his will or intestacy, for his undivided share is his to dispose of as he wishes.
- Lastly though the four unities of a joint tenancy may be present in a tenancy-in-common the only unity which is essential is the unity of possession. Each tenant-in-common is entitled to Possession of the entire land that is to say, every part of it as much as the others. Vide Jahuri Shah v. D. P. Jhun-jhunwala. AIR 1967 SC 109.

10. The Gujarat High Court also referred to the legal principles enunciated by the Honourable Privy Council and the Honourable Supreme Court when it observed/held:

> "Now when property is transferred to two or more persons, a question may arise whether the transferees take as joint tenants or as tenants-in-common. **The rule of English law is to presume that a transfer to a plurality of persons creates a joint tenancy unless there are words of severance. The law in India is, however, different.** It has always been held in this country that where there is a transfer to two or more persons, they must be presumed to take as tenants-in-common unless there are clear words conveying a contrary intention. Vide Jogeshwar Narain Deo v. Ram Chand Dutt. (18961 23 Ind. App. 37 **(PC);** Mahmad Jusab v. Fatima Bai. 49 Bom LR 505 = (AIR 1948 Bom 53).

11. In yet another decision, the Gujarat High Court in the case of Union of India (UOI) vs. Sarala Dhruvakumar Shukla decided on the 11th July, 2003 [AIR 2004

Guj 150] held that the Post Office Savings Account Rules, 1981 providing that upon the death of the husband, the joint Account became "the single-holder Account" do not prohibit any succession taking place in accordance with the relevant law regarding succession of property upon the death of one of the depositors.

The Excerpts from the Gujarat High Court decision are in the **ANNEXURE-I**

12. Therefore, on the principle & authority of the Honourable Privy Council, the Supreme Court & the Gujarat High Court, it is manifestly clear that in India, the Law presumes that the property held by the Joint Account-holders is held by the two or more persons as "tenants –in-common" and not as "Joint-tenants", unless the contrary intension is expressly so stated.

13. The above legal position can be demonstrated in a bullet-point–manner as below:

Joint tenants: As joint tenants (sometimes called 'beneficial joint tenants'):

- One has equal rights to the whole property
- The property automatically goes to the other owners if one dies.
- One can't pass on the ownership rights in the property by making a Will.

Tenants in common: As tenants in common:

- One can own different shares of the property
- The property doesn't automatically go to the other owners if one dies.
- One can pass on one's share in the property by Will.

Change your type of ownership:

One can change from being either:

- Joint tenants to tenants in common, e.g. if you divorce or separate and want to leave your share of the property to someone else.
- Tenants in common to joint tenants, e.g. if you get married and want to have equal rights to the whole property.
- This is called transferring ownership; this has to be supported by proper documentation.

14. Considering the legal position as discussed above, all the property held in the "Joint names" would be considered as being held by such persons as "tenants-in-common".

As a corollary, on the death of one of the joint owners, the property would not revert to or belong to the survivor or the last survivor, but it would follow the succession route. Therefore, every joint owner must be on guard and take the advantage of the Nomination facility available under the law in relation the property held in joint names.

ILLUSTARATIVE POSITION IN VARIOUS FIELDS:

(A) BANK DEPSOITS:

15. Some nationalized or non-nationalized Banks are marking the Joint Accounts or the Fixed Deposit Receipts or other Term Deposits in joint names with "Either or Survivor" or "Anyone or the Last Survivor" mandate, which, according to the Banks, provides enough safeguard as the Banks would, without any additional documentation, hand over the property to the survivor or the last survivor, on production of the death Certificate of the joint-holder/s. On that premise, the Banks even dissuade or deter by advice that the clients need not file any Nomination. In the absence of Nomination, it may be construed as having the effect that when anyone dies, the survivor or the last survivor would collect the money from the Bank, and may retain it as his/her.

16. The prevailing practice of some of the Banks, as above, has been frowned upon by the Reserve Bank of India, the Regulatory Body. The Reserve Bank of India has since given (14/12/2012)the guidelines (Joint Accounts) :

- "Reserve Bank of India has advised banks to allow all depositors to use nomination facilities if they are willing to. The banking regulator said has noticed that sometimes customers opening joint accounts with or without "either or survivor" mandate, are dissuaded from exercising the nomination facility. It clarified that nomination facility is available for joint deposit accounts too and advised banks to ensure that their branches offer nomination".

17. The Banks mislead the customers by saying that the nomination is unnecessary. In fact, the rule "E or S" or "A or S" is merely for "collecting" the amount from the Bank, and the person "collecting the money", be the "survivor" or the "Last Survivor" or even the Nominee of one of them, does not get the "beneficiary title". Therefore, even when the Fixed Deposit Receipt or the Joint Account is "E or S", the Nomination must be made and (to complete the "title of such nominee") the Will must say explicitly that the "nominee 'xyz'" is the "beneficial owner" having full rights, title and interest to deal with the property so received, to the exclusion of all others.

- The Banking Regulation Act, 1949. Section 45ZA thereof, is given in **Annexure-II**

(B) POST OFFICE ACCOUNTS, NATIONAL CERTIFICATES:

18. The case law quoted in the preceding paragraphs i.e. the Gujarat High Court decisions related to the Joint Accounts held in the Post Offices. The Counsel on behalf of the Appellant Post Master General raised the contention that the Note no. 4 below Rule 4 of the Post Office Savings Account Rules, 1981 provides that:

> "if one of the depositors dies in a joint account, the joint account shall, as from the date of death of the said depositor, be deemed to be a single account in the name of the surviving depositor".

The Honourable Gujarat High Court held that the Post Office Rules did not prohibit the operation of any succession taking place in accordance with the relevant law regarding succession of property upon the death of one of the depositors. The general principle of law is that when there are two owners of a property jointly owning such property, they are presumed to be "tenants in common". Consequently, each joint owner has distinctive share, though not earmarked, and that principle would apply in the case of a Joint Account under the monthly income scheme Rules also.

(C) EMPLOYEES' PROVIDENT FUNDS AND Miscellaneous Provisions Act, 1952 ("Provident Fund Act")

19. In the case of Smt. Usha Majumdar and Ors. Vs. Smt. Smriti Basu (AIR 1988 Cal 115,) decided on the 28th August, 1987 the Division Bench of the Kolkata High Court considered the provisions of the Provident Fund Act, and held as under:

QUOTE:

The Issue was:

> "9. The question whether the plaintiff is also entitled to equable distribution of the money which was standing to the credit of her father in his account under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("Provident Fund Act" for short) and since received by the defendant-appellant No. 4 as nominee in respect thereof."

- Considering the various provisions of the Provident Fund Act and the Scheme we are of the opinion that the status of a nominee under the Provident Fund Act is completely-different from his counterpart under the Insurance Act. The most and striking difference about the status of the nominee under the two Acts is clearly discernible from Section 10(2) of the Provident Fund Act which expressly provides that the amount standing to the credit of a member of the Fund at the time of his death shall vest in the nominee and it shall be free from any debt or liability incurred by the deceased or the nominee before the death of the member.
- The Honourable Kolkata High Court, therefore, held that the nominee under the Provident Fund Act has not only the right to receive the money but also a beneficial interest therein".

UNQUOTE:

- The Honourable Kolkata High Court judgment (excerpts) is in **ANNEXURE-III**

(D) JOINT STOCK COMPANY SHARES:

20. In the case of the Company shares, the legal position of the Nominee is well settled by the decision of the Honourable Bombay High Court in the case of Harsha Nitin Kokate vs. The Saraswat Co-Op. Bank Ltd., decided on the 20th April, 2010. The High Court reviewed the case law and referred to the provisions of the Companies Act, 1956, (as amended on 31-10-1998) Section 109A thereof, which reads:

> **S.109A. Nomination of shares** - (1) Every holder of shares in, or holder of debentures of a company may, at any time, nominate, in the prescribed manner, a person to whom his shares in or debentures of, the company shall vest in the event of his death. (2) .....
>
> (3) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of such shares in, or debentures of, the company, where a nomination made in the prescribed manner purports to confer on any person the right to vest the shares in, or debentures of, the company, the nominee shall, on the death of the shareholder or holder of debentures of the company or, as the case may be, on the death of the joint holders become entitled to all the rights in the shares or debentures of the company or, as the case may be, all the joint holders, in relation to such shares in, or debentures of the company to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.
>
> (4).....
>
> {Sec. 72 of the Companies Act, 2013 is in pari materia: see Annexure-IV}

On reading the above provisions, the High Court observed that the nominee would become entitled to all the rights in the shares of the Company to the exclusion of all other persons. That is the effect of vesting the shares in the nominee. The position would be the same under the Depository Act, 1996. (Shares held in Demat Account)

21. Considering the above provisions, the High Court held that upon such nomination the securities automatically get transferred in the name of the nominee upon the death of the holder of shares. Accordingly, in such a situation, the nominee would be entitled to elect to be registered as a **beneficiary owner** of the Shares by notifying the Bank along with the certified copy of the death certificate. Such nomination carries effect notwithstanding anything contained in a Testamentary disposition or nominations made under any other law dealing with the Securities. The last of the many nominations would be valid.

- The Text of the Honourable Bombay High Court decision in Harsha Nitin Kokate case is in **Annexure—IV.**
- The case reference of the Honourable Delhi High Court decision in M/S Dayagen Pvt. Ltd. is also given, and at the end new section 72 of the Companies Act, 2013 is reproduced in **Annexure-IV.**

(D) JOINT STOCK COMPANY SHARES: [Part-II]

(DISSENTING VIEW)

22. While the view taken by the Bombay High Court in Kokate case (supra) based on the statutory provisions in the Companies Act, 1956 distinguishing the decision of the Honourable Apex Court in Smt. Sarabati Devi & Anr. v. Smt. Usha Devi, AIR 1984 SC 346 and Vishin N. Kanchandani v. Vidya Lachmandas Kanchandani, AIR 2000 SC 2747 which held that a mere nomination did not confer any beneficial interest in favour of the nominee, stands to reason; recently, another single member bench has expressed a dissent. Following are the details:

23. The Bombay High Court in Jayanand Jayant Salgaonkar vs. Jayashree Jayant Salgaonkar has held (on 31st March 2015) that a nominee of shares and securities of a company merely holds the securities in trust and as a fiduciary on behalf of any claimants under the laws of succession. The court was compelled to analyze the question of law since the earlier decision in Harsha Nitin Kokate vs. The Saraswat Co-operative Bank Limited & Ors. (**Kokate case**) was assailed as being in direct conflict with the views of the Apex Court on the subject. The Court observed /held as below:

QUOTE:

> **"33.** Mr. Pai also cites the decision of a Division Bench of the Calcutta High Court in Smt. Usha Majumdar v Smt. Smriti Basu,34 which held that a nominee in respect of a provident fund account is exclusively entitled to the amount in that account to the exclusion of the others. It is not possible to accept this submission. That decision was considered by Mr. Justice Britto in Antonio Joao Fernandes, and expressly not accepted in view of Sarbati Devi and Khanchandani. Mr. Justice Britto's decision binds me; that of the Calcutta High Court, with respect, does not. To accept Mr. Pai's submission, I would have to hold that Antonio Joao Fernandes was incorrect and refer the matter to a larger Bench, or to hold that it was per incuriam. **I can do neither. xxxx**
>
> But at the end, the following view is taken:
>
> **"40.** There are additional problems too. ....it is clear that a nomination only provides the company or the depository a quittance. The nominee continues to hold the securities in trust and as a fiduciary for the claimants under the succession law. Nominations under Sections 109A and 109B of the Companies Act and Bye-Law 9.11 of the Depositories Act, 1996 cannot and do not displace the law of succession, nor do they open a third line of succession. This is the consistent view of the Supreme Court in Khanchandai, Shipra Sengupta and of our Court in Nozer Gustad Commissariat and Antonio Joao Fernandes, all decisions that preceded Kokate; and the submission made in paragraph 9 of Kokate was correctly placed and was in line with those decisions. **Those decisions were all**

binding on the Kokate Court. They were neither noticed nor considered. The Kokate Court could not have taken a view contrary to those decisions. Kokate is, therefore, per incuriam. xxx

24. While the Court in **Salgaonkar case** felt that it was bound to follow the Single Judge decision in Mr. Antonio Joao Fernandes vs. The Assistant Provident Fund Commissioner & Ors., 2010 (4) Bom CR 208, delivered on the 6th April 2010, but in respect of the Kokate's decision, also delivered by a Single Judge of the same High Court on the 20th April 2010 (15 days late) the Court dissented & hastened to declare it as "per incurium".

Incidentally, what is "per incuriam"?

- In Secretary of State for Trade and Industry v Desai (1991) The Times 5 December, Scott LJ said that to come within the category of **per incuriam** it must be shown not only that the decision involved some manifest slip or error but also that to leave the decision standing would be likely, inter alia, to produce serious inconvenience in the administration of justice or significant injustice to citizens.
- However, this rule does not permit the Court of Appeal to ignore decisions of the House of Lords. In Cassell v Broome [1972] AC 1027 Lord Denning MR held the House of Lords' decision in Rookes v Barnard [1964] AC 1129 **to be per incuriam** on the basis that it ignored previous House of Lords' decisions. He was rebuked sternly **by the House of Lords** who considered that the Court of Appeal **'really only meant' that it 'did not agree' with the earlier decision**.

25. With utmost respect, it is felt that having regard to the judicial propriety and directives of the Apex Court, observations of the House of Lords, the Court in **Salgaonkar case (supra)** had better recorded its "dissent" and proceeded to make a reference to the Larger Bench.

- One thing is clear that the decision in the Kokate case is not a standalone decision as it is in company with the Delhi High Court decision on Company Shares & the Kolkata High Court Division Bench decision in PF case, taking identical view.
- That apart, unless **the decision in Kokate case** is overruled as per judicial precedent theory, it holds the field, notwithstanding a dissent expressed by another Single Judge of the same High Court.

(E) IMMOVABLE PROPERTIES: (General)
LAND, BUILDINGS.

26. Having considered the situation in relation to movable assets like the Deposit Accounts in the Banks, Post Offices Savings Accounts and other Joint Accounts like Monthly Income Schemes and the Company Shares, the principles of law relating to the immovable property can, now, be examined. There are

specific provisions in the Transfer of Property Act, 1872. The relevant Section dealing with the Joint Owners is reproduced below:

> **45.** Joint transfer for consideration:
>
> Where immovable property is transferred for consideration to two or more persons and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced. In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, **such persons shall be presumed to be equally interested in the property.**

It is a well-settled principle of law that there is no need to call into aid any of the rules of construction when meaning of the words in a statute is plain and unambiguous. The statutory provisions speak so eloquently that no other legal principle or authority is necessary.

- The provisions of joint ownership, transfers contained in the Transfer of Property Act,1872 are reproduced in **ANNEXURE_V**

(F) IMMOVABLE PROPERTIES:

(Co-operative Housing Society)

27. This last category of Joint Ownership is a combined type, where a person subscribes to the Membership of a Co-operative Housing Society Ltd., by purchasing the requisite number of shares of the Society and obtains a Share Certificate (a movable asset) and as a sequel thereto gets a right to occupy a Flat (immovable property) in a building owned by the Society. This type of the Society is called: "a tenant co-partnership society". In such a type of society, it is the society in which the land and the buildings, in the eye of law, vest.

Therefore, when a member of such a co-operative housing society "transfers his shares" to another with the approval of the society, he not only transfers the shares but also, as a necessary incident thereof, transfers his interest in the immovable property which has been allotted to him. The Share Certificate carries the name/s of the Member/s.

28. If there are two or more persons, who have contributed to the purchase price of the Flat, the names of all such persons are specified in the Share Certificate. While the person whose name stands First is called "the Member", the 2nd and the 3rd persons whose names are in the Share Certificate are called "Associate Members".

Property Held in 'Joint Names' under Maharashtra Co-operative Society

- The Co-operative Department, Maharashtra State, has been doing flip-flop as to the true meaning & connotation of the term "Associate Member" & the rights, duties & obligations of such an Associate Member/s. Even as of date, there is a complete lack of clarity.

29. The concept of 'Associate member' and 'joint member' was well defined & the decision of the Honourable Bombay High Court in the case of R.B. Rajput vs. Hiralal Bhagwandas Rajput and others (1989) 91 BOMLR 869, had fully explained it way back in 1989. The Honourable High Court held:

QUOTE:

> "6. At this juncture, before going to the averments in the plaint, I will like to refer to the definition of 'member' and 'associate joint member' as contemplated by the Maharashtra Co-operative Societies Act, 1960. xxx
>
> After going through the aforesaid provision, it is clear that as per section 2, sub-section 19(b) 'associate member' means a member who holds jointly a share of a society with others, but whose name does not stand first in the share certificate. **That means there is no distinction as per the Maharashtra Co-operative Societies Act, 1960 between associate member and the joint member.** Further it is also pertinent to note that in Exh. 'A' which I have already referred to i.e. the joint application made by respondent No. 1 and the present petitioners, **they have made a clear cut statement that the said suit flat was purchased by them jointly and therefore, the petitioner's name should be added jointly along with respondent No. 1."**

UNQUOTE:

30. The confusion as to the true meaning & purport is on account of refusal to treat the "Joint Purchaser" alone as the "Associate Member".

(i) The Maharashtra Co-operative Societies (Amendment)Act, 2013,which is deemed to have come into force on the 14th February 2013 unambiguously defines in Section 2(19)(b):**"Associate Member" "**means a member who holds jointly a share of a society with others, but whose name does not stand first in the share certificate".

(ii) However, the Bye-law no. 3 (xxiv) (b) of the 2014 Model Bye-laws amplifies and gives distorted definition, which reads: **"Associate Member"** means a member who holds the right, title and interest in the property individually or jointly with other, but whose name does not stand first in the share certificate.

(iii) And under 2014 Model Bye-law no. 19(b) a person "eligible to be an Associate member" is required to apply in the Appendix 5 and pay Rs. 100 /=for admission as an Associate Member.

(iv) Now, **Appendix 5** creates **two categories**: one where a person intending to hold shares jointly, and the other who does not jointly

own or have 'joint title to the property', both paying Rs. 100/= as admission fee for becoming an "Associate Member".

Reading of the confused phraseology in the Bye-laws, it appears clear that the concept of "Associate Membership" has acquired two meanings, one true legal meaning as the "Joint (purchaser) Member", and another popular meaning as a member 'added for the sake of convenience'.

31. It is high time that the Commissioner for Co-Operation and Registrar, Co-operative Societies, Maharashtra State, clears the ground by giving clear-cut ruling on this widely confused area: "Associate Membership".

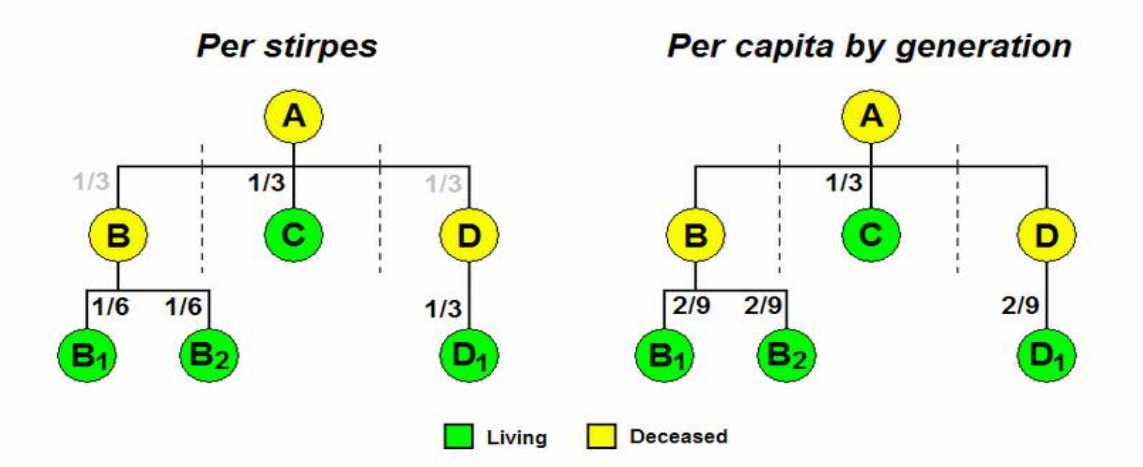
32. Once it is accepted that the Joint Purchaser is the Associate Member, it is obvious that if the person whose name stands first in the share Certificate dies, the membership of the Associate member does not lapse or become non-exiting. Some Officials in the Co-operative Department & many Society-Office-bearers believe that if the first or primary-holder of the Share Certificate dies, the membership of the Associate Member automatically stands deleted. This is misreading, misconstruction of the law.

In fact, when the share certificate stands in the "joint names" each joint-holder has a share in the capital of the society, and the Member & the Associate member can & should individually appoint a "nominee" to their respective interests in the share or property of the Society.

Per Stirpes vs. Per Capita

33. In this context, one needs to know that there are two ways to leave your estate to your children, Per Stirpes and Per Capita. Per Stirpes means that the Grantor intends that the Beneficiary's share of the inheritance will go to his or her heir; and Per Capita indicates that the Grantor intends that no one except the named beneficiary receive that share of the estate.

- Illustrations are given in the **ANNEXURE-VI** & the graphic chart is below



34. The "Joint Ownership" concept qua the movables like Bank Accounts, Post Office Accounts etc. and the Joint Ownership in relation to the immobile property must be kept in mind when dealing with the property transactions.

FINALITY: JUDICIAL OPINION

35. Incidentally, the conflicting judicial opinion is of a common occurrence rather than an exception. The Trial Judge interprets the law and so does the Higher Judiciary. As of date, the law of the Bombay High Court in Kokate case declared by a single judge holds the field until overruled by a superior court. A dissenting opinion of a single judge of the court of co-ordinate jurisdiction is neither here nor there.

- Incidentally, a reference is invited to interesting comments in the context of finality of judicial opinion.
  - (i) USA Justice John Marshall's most famous declaration from his most famous opinion: "It is, emphatically, the province and duty of the judicial department, to say what the law is".
  - (ii) A befitting reply: an oft quoted self-reflection of an American judge: "We are not final because we are infallible, we are infallible only because we are final". (An Associate Justice of the Supreme Court of the United States, Robert Jackson in Brown v. Allen in 1953).
  - (iii) On the 14th Sep., 2015: While asking the counsel for Yusuf Mohsin Nul-walla, Harish Salve, to move a curative petition, (in the Supreme Court) Justice Gogoi said: "All orders of the court are not always correct or perfect. Whatever orders we give, right or wrong, **are final.**"
- However, pending finality in the Kokate case, like the hypothetical prudent-man-theory, one must protect others' interests (legal heirs) by arranging the affairs in such a way that the property transmission is smooth and as far as possible litigation-free.

36. In Conclusion:

(i) Looking to the true legal meaning & purport of the "Joint Ownership" of the estate, movable or immovable, one thing appears clear that the person must bear in mind the consequences that flow from the concept of "joint tenants" and "tenants-in-common". In the case of "joint tenants" the property automatically goes to the other owner/s if one dies; whereas in the case of "tenants-in-common" it is not automatic.

(ii) The rule of English law is to presume that a transfer to a plurality of persons creates a "joint tenancy" unless there are words of severance. The law in India is different. It has always been held in this country that where there is a transfer to two or more persons, they must be

presumed to take as "tenants-in-common" unless there are clear words conveying a contrary intention.

(iii) The discussion hereinabove would make it abundantly clear that it is important to file "nomination" forms, in all cases, to protect the interest in the property even when the Deposit or other Accounts are in "joint names", and even with "E or S" mandate; and make a Will based on such nomination and declare unequivocally in the Will that the person in whose favour a Nomination has been filed would be the exclusive owner of that particular property, with all rights to hold, enjoy or dispose of the property at the sole discretion of such person; and no one else shall have any right, title or interest threin whatsoever.

(iv) A nomination in respect of each property coupled with the relative will in favour of the nominee would avoid complications and may perhaps render the property litigation–free; whether the Kokate case is endorsed or overruled by a superior Court in the years ahead.

ANNEXURE: I

The Gujarat High Court in the case of
Union of India (UOI) vs. Sarala Dhruvakumar Shukla
Decided on 11th July, 2003[AIR 2004 Guj 150]
Had held: [EXCERPTS ONLY]

QUOTE:

1. The High Court was dealing with the Letters patent appeal against the judgment and order dated 5.7.2001 passed by the learned Single Judge allowing Special Civil Application No. 458 of 2001 challenging the decision of the appellants herein, i.e. Post Master General, Ahmedabad and Sub-Post Master, LG Hospital Road Post Office, Maninagar, Ahmedabad under the provisions of the Post Office Savings Account Rules, 1981 (hereinafter referred to as "the Rules").

> The learned Single Judge held that the appellants [Union of India] were estopped from treating the account as a single-holder account upon the death of the husband of the first petitioner.

2. It was the case of the Appellants, that is, the Post Master General, that upon the death of the husband, the joint Account became "the single-holder Account" and as such the substitution of the name of the second petitioner, the Nominee, in place of the husband who died, was wrong.

3. The Counsel for the Appellants pointed out that that the note below Rule 4 of the Post Office Savings Account Rules, 1981 provides that:

> "if one of the depositors dies in a joint account, the joint account shall, as from the date of death of the said depositor, be deemed to be a single account in the name of the surviving depositor".

4. The Honourable High Court held:

"5. Having heard the learned counsel for the appellants, we are of the view that all that the aforesaid note 4 below Rule 4 of the 1981 Rules provides is that when there is a joint account of two depositors and one of them expires, the ordinary consequence would be that the account would become a single depositor account, that is, it will be deemed to be a single account in the name of the surviving depositor. The question is whether the above note will apply even where the heir or the nominee of the deceased depositor comes forward for getting his or her name substituted for the name of the deceased depositor in the joint account.

The Rules do not prohibit any such succession taking place in accordance with the relevant law regarding succession of property upon the death of one of the depositors. The general principle of law that when there are two owners of a property jointly owning such property, they are presumed to be tenants in common and each has a definite though undivided share in the property, would apply in the case of a joint account under the monthly income scheme Rules also. **As far as immoveable property is concerned, Section 45 of the Transfer of Property Act, 1882** provides that in the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, **such persons shall be presumed to be equally interested in the property.**

A joint tenancy connotes unity of title, possession, interest and commencement of title; in a tenancy in common, there may be unity of possession and commencement of title, but the other two features would be absent.

5. The High Court further held:

(v) The rule of English law is to presume that a transfer to a plurality of persons creates a joint tenancy with a right of survivorship, unless there are words of severance. This principle is adopted in Section 106 of the Indian Succession Act, 1952, replacing Section 93 of the Indian Succession Act, 1865; and a joint tenancy has been recognized in a gift by will of an Indian Christian, Parsee, and Muslim.

(vi) The Hindu rule is the opposite. In Jogeswar Narain vs. Ram Chand Dutt, 23 IA 37, 44; Bahu Rani vs Rajendra Baksh Singh, (1933) 60 IA 95, 101, the Privy Council said -

"The principle of joint tenancy appears to be unknown to Hindu law, except in case of coparcenary between members of an undivided family."

- This has been approved by the Supreme Court in Venkatakrishna vs. Satyavathi, AIR 1968 SC 751. Even if the grantees are members of a coparcenary they will take as tenants in common, unless a contrary intention appears from the grant. **It is held that in India the**

Court must always lean against holding a bequest or a grant to be a joint bequest or grant, and the presumption must always be in favour of a tenancy in common (Mahamed Jusali vs. Fatimabai (1948) Bom 53, 49 Bom LR 505, AIR 1949 Bom 33 [vide Mulla's Transfer of Property Act, 9th Ed. Page 340].

- In any view of the matter, since Rule 4 stipulated at the relevant time the upper limit of Rs.2,04,000/- for a single account and Rs. 4,08,000/- for a joint account, there was no breach of the said substantive part of Rule 4 because the amount in the joint account did not exceed Rs. 4,08,000/-. It is also required to be noted that it is not the case of the respondent authorities that petitioner No.2 had any other MIS account in his name before he became a joint holder with his mother upon the death of his father in 1995.

6. In view of the above interpretation of the Rules and also in view of the fact that upon the death of the husband of petitioner No. 1 in the year 1995, the appellants permitted the second petitioner, who was a nominee, to be substituted for his deceased father (who was husband of the first petitioner) in the aforesaid joint monthly income scheme account, the Postal Department was rightly estopped from taking the view that continuation of the joint monthly income scheme account in the names of the first petitioner and the second petitioner was contrary to the aforesaid Rules."

UNQUOTE:

ANNEXURE:II

TENANCY BY THE ENTIRETY

There are three types of concurrent ownership, or ownership of property by two or more persons: tenancy by the entirety, Joint Tenancy, and Tenancy in Common.

A tenancy by the entirety can be created only by married persons. A type of concurrent estate in real property held by a Husband and Wife whereby each owns the undivided whole of the property, coupled with the Right of Survivorship, so that upon the death of one, the survivor is entitled to the decedent's share.

It can be created only by will or by deed. As a form of joint tenancy that also creates a right of survivorship, it allows the property to pass automatically to the surviving spouse when a spouse dies.

In addition, tenancy by the entirety protects a spouse's interest in the property from the other spouse's creditors. Under a tenancy by the entirety, creditors of an individual spouse may not attach and sell the interest of a debtor spouse: only creditors of the couple may attach and sell the interest in the property owned by tenancy by the entirety.

It differs from joint tenancy in one major respect: neither party can voluntarily dispose of her or his interest in the property.

In the event of Divorce, the tenancy by the entirety becomes a tenancy in common, and the right of survivorship is lost.

About half of the U.S. states allow tenancy by entirety for all types of property; a handful of states allow it only for real estate.

THE BANKING REGULATION ACT, 1949. SECTION 45ZA THEREOF, READS:

45ZA. Nomination for payment of depositors' money.- (1) Where a deposit is held by a banking company to the credit of one or more persons, the depositor or, as the case may be, all the depositors together, **may nominate, in the prescribed manner**, one person to whom in the event of the death of the sole depositor or the death of all the depositors, the amount of deposit may be returned by the banking company.

(2) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of such deposit, where a nomination made in the prescribed manner purports to confer on any person the right to receive the amount of deposit from the banking company, the nominee shall, on the death of the sole depositor or, as the case may be, on the death of all the depositors, become entitled to all the rights of the sole depositor or, as the case may be, of the depositor, in relation to such deposit to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

- It is undoubtedly true that: the Nomination as per sub-section (1) above intends " to confer on any person the **right to receive the amount** of deposit from the banking company", and as per sub-section (2) become entitled **to all the rights of the sole depositor or, as the case may be, of the depositor, in relation to such deposit to the exclusion of all other persons**", and such payment made by the Bank would, in terms of sub-section (4) >>> (4) Payment by a banking company in accordance with the provisions of this section shall constitute a full discharge to the banking company to its liability in respect of the deposit:
- However, when the dispute is raised inter-se between the Joint Account holder, the Nominee or the survivor / Last Survivor who collected the amount from the Bank does not get full beneficiary title; but his S/he simply holds the money as a Trustee.
- This is so, based on the weighty authority of the Privy Council / the Supreme Court:

  "Two case laws were also dealt with in support of the derivations made therein. Those cases are (ILR 55 Cal. 944 = AIR 1928 PC 172) Guran Ditta Vs. Ram Ditta and the other case law is Pandit Pushkar Nath 71 Ind App 1997 = (AIR 1945 PC 10) . It was held in the first case as follows:

> " The deposit made by a Hindu of his money in a bank in the joint names of himself and his wife, and on the terms that it is to be payable to either or the survivor, does not on his death constitute a gift by him to his wife. There is resulting trust in his favour in the absence of proof of a contrary intention, there being in India no presumption of an intended advancement in favour of a wife."

The same view was expressed by the Judicial Committee in the second cited case above mentioned. (AIR 1945 PC 10).

ANNEXURE: III

SMT. USHA MAJUMDAR AND ORS. VS. SMT. SMRITI BASU

(AIR 1988 CAL 115,) DECIDED ON 28 AUGUST, 1987

THE DIVISION BENCH OF THE KOLKATA HIGH COURT CONSIDERED THE PROVISIONS OF THE PROVIDENT FUND ACT,

and held as under:

QUOTE: The Issue was:

"9. The question whether the plaintiff is also entitled to equable distribution of the money which was standing to the credit of her father in his account under the **Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("Provident Fund Act" for short)** and since received by the defendant-appellant No. 4 as nominee in respect thereof."

- Mr. Pal submitted that the principle laid down by the Supreme Court in the case of Sarbati Devi (supra), that a mere nomination made under Section 39 of the Insurance Act did not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the assured, was not applicable to nominations made under the Provident Fund Act as would be evidently clear from the various provisions of the Act and the Scheme framed thereunder; and according to Mr. Pal, **the nominee under the latter becomes entitled to the money also.** He relied upon a Division Bench judgment of this Court in the case of Keshablal v. Iva Rani Rudra, reported in AIR 1947 Cal 176 in support of this contention.
- To consider and appreciate the rival contentions of the parties in their proper perspective it will be necessary to read the provisions of Section 39 of the Insurance Act juxtaposing the relevant provisions of the Provident Fund Act and the scheme framed thereunder. Section 39 of the Insurance Act reads as under:

"39. Nomination by policy-holder -

(1) The holder of a policy of life insurance on his own life may, when effecting the policy or at any time before the policy matures for pay-

ment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death:

Provided that XXX

(2) Any such nomination in order to be effectual shall unless it is incorporated in the text of the policy itself, be made by an endorsement on the policy communicated to the insurer and registered by him in the records relating to the policy **and any such nomination may at any time before the policy matures for payment be cancelled or changed by an endorsement, or a further endorsement or a will, as the case may be,** but unless notice in writing of any such cancellation or change has been delivered to the insurer, the insurer shall not be liable for any payment under the policy made bona fide by him to a nominee mentioned in the text of the policy or registered in records of the insurer.

(3) to (7) xxxxx policy."

- In the case of Sarbati Devi (supra) the Supreme Court considered the above clauses in details to decide the only question which was raised therein, namely, whether a nominee under the above section got an absolute right to the amount due under a life insurance policy on the death of the assured. On such consideration and looking into decisions of different High Courts on the point the Supreme Court observed that the language of Section 39 of the Insurance Act was not capable of altering the course of succession and ultimately decided ....these words :

  ".....The reasons given by the Delhi High Court are unconvincing. We, therefore hold that the judgments of the Delhi High Court in Fauja Singh's case AIR 1978 Delhi 276 and in Mrs. Uma Sehgal's case do not lay down the law correctly. **They are, therefore, overruled.** We approve the views expressed by the other High Courts on the meaning of Section 39 of the Act and hold that a mere nomination made under Section 39 of the Act does not have **the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the assured.** The nomination only indicates the hand which is authorised to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them."

- 13. Having given our anxious consideration to the various provisions of the Provident Fund Act and the Scheme we are of the opinion that the status of a nominee under the Provident Fund Act is completely-different from his counterpart under the Insurance Act. The most and striking difference about the status of the nominee under the

two Acts is clearly discernible from Section 10(2) of the Provident Fund Act quoted earlier which expressly provides that the amount standing to the credit of a member of the Fund at the time of his death shall vest in the nominee and it shall be free from any debt or liability incurred by the deceased or the nominee before the death of the member. From Section 10(2) **it is abundantly clear that immediately upon the death of the member the provident fund money becomes part of the asset of the nominee whereas under the Insurance Act after the death of the assured the money continues to be his asset**; and the money which was standing to the credit of the member becomes free even from the debt or liability incurred by the nominee before the death of the member.

- Only because the money vested in and thereby became the property of the nominee after the death of the member such a provision was required to be incorporated as, otherwise, **being estate of the nominee**, it was liable to be attached for debts or liabilities incurred by him prior to the death of the member. That the nominee under the Provident Fund Act, unlike the nominee under the Insurance Act, gets a right to the money also has been made clear by the provisions of paras 61 and 70 of the Scheme quoted earlier.

  For the foregoing discussions we therefore find no hesitation in concluding that the nominee under the Provident Fund Act, unlike the nominee under the Insurance Act, has not only the right to receive the money but also a beneficial interest therein".

UNQUOTE:

N.B. In the recent decision of the Honourable Supreme Court, in Indrani Wahi case, (10th March 2016) in paragraph 13, at the end, the Court held:

> ".....At this juncture, all that needs to be stated with reference to the judgment in the Smt. Sarbati Devi case (supra) is, that the provisions with reference to nomination under the Life Insurance Act, 1938 are at variance from the ones which are subject matter of consideration in the instant case, and as such, it would suffice to merely state, that the aforesaid judgment is not of much significance, insofar as the adjudication of the present controversy is concerned".

That means, the language of the statute plays an important role.

ANNEXURE: IV

BOMBAY HIGH COURT

Harsha Nitin Kokate vs. the Saraswat Co-Op. Bank Ltd. & ... on 20 April, 2010: Bench: R. S. Dalvi

NOTICE OF MOTION NO. 2351 OF 2008

IN SUIT NO. 1972 OF 2008

Harsha Nitin Kokate ...Plaintiff

Vs.

The Saraswat Co-op. Bank Ltd. & Ors. ...Defendants

CORAM: SMT. ROSHAN DALVI, J.

DATED: 20TH APRIL, 2010

JUDGMENT. : 1. The Plaintiff married one Nitin Kokate on 3rd December 2004. Her husband expired on 5th July 2007. Nitin Kokate held certain shares in D- mat Account with the Depository Participant Cell of Defendant No.1. Her husband executed a nomination in the prescribed form following the prescribed procedure set out by the Depository Participant, Defendant No.1 Bank in favour of the Defendant No.3, his nephew on 11th July 2006. The Plaintiff claims an interest in the said shares as his heir and legal representative. She claims to have them sold.

2. This Suit is not concerned with the reason why she claims the sale of the shares. The Plaintiff must show her legal right, title and interest in those shares. If that is shown, the Plaintiff would be entitled to sell or transfer those shares or to hold them as her own.

3. The Defendant No.3 claims right, title and interest in the shares pursuant to the nomination executed in his favour. The nomination has been executed well prior to the death of the deceased and well after his marriage with the Plaintiff. The Defendant No.1 Bank has stated that the nomination is executed as required and has been so registered with the Depository Participant. The effect of the nomination is, therefore, to be seen. The nomination form itself shows that the rights of transfer and/or the amount payable in respect of the securities held by Nitin Kokate, Defendant No.3 vests in him as the said nominee.

4. The law relating to nomination is set out in 109A of the Companies Act pursuant to the amendment which came into effect on 31st October 1998. It is common knowledge that prior to 1996 shares were not held in de- materialised form. Consequent upon the Dematting of the shares the Share Certificates in physical form are not mandatorily required to be issued by the Limited Companies listed on the Stock Exchanges. Shares can be transferred by word of mouth or on the Internet from person to person. Upon such transfer the membership rights of the holder of the shares changes. Since the share is an intangible movable property it is bequeathable estate. The nomination in respect of the shares is, therefore, important. Section 109A sets out the rights of the holder of shares to nominate as well as the rights of the nominees thus:-

S.109A. Nomination of shares - (1) Every holder of shares in, or holder of debentures of a company may, at any time, nominate, in the prescribed manner, a person to whom his shares in or debentures of, the company shall vest in the event of his death.

(2) .....

(3) Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of such shares in, or debentures of, the company, where a nomination made in the prescribed manner purports to confer on any person the right to vest the shares in, or debentures of, the company, the nominee shall, on the death of the shareholder or holder of debentures of the company or, as the case may be, on the death of the joint holders become entitled to all the rights in the shares or debentures of the company or, as the case may be, all the joint holders, in relation to such shares in, or debentures of the company to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

(4).....

It can be seen from the aforesaid provision that nomination is required to be made in the prescribed manner. Upon such nomination the shares would vest in the nominee in the event of the death of the holder. Further upon it being made in the prescribed manner the nominee would become entitled to all the rights in the shares of the Company to the exclusion of all other persons. That is the effect of vesting the shares in the nominee.

5. Mr. Maheshwari drew my attention to the Depositories Act 1996. Section 9.11 thereof relates to transmission of securities in the case of nomination. Section 9.11 runs thus:-

9.11. TRANSMISSION OF SECURITIES IN THE CASE OF NOMINATION:

9.11.1. In respect of every account, the Beneficial Owner(s) ("Nominating Person(s)") may nominate any person ("Nominee") to whom his securities shall vest in the event of his death in the manner prescribed under the Business Rules from time to time.

9.11.2. The securities held in such account shall automatically be transferred in the name of the Nominee, upon the death of the Nominating Person, or as the case may be, all the Nominating Persons subject to the other Bye Laws mentioned hereunder.

9.11.3.....

9.11.4. Beneficial Owner(s) may substitute or cancel a nomination at any time. A valid nomination, substitution or cancellation of nomination shall be dated and duly registered with the Participant in accordance with the Business Rules prescribed therefor. The closure of the account by the Nominating Person(s) shall conclusively cancel the nomination.

9.11.5. A Nominee shall not be entitled to exercise any right conferred on Beneficial Owners under these Bye Laws, upon the death of the Nominating Person(s), unless the Nominee follows the procedure prescribed in the Business Rules for being registered as the Beneficial Owner of the securities of the Nominating Person(s) in the books of the Depository.

9.11.6. A nominee shall on the death of the Nominating Person(s) be entitled to elect him to be registered as a Beneficial Owner by delivering a notice in writing to the Depository, along with the certified true copy of the death certificate issued by the competent authority as prescribed under the Business Rules. Subject to scrutiny of such election, the securities in the Account shall be transmitted to the account of the Nominee held with any depository.

9.11.7. **Notwithstanding anything contained in any other disposition and/or nominations made by the Nominating Person(s) under any other law for the time being in force, for the purposes of dealing with the securities lying to the credit of deceased Nominating Person(s) in any manner, the Depository shall rely upon the last nomination validly made prior to the demise of the Nominating Person(s). The Depository shall not be liable for any action taken in reliance upon and on the basis of nomination validly made by the Nominating Person(s).**

9.11.8.....

(Underlining supplied)

6. Upon such nomination the securities automatically get transferred in the name of the nominee upon the death of the holder of shares. The nomination is required to be dematted duly registered with the Depository Participant (Bank) in accordance with the Business Rules. The nominee is required to follow the prescribed procedure in the Business Rules. Upon the death of the holder of the shares the nominee would be entitled to elect to be registered as a beneficiary owner by notifying the Bank along with the certified copy of the death certificate. The Bank would be required to scrutinise the election and nomination of the nominee registered with it. Such nomination carries effect notwithstanding anything contained in a Testamentary Disposition or nominations made under any other law dealing with the Securities. The last of the many nominations would be valid.

7. Under the said Section the holders of the shares would nominate any person in whom the securities would vest in the event of his death. This nomination has to be made in the manner prescribed under the Business Rules.

8. It can be seen that since all the shares are held in Demat form with the Depository Participant and the portfolio of the holder may change each day.

Hence one nomination is specifically required to be made as provided in the aforesaid legislation. The nomination would have the effect of vesting in the nominee complete title in the shares. He would be entitled to elect to be registered as a beneficial owner of the shares or he would have the right to transfer the shares. These are inter alia the rights of every shareholder of a listed Companies. These rights show that the vesting of the shares is upon the death of the shareholder provided only that the nomination is made as per the procedure set out by the Depository Participant. This procedure is the registration of the form of nomination constituting the nomination of the nominee with his photograph signed by the holder as well as the nominee and witnessed by at least 2

persons and registered with the Bank. The purpose and object of this Section is clear. It is simplifies the procedure relating to the transmission of shares which is otherwise an intangible movable property. As the shares are now held in Dmat form and can be purchased and sold in the market by word of mouth or on the Internet, and no physical share certificates are issued by Companies, only one nomination for all the shares in all the companies need be made. That can be registered only with the Depository Participant who records all the share transactions of the holder of the shares who is mandatorily required to open a Demat account with the Depository Participant. Hence the legislature has simplified and specified the procedure for vesting of shares by nomination made in the prescribed manner.

9. Mr. Maheshwari on behalf of the Plaintiff contends that the nomination only makes a nominee a trustee for the shares. He holds the shares in trust for the estate of the deceased, the deceased died intestate and hence the Plaintiff as the widow would be entitled to the shares to the exclusion of the nominee.

10. Mr. Maheshwari drew my attention to the case of Smt. Sarbati Devi vs. Smt. Usha Devi, A.I.R. 1984 SC 346 for which a nomination made under the Insurance Act in respect of the Life Insurance Policy under Section 39 of the Act came to be considered.

Section 39 of the Insurance Act runs thus:-

39. Nomination by policy-holder - (1) The holder of a policy of life insurance on his own life may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death."

11. Under the Insurance Act the nomination entails payment by the Insurance Company to the nominee to obtain a complete discharge. Once the amount under the Policy is paid to the nominee, the nominee would hold it in Trust or the Estate because under the Insurance Act there is no legislative provision that the nominee would obtain any other right.

12. It may be mentioned that the position under Section 30 of the Maharashtra Co-operative Societies Act is similar for nominees in respect of shares in a Housing Society.

Section 30 of The Maharashtra Co-operative Societies Act runs thus:-

30. (1) On the death of a member of a society, the society shall transfer the share or interest of the deceased member to a person or persons nominated in accordance with the rules or, if no person has been so nominated, to such person as may appear to the committee to be the heir or legal representative of the deceased member:

Provided that, such nominee, heir or legal representative, as the case may be, is duly admitted as a member of the society:

Provided further that, nothing in this sub-section or in section 22 shall pre-

vent a minor or a person of unsound mind from acquiring by inheritance or otherwise, any share or interest of a deceased member in a Society.

(2).....

(3).....

(4) All transfers and payments duly made by a society in accordance with the provisions of this section shall be valid and effectual against any demand made upon the society by any other person.

Hence in a Co-operative Society also the shares of the member can be simplicitor transferred to the nominee which transfer would effectually discharge the Society as against any other person making a demand.

Such a transfer, therefore, cannot and does not result in vesting of the flat in such nominee. Hence such nominee is merely a trustee for the estate of the deceased. **The Society is not concerned with the dispute amongst the heirs of the deceased.**

13. The provision pursuant to the amendment of the Companies Act is quite the contrary. The nomination under Section 109A of the Co-operative Act does not entail mere payment of the amount of shares. It specifically vests the property in the shares in the nominee, in the event of the death of the holder of the shares. The analogy drawn from the judgment in the case of Sarbati Devi is completely misplaced.

14. The meaning and definition of the word "Vest" is required to be considered. Black's Law Dictionary 8th Edition at page 1594 shows the meaning of "Vest" thus:-

"Vest: 1. To confer ownership of (property) upon a person.

2. To invest (a person) with the full title to property.

3. To give (a person) an immediate, fixed right of present or future enjoyment.

4. Hist. To put (a person) into possession of land by the ceremony of investiture.

Vested: Having become a completed, consummated right for present or future enjoyment; not contingent; unconditional; absolute <a vested interest in the estate>."

Further the meaning of vested right is given in the aforesaid Dictionary at page 1349 thus:-

"Vested right. A right that so completely and definitely belongs to a person that it cannot be impaired or taken away without the person's consent".

15. The meaning of Vested Interest in the said Dictionary is explained at page 829 thus:-

"Vested interest. An interest the right to the enjoyment of which, either present or future, is not subject to the happening of a condition precedent".

16. The meaning of Vested Estate at page 588 is shown thus:-

"Vested estate. An estate with a present right of enjoyment or a present fixed right of future enjoyment.

17. Advanced Law Lexicon by P. Ramanatha Aiyar 3rd Edition 2007 at page 2677 when explains the term Vested Legacy thus:-

VESTED LEGACY. A legacy the interest in which is so fixed as to be transmissible to the personal representative of the legatee.

18. The judgment in the case of The Fruit & Vegetable Merchants Union Vs. The Delhi Improvement Trust, A.I.R. 1957 SC 344 at page 353 holds that the word "Vest" can be used differently upon considering the English Law.

19. It is observed that the word "Vest" is a word of variable import even under Indian Statutes. The illustrations given in the judgment are the Insolvency Act which provides that the property vests in the Receiver. Such vesting is held to be temporary and only for the purpose of management of the properties of the insolvent for payment of his debts after distributing his assets. Consequently, the Receiver would have no interest of his own in the property vested in him. The vesting under the Land Acquisition Act is shown to be different. Under that Act the property would vest "absolutely in the Government free from all encumbrances". Hence upon such vesting the property acquired becomes the property of the Government without any conditions or limitation either as to its title or possession.

Consequently, it is held at page 353 runs thus:-

> "It would thus appear that the word "vest" has not got a fixed connotation, meaning in all cases that the property is owned by the person or the authority in whom it vests. It may vest in title, or it may vest in possession, or it may vest in a limited sense, as indicated in the context in which it may have been used in a particular piece of legislation."

20. Hence under that judgment which considered the provisions of the U.P. Town Improvement Act it was held that the land vesting in the Municipal or Legal Body was so vested only for the purpose of managing that land and would not transfer ownership of the property to the Authority.

21. In the case of Dr. M. Ismail Faruqui vs. Union of India A.I.R. 1995 S.C. 605 the concept of vesting the property in the Acquiring Authority came to be considered under the Acquisition of Certain Area at Ayodhya Act (33 of 1993). Considering the pith and substance of the Act, which was for the acquisition of the property at Ram Janma Bhoomi-Babri Masjid site under a legislation, it was held that vesting of the disputed land (Ram Janma Bhoomi-Babri Masjid) was limited to holding it by the Civil Government as Statutory Receiver and vesting of the area in excess of the disputed structure was absolute.

Hence, it is seen that the intention of the Legislature is of primary importance in considering the effect of the term "vest" in a given legislation.

22. In the case of Municipal Corporation of Greater Bombay Vs. Hindustan Petroleum Corporation (2001) 8 SCC 143 the vesting of watercourse in the Municipal Corporation was held not to be except for entrustment of the duty of the Municipality to maintain them in the manner provided under Section 220A of the Bombay Municipal Corporation Act, 1888.

This would be in consonance with the intention of the legislation - no land can become of the ownership of the Municipality merely because the Municipality is enjoined to maintain it and for which the vesting in possession alone would take place; the ownership would not vest.

23. Considering some of these judgments it has been held in the case of Bharat Coking Coal Ltd. Vs. Karam Chand Thapar & Bros. 2002 (8) SCALE 388 that the term vest in common English acceptation would mean and imply conferment of ownership of properties upon a person and in similar vein it gives immediate and fixed right of present and future enjoinment. However, it is observed, following the decision in the case of Fruit and Vegetables (supra) and Dr. M Faruqui (supra) that the term vest is a word of variable import. In that judgment the right, title and interest of the Coke oven plant which is vested in the Central Government under the Coking Coal Mines (Nationalisation) Act, 1972 was considered.

In that case the Appeal of the Company, in which the right, title and interest of the owners of the plants were to have vested under the aforesaid legislation, was dismissed holding that pursuant to the legislation the right, title and interest could not stand transferred to the Government Company since no infraction by the title holders was seen.

24. In the light of these judgments Section 109A of the Companies Act is required to be interpreted with regard to the vesting of the shares of the holder of the shares in the nominee upon his death. **The act sets out that the nomination has to be made during the life time of the holder as per procedure prescribed by law. If that procedure is followed, the nominee would become entitled to all the rights in the shares to the exclusion of all other persons. The nominee would be made beneficial owner thereof. Upon such nomination, therefore, all the rights incidental to ownership would follow. This would include the right to transfer the shares, pledge the shares or hold the shares.** The specific statutory provision making the nominee entitled to all the rights in the shares excluding all other persons would show expressly the legislative intent. Once all other persons are excluded and only the nominee becomes entitled under the statutory provision to have all the rights in the shares none other can have it. **Further Section 9.11 of the Depositories Act 1996 makes the nominee's position superior to even a testamentary disposition.** The non-obstante Clause in Section 9.11.7 gives the nomination the effect of the Testamentary Disposition itself. Hence, any other disposition or nomination under any other law stands subject to the nomination made under the Depositories Act. Section 9.11.7 further shows that the last of the nominations would prevail. This shows the revocable nature of the nomination much

like a Testamentary Disposition. A nomination can be cancelled by the holder and another nomination can be made. Such later nomination would be relied upon by the Depository Participant. **That would be for conferring of all the rights in the shares to such last nominee.**

25. A reading of Section 109A of the Companies Act and 9.11 of the Depositories Act makes it abundantly clear that the intent of the nomination is to vest the property in the shares which includes the ownership rights thereunder in the nominee upon nomination validly made as per the procedure prescribed, as has been done in this case. These Sections are completely different from Section 39 of the Insurance Act set out (supra) which require a nomination merely for the payment of the amount under the Life Insurance Policy without confirming any ownership rights in the nominee or under Section 30 of the Maharashtra Co-operative Societies Act which allows the Society to transfer the shares of the member which would be valid against any demand made by any other person upon the Society. Hence these provisions are made merely to give a valid discharge to the Insurance Company or the Co-operative Society without vesting the ownership rights in the Insurance Policy or the membership rights in the Society upon such nominee. **The express legislature intent under Section 109A of the Companies Act and Section 9.11 of the Depositories Act is clear.**

26. Since the nomination is shown to be correctly made by her husband who was the holder of the Suit shares, the Plaintiff would have no right to get the shares of her deceased husband sold or to otherwise deal with the same.

27. Consequently the Notice of Motion is dismissed.

(SMT. ROSHAN DALVI, J.)

DELHI HIGH COURT

M/S Dayagen Pvt. Ltd. vs. Mr. Rajendra Dorian Punj & Anr.

On 2 July, 2008 Author: Vipin Sanghi

Co. A. (SB) No.14/2007

(RELEVANT EXCERPTS FROM THE JUDGMENT):

"39. From a reading of the aforesaid provision it is seen that a shareholder may, at any time, nominate in the prescribed manner a person in whom his shares in the company shall vest in the event of his death. Subsection (3) of Section 109A begins with a non obstante clause which overrides any other law for the time being in force or any disposition whether testamentary or otherwise, in respect of shares of which a nomination is made in the prescribed manner, and states that upon the demise of the shareholder such nomination would entitle the nominee, in relation to the shares to all the rights therein, to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner. Therefore, if a member desires to make a nomination, it is required to be made "in the prescribed manner" by virtue of sub-section(1) of

Section 109A and the nomination would have an overriding effect "where a nomination is made in the prescribed manner". Even the variation or cancellation of an earlier nomination has to be made "in the prescribed manner. In Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd. (2005) 7 SCC 234 the Supreme Court, while dealing with Section 45 of the Arbitration and Conciliation Act, 1996 observed as follows: -

> "29. If the requirements of a statute which prescribes the manner in which something is to be done are expressed in negative language, that is to say, if the statue enacts that it shall be done in such a manner and no other manner, it has been laid down that those requirements are in all cases absolute, and that neglect to attend to them will invalidate the whole proceeding."

"40. The submission of Mr. Shakdher based on Sarbati Devi (supra), that a nominee merely holds the estate of the deceased for the benefit of the legal heirs of the deceased, and that the legacy does not vest in the nominee does not appear to be correct, in view of the express language of Section 109A of the Act. From a plain reading of Section 109A, it is abundantly clear that the intendment of the Legislature is to override the general law of succession and to carve out an exception in relation to nomination made in respect of shares and debentures. The section expressly vests the nominee, who is nominated in the prescribed form, upon the death of the share/debenture holder with full and exclusive ownership rights in respect of the shares/debentures of which he is the nominee. The prescribed manner, to which repeated reference is made in Sections 109A,is to be found in Form No.2B which reads as follows:

"Form No.2B [See rules 4CCC and 5D] Nomination Form (To be filled in by individual(s) applying singly or jointly) I/We.....and.....and.....the holders of Shares/Debentures/ Deposit Receipt bearing number(s)..... of M/s.....wish to make a nomination and do hereby nominate the following persons(s) in whom all rights of transfer and/or amount payable in respect of shares or debentures or deposits shall vest in the event of my our our death.

Name: .....Address ..... Date of Birth.....

*(to be furnished in case the nominee is a minor) **The Nominee is a minor whose guardian is ..... Name and Address ....

(**To be deleted if not applicable) Signature :..... Name :..... Address :..... Date :.....

Signature :.....Name :..... Address :.... Date : ....."

From the aforesaid it is evident that the nomination is required to be attested by witnesses."

Companies Act, 2013

72. Power to nominate.

1. Every holder of securities of a company may, at any time, nominate, in the prescribed manner, any person to whom his securities shall vest in the event of his death.
2. Where the securities of a company are held by more than one person jointly, the joint holders may together nominate, in the prescribed manner, any person to whom all the rights in the securities shall vest in the event of death of all the joint holders.
3. Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of the securities of a company, where a nomination made in the prescribed manner purports to confer on any person the right to vest the securities of the company, the nominee shall, on the death of the holder of securities or, as the case may be, on the death of the joint holders, become entitled to all the rights in the securities, of the holder or, as the case may be, of all the joint holders, in relation to such securities, to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.
4. Where the nominee is a minor, it shall be lawful for the holder of the securities, making the nomination to appoint, in the prescribed manner, any person to become entitled to the securities of the company, in the event of the death of the nominee during his minority.

[29th August, 2013]

An Act to consolidate and amend the law relating to companies.

BE it enacted by Parliament in the Sixty-fourth Year of the Republic of India as follows:—

ANNEXURE: V

The Transfer of Property Act, 1872:

The relevant provisions are reproduced below:

44. Transfer by one co-owner

Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same' but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

- Then the next Section deals with the Joint Owners:

45. Joint transfer for consideration

Where immovable property is transferred for consideration to two or more persons and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they were respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests **in such property in proportion to the shares of the consideration which they respectively advanced**.

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, **such persons shall be presumed to be equally interested in the property.**

- Now, the converse situation is covered in the next section 47:

47. Transfer by co-owners of share in common property

Where several co-owners of immovable property transfer a share therein without specifying that the transfer is to take effect on any particular share or shares of the transferors, the transfer, as among such transferors, takes effect on such shares equally where the shares were equal, and, where they were unequal, proportionately to the extent of such shares.

Illustration

A, the owner of an eight-anna share, and B and C, each the owner of a four-anna share, in mauza Sultanpur, transfer a two-anna share in the mauza to D, without specifying from which of their several shares the transfer is made. To give effect to the transfer one-anna share is taken from the share of A, and half-an-anna share from each of the shares of B and C.

[Here, "Sultanpura" is a District in the Uttar Pradesh, and "Mauza" means: "Before the 20th century, the term referred to a revenue collection unit in a pargana or revenue district. As populations increased and villages became more common and developed, the concept of

the mouza declined in importance. Today it has become mostly synonymous with the gram or village.

- These provisions speak so eloquently that no other principle or authority is necessary. The provisions of law would operate unless the parties make an agreement to the contrary.

ANNEXURE: VI

Illustrations of Per Stripes and Per Capita.

(vii) If there are two or more primary beneficiaries and each has children, it is important to specify in the will whether the children of each prime beneficiary are simply to take their parent's share, divided equally among the children of that particular parent, or whether all of the children of all of the deceased prime beneficiaries are to share equally in the combined shares of their deceased parents.

(viii) Reviewing examples helps solidify understanding of per stirpes and per capita distribution.

EXAMPLE 1:

Consider an example where you, the Grantor, are not survived by your spouse but you are survived by two children (named Amy and Bob), and Amy and Bob will each receive 50% of your estate. Suppose Bob died before you and left a child (named Bob, Jr.). Where should Bob's 50% of your estate go? To Amy, or to Bob, Jr.?

(i) If you want Bob's share to be inherited by Bob's children, then the share passes per stirpes (think of it as "down the stripe"). If you want Amy to get the entire estate (thus shutting out Bob's children), then the estate passes per capita. Per Capita distribution looks at the number of surviving heads on the generational line.

EXAMPLE 2:

(ii) The remainder of the estate is to go to Arnold and Betty in equal shares and, if either or both die before the testator, then to their children living per stirpes. Arnold and Betty both die before the Grantor. Arnold has one child, Cindy, and Betty has two children, Debra and Edward. Cindy gets half of the residue; Debra and Edward each get one quarter under a per stirpes distribution.

If a per capita distribution were called for, then Cindy, Debra and Edward would each get one-third.

MEMORANDUM OF FAMILY ARRANGEMENT

Alias

तथा

कौटुंबिक व्यवस्थापत्र संलेख

MEMORANDUM OF FAMILY ARRANGEMENT

(keÀe ì eyekeÀ J³eJemLeeHeve me#eHeueKe)

By Adv. Dinakar Parashram Bhave
Mobile: 9820529371

In the recent past, an Article on the subject: "Your Wealth, Your Will" (DeeHeueer meHeÊee, DeeHeueer F®íe) written by me in Marathi was published in the Maharashtra Times during January-March 2015. Later on its English version was published by the New Book Corporation, Mumbai in its taxation Bulletin in January 2016; and thereafter, in February 2016 these Articles in Marathi & English had been released in the Book-form.

Recently, the Hindi version of the Book: "Your Wealth, Your Will" (DeeHekeÀer meHeÊee DeeHekeÀe Jemee³eIeveecee) was declared as published at the gracious hands of shri. Pushp Joshi, Director-HR, Hindustan Petroleum Corporation Limited, Petroleum House, Mumbai, and released at the small but most impressive function organized on the very auspicious day: 2nd August 2016, (Dee<ee{ DeceeJem³ee (oeHe Hejpee))

2. The main focus of these Books was on the awareness aspect and acquainting the readers with fundamentals governing the functional & operational areas concerning the disposition of wealth through testamentary & non-testamentary trajectories, in a non-technical & simple language without much of legalistic jargon, so that the subject would be easily digestible, palatable to a legendary "common-man" depicted by Late R. K. Laxman.

Conflict of Interests & Family Arrangement:

3. As stated above, the emphasis at the initial stage was on avoidance or minimization of litigation by proper planning through the secret document called Will; and the dispute area emerging as a fall out of the defective, deficient Wills or conflict areas concerning implementation of some aspects of Wills was deliberately left untouched, to be dealt with separately in future.

4. Today, it is proposed to take-up the issues involving conflict of interests arising primarily due to defective drafting of the Will, or unintentional complexities emerging due to lack of clarity in expressing the true intention by the Testator/Testatrix in his/her Will, or mistaken belief regarding ownership and interest in relation to the ancestral properties or denial of legitimate share to the daughter/s or inadvertent excesses due to ignorance of the limitations under the law on right to dispose of self-acquired properties and the like deficiencies or defects giving rise to unpleasantness and disputes among the family members and close relatives bringing them to the door steps of a Court of law.

5. Looking to the present trend of the Courts of law in India and the Central Government's Litigation Policy, the dispute resolution 'out-of-court' has assumed greater importance & weightage and hence it is now considered more appropriate to deal with the Dispute Resolution through "Family Arrangements", which have been upheld by the highest court of Law in India, that is, the Supreme Court of India.

It is, therefore, proposed to deal with the subject of Family Arrangements in detail: Formation of arrangement/Agreement, documentation, payment of stamp duty, registration & mutation entries relating to properties in the Government & municipal records to give finality to the dispute resolution.

A specimen copy of the "Memorandum of Family Arrangements" is also annexed to give an idea of the legal requirements to be complied with in settling the disputes/ possible disputes to maintain harmonious relations among the legal heirs & near relatives and eschew litigation.

Some technicalities:

6. This present article deals with the Family Arrangement, its formation, execution, and implementation under the Indian legal system.

7. The subject matter does involve some kind of technical & legal complexities, but an attempt is made to place it in a simple & easy to understand manner. Nevertheless, some references to accepted legal & technical definitions and allied settled principles of law are inevitable for the proper understanding of the subject matter, which has multiple facets & complex dimensions conceptually & in practical application.

8. The conflict of interest among the legatees or devisees surfaces when the Testator/Testatrix may not have distributed the property in a "just, fair & reasonable" manner so as to please everyone. In fact, everyone knows that even the God almighty cannot help displease someone at sometime. But when it comes to property, each legal heir wants to have a bigger chunk of the estate! A lion's share!!

WHAT DOES "A Lion's Share" ACTUALLY MEAN?

9. An allegorical story to serve as a pleasant vehicle for a moral doctrine:

what is Lion's share? Aesop's fables {Greek author of fables (circa 620-560 BC)} teach in a lucid manner the truth universally applicable. Kindly Read below:

• A Lion, an Ass, and a Fox were hunting in company, and caught a large quantity of game. The Ass was asked to divide the spoil. This he did very fairly, giving each an equal share.

• The Fox was well satisfied, but the Lion flew into a great rage over it and with one stroke of his huge paw, he added the Ass to the pile of slain.

•Then he turned to the Fox.

"You divide it," he roared angrily.

•The Fox wasted no time in talking. He quickly piled all the game into one great heap. From this he took a very small portion for himself, such undesirable bits as the horns and hoofs of a mountain goat, and the end of an ox tail.

• The Lion now recovered his good humor entirely.

• "Who taught you to divide so fairly?" he asked pleasantly.

• "I learned a lesson from the Ass," replied the Fox, carefully edging away.

10. The Aesop's story brings out the distinction between the 'equal' and "equitable" or just & fair distribution! Each legatee or devisee thinks s/he should get "fair" share; and when that does not happen, the swords are out. The fight continues regardless of the outcome, from one Court to another Court in an endless manner; but the litigation takes a heavy toll, a lot of time & energy of the stake-holders; and the legatees, relatives unwittingly divert a part of the wealth to the legal fraternity & their associates, whose Bank balances swell rapidly compared to progress in litigation.

11. It is quite well-known that the distribution of total wealth of a Nation amongst the stakeholders has had attracted the attention of many a Economist world over. Over a period of time, various theories were evolved: capitalism, socialism and communism; and different countries experimented with these ideologies to effectuate equitable distribution of wealth but with no universally acceptable formula could be agreed upon or implemented. Once it was a cherished dream of many: "From each according to his ability, to each according to his needs" (German: Jeder nach seinen Fähigkeiten, jedem nach seinen Bedürfnissen). A slogan first used by Louis Blanc in 1851 and popularized by Karl Marx in 1875. In the Marxist view, such an arrangement will be made possible with the full development of socialism. But the USSR Empire collapsed in 1991. The world had pinned hopes on the Soviet socialism doctrine, but that failed. The Russian & the Chinese are now leaning towards capitalistic economic pattern, with all its faults.

12. It is interesting to notice that when the world total GDP is over $ 62 trillion, yet half the population is not having one square meal each day—some

have no meals for half the month. A lopsided distribution of wealth passes uncontrolled & uncorrected as there is no unanimity amongst nations.

WEALTH DISTRIBUTION IN A FAMILY:

13. While the large-scale-wealth distribution of a Nation State poses a great problem, it should not happen in the family domain, where the close bond of family must dictate amicable settlement of differences in attitudinal orientations for the common interest of the family wealth. If the decedent has failed to divide the wealth appropriately, surely, the emotional quotient of the legal heirs, coupled with their collective wisdom must drive them to a more sensible path of "give & take" rather than the thorny or litigation muddled path which eventually is destined to ruin the family-wealth instead of preserving & augmenting for the posterity, and likely to cause irreparably damage to the name, fame and honour of the Family.

14. Surely, the more sensible approach would be to sit down at the round-table and draw out the settlement formula, soft paddling the terms & conditions to achieve a 'win-win' feeling amongst all involved. If everyone involved in the settlement process is compassionate, caring and respecting the view point of another person, keeps in mind the Family Honour & genuinely desires to retain the cordiality in intra-personal relationship of the members of the family, an equitable, just re-distribution is always possible. While the five fingers of the palm are unequal in length, they become just equal if one 'bends' them inwardly to touch the proximal palmar crease. A bit of bending makes the difference! Life becomes a lot easier for everyone; sans litigation or conflict. Everyone can enjoy peacefully his/her slice in the cake, the estate!!!

In the latter part of this article, the legal aspects of such family arrangements are dealt with in a comprehensive manner.

WHAT IS FAMILY ARRANGEMENT?

14. The background & purpose can be better understood, if one reads the excerpt's from the Apex Court Constitution Bench decision in the case of **Kale & Others vs. Deputy Director of Consolidation** {Decided on 21st January, 1976: 1976 AIR 807} wherein their Lordships have succinctly unfolded the pith & substance of the whole phenomenon.

15. The Court observed/ held:

QUOTE:

"Before dealing with the respective contentions put forward by the parties, we would like to discuss in general the effect and value of family arrangements entered into between the parties with a view to resolving disputes once for all.

• By virtue of a family settlement or arrangement members of a family descending from a common ancestor or a near relation seek to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles

once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family. The family arrangements are governed by a special equity peculiar to them and would be enforced if honestly made.

• In this connection, Kerr in his valuable treatise "Kerr on Fraud" at p. 364 makes the following pertinent observations regarding the nature of the family arrangement which may be extracted thus;

"The principles which apply to the case of ordinary compromise between strangers, do not equally apply to the case of compromises in the nature of family arrangements. Family arrangements are governed by a special equity peculiar to themselves, and will be enforced if honesty made, although they have not been meant as a compromise, but have proceeded from an error of all parties, originating in mistake or ignorance of fact as to that their rights actually are, or of the points on which their rights actually depend."

• The object of the arrangement is to protect the family from long drawn litigation or perpetual strifes which mar the unity and solidarity of the family and create hatred and bad blood between the various members of the family. Today when we are striving to build up an egalitarian society and are trying for a complete reconstruction of the society, to maintain and uphold the unity and homogeneity of the family which ultimately results in the unification of the society and, therefore, of the entire country, is the prime need of the hour. A family arrangement by which the property is equitably divided between the various contenders so as to achieve an equal distribution of wealth instead of concentrating the same in the hands of a few is undoubtedly a milestone in the administrating of social justice. That is why the term "family" has to be understood in a wider sense so as to include within its fold not only close relations or legal heirs but even those persons who may have some sort of antecedent title, a semblance of a claim or even if they have "a spes successions"{i.e. During the lifetime of a person, the chance of his heir apparent succeeding to the estate or the chance of a relation obtaining a legacy under his will is a 'Spes Successionis'(chance of succession). Such expectancy does not amount to an interest in property and cannot be made the subject matter of a transfer.} so that future disputes are sealed forever and the family instead of fighting claims inter se and wasting time, money and energy on such fruitless or futile litigation is able to devote its attention to more constructive work in the larger interest of the country. The Courts have, therefore, leaned in favour of upholding a family arrangement instead of disturbing the same on technical or trivial grounds. Where the Courts find that the family arrangement suffers from a legal lacuna or a formal defect the rule of estoppel is pressed into service and is applied to shut out plea of the person who being a party to family arrangement seeks to unsettle a settled dispute and claims to revoke the family arrangement under which he has himself enjoyed some material benefits.

• The law in England on this point is almost the same. In Halsbury's Laws of England, Vol. 17, Third Edition, at pp. 215-216, the following apt observations

regarding the essentials of the family settlement and the principles governing the existence of the same are made:

"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 dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term "family arrangement" is applied.

• Family arrangements are governed by principles which are not applicable to dealings between strangers. The court, when deciding the rights of parties under family arrangements or claims to upset such arrangements, considers what in the broadest view of the matter is for the interest of families, and has regard to considerations which in dealing with transactions between persons not members of the same family would not be taken into account. Matters which would be fatal to the validity of similar transactions between strangers are not objections- to the binding effect of family arrangements".

• In other words, the Honourable Court put the binding effect and the essentials of a family settlement in a concretized form, the matter may be reduced into the form of the following propositions:

(1) 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;

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

(3) The family arrangement may be even oral in which case no registration is necessary;

(4) 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 arrangement made under the document and a mere memorandum pre pared after the family arrangement had already been made either for the purpose of the record or for in formation of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of s. 17(2) of the Registration Act and is, therefore, not compulsorily registrable;

(5) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property 'It which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party relinquishes all its claims or titles in favour of such a person and acknowledges

him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the Courts will find no difficulty in giving assent to the same;

(6) Even if bona fide disputes, present or possible, which may not involve legal claims, are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement.

The principles indicated above have been clearly enunciated and adroitly adumbrated in a long course of decisions of this Court as also those of the Privy Council and other High Courts, which we shall discuss presently.

UNQUOTE:

16. In Lala Khunni Lal & Ors. Vs. Kunwar Gobind Krishna Narain and Anr. The statement of law regarding the essentials of a valid settlement was fully approved of by their Lordships of the Privy Council. In this connection the High Court made the following observations, which were adopted by the Privy Council:

The learned judges say as follows:

"The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognizing the right of the others as they had previously asserted it to the portion allotted to them respectively. It was in this light, rather than as conferring - a new distinct title on each other, that the parties themselves seem to have regarded the arrangement, and we think that (1) L. R. 38 T. A. 87. 102, it is the duty of the Courts to uphold and give full effect to such an arrangement."

Their Lordships have no hesitation in adopting that view."

17. This decision was fully endorsed by a later decision of the Privy Council in Mt. Hiran Bibi and others v. Mt. Sohan Bipi .

18. In Sahu Madho Das and others v. Pandit Mukand Ram and another(2) this Court appears to have amplified the doctrine of validity of the family arrangement to the farthest possible extent, where Bose, J., speaking for the Court, observed as follows:

"It is well settled that compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognizing the right of the others, as they had previously asserted it, to the portions allotted to them respectively. That explains why no conveyance is required in these cases to pass the title from the one in whom it resides to the person receiving it

under the 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. But, in our opinion, the principle can be carried further and so strongly do the Courts lean in favour of family arrangements that bring about harmony in a family and do justice to its various members- and avoid in anticipation, future disputes which might ruin them all, and we have no hesitation in taking the next step. (fraud apart) and upholding an arrangement under which one set of members abandons all claim to all title and interest in all the properties in dispute and acknowledges that the sole and absolute title to all the properties resides in only one of their number (provided he or she had claimed the whole and made such an assertion of title) and are content to take such properties as are assigned to their shares as gifts pure and, simple from him or her, or as a conveyance for consideration when consideration is present."

19. In Ram Charan. DAS v. Girjanandini Devi & Ors. (3), this Court observed as follows:

"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. The word 'family' in the content is not to be under stood in a narrow sense of being a group of persons who are recognized in law as having a right of succession or (1) A.I.R. 1914 P.C.44. (2) [1955] 2 S.C.R. 22, 42-43. (3) [1965] 3 S.C.R. 841, 850-851, having a claim to a share in the property in dispute. The consideration for such a settlement, if one may put it that way, is the expectation that such a settlement will result in establishing or ensuring amity and goodwill amongst persons bearing relationship with one another. That consideration having been 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."

20. In Maturi Pullaiah and Another v. Maturi Narasimham and Others- AIR 1966 SC 1836 this Court held that although conflict of legal claims in praesenti or in futuro is generally condition for the validity of family arrangements, it is not necessarily so. Even bona fide dispute present or possible, which may not involve legal claims, would be sufficient. Members of a joint Hindu family may to maintain peace or to bring about harmony in the family, enter into such a family arrangement. If such an agreement is entered into bona fide and the terms thereto are fair in the circumstances of a particular case, the courts would more readily give assent to such an agreement than to avoid it."

21. In a recent decision of the Apex Court in S. Shanmugam Pillai and others v. K. Shanmugam Pillai & others the entire case law was discussed and the Court observed as follows:

"If in the interest of the family properties or family peace the close relations had settled their disputes amicably, this Court will be reluctant to disturb the same. The courts generally lean in favour of family arrangements.

22. Thus it would appear from a review of the decisions analyzed above that the Courts have taken a very liberal and broad view of the validity of the family settlement and have always tried to uphold it and maintain it. The central idea in the approach made by the Courts is that if by consent of parties a matter has been settled, it should not be allowed to be re-opened by the parties to the agreement on frivolous or untenable grounds. The object is to preserve the property and the good name of the family by recognizing that it is not in the good interest of the family or the members to engage in fights or disputes.

To sum up:

To effect a family arrangement all that is necessary is that the parties must be related to one another in some way and have a claim or a possible claim to the property or even a semblance of a claim or spes successionis or even on some other ground as, say, affection or ignorance of the parties of their rights; and when the purpose or object is of maintaining peace and harmony in the family.

WHAT IS MEANT BY "ARRANGEMENT"?

23. The word 'arrangement' in the 'Family Arrangement' means to come to an agreement about, to settle the dispute. The process of 'arrangement' is just like the process of arbitration. The process of arrangement is not synonyms with process of determination of the rights of the parties like in a legal suit instituted in any court of law by the warring parties. The arrangement is not arrived at strictly in accordance with law of inheritance as in vogue for the time being. Consequently, even the person who has no right to inherit particular property may get some share in an arrangement arrived at. The arrangement is more about compassionate nature, arrived at to take care of mutual interest, desire to co-exist peacefully. As held by the Apex Court in number of cases, 'arrangement' with reference to family arrangement is to bring about harmony in a family and do justice to its various members and avoid in anticipation future disputes, which might ruin them all, and simultaneously tarnish the name, reputation & family honour .

24. In some cases the Courts have upheld the agreements; and in some other cases the Courts have refused to accept as bon fide the arrangements amongst the signatory parties. Illustratively:

VALID ARRANGEMENTS:

The following are examples of family arrangements which have been approved, accepted by the Court.

(i) An agreement providing for payment of the son's debts in consideration of his giving up his interest in the family business.

(ii) A resettlement of the family property making provision for an illegitimate child.

(iii) An agreement between members of a family to divide equally whatever they obtain under the will of an ancestor.

INVALID ARRANGEMENTS:

The following are examples of family arrangements which were held as not bona fid or just/fair:

(i) A compromise of claim to estates founded on a mistake as to the title induced by misrepresentation of one of the parties to the compromise.

(ii) An agreement as to family property not executed by all the intending parties to it.

FAMILY ARRANGEMENT AMONG MUSLIMS:

21. The Family arrangement is also valid among Muslims. The following case law supports the view: Income Tax Appellate Tribunal – Guwahati: Bibijan Begum vs. Income-Tax Officer on 10 April, 1989: Equivalent citations: 1990 32 ITD 157 Gau

• The Guwahati Bench of the Income Tax Appellate Tribunal in a very elaborate judgment held that there is no bar for Mohammedans to effect a family arrangement. In that case the assessee had an absolute right over her Mehr property and in exchange of that land the assessee received another land over which a multi- storeyed building was to be constructed. The assessee's two daughters and two sons had antecedent right to the properties in the capacity as her heirs though their shares were not specified. The Tribunal held that by a family arrangement the rights of those children had been specified. The family arrangement by which the assessee and her four children received 1/5th share each in the multi-storeyed building was, therefore, valid. The Tribunal therefore, held that the assessee lady could not be assessed in respect of that share of house property which was given to her children pursuant to the family arrangement.

Some excerpts from the ITAT Judgment:

QUOTE:

9. In this connection, it is worthwhile to refer to Mulla's Hindu Law, 14th Edn., page 238. It was mentioned therein that the court leans strongly in favour of family arrangements to bring about harmony in the family and to do justice to the various members and, avoid, in anticipation, future disputes. It was further observed that in the case of a family arrangement, it is not necessary that there should have been previous dispute as to the rights of the parties. The term 'family' in the context of family arrangement is to be understood in a narrower sense of being a group of persons who are recognized in law as having a right of

succession or having a claim of share in the property in dispute. Xxxxxx It was pointed out that such transaction brought about by the family arrangement is not the creation of an interest. It was pointed out that ordinarily each party takes a share or interest in the property by virtue of independent title which is admitted to that extent by the other parties.

xxx

16. As pointed out by the I.T.O., the assessee obtained certain properties in the village on account of meher which she was entitled to receive from the husband in consideration of the marriage. At para 100 of Tyabji's Muhammadan Law (third edition), it was observed that the wife may validly agree to a reduction of her meher, or make a gift (or remission) of the whole of it to her husband or after his death to his heirs; provided that she voluntarily and deliberately gives up her right and that such remission may be made conditional in lieu of an annuity and if purported to be made by the widow to a deceased husband or his heirs, consists of a release of the claim, which under the Mohammedan Law was not required to be accepted by the heirs of the husband. Thus in our opinion, the assessee in the present case had the absolute right over her meher property. It is also equally true that her children are heirs to such properties i.e. to say they have got antecedent right to such properties in their capacity as heirs, though at the point of time each one of them cannot identify or specify a claim to a particular property with ascertainable accuracy. But this family arrangement executed between the parties concerned, the rights of those children have been specified i.e. the first son would be entitled for the second floor, the first daughter for the third floor, the second daughter for the fourth floor and the other soft for the fifth floor. We have mentioned above that the family arrangement in the present case should be treated as valid. Even otherwise, one may argue that the transaction was in the nature of a gift by the assessee's mother to the children. But here again that as a result of the family arrangement or family settlement which is in the nature of a partition, there could be no gift involved as the recipient had already acquired antecedent rights to such properties and as a result of this family arrangement their specific shares have been particularized and identified.

UNQUOTE:

• The Guwahati High Court in the case of Ziauddin Ahmed v. CGT, 102 ITR 253 held that the family arrangement amongst the members of Mohammedan family is valid and therefore, the shares given by a father to his sons at less than market value in order to preserve the family peace is not liable to gift tax.

MEMORANDUM OF FAMILY ARRANGEMENT-CUM-COMPROMISE:

22. As is well known, the family dispute may arise on account of some unfair division of property specified in the Will, or it may arise due to challenge of the Will itself by some legatee or devisee pointing out some inherent "defect" or

"deficiency" in the Will document such as it being not signed in the presence of at least two witnesses; or more than two Wills, both undated are in existence; or such similar defect including denial of any property to a legal heir, who claims that s/he had been unduly neglected.

23. In such circumstances, the need arises for the 'family' to come together and try to resolve the disputes and arrive at amicable settlement applying "give & take" principle so as avoid defaming the family name & at the same time eschewing the litigation path which ruins the wealth of the family. When the object, purpose of the family is to sink their differences and disputes, settle and resolve their conflicting claims or disputed titles once for all in order to buy peace of mind and bring about complete harmony and goodwill in the family, the Courts are ready & willing to support such arrangements.

Now, the next hurdle is how to go about and have separation of property and then keep adequate 'record' thereof so as to avoid possibility of the matter being 'reopened' in the future.

24. As has been noticed above, the arrangement has to be agreed upon amongst the contenders and the matter should be discussed amongst them to arrive at workable division of the estate. Then, the next step is to record a family arrangement arrived at orally, in the form of a memorandum of family arrangement-cum-compromise. This document is required to be drawn up wherein the properties and assets belonging to the parties to the family arrangement are required to be specified. Thereafter the fact of arriving at family arrangement sometime in the past with the help of well-wishers and family friends is required to be mentioned in the operative portion of the Memorandum of Family Arrangement-cum-Compromise. The properties and businesses which have been allotted to different parties are required to be specified. There has to be a clear understanding amongst all as what share each one has got and unequivocal acceptance for allowing others to enjoy their respective share of property peacefully, without hindrance. Once the understanding is reached, agreed upon and given effect to, then the next step would be to document it for posterity & ensuring that it does not get re-opened.

25. In addition to the Memorandum of Family Arrangement, other documents like affidavits of each of the parties to the Family Arrangement are required to be obtained wherein each of the parties confirms on oath that s/he has received a particular asset or a part of it and the family arrangement is arrived at to his/her total satisfaction and it is binding on him/her and anyone claiming through him/her. In such an affidavit the party giving up his/her right in other properties which are allotted to other parties to the Family Arrangement states that the said other properties may be transferred in the records of the registering authorities without notice to him/her. Each affidavit is required to be executed before a Notary Public or Judicial Magistrate; and all such Affidavits so executed are to be attached to the Memorandum of family arrangements as forming an integral part of the Agreement.

26. In order to enable the person of the family, to whom a particular property is allotted, to deal with the property as his own, a consent letter may be required to be given by a member in whose name the said property was standing prior to the family arrangement. Depending on the facts of each case, various other connected documents may be required to be brought on record by mentioning them in the agreement so as to effectuate a proper and binding family arrangement. The entire idea of the Family Arrangement is that each legal heir, contender or claimant finally & eventually gives up his/her claim or right on the remainder of the property other than the one allotted to him/her; and undertakes not to lay any claim on such property in future. It is acceptance of the property allotted to a person & his/ her giving up right, title & interest in all the residue estate permanently & forever, constitutes essentiality of the Family Arrangement. Only on such understanding & undertaking to abide by the settlement so reached, that the disputes/currently prevailing or likely to arise in future can be given quietus once and for all.

FAMILY ARRANGEMENT AND PARTITION:

27. A family arrangement may be based on disputed or potential or possible or even notional claim/s. In a partition, there should be very clear pre-existing rights. In a family arrangement, as is obvious, some degree of relationship is involved. A partition can be entered into between persons who have or who may not have family relationship, but they must be co-owners of the property. A family arrangement can be in the nature of re-aligning, re-distributing or even consolidating certain claims and rights or even foregoing certain rights in favour of some claimant. A partition is always in the nature of division of the property between the co-owners alone. There could be other differences on a case-to-case basis.

FAMILY ARRANGEMENT AND GIFT:

28. A family arrangement needs to be distinguished from a voluntary transfer without any consideration, that is, a gift. What constitutes a 'gift' in law?

(i) At common law, for a gift to have legal effect, it was required that (a) there be intent by the donor to give a gift, and (b) delivery to the recipient of the item to be given as a gift. Section 122 of the Transfer of Property Act, 1872 defines: "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.

Acceptance when to be made:-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.

(ii) Thus, three elements are essential in determining whether or not a gift has been made: delivery, donative intent, and acceptance by the donee. Even

when such elements are present, however, courts will set aside an otherwise valid gift if the circumstances suggest that the donor was, in actuality, defrauded by the donee, coerced to make the gift, or strongly influenced in an unfair manner.

(iii) The two principal categories of gifts are inter vivos gifts and causa mortis gifts.

(a) Inter vivos gifts: Inter vivos is Latin for "between the living" or "from one living person to another." A gift inter vivos is one that is perfected and takes effect during the lifetime of the donor and donee and that is irrevocable when made. It is a voluntary transfer of property, at no cost to the donee, during the normal course of the donor's life.

(b) Causa Mortis Gifts: A gift causa mortis (Latin for "in contemplation of approaching death") is one that is made in anticipation of imminent death. This type of gift takes effect upon the death of the donor from the expected disease or illness. In the event that the donor recovers from the peril, the gift is automatically revoked. Gifts causa mortis only apply to personal property.

DIFFERENCE: GIFT VS. FAMILY ARRANGEMENT

• The Guwahati High Court in Ziauddin Ahmed's case (102 ITR 253) had held that a receipt of family property at less than adequate consideration, pursuant to a family arrangement, cannot be taxed under the erstwhile gift tax law, which sought to deem such receipt otherwise as a taxable gift.

• Interestingly, Section 56 (2) (vi) of the Income Tax Act,1961, as amended effective April 2006 provides that if the aggregate sum of money received by an individual without consideration during the year is more than `50,000 the same will be chargeable to tax. Effective, October 2009, receipt of sum of Money, Immovable property as well as certain specified movable property if the amount exceeds `50000 in aggregate in case of each of such category of assets, the Donee, is liable to pay tax by including the value of Gift in his income, under the head: "income from other sources". However, the Gift given /received by a specified "relative" is 'exempt', regardless of value.

• One can possibly argue that when receipt from relatives is exempted, on a parity of reasoning the asset received under the family arrangements, at less than adequate consideration, may be held as exempt.

STAMP DUTY AND REGISTRATION:

29. As regards the Registration of the Memorandum of Family Arrangement, under the Registration Act, 1908, the matter is no longer res integra, that is, it is settled beyond doubt and stands concluded.

• In Bhoop Singh vs Ram Singh Major & Ors on 11 September, 1995 (1996 AIR 196, 1995 SCC (5) 709), the Honourable Supreme Court held:

QUOTE:

"13. In other words, the court must enquire whether a document has recorded unqualified and unconditional words of present demise of right, title and interest in the property and included the essential terms of the same; if the document, including a compromise memo, extinguishes the rights of one and seeks to confer right, title or interest in praesenti in favour of the other, relating to immovable property of the value of Rs.100/- and upwards, the document or record or compromise memo shall be compulsorily registered.

14. In Tek Bahadur v. Debi Singh & Ors., AIR 1966 SC 292, the Constitution Bench of this Court considered the validity of the family arrangement and the question was whether it requires to be compulsorily registered under section 17. This Court, while upholding oral family arrangement, held that registration would be necessary only if the terms of the family arrangements are reduced into writing. A distinction should be made between the document containing the terms and recital of family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of section 17(2) of the Registration Act. It was held that a memorandum of family arrangement made earlier which was filed in the court for its information was held not compulsorily registrable and therefore it can be used in evidence for collateral purpose, namely, for the proof of family arrangement which was final and binds the parties. The same view was reiterated in Maturi Pullaiah & Anr. v. Maturi Narasimham & Ors., AIR 1966 SC 1836, wherein it was held that the family arrangement will need registration only if it creates any interest in immovable property in present time in favour of the parties mentioned therein. In case where no such interest is created the document will be valid, despite it being non-registered and will not be hit by section 17 of the Act.

UNQUOTE:

• Therefore, the Memorandum declaring that the re-alignment of property had been agreed orally & implemented, does not require Registration and the Certified True Copy (by Notary) can be submitted to the Authorities concerned –Revenue or Municipal—for carrying out "mutation entries" in the Records , based on the Memorandum signed by all concerned. On the other hand, if the family arrangement involved a declaration of right, in presenti, then, it requires registration as per decision in the case of Chandreshwar Singh V. Ramchandra Singh, AIR 1973 Pat. 215 at p.223.

It was also held by the Honourable Apex Court that that even if a Family Arrangement, which required registration was not registered, it would operate as a complete estoppel against the parties, which had taken advantage thereof.

To sum up the legal position:

I. A family arrangement can be made orally.

II. If made orally, there being no document, question of payment of stamp duty or registration does not arise.

III. If the family arrangement is reduced to writing and it purports to create, declare, assign, limit or extinguish any right, title or interest of any immovable property, it must be properly stamped and duly registered as per the State Stamp Act, and Indian Registration Act, 1908.

IV. A mere Memorandum prepared after the family arrangement had already been made either for the purpose of record or for information of the court for making necessary mutation, requires no Registration, but the instrument or document being in writing needs to be duly stamped.

STAMP DUTY ON MEMORANDUM FAMILY ARRANGEMENT:

30. As adverted in the foregoing paragraphs, the Memorandum is a sort of Agreement for keeping a record of the orally agreed re-distribution of the total properties arrived at & implemented. Surely, the purpose is to keep the understanding in black & white and duly acknowledged by all concerned by setting their respective hands at the end of the Memorandum. Each party to the Agreement also executes an Affidavit-Disclaimer acknowledging what is "received" & "giving up his/her claim or interest" in the remainder of the properties of the decedent.

(a) As regards the chargeability of the Stamp Duty on such a document is concerned**,** it is settled legal position that the Stamp Act does not require transactions to bear stamp duty; it is dealing and dealing only with documents. The levy is on the "instruments" classified under various Articles set out in the Schedule appended to the Stamp Act.

• A reference is invited to the decision of the Delhi High Court: in Shri Mangat Ram & Another vs Shri Ram Narain Gupta & another I.A. 2698/07 in CS (OS) No. 549/1995 decided on 5 April, 2010:

QUOTE:

"50. At this stage, I would like to deal with the first submission of Mr. Kapoor that a memorandum in relation to any transaction, once drawn, would attract stamp duty. This submission is founded upon the decision in Cohen and Moore v. Commissioners of Inland Revenue 1933(2) KB 126 relied upon by Mr. Kapoor. In Cohen (supra) the court held:

".....It has been pointed out on more than one occasion that the Stamp Act does not require transactions to bear stamp duty; it is dealing and dealing only with documents. Where, therefore, there has been an oral agreement of sale no stamp duty is exigible: but if the parties choose to make a record of the fact that

they have entered into an agreement there seems every reason why stamp duty should be exigible. I cannot myself think that in S.59 the Legislature intended to draw any distinction between the case where by a document in writing the parties record an agreement entered into at the time of signing the record by means of an offer and acceptance contained in the written document, and the case where they are making a record in writing of an oral offer and an oral acceptance, made, it may be, only a few days before. In my opinion, S.59 does apply to a record made of an oral agreement arrived at between the parties....."

51. The aforesaid observations, in the Indian context and on the basis of the law as it stands, would have to be qualified. Firstly a sale or any other form of transfer of the value of more than Rs.100/- of immovable property can be made only by a registered instrument. The instrument once drawn would be liable to bear stamp duty. Secondly, even if a sale of immovable property is made orally for consideration less than Rs. 100/- with delivery of possession, a subsequent memorandum created merely for posterity, in my view, would neither require stamping nor registration. Therefore, I do not accept the first submission of Mr. Kapoor in the wide terms as it is advanced. The same would have to be qualified in the aforesaid terms."

UNQUOTE:

(b) Section 2 (l) of the Maharashtra Stamp Duty Act, 1958 defines the term "Instrument" as under:

(l) "instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded, but does not include a bill of exchange, cheque, promissory note, bill of lading, letter of credit, policy of insurance, transfer of share, debenture, proxy and receipt; { the documents "excluded" from definition of "instruments" & consequently from Levy of stamp duty under section 3 of the Maharashtra Stamp Duty Act, 1958, are those enumerated in The Union List or List-I (the last item is numbered 97) given in Seventh Schedule in the Constitution of India on which Parliament has exclusive power to legislate. List I, Entry 91 reads: Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts." On the aforesaid 'instruments' levy is under the Indian Stamp Act, 1899.}

(C) It is a settled position that a "Document" which does not create or extinguish any right or liability is not an "instrument" & hence not liable to stamp duty. But a Memorandum of Family Arrangement when signed by the members of the family would be a "document" in the nature of "Agreement" vide Article 5 of the Schedule I to the Maharashtra Stamp Act, 1958 and entry (h) (B) thereof, the Stamp Duty payable is rupees one hundred.

Article 5 reads:

5. AGREEMENT OR ITS RECORDS OR MEMORANDUM OF AN AGREEMENT -

(a) TO (g-e) XXXX
(h) (A) if relating to, - (i) TO (vi) xxxxxx

(B) if not otherwise provided for-One hundred rupees.

In other words, the Memorandum of Family Arrangement is required to be executed on the non-judicial stamp paper of '. 100/- (Rupees one hundred only) and the Affidavits annexed thereto will have to be executed on the Stamp paper of '. 100/-(Rupees one hundred only) and signed before the Notary Public or the Judicial Magistrate. As clarified, the document is not required to be registered under the Registration Act, 1908.

(d) While the stamp duty rate on the Memorandum of an Agreement or Affidavit will vary from State to State, a couple of illustrations are given below:

• In the State of Uttar Pradesh, the Stamp Duty is as follows:

SCHEDULE I-B [See section 3]

STAMP-DUTY ON INSTRUMENTS UNDER THE INDIAN STAMP ACT, 1899 AS AMENDED UPTO DATE IN ITS APPLICATIOIN TO UTTAR PRADESH

NOTE- The Articles in Schedule I-B are numbered so as to correspond with similar Articles in Schedule I of Act no.2 of 1899.

5. AGREEMENT OR MEMORANDUM OF AN AGREEMENT -

(a) xxx

(b) xxx

(c) If not otherwise provided for .....one hundred rupees

• Similarly, in Karnataka State:

THE KARNATAKA STAMP ACT,1957

Schedule. (Updated till 13/10/2011.)

Description of Instrument	Proper Stamp Duty
Article 5. Agreement or2 [its records or] Memorandum of an Agreement	
(i) xxx	
(h) xxx	
(j) if not otherwise provided for	Two hundred rupees].

• It is, thus, necessary to look into the Stamp Act of the State in which the Memorandum of Family Arrangement is being executed & ensure that the Agreement /Affidavits are executed on the stamp paper of requisite value by referring to the relative Schedule Entry in the State Stamp Act.

DRAFTING OF MEMORANDUM OF FAMILY ARRANGEMENT:

31. It may be noted that the Courts have consistently held that the Memorandum would have to be registered if the re-alignment or re-distribution terms & conditions are spelt out in the Family Arrangement document and based on which assets are re-distributed. In that case, the document will be construed as an "instrument" of transferring, creating rights relating to the property and would attract stamp duty at applicable rates. However, if the properties are already transferred based on oral agreement, the memorandum will be a simple agreement of record of understanding and hence, just Stamp Duty of `. 100/- (Maharashtra & Uttar Pradesh) `. 200/- (Karnataka) will suffice.

• For having a general idea as to how the Memorandum of such Agreements, is to be drafted, **a specimen copy** is given as Attachment hereto.

• The Agreement must spell out the name of the person, who will keep the "original" copy of the Agreement and it must be recorded that s/he agrees and undertakes to produce it before any court or authority when required. For record purposes, Certified True copies may be given to each signatory; and it may also be recorded in the Agreement itself.

• It is, however, necessary to have the Memorandum of Family Agreement duly vetted by an Advocate familiar with such matters to avoid complications when it is submitted for carrying out mutations in Official records of municipality or Revenue Department.

MUTATION ENTRIES: REVENUE / MUNICIPAL RECORDS

32. Based on the duly executed Memorandum of Family Arrangement the final step would be to file a copy thereof with the Revenue & Municipal Authorities with an application jointly signed by all requesting to carry out mutations entries in the Records; and subsequently modified entries duly attested by the Competent Authority be given to each signatory. In that manner, the Family Arrangement gets effectually sealed for posterity, and everyone is assured that s/he holds proper title document.

33. To sum up:

(i) It is desirable that the legal heirs & other relatives come to a negotiating table & as a remedial step to the defective Will or deficient Will, draw up the plan on give & take principle, for just, fair & reasonable distribution of wealth, so that the name, fame or reputation of the family is spared and the costly, time consuming litigation path is eschewed.

(ii) The Family Arrangement has been well recognized as the most honourable way of settling the disputes or possible disputes among the heirs & other relatives arising on account of invalid wills or dispute-prone distribution of wealth under the testamentary disposition; and resolving the matters amicably for maintaining the peace & harmony in the family. Traditionally, in England & other commonwealth countries including India, the highest Court of the land and all the High Courts have given blessings to bona-fide arrangements among family members.

(iii) The Memorandum of family arrangement does not transfer or create any new rights relating to the property but merely ensures just & fair re-distribution of wealth and hence it is not required to be compulsorily registered under the Registration Act, 1908.

(iv) As regards the Stamp Duty on the Memorandum of family arrangement, it may be necessary to examine the provisions of the State Act. Each state has a separate law on the stamp duty.

In Maharashtra, Article 5 of the Schedule-I appended to the Maharashtra Stamp Act, 1958, would cover such Agreements and hence the stamp duty of '. 100 /- would be payable. In other words, the memorandum / Agreement may be engrossed on the non-judicial stamp paper of '.100/- which has to be purchased in the name of one of the signatories. However, the annexure Affidavits will have to be on the stamp paper of '. 100/- purchased in the name of each signatory.

(v) On completion of the Agreement, requisite applications be made before the Revenue / Municipal authorities to carry out changes in the Official records in conformity with the Family Arrangement document.

(vi) If all the concerned parties come forward in striking the balance, each one would enjoy peace of mind, and the name, fame or reputation of the family would remain intact. If they do not elect this path, the resultant misery may ruin one & all and diminish the wealth in the litigation process.

EPILOGUE:

This monograph demonstrates that it is not a bed of roses all the way. The path is thorny one. The obstacles in the way are difficult but not un-surmountable. The test of wisdom lies in choosing the lesser evil and navigating confidently to reach the goal.

As regards the Conflict of interests, the defects or deficiencies in the Will may be eschewed and all concerned should come to the round-table in the best interest of all and strike the balance to evolve a truly just, fair & reasonable re-distribution formula keeping in mind the "give & take" principle and draw the plan for re-alignment or re-distribution of wealth, implement it and put it in Memorandum of Family Arrangement format for record purposes for posterity. Have the Memorandum carried to the Authorities for carrying out 'mutation entries'. These Family Arrangements are held by the Courts as fully legal.

Memorandum of Family Arrangement

Truly, wisdom lies in choosing the right path, taking the right step, at the right time to save the family from hassels & preserve, distribute wealth in just & fair manner.

BANDRA (EAST) D. P. BHAVE
15th September 2016 ADVOCATE

ATTACHMENT

(Specimen copy)

(May be adopted in consultation with an Advocate familiar with such matters)

MEMORANDUM OF FAMILY ARRANGEMENTS ENTERED INTO AND EXECUTED BY

MEMBERS OF THE FAMILY OF LATE Mr. xxx,

INDEX

Sr. No.	Date	Document	Annex No.
1.	15-09-2016	Memorandum of Family Arrangements.	
2.	03-08-2016	A Notarized copy of last will and testament of late Mr. xxx	I
3.		Immovable Properties	II
4.		(i) Property Card &Village Map	III
5.		(ii) Tenancy rights –rent receipt	IV
6.		(iii) Tenancy rights –rent receipt	V
7.		(iv) Share certificate–MMM-co-op. society.	VI
8.		Movable Properties	VII
9.	15-09-2016	Affidavit Declaration of DECLARATION OF Mrs. AAA	VIII
10.	15-09-2016	Affidavit Declaration of Shri. BBB, CCC, DDD,EEE,FFF,GGG	IX TO XIV

` 100/-

STAMP PAPER OF RUPEES ONE HUNDRED ONLY
(State of Maharashtra)

(Please Type in double space)

MEMORANDUM OF FAMILY ARRANGEMENTS

This Memorandum of Family Arrangements is made and entered into on this 15th day of September in the year two thousand and sixteen [15-09-2016], at (Place),

Memorandum of Family Arrangement

BETWEEN

1. Mrs. AAA, aged about .... , a Housewife (occupation), residing at (address, city, state, PIN), hereinafter referred to as the Party of the First Part, (which expression shall unless it be repugnant to the context or meaning thereof be deemed to include her heirs, executors and administrators)

AND

2. Mr. BBB, aged about ....., a Merchant (occupation), residing at (address, city, state, PIN), hereinafter referred to as the Party of the Second Part, (which expression shall unless it be repugnant to the context or meaning thereof be deemed to include his heirs, executors and administrators)

AND

3. Mr. CCC, aged about ...., a Government Servant (occupation), residing at (address, city, state, PIN), hereinafter referred to as the Party of the Third Part, (which expression shall unless it be repugnant to the context or meaning thereof be deemed to include his heirs, executors and administrators)

AND

4. Mr. DDD, aged about ...., an Entrepreneur running a Hotel (occupation), residing at (address, city, state, PIN), hereinafter referred to as the Party of the Fourth Part, (which expression shall unless it be repugnant to the context or meaning thereof be deemed to include his heirs, executors and administrators)

AND

5. Mr. EEE, aged about ..., a Merchant (occupation), residing at (address, city, state, PIN), hereinafter referred to as the Party of the Fifth Part, (which expression shall unless it be repugnant to the context or meaning thereof be deemed to include his heirs, executors and administrators)

AND

6. Mrs. FFF, aged about ...., a Housewife (occupation), residing at (address, city, state, PIN), hereinafter referred to as the Party of the Sixth Part, (which expression shall unless it be repugnant to the context or meaning thereof be deemed to include his heirs, executors and administrators)

AND

7. Mrs.GGG, aged about ....., a Private Company service (occupation), residing at (address, city, state, PIN), hereinafter referred to as the Party of the Seventh Part, (which expression shall unless it be repugnant to the context or meaning thereof be deemed to include his heirs, executors and administrators),

AND

Hereinafter Individually & Separately referred to as “a Party” OR “Each Party” OR “A Party of the First Part or the Second Part or, the

Third Part etc. as the case may be" and "Collectively" referred to as "The Parties" or "All the Parties":

WHEREAS

(A) All the Parties herein are brothers and sisters of each other (Except the Party of the First Part, who is their Mother), and

(B) All the Parties are legal heirs to the self-acquired movable & immovable properties of Late SHRI XXX , who expired on 4th July 2016, leaving behind him his Last Will And Testament dated 5th April 2002, and

(C) When the Last will & Testament of Late Mr. XXX, was read out on the 18th July 2016 to All the Parties by Mr. NNN, younger brother of the deceased, it was revealed that there were some deficiencies in so far as the bequeathing of the Estate of the Late Mr. XXX, in as much as the directions as to demise of certain Plots of Land and/ or bequeathing of amounts lying in some Bank Accounts had inadvertently remained to be mentioned in the Last Will & Testament.

A Notarized Copy of the said Last Will And Testament dated 5th April 2002, is annexed hereto as forming integral part of this Memorandum of Family Arrangements, and marked as "Annexure –I", and

(D) In the aforesaid premises, "All the Parties" unanimously decided to modify the distribution of the estate & the properties of Late Mr. AAA, in a fair and more equitable manner taking in to account the expressed intention of the deceased in terms of the said Annexure-I, and need to take a pragmatic view of settling remaining properties not adverted to in the said Annexure-I; and

(E) "All the Parties" hereto had discussed the entire matter at a Meeting held at the residence of Mrs. AAA on 4th September 2016 and had unanimously agreed to division and distribution of the entire properties, both movable and immovable, left behind by the deceased Late Mr. XXX, who expired on 4th July 2016, in a more realistic, equitable and just manner, amicably, amongst themselves so as to avoid any future conflict and disputes or litigation amongst themselves and thereby save hardship and trouble, achieve harmony and maintain good family ties and family reputation, which was cherished by the Late SHRI XXX , and

(F) "All the Parties" hereto have had, pursuant to oral agreement as aforesaid, implemented those decisions within a week (7 days) of the meeting held on 4th September 2016 and more particularly specified in the Annexures II to VII hereto and forming integral part of this Memorandum of Family Arrangements, and

Now, therefore, this memorandum of family arrangements, merely records the said agreed distribution of movable & immovable properties of late Mr. XXX, amongst "all the parties", as agreed upon orally in the meeting held on 4th September 2016, and implemented pursuant thereto, for the purposes of facilitating/ assisting mutation in government or other official records with respect to those properties more specifically described in the Annexures-II to VII hereto, And

NOW, THEREFORE, THIS MEMORANDUM of FAMILY ARRANGEMENTS RECORDS, AS AIDE MEMOIRE, THE SAID ORAL AGREEMENT, WHICH HAS ALREADY BEEN DULY IMPLEMENTED, AS BELOW:

1. It was agreed by and between "All the Parties" hereto that Immovable properties more specifically described in the Annexure-II shall stand in the name of 'each party' as indicated in the Annexure-II forming part of this Agreement, as shown below:

AA. AGRICULTURE LAND:

The entire piece and parcel of Agriculture Land, located in ..... Village, Taluka ...., District ...., ……..State, recorded at no. R. no. ...., block no. .... admeasuring eleven (11) Acres [A certified / notarized True Copy of the Property Card AND a Copy of Village Map showing Survey No. And Area, as Certified by the Talathi / Tahsildar are annexed hereto and collectively marked as "Annexure-III (Colly)].

The Map shows Four (4) segments of total Agriculture Land in different colours indicating equal part, namely:

- That part shown in RED colour is of the Party of the SECOND Part,
- That part shown in Blue colour is of the Party of the THIRD Part,
- That part shown in YELLOW colour is of the Party of the FOURTH Part,
- That part shown in GREEN colour is of the Party of the FIFTH Part,

BB. TENANTED PROPERTIES/OWNERSHIP PROPERTY:

(a) SHOP at No.1, (address) , which was a Rented Property in the name of Late SHRI XXX, [Tenancy Rights as evidenced by Land Lord's Rent Receipt / Confirmatory Letter as per Annexure –IV]

(b) HOUSE PROPERTY –At Block no...., Room no. ..., (address) [Tenancy Rights as evidenced by Land Lord's Rent Receipt / Confirmatory Letter as per Annexure –V]

(c) OWNERSHIP Rights in Plot no. ..., Survey No. ..... (Address)

Area, admeasuring ....Sq. Mtr, Purchased by Late SHRI XXX, in MMM Co-OP. Housing Society LTD. (Proposed), (address), as evidenced by the Share Certificate, a True Copy whereof is annexed hereto and marked as "Annexure-VI.

*** It was agreed by and between "All the Parties" hereto that Tenanted Properties at (a) & (b) above would be that of the Party of the FIFTH Part, And the OWNERSHIP Rights in Plot no. .., would be taken over by the process of bidding and the Party quoting highest bid from among Party of the Second Part, the Third Part, the Fourth Part And the Fifth Part shall have the Share Certificate no. ……..Dated ……..transferred in his name (with the consent of all the Parties hereto) and thereupon that Party should pay one-fourth amount to the other Parties bidding this Property.

2. It was agreed by and between "All the Parties" hereto that the Movable properties more specifically described in the Annexure-VII, shall be taken by Each Party as indicated in the said Annexure-VII, as summarized below:

AA. SHARE CERTIFICATES –VARIOUS COMPANIES:

It was agreed that all the Shares in various Companies Listed in Annexure-VII should be transferred in the name of the Party of the First Part,

BB. CASH AMOUNT:

The Party of the First Part, AAA, shall receive ` 40,000=00 [Rupees Forty Thousand Only] and Parties of the Sixth & Seventh Part, FFF & GGG shall receive each ` 20,000=00 [Rupees Twenty Thousand Only] And that total amount of ` 80,000=00 [Rupees Eighty Thousand Only] shall be contributed in equal share by each party of the Second, Third, Fourth And Fifth Part (BBB, CCC, DDD, EEE) And accordingly, each party has discharged its obligation and the Parties of the First Part, Party of the Sixth & Seventh Part do admit having received such amounts as on the date of signing of these presents.

3. It was agreed by and between " All The Parties" hereto that Each Party hereto shall extend all active and full co-operation to each other Party in giving written consent, statement, jab-jabani (peeye-peyeevee) before any Government or other Public or Private Authority, file Affidavits, wherever necessary, give signatures when required by any Party so as to effectuate smooth transition / transmission / mutation of any or all properties, movable or immovable in the manner already agreed upon and shall ensure every assistance without demur for achieving the said purpose and object.

4. It was also agreed by and between " All The Parties" hereto that Each Party hereto would sign an Affidavit - Declaration indicating clearly that Each Party has already received such Property, movable and / or Immovable, and nothing more or nothing less, than what was earlier Agreed, and thereafter each Party shall keep every other Party indemnified against any claim in respect any other property not belonging to it, and such Declaration shall be binding on any person claiming through or behalf of that Party; and accordingly, Each Party has separately signed such Affidavit –Declaration, which are annexed hereto as Annexure VIII to Annexure XIV.

5. Each Party has had agreed to execute / sign this Memorandum of Family Arrangements with his or her free will, full consent without any pressure or threat and being in sound state of health and mind, clearly understanding that the Family Arrangements as implemented in accordance with oral agreement are fully, truly and completely binding on Each Party and also on any one claiming through him/her; and further that this Memorandum of Family Arrangements shall be deemed to be irrevocable and irreversible and that no Party to this Memorandum shall call in question the correctness, legality or propriety of the Family Arrangements in any manner whatsoever before any Authority or in any Court of law at any time after its execution by All the Parties hereto.

6. The Annexure I to VII are annexed hereto and each annexure has been initialled /signed by Each Party to this Memorandum of Family Arrangements; and Annexure VIII TO XIV are executed by Each Party being Affidavit-declaration and all these Annexure I TO XIV and each one of them forms an integral part of this Memorandum of Family Arrangements executed on the day and the year first herein above written.

7. The Original Copy of this Memorandum of Family Arrangements shall be retained with the Party of the First Part, Mrs. AAA, and a True Copy, duly Notarized, shall be provided to Each Party executing these presents.

8. IN WITNESS WHEREOF Each Party hereto has set and subscribed his/her respective hand the Day and the Year first herein above written:

SIGNED AND DELIVERED by the)

Withinnamed Party of the FIRST PART, AAA
WITNESSES:

In the presence of .....)
In the presence of.....)

SIGNED AND DELIVERED by the)

Withinnamed Party of the SECOND PART, BBB
WITNESSES:

In the presence of .....)
In the presence of .....)

SIGNED AND DELIVERED by the)

Withinnamed Party of the THIRD PART, CCC
WITNESSES:

In the presence of .....)
In the presence of .....)

SIGNED AND DELIVERED by the)

Withinnamed Party of the FOURTH PART, DDD
WITNESSES:

In the presence of .....)
In the presence of .....)

SIGNED AND DELIVERED by the)

Withinnamed Party of the FIFTH PART, EEE
WITNESSES:

In the presence of .....)
In the presence of .....)

SIGNED AND DELIVERED by the)

Withinnamed Party of the SIXTH PART, FFF
WITNESSES:

In the presence of .....)
In the presence of .....)

SIGNED AND DELIVERED by the)

Withinnamed Party of the SEVENTH PART, GGG
WITNESSES:

In the presence of .....)
In the presence of .....)

****

ANNEXURE-I

A Notarized Copy of the Last Will & Testament dated 5th April 2002 of Late SHRI XXX , is annexed hereto as forming integral part of this Agreement of Family Arrangement, and marked as "Annexure –I",

ANNEXURE-II

• OWNERSHIP Rights in Plot no. ..., Survey No. .....(address) Admeasuring ....Sq. Mtr, Purchased by Late SHRI XXX, in MMM Co-OP. Housing Society LTD. (Proposed), (address) , as evidenced by the Share Certificate, a True Copy whereof is annexed hereto and marked as " Annexure-VI.

ANNEXURE-III [COLLY]

[A certified / notarized True Copy of the Property Card AND a Copy of Village Map showing Survey No. And Area, as Certified by the Talathi / Tahsildar are annexed hereto and collectively marked as "ANNEXURE-III (COLLY)].

The Map shows Four (4) segments of total Agriculture Land in different colours indicating equal part, namely:

- That part shown in RED colour is of the Party of the Second Part,
- That part shown in Blue colour is of the Party of the Third Part,
- That part shown in YELLOW colour is of the Party of the Fourth Part,
- That part shown in GREEN colour is of the Party of the Fifth Part,

ANNEXURE-IV

SHOP at No.1, (address), which was a Rented Property in the name of Late XXX, [Tenancy Rights as evidenced by Land Lord's Rent Receipt / Confirmatory Letter as per Annexure –IV]

ANNEXURE-V

House Property – At Block no...., Room no. ..., (address) [Tenancy Rights as evidenced by Land Lord's Rent Receipt / Confirmatory Letter as per Annexure – V]

ANNEXURE-VI

House Property –Plot ..... (Address), admeasuring ..... Sq. Mtr Purchased by Late SHRI XXX, in MMM Co-OP. Housing Society LTD. (Proposed), (Address) Share Certificate no. ....DT. .....OF MMM Co-OP. Housing Society LTD. (Proposed), a True Copy whereof is annexed hereto and marked as "Annexure-VI,

ANNEXURE-VII

MOVABLE PROPERTIES OF LATE SHRI L XXX:

AA. Share Certificates/ Debentures –Various Companies:

Sr. No.	Name of The Company	Share/Debenture/Certificate No.
1.		
2.		

N.B. All the Shares/Debentures in various Companies, Listed above, shall be transferred In the name of the Party of the First Part, AAA,

BB. CASH AMOUNT:

Person Receiving	Amount	Contribution by
AAA ,	`40,000=00 [Rupees Forty Thousand Only]	BBB,CCC,DDD,EEE in equal ratio i.e. ` 10,000=00 by each one
FFF	`20,000=00 [Rupees Twenty Thousand Only]	BBB, CCC, DDD, EEE in equal ratio i.e. ` 5,000=00 by each one
GGG	`20,000=00 [Rupees Twenty Thousand Only]	BBB, CCC, DDD, EEE in equal ratioi.e. ` 5,000=00 by each one

N.B. Each party admits having paid / received the amount as shown in the above table

ANNEXURE-VIII

[ON A Non-Judicial Stamp Paper of ' 100/-[Rupees One Hundred Only]

AFFIDAVIT –DECLARATION OF DISCLAIMER

AFFIDAVIT DECLARATION OF Mrs. AAA, aged about ..., a housewife, residing at (address, City, State, PIN), hereinafter called the Deponent, on solemn affirmation.

I, the above named deponent, do hereby solemnly affirm and state & declare as under:

1. THAT I have signed this Memorandum of Family Arrangements of my own free will and I fully agree and confirm that what is stated therein is true and correct in accordance with the oral decisions taken at the meeting held on 4th September 2016 by all the parties and implemented in conformity therewith.

2. THAT I agree and confirm that I shall not claim anything more than what has been given to me, and/or received or to be received by me in terms of the Agreed family arrangement.

3. THAT I further agree that this agreement of family arrangement is irrevocable, irreversible & binding not only on me but also on any one claiming through me or on my behalf.

4. THAT I agree to render full co-operation, assistance and support and undertake to sign all or any papers, documents, file further affidavits, and remain present for Deposition of any statement before any government or other competent Authority –public or private— for the purposes of mutation of properties in line with this Memorandum of family arrangement.

Place: DEPONENT
Date: 15th September 2016

VERIFICATION

I, the above named deponent, do verify that the contents of this Affidavit Declaration in paragraphs 1 to 4 are true to the best of knowledge and belief and nothing material has been concealed.

VERIFIED At (Place) on this 15th Day of September 2016

Place: DEPONENT
Date: 15th September 2016

BEFORE ME

NOTARY/ SEAL

ANNEXURE-IX to XIV

[ON A Non-Judicial Stamp Paper of ' 100/-[Rupees One Hundred Only]

AFFIDAVIT –DECLARATION OF DISCLAIMER

As per AAA's Affidavit above —

- Similarly worded Affidavits by BBB, CCC, DDD, EEE, FFF, GGG (Six)

GST IMPACT ON HOUSING SOCIETIES

Alias

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जीएसटी आणि गृहनिर्माण संस्था

GST IMPACT ON HOUSING SOCIETIES

(Jemle DeeeCe meJee keÀjÒeCeeueee®ee ienveveceeCe memLeeJej ÒeYeeJe)

By Adv. Dinakar Parashram Bhave
Mobile: 9820529371

One may start with a bit of history relating to Service Tax. Dr. Raja Chelliah Committee on tax reforms recommended the introduction of service tax. Service tax had been first levied on three services [Insurer, Stock-Broker and Telegraph Authority] at a rate of five per cent flat from 1st July 1994 till 13th May 2003, then the rates of tax were stepped up, education cess was added to boost revenue.

2. The revenue from the service tax to the Central Government has shown a steady rise since its inception in 1994. The tax collections have grown substantially since 1994–95 i.e. from Rs. 410 crore to Rs. 132,518 crore in 2012–13. The total number of Taxable services increased from 3 in 1994 to 119 in 2012. In the last fiscal, (2016-2017) the Service Tax revenue was about Rs. 254,000 crore.

3. In the Service Tax regime, prevalent during the period till 30th June 2012, the service tax was levied only on the Specified categories of activities mentioned as "taxable services" in the Finance Act, 1994.

4. Effective 16th June 2005 vide Notification No.15/2005-ST, dated 7th June 2005, a new Category of Taxable Service was introduced vide Section 65(25a) of the Finance Act, 1994:

- **"Club or Association"** means providing services, facilities or advantages, for a subscription or any other amount, to its members, **but does not include**-

  (i) **any body established or constituted by or under any law for the time being in force; or (RWA/Housing Society)**

(ii) any person or body of persons engaged in the activities of trade unions, promotion of agriculture, horticulture or animal husbandry; or

(iii) any person or body of persons engaged in any activity having objectives which are in the nature of public service and are of a charitable, religious or political nature; or

(iv) any person or body of persons associated with press or media;

- Section 65 (105) (zzze) of the Finance Act, 1994, defined **"Taxable Service"** means any service provided or to be provided to its members, by any club or association in relation to provision of services, facilities or advantages for a subscription or any other amount.
- Thus, until 30th June 2012, the Co-operative Housing Societies were outside the Service Tax net.

5. However, from 1st July 2012 the concept of taxation on services was changed from a 'Selected service approach' to a 'Negative List regime'. This changed the taxation system of services from tax on some Selected services to tax being levied on every service other than exempt services mentioned in the Negative list.

6. The Central Government had issued Notification [Notification No. 25/2012-S.T., dated 20-6-2012] effective 1st July 2012 granting Exemption to the Co-operative Housing Societies under certain conditions: Entry 28 reads:

"28. Service by an unincorporated body or a non-profit entity registered under any law for the time being in force, **to its own members by way of reimbursement of charges or share of contribution -**

(a) as a trade union;

(b) for the provision of carrying out any activity which is exempt from the levy of service tax; or

(c) up to an amount of five thousand rupees per month per member for sourcing of goods or services from a third person for the common use of its members in a housing society or a residential complex;

7. There were certain doubts and the Central Board of Excise & Customs, the Apex Administrative body, (CBEC) had clarified the position vide its Circular No. 175/1/2014-S.T., dated 10-1-2014:

Sl. No.	Doubt	Clarification
1.	In a residential complex, monthly contribution collected (i) from members is used by the RWA for the purpose of making payments to the third parties, in respect of commonly used services or goods [Example: for providing security service for the residential complex, maintenance or upkeep of common area and common facilities like lift, water sump, health and fitness centre, swimming pool, payment of electricity Bill for the common area and lift, etc.]. Is service tax leviable? (ii) If the contribution of a member/s of a RWA exceeds five thousand rupees per month, how should the service tax liability be calculated?	Exemption at Sl. No. 28(c) in notification No. 25/2012-S.T. is provided specifically with reference to service provided by an unincorporated body or a non-profit entity registered under any law for the time being in force such as RWAs, to its own members. However, a monetary ceiling has been prescribed for this exemption, calculated in the form of five thousand rupees per month per member contribution to the RWA, for sourcing of goods or services from third person for the common use of its members. If per month per member contribution of any or some members of a RWA **exceeds five thousand rupees, the entire contribution of such members** whose per month contribution exceeds five thousand rupees **would be ineligible for the exemption under the said notification.** Service tax would then be leviable on the aggregate amount of monthly contribution of such members.
2.	(i) Is threshold exemption under notification No. 33/2012-S.T. available to RWA? (ii) Does 'aggregate value' for the purpose of threshold exemption, include the value of exempt service?	Threshold exemption available under notification No. 33/2012-S.T. is applicable to a RWA, subject to conditions prescribed in the notification. Under this notification, taxable services of aggregate value not exceeding ten lakh rupees in any financial year is exempted from service tax. **As per the definition of 'aggregate value' provided in Explanation B of the notification, aggregate value does not include the value of services which are exempt from service tax.**

Sl. No.	Doubt	Clarification
3.	If a RWA provides certain services such as payment of electricity or water bill issued by third person, **in the name of its members**, acting as a 'pure agent' of its members, is exclusion from value of taxable service available for the purposes of exemptions provided in Notification 33/2012-S.T. or 25/2012-S.T.?	In Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006, it is provided that expenditure or costs incurred by a service provider as a pure agent of the recipient of service shall be excluded from the value of taxable service, subject to the conditions specified in the Rule. For illustration, where the payment for an electricity bill raised by an electricity transmission or distribution utility in the name of the owner of an apartment in respect of electricity consumed thereon, is collected and paid by the RWA to the utility, without charging any commission or a consideration by any other name, the RWA is acting as a pure agent and hence exclusion from the value of taxable service would be available. **However, in the case of electricity bills issued in the name of RWA, in respect of electricity consumed for common use of lifts, motor pumps for water supply, lights in common area, etc., Since there is no agent involved in these transactions, the exclusion from the value of taxable service would not be available.**
4.	Is CENVAT credit available to RWA for payment of service tax?	RWA may avail cenvat credit and use the same for payment of service tax, in accordance with the Cenvat Credit Rules.

Clarification by the Central Government

8. The aforesaid clarification given in January 2014 by the Central Government in the context of the Negative List regime of taxation of services, effective 1st July 2012, has been the basis of levy of Goods & Services Tax under the new GST regime effective 1st July 2017.

- It would be relevant to understand the role played by Resident Welfare Association or the Co-operative Housing Society as service providers to its Members or Shareholders, respectively, and the legal structure & status of these service providers under the law.

Resident Welfare Associations – [RWA]

9. In Delhi and several other cities in India, one will see that residential colonies are having a Resident Welfare Association for each colony and each block. For example, if one is staying at G-Block SAKET, it will be having an independent G-Block Resident Welfare Association (RWA). Resident Welfare Associations (RWAs) are typically registered under the Societies Registration Act, 1860; they are governed by constitutional documents such as a Memorandum of Association, which contains their objectives and functions. Being voluntary associations, made by residents, they don't have any statutory powers and have powers restricted to the contribution of sums for maintenance, and are answerable for accounting thereof.

- Some activities & functions are:

  (a) To take up the matter with the competent authorities for the common interest of the residents for providing or improving common facilities in the area like – park, drainage, roads, streetlights, scavenging, water and electricity supplies, banking, post office, bus services facilities, community hall, milk booth, health center, rationing shop, mini-super bazaar, shopping facilities etc.

  (b) To arrange and organize social and cultural functions from time to time.

  (c) To approach the concerned authorities for redressal of grievances of the members of the society.

  (d) To share information about the Government Rules, policies, notifications amongst the members of the association.

Comparison: RWAs and Co-operative Housing Societies

10. In contrast to the powers of co-operative housing societies, the powers of Resident Welfare Associations are very limited. There are no statutory powers as they are voluntary organizations created to manage residents' interest. Co-operative housing societies have various powers such as:

(a) The power to give permission or refuse for transfer of a flat by a member.

(b) The power to expel a member.

Co-operative Housing Societies

11. While the formation of the Co-Operative Societies, their registration procedures; Rules and bye-laws may differ from one State to another, the broad principles will be more or less similar in nature. Generally, a typical Housing Society will be a non-profit entity, but the activities may involve generation of some income which is shared by all on mutuality principle.

Co-operative Societies Act: Maharashtra State

12. Section 2 (16) of the Maharashtra Co-operative Societies(MCS) Act, 1960 defines: "Housing Society" means a society, the object of which is to provide its members with open plots for housing, dwelling or flats; or if open plots, the dwelling houses or flats are already acquired, to provide its members common amenities and services."

- Rule 10 of the MCS Rules, 1961 classifies the housing societies into THREE categories:

  (i) Tenant Ownership Housing Societies:

  (a) These are housing societies where land is held either on leasehold or freehold basis by societies and houses are owned or are to be owned by members.

  (b) In such societies, the societies are the owners or lessees of land, plots are carved out and given on a long term lease to construct their dwelling houses thereon as per the terms of the lease deed.

  (ii) Tenant Co-Partnership Housing Societies:

  (a) These are societies which hold land on ownership or on lease and construct flats thereon **which are allotted to members** who occupy them.

  (b) The societies, thus, hold both the land and buildings and its members are allottees therein having the right of occupancy which right is heritable, transferable by transfer of shares to other persons in accordance with the provisions of the Act.

  (iii) OTHER HOUSING SOCIETIES:

  (a) These are house mortgage societies and house construction societies.

  (b) House mortgage has the object of advancing loans to the members and to the societies on the security of land and houses.

(c) House construction deals in purchase and sale of constructed houses or dwellings to members or other societies.

JUDICAIL REVIEW

13. In Mulshanker Kunverji Gor and Ors. vs. Juvansinhji Shivubha Jadeja decided on 18 September, 1979, The Honourable Gujarat High Court has critically analyzed the provisions of the Gujarat Co-operative Societies Act, 1961 (same as MCS Act, 1960, as adapted on formation of the Gujarat State on 1st May 1960) and succinctly stated the law in these words:

"5. We have no doubt in our minds that Section 42 of the Gujarat Co-operative Societies Act, 1961, inter alia, exempts from compulsory registration instruments relating to shares in a society notwithstanding that the assets of such society consist wholly or in part of immovable property. .... It is necessary, therefore, to find out what an instrument of transfer relating to "shares in a society" conveys to the transferee. It has been argued that there are two types of co-operative housing societies. **One type is called 'tenant co-partnership society", another is called "tenant ownership society"**

- A **"tenant co-partnership society**" is a society where the land is owned by the society and upon which houses are constructed by the society for the benefit of its members. It is the co-operative venture of all the members of a co-operative housing society which brings into being the houses which the members in their turn may occupy. They are constructed out of its own assets and out of the moneys borrowed by it. The debt is discharged by the society by collecting periodical contributions from them in specified amounts. In such a society, it is the society in which the land and the buildings in the eye of law vest.
- It has been argued that in "**tenant ownership society**", the land belongs to the society and the superstructure thereupon is constructed, not by the society out of its funds but, by the member out of his personal funds.
- In such a case, when by an instrument a member transfers his "shares in the society" to another person, he not only transfers his shares but also his right to occupy and enjoy the land belonging to the society and the super-structure which he has constructed out of his personal funds and which belongs to him personally.
- The transfer of such a superstructure cannot be effected **except under a registered conveyance because clause (a) of Section 42 does not exempt from compulsory registration the transfer of a member's personal immovable property - not belonging to the society - to another……"**
- This distinction is vital when considering concept of "pure agent" **theory under the CGST Rules, 2017.**

NEW TAX REGIME

GOOD AND SERVICES TAX (GST):

14. With a great fanfare the Central Government announced at the Parliament Hall in New Delhi on the mid-night of 30th June 2017 / 1st July 2017 that the dream project of having "One nation, One Tax", i.e. Goods and Services Tax has actually dawned. The Honourable Prime Minister described it as "Good" and "Simple" Tax. At the first blush it does not look to be that simple, but time alone will judge the impact of it on the Trade & Industry, the people & the Nation's Economy.

15. Broadly, the Central Goods and Services Tax Act, 2017 (CGST Act) defines **various concepts** & terminologies (Definition section has 121 sub-sections): a few of them are new, but many others are borrowed from the erstwhile Taxation Laws like Excise Act, Central Sales Tax Act, Finance Act (for levying Service Tax) and other laws like Entry Tax, prevailing as on 30th June 2017. The composite structure of GST laws includes allied laws like State/Integrated/Union Territory GST Acts; and many Forms & Rules of procedure are in place for implementing the new Indirect Taxation System, which is in tune with the Theory of Value Added Taxation, evolved in 1950s & now adopted by about 160 out of nearly 193 Countries World –over.

16. Now, one can turn to the statutory provisions in the context of its impact on the Resident Welfare Associations (RWA) and the Housing Co-operative Societies functioning under the State Acts.

- Important definitions from the CGST ACT,2017 are reproduced below:

  Definitions. 2. — In this Act, unless the context otherwise requires,—

  (5) **"agent"** means a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another;

  (6) **"aggregate turnover"** means the aggregate value of all taxable supplies (excluding the value of inward supplies on which tax is payable by a person on reverse charge basis), exempt supplies, exports of goods or services or both and inter-State supplies of persons having the same Permanent Account Number, to be computed on all India basis but excludes central tax, State tax, Union territory tax, integrated tax and cess;

  (17) "**business**" includes —

  (a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;

(e) **provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members**;

(31) **"consideration**" in relation to the supply of goods or services or both includes —

(a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;

(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply **unless the supplier applies such deposit as consideration for the said supply;**

(52) "**goods**" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply;

(84) "**person**" includes —

(a) an individual;

(i) **a co-operative society** registered under any law relating to co-operative societies;

(l) society as defined under the Societies Registration Act, 1860 (21 of 1860);

(93) "recipient" of supply of goods or services or both, means —

(a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;

(b) xxxxx ; and

(c) where no consideration is payable for the supply of a service, the person **to whom the service is rendered,**

and any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall in-

clude an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied;

(102) **"services" means anything other than goods**, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

(108) **"taxable supply"** means a supply of goods or services or both which is leviable to tax under this Act; (Section 9 (1) of the Act: Levy & collection)

17. It would be manifestly clear from the above definitions in the Central Goods & Services Tax Act, 2017 that a Co-operative Housing Society is 'a person' carrying on 'business' of making provision for a subscription or any other consideration of the facilities or benefits to its members; and consequently comes under the GST –net.

- However, under section 22(1) of CGST Act 2017, the supplier of services is not liable get registered or pay tax until he crosses the threshold limit of ' 20 lakhs:
- Section 22 (1) reads:

22. Persons liable for registration. — (1) Every supplier shall be liable to be registered under this Act in the State or Union territory, other than special category States, from where he makes **a taxable supply of goods or services or both**, **if his aggregate turnover in a financial year exceeds twenty lakh rupees :**

Provided that where such person makes taxable supplies of goods or services or both **from any of the special category States**, he shall be liable to be registered if his aggregate turnover in a financial year exceeds ten lakh rupees.

18. Therefore, once the "aggregate turnover", which includes value of taxable supplies, exempt supplies etc. then the person must get registered & pay taxes on all "taxable supplies". Under the section, if the aggregate turnover is below `20 Lakhs, then the person is outside the Tax-net, even if the aggregate value contains some "taxable supplies". So, even if "per member per month amount exceeds `5000", but if the aggregate turnover is below `20 lakhs; then no GST is payable. Likewise, if the aggregate turnover is above `20 lakhs, but there is no "taxable supply", that is, all members pay less than `5000 per month, there is no tax liability.

19. A Housing Society is also entitled to take the benefit of Exemption notification [Notification No. 12/2017-Central Tax (Rate), dated 28-6-2017]; Entry 77 therein reads:

TABLE

Sl. No.	Chapter, Section, Heading, Group or Service Code (Tariff)	Description of Services	Rate (per cent.)	Condition
77	Heading 9995	Service by an unincorporated body or a non-profit entity registered under any law for the time being in force, to its own members by way of reimbursement of charges or share of contribution - (a) as a trade union; (b) for the provision of carrying out any activity which is exempt from the levy of Goods and Service Tax; or (c) **up to an amount of five thousand rupees per month per member** for sourcing of goods or services from a third person for the common use of its members in a housing society or a residential complex.	Nil	Nil

20. A plain reading of this Exemption entry 77, will show that the ceiling limit is per member per month is ' 5000, and if the amount exceeds even by say '100, then the entire amount of '5100 becomes liable to be taxed @ 18%, rate of tax currently fixed.

- The Clarification as to what is to be included in this ceiling limit and what is to be excluded as given in January 2014 (supra) holds good under the GST Regime. This is evident from the recent Press Note dated 12 July 2017, reproduced below:

Press Information Bureau-

Government of India-Ministry of Finance

13-July-2017 15:48 IST

Services provided by the Housing Society, Resident Welfare Association (RWA) not to become expensive under GST;

(i) There are some press reports that services provided by a Housing Society [Resident Welfare Association (RWA)] will become expensive under GST. These are completely unsubstantiated.

(ii) It may be mentioned that supply of service by RWA (unincorporated body or a registered non- profit entity) to its own members by way of reimburse-

ment of charges or share of contribution up to an amount of five thousand rupees per month per member for providing services and goods for the common use of its members in a housing society or a residential complex are exempt from GST.

(iii) Further, if the aggregate turnover of such RWA is up to Rs.20 Lakhs in a financial year, then such supplies would be exempted from GST even if charges per member are more than Rs. five thousand.

(iv) RWA shall be required to pay GST on monthly subscription/contribution charged from its members if such subscription is more than Rs. 5000 per member **and** the annual turnover of RWA by way of supplying of services and goods is also Rs. 20 lakhs or more.

(v) Under GST, the tax burden on RWAs will be lower for the reason that they would now be entitled to ITC in respect of taxes paid by them on capital goods (generators, water pumps, lawn furniture etc.), goods (taps, pipes, other sanitary/hardware fillings etc.) and input services such as repair and maintenance services.

(vi) ITC of Central Excise and VAT paid on goods and capital goods was not available in the pre-GST period and these were a cost to the RWA.

(vii) Thus, there is no change made to services provided by the Housing Society (RWA) to its members in the GST era.

AMBIT & SCOPE OF EXEMPTION:

21. From the above clarification it is clear that even if the monthly charges per member per month cross the limit of ‘5000, the RWA / Housing Society is not liable to pay GST unless the “aggregate turnover” as computed in terms of section 2(6) of the CGST exceeds ‘20,00,000 in a fiscal. Now, computation of the threshold is comparatively easy, the computation of “per member per month limit” is the real poser.

22. Tax Experts, that is, tax professionals (Chartered Accountants or Advocates or other Practitioners) are not on the same page. Some argue that the Society makes payment of Property Taxes or Water Charges or Electricity Bills “on behalf of the members” and as such “acting as their Agent” or “pure agent”; and hence these amounts must be “excluded from the Monthly maintenance Bill” in the context of “exemption limit of `5000” under the Notification dated 28-06-2017. The other school of thought is that the concept of “pure agent” has limited application.

23. It is respectfully submitted that apart from the clarification of the Board (CBEC), on the basic principle of agency or pure agent theory embodied in Rule 33 of the Central Goods & Services Tax Rules, 2017, unless there is a legal liability on an individual Member to pay the Charges levied by a Municipal Body, or other Authority the question of RWA / CHS or someone “paying it to the Third Party on behalf of a Member” does not arise.

{CBEC Circular dated 10th January 2014, sr. no. 3,

"However, in the case of electricity bills issued in the name of RWA, in respect of electricity consumed for common use of lifts, motor pumps for water supply, lights in common area, etc., Since there is no agent involved in these transactions, the exclusion from the value of taxable service would not be available." }

For application of "agency theory" one must determine on whom the legal liability to pay the charge or amount rests.

In many Housing Societies, the Land & Building are both "owned" by the Society and therefore, the Property Card Register in Municipal Records will show the name of the Society as "owners". Consequently, the **primary legal liability to pay Property Tax / House Tax or water charges is on the owner**; even though some Municipalities hold "the occupier" also liable to pay such amounts. In these cases, certainly, the Agency theory fails.

24. Now, the "pure agent" concept embodied in Rule 33 of the Central Goods & Services Tax Rules, 2017, (or erstwhile Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006, prevailing prior to 30th June 2017) is entirely in the different context.

- A useful reference may be made to the **Guidance Note:**

  Exemption for Service Tax if Society is working as Pure Agent

- The CBEC's Education guide in para 7.11.8 clarifies that if resident welfare association or any society is working as pure agent i.e. service is provided on actual reimbursement basis or without any mark-up for procuring any goods or services from a third person, then the amount collected by the association / society from its members may be excluded from the value of taxable service, in terms of Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006. For instance, payment of electricity / water bill pertaining to individual member, **municipal taxes paid by society on behalf of its members, etc**. Charges collected by society towards common expenses such as electricity for common area, water bill for garden / swimming pool, club house, transfer fees etc. cannot be excluded from the value of taxable services, since in this cases, society is not acting as an agent but incurring these expenses for the members of the society.

25. Now, one may examine the ambit & scope of Rule 33:

CENTRAL GOODS & SERVICES TAX RULES, 2017

[Notification No. 3/2017-Central Tax, dated 19-6-2017 as amended]

RULE 33. Value of supply of services in case of pure agent. — Notwithstanding anything contained in the provisions of this Chapter, the expenditure or costs incurred by a supplier as a pure agent of the recipient of supply shall be ex-

cluded from the value of supply, **if all the following conditions are satisfied**, namely:-

(i) the supplier acts as a pure agent of the recipient of the supply, when he makes the payment to the third party on authorisation by such recipient;

(ii) the payment made by the pure agent on behalf of the recipient of supply has been separately indicated in the invoice issued by the pure agent to the recipient of service; and

(iii) the supplies procured by the pure agent from the third party as a pure agent of the recipient of supply are in addition to the services he supplies on his own account.

Explanation:- For the purposes of this rule, the expression "pure agent" ***means a person who -***

(a) enters into a contractual agreement with the recipient of supply to act as his pure agent to incur expenditure or costs in the course of supply of goods or services or both;

(b) neither intends to hold nor holds any title to the goods or services or both so procured or supplied as pure agent of the recipient of supply;

(c) does not use for his own interest such goods or services so procured; and

(d) **receives only the actual amount** incurred to procure such goods or services **in addition to the amount received for supply he provides on his own account.**

Illustration. — Corporate services firm A is engaged to handle the legal work pertaining to the incorporation of Company B. Other than its service fees, A also recovers from B, registration fee and approval fee for the name of the company paid to the Registrar of Companies. The fees charged by the Registrar of Companies for the registration and approval of the name are compulsorily levied on B. A is merely acting as a pure agent in the payment of those fees. Therefore, A's recovery of such expenses is a disbursement and not part of the value of supply made by A to B.

26. If one has to apply this concept of pure agent, the first thing missing in the case of Housing Societies is that there is no contract of service between the Society & the Member for rendering any service **"in the course of which" the Society incurs "cost & expenditure", and then as per Explanation, clause (d) >>>**(d) **receives only the actual amount** incurred to procure such goods or services "**in addition to the amount received for supply "he provides on his own account".**

With due respect, the "Pure Agency" concept does not hold good in the case of Monthly maintenance Bills rendered by the Society by way of "reimbursement of charges" or "share of contribution".

In the context of the concept of Pure Agent, the Board (CBEC) has clarified the matter and it would be binding on the Department.

QUOTE:

Pure Agent Concept in GST (Excerpts)

Directorate General of Taxpayer Services

CENTRAL BOARD OF EXCISE & CUSTOMS

www.cbec.gov.in

INTRODUCTION

The GST Act defines an "Agent" as a person including a factor, broker, commission agent, ..., who carries on the business of supply or receipt of goods or services or both on behalf of another.

Who is a pure agent and why is a pure agent relevant under GST?

Broadly speaking, a pure agent is one who while making a supply to the recipient, also receives and incurs expenditure on some other supply on behalf of the recipient and claims reimbursement (as actual, without adding it to the value of his own supply) for such supplies from the recipient of the main supply.

• While the relationship between them (provider of service and recipient of service) in respect of **the main service** is **on a principal to principal basis**, the relationship between them in respect of other ancillary services is that of a pure agent.

Let's understand the concept by taking an example:

A is an importer and B is a Custom Broker.

• "A" approaches "B" for customs clearance work in respect of an import consignment.

• The clearance of import consignment and delivery of the consignment to A would also require taking service of a transporter.

• So A, also authorizes B, to incur expenditure on his behalf for procuring the services of a transporter and agrees to reimburse B for the transportation cost at actuals.

• In the given illustration, B is providing Customs Brokers service to A, which would be on a principal to principal basis.

• The **ancillary service of transportation** is procured by B on behalf of A as a pure agent and expenses incurred by B on transportation should not form part of value of Customs Broker service provided by B to A.

• **This, in sum and substance is the relevance of the pure agent concept in GST.**

illustration:

Suppose a Customs Broker issues an invoice for **reimbursement of a few expenses** and for consideration towards agency service rendered to an importer.

The amounts charged by the Customs Broker are as below:

Sr. No.	Component charged in invoice	Amount
1.	Agency Income	Rs. 10000/-
2	Traveling expenses; Hotel expenses	Rs. 15,000/-
3.	Customs Duty	Rs. 5,000/-
4.	Docks Dues	Rs. 5000/-

• In the above situation, agency income and travelling/ hotel expenses shall be added for determining the value of supply by the Customs Broker whereas Docks dues and the Customs Duty shall not be added to the value, provided the conditions of pure agent are satisfied.

Prepared by: National Academy of Customs, Indirect Taxes & Narcotics

UNQUOTE:

The aforesaid clarification, states that if a Service Provider "during the course of his rendering service" to the recipient (on principal to principal basis), also receives and incurs expenditure on some other ancillary supply on behalf of the recipient and claims reimbursement (as actual, without adding it to the value of his own supply) for such supplies from the recipient of the main supply, he is said to be acting as pure agent. The concept of pure agent theory has no application in the case of CHS as the Society is not, strictly speaking, in the business of providing services, though the service it provides is "treated" as falling under the definition of term "business".

What is the Scope of Exemption under Entry 77?

27. The Entry, on analysis, reads:

(A) Service by a non-profit entity registered under any law for the time being in force,

(B) to its own members

(i) by way of reimbursement of charges or

(ii) share of contribution –

(a) up to an amount of five thousand rupees per month per member

(b) for sourcing of goods or services

(c) from a third person

(d) for the common use of its members

(e) in a housing society or a residential complex.

28. It is a settled principle of law that the eligibility criteria laid down in an "exemption" provision in a statute or a rule or a notification has to be construed strictly, and when there is a doubt, construe it in favour of the State and not the tax-payer; but once it is found that the applicant is covered by the same, the exemption notification should be construed liberally. Secondly, the words and expressions defined in the Act have to be assigned the same meaning in the entire enactment unless the context requires otherwise. Similarly, the rules of English language/grammar have to be followed and the meaning ascribed in "common parlance understanding" of those who deal with the subject is to be adopted.

29. The terms of Exemption entry **when re-phrased would read**:

- **Service provided by Housing Society to its members for procuring from third party goods/services for the common use of members by way of reimbursement of charges or share of contribution up to Rs. 5000 per month per member**

Now, the expression, services to Members by way of "reimbursement of charges" or "share of contribution", has to be interpreted:

- Both are un-identical expressions.
- The term "charge" in legal connotation means: To impose a tax, duty.
- In the context, it would mean the tax or levy by Government or Local /Municipal or other Body.
- It follows that all levies on the Society, (be it Property Tax, Water tax or Non-Agricultural Assessment) which are "paid" by the Society, are being "reimbursed by Members", through Monthly Maintenance Bills.
- **Second expression**, "share of contribution", which would refer to the "expenditure" incurred by the Society for providing common benefits, facilities. e. g. sweeper, lift, water pump, common area lights, and other expenses made in terms of the Bye-laws.
- "Share of contribution" is also mentioned in the Bye-laws, e.g. Bye-law 69 (a) reads:

  69. (a) **The Committee shall apportion the Share of each member towards the charges of the Society on the following basis:**

  (i) Property taxes: As fixed by the Local Authority.

  (ii) Water Charges: On the basis of total number and size of inlets provided in each flat.

(iii) Expenses on repairs and maintenance of the building/ buildings of the Society: At the rate fixed at the General body from time to time, subject to the minimum of 0.75 per cent per annum of the construction cost of each flat for meeting expenses of normal recurring repairs.

(iv) Expenses on repairs and maintenance of the lift, including charges for running the lift: **Equally by all the members** of the building in which lift is provided, irrespective of the fact whether they use the lift or not.

30. Now, the term: "up to" an amount of `5000. The expression "up to" is used to say that something is less than or equal to but not more than a stated value, number, or level: Therefore, if the Bill crosses the mark, the entire exemptions is lost.

31. Coming to **different types of Funds** envisaged by the Act, Rules and the Bye-laws, it is seen that the Society includes in its "monthly maintenance Bill", stated amount towards the named Fund. This amount cannot be called "share of contribution", because the amount is not "appropriated" against any specified expenditure incurred for sourcing goods or services, but is a provision for future. Let us take illustration:

e.g. SINKING FUND

Sinking fund, noun: **sinking fund**; plural noun: **sinking funds**

1. a fund formed by **periodically setting aside money** for the gradual repayment of a debt or replacement of a wasting asset.

- So although one may "contribute" or "share" as "a member", the "amount", specified in the Bill, the Society which received it, has not earmarked it for a "particular supply of goods or services". >>>**it will be retained as "deposit" for future "expenditure"** for procuring supply from the third parties. Therefore, it is not a "consideration", for any service provided by the Society. In the definition of the term consideration in section 2(31) , a Proviso is there:

  Provided that "**a deposit" given** in respect of the supply of goods or services or both *shall* not be *considered* as payment made for such supply **unless the supplier applies such deposit as consideration for the said supply**;

- So, in presenti, the amount Billed /paid towards 'sinking fund' cannot be treated "as contribution" for sourcing supply of goods or services for the benefit of members. However, when the fund is utilized, yes, taxability may arise >>>subject to threshold etc.

When the Amount Paid By the Member (a) Exceeds Exemption or (b) Retained by the Society

32. It has been clarified by the Board, that if the amount collected from each Member per month exceeds the threshold of ‘5000 even by say ‘100, then the Value of taxable supply is NOT just ‘100, but the entire amount of ‘5100.

- The next question is how one must treat the amounts Billed or included in the Monthly Maintenance Charges, which are not collected by the Society for defraying it to the Third Parties for the sourcing of goods & services for the common use by the Members. In other words, the amounts collected are retained as such by the Society itself for eventually sharing it on mutuality principle.

  For example: Parking Charges are a sort of rent for user of the open common area and that amount is collected from those who keep their four-wheelers, with the permission of the Society, in the open area in the Society compound, and such amount is not paid over to anyone, but is retained with the Society itself.

- What are the other services for which society collects amounts from members, who are the beneficiaries, and retains such amounts as its own:

  1. Late payment fees
  2. Parking charges
  3. Rebates received from outsider for specific class conducted in society
  4. Non occupancy fees
  5. Guest room booking
  6. Club house booking
  7. Any other receipts
  8. Transfer Fee
  9. Admission Fee
  10. NOC Charges

33. In the light of the above discussion, a ready to use Table is prepared indicating which items are to be included **in the ceiling limit of rupees five thousand:**

Monthly Co-op. Housing Society Bill:

Maintenance charges & other components of Bill

Sr. No.	By way of "reimbursement of charges" or "share of contribution"	Applicability	Whether includable in Rs. 5000: Y or N
1.	Service charges (housekeeping, security, electricity for common areas, equipment, sweeper)	Equally divided among the flats	Y
2.	Expenses on repair and maintenance of elevators	Equally divided among the flats	Y
3.	Non-occupancy charges	For flats which are rented, calculated at 10% of service charges	N
4.	Use of Open space, Terrace, community Hall	As decided by the General Body	N
5.	Entrance Fee, Share Transfer Fee and Premium	As per Bye-law: '100, ' 25000 & as decided by the General Body (but within limits as Govt. Resolution) , respectively	N
6.	water charges	Actual consumption of each flat, or number of water inlets	Y
7.	Property tax: Co-Partner	Actual as determined by BMC	Y
8.	Ownership Society	Bill on Member, Society may act as an agent	N
9.	Insurance Premium	As per General Body	Y
10.	Non-Agri. Assessment	At the rate fixed under MLRC,1966	Y
11.	**Creation of the Repairs and Maintenance Fund**	0.75% per annum of the construction cost of each flat	N
12.	Sinking fund	Minimum of 0.25% per annum of the construction cost of each flat	N
13.	Major repairs fund	As decided by the General Body	N

34. In conclusion, it can be said that for the Services rendered by the Society the amounts paid by the Members by way of reimbursement of charges/share of contribution, fall under three categories:

(a) Amounts includible in the ceiling limit of ‘ 5000, and as such exempt,

(b) Amounts excludible from the ceiling limit of ‘ 5000 as being in the nature of “Deposits”, like contribution towards Funds, and liable to be taxed, when “appropriated” against any supply of goods/ services, subject to exemption/s,

(c) Amounts ineligible for Exemption, as being retained by the Society, and hence liable to taxation under GST Law.

35. Once the Housing Society crosses the Exemption limit and the aggregate value exceeds the threshold of ‘ 20 Lakhs, the Society is obliged to obtain Registration, pay GST, file periodical Returns and comply with all the procedures and formalities under the law, by taking requisite assistance from the Tax experts, if need be.

36. As would be evident from the analysis of the legal provisions of the GST law, clarifications of the Board (CBEC) that there are many arguable issues, and the last word can be said by the Board (CBEC) or the Courts of law. Till then keep your fingers crossed.

• Until that time, the views expressed in this analytical note may serve as a useful guide to arrange the affairs of the Housing Society so as be within the framework of new dispensation under the good & simple Tax regime, called GST Regime.

Bandra,

21st August 2017

TAXABILITY UNDER THE GST LAWS: ON "COMMISSION" RECEIVED IN CONVERTIBLE FOREIGN EXCHANGE

TAXABILITY UNDER THE GST LAWS: ON "COMMISSION" RECEIVED IN CONVERTIBLE FOREIGN EXCHANGE

By Adv. Dinakar Parashram Bhave
Mobile: 9820529371

A Sole Proprietary Concern, say M/s. Midas Instruments, Mumbai, (for brevity: "Midas") is dealing in Laboratory Instruments, its spare parts, Laboratory Equipment, and other related activities such as servicing, repairs and maintenance of Laboratory Equipment/Instrument.

2. One of its activities relates to providing services to its Principals, M/S Fisher & CO., France, by way of procuring Purchase Orders (P. O.) from the parties desirous of purchasing advanced type of Laboratory Equipment, by negotiating the terms of supply including fixation of price above the floor price, fixed by the Principals. If Midas can negotiate better price than the floor price, the difference between the floor price and actual price is given to Midas by way of "Commission" in "convertible foreign exchange".

3. The modus operandi of the negotiated transactions can be briefly summarized as under:

(a) The prospective customer in India places the P.O. directly on the Principals , M/S Fisher & CO., France, and arranges for Letter of Credit for remittance of price in foreign currency,

(b) The principals directly supply the Laboratory Equipment to the party in India, say M/S Panama Laboratory, Mumbai which pays price and gets the delivery from the Customs on payment of custom duty and IGST as applicable.

(c) In the majority of cases, barring one or two exceptions, the P. O. states the name of Midas, and also mentions that the Indian Purchaser will be entitled to have some "discount in kind", like getting some items Free of cost such as a TV set, a Computer or a Camera etc.; which is to be provided by Midas as a necessary charge on the "commission", it receives in convertible Foreign Exchange.

(d) Accordingly, Midas arranges, at its own cost such articles to be given free, in the nature of "discount in kind", and hands over to the same to the Purchasing Party in India in fulfillment of the accepted terms of sale / purchase Agreement between the Principals at France and the Indian Purchasing Party.

(e) The P.O. also states that during the Guarantee period, say, one year the seller/supplier at France will give "free service", if required (but that would not include any replacement of parts etc.). Midas, however, has no contractual obligation to give such "free Service".

(f) Once the P.O. is completed, the Principals M/S Fisher & CO., France, issues a "Credit Note", for the "Commission", which is remitted in freely convertible Foreign Exchange, normally in Euro Currency: (sign: €; code: **EUR**) the official currency of the European Union).

(g) Midas was not issuing any Debit Note or Invoices or any other document, but Accounting was done on the basis of the Credit Note/s. In the erstwhile Service Tax regime (prior to July 2017, before the GST Laws) the service tax was paid on the commission amounts and the Rupee equivalent was offered for Income Tax as per the law.

(h) Midas may, now, have to issue Debit Note or Tax Invoice as required by or under the applicable GST Laws.

4. Now, the following questions arise for consideration:

(i) Whether the "Commission" received by Midas in convertible Foreign Exchange as an "Intermediary" for acting as a Broker or facilitator, in procuring from an Indian Customer/s purchase order/s (P.O.) for Laboratory Equipment, is liable to GST either under CGST/SGST Acts or the IGST Act? And

(ii) If liable, whether the entire amount of "Commission" as converted in rupees, will be the "taxable Value" for tax quantification or whether the following deductions can be claimed:

(a) Deducting "expenditure" on free supplies, which is a "charge on the commission amount" under the Contractual Terms as per P.O.

(b) Deduction of tax element treating amount of "net Commission" (as per (a) above) as inclusive of CGST/SGST Act or IGST Act as the case may be.

(iii) Whether Debit Note can be issued to M/S Fisher & CO., France, showing the value break-up as per (ii) above?

5. For the purposes of examining the issues involved one needs to go through the labyrinth of new GST Laws.

6. The conspectus of various provisions gives the following picture:

(i) Services provided by the Commission Agent (located in the Taxable Territory) to the Principal-Seller (located in Non-Taxable Territory/ Abroad) in respect of procurement of order/s from the Customers located in the Taxable Territory on behalf of the foreign supplier of goods, would be termed as "taxable services" under the GST Regime, because the intermediary (Midas) does some activity for which monetary consideration, that is, "Commission" amount is received in freely convertible currency. These activities would fall in the widely worded definition of "Service", in section 2 (102), which reads:

"services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination **for which a separate consideration is charged**;

(ii) Section 13 of the IGST Act, 2017 is made applicable to determine the 'place of service', where location of supplier or location of recipient of service (either) **is outside India.**

(iii) In the present case, Midas being the supplier of service (located in India in Taxable Territory) and customer i.e. recipient of Service (i.e. supplier of goods is located outside India, France, in Non-Taxable Territory), Section 13 of the above IGST At gets attracted.

(iv) Section 13 of IGST Act, has in all 13 sub-sections applicable to different situations /circumstances.

- Sub-section (2) of Section 13 is the general section which provides that the 'place of supply of service' is the location of recipient of service, **except the services specified in sub-sections (3) to (13).**
- It means the general principle in sub-section (2) is displaced i.e. not applicable to sub-section (3) to (13), which needs to be examined individually & separately.
- **Sub-section (8) covers the case on hand; and the same is reproduced here below**–

  "(8) The **place of supply of the following services** shall be the location of the supplier of services, namely:–

  (a) **Services** supplied by a banking company, or a financial institution, or a non-banking financial company, to account holders;

  (b) Intermediary services;

(c) **Services** consisting of hiring of means of transport, including yachts but excluding aircrafts and vessels, up to a period of one month."

(v) The term "Intermediary" is defined in Section 2(13) of the IGST Act, which says:

"(13) 'intermediary' means a broker, an agent or any other person, by whatever name called, **who arranges or facilitates the supply of goods or services or both, or securities, between two or more persons**, but does not include a person who supplies such goods or services or both or securities on his own account".

(vi) Consequently, Midas being an Agent or Broker (or Commission Agent) and facilitator between the France -seller of the goods and the Indian-buyer of the goods, it shall be covered under the definition of 'Intermediary" under Section 2 (13) of the IGST Act; but **may not be regarded as providing "Intermediary Services", which expression is a coined phase, by the Draftsman, and not defined in any GST Law, i.e. CGST/SGST Act or IGST Act.** Apparently, "Intermediary" is an "adjective' and qualifies "services". {Adjective: 4.being between; intermediate. 5. Acting between persons, parties, etc.; serving as an intermediate agent or agency: e.g. an intermediary power.}

(vi) It may be argued that the "Intermediary" providing such Agency or Broker's services may fall in the expression of "Intermediary services" appearing in clause (b) of sub-section (8) of Section 13 of the IGST Act. If it were to be true interpretation**,** the registered place of the Supplier (Midas) being in India /in Taxable Territory, the place of supply becomes 'India /Taxable Territory' and hence CGST + SGST may get attracted.

7. Though Midas is providing the service to the foreign supplier of goods and also receiving 'valuable consideration' in freely convertible foreign exchange, but still it is not considered as 'Export of service' for the reason given in the definition of 'Export of Service', quoted below, read with section 13(8) (b) of the IGST Act as **all the conditions of "export of service" are not met in the case on hand:–**

- Conditions precedent for treating the service as 'export of service' [as per Section 2(6) of the IGST Act] – All conditions have to be met.

"(6) **"export of services" means** the supply of any service when,–

(i) the supplier of service is located in India;

(ii) the recipient of service is located outside India;

(iii) the place of supply of service is outside India;

(iv) the payment for such service has been received by the supplier of service in convertible foreign exchange; and

(v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8".

- A plain reading of the definition of "export of services" shows that the word "means" is used while defining. Where 'means' is employed in the definition clause it shows that the definition enacted is a hard and fast one and that no other meaning can be assigned to the word "defined" than the one that is put down in the definition.
- Secondly, the definition starts by saying "**when**" and followed by each clause ending with a semi-colon showing close connection with each other and the last but one clause uses "and", to make it clear that all the clauses must be fulfilled concurrently and coextensively & then alone it will qualify as an "export of services".
- On the superficial or flash reading, it may appear that in the present case, **the condition No. (iii) in section 2(6) is not getting fulfilled** because of the **terminology used** in section 13(8) (b) of the IGST Act, ("intermediary services") read with section 2(13) defining "intermediary" to include broker or agent **who arranges or facilitates the supply of goods or services**, and consequently the "place of supply" gets coincided with "the place of supplier", both in the taxable territory, India, and rendering the transaction taxable under the CGST/SGST Act, by denying the benefit of "export of services" or IGST Act legitimately due by virtue of the "recipient of Services" being in non-taxable territory, abroad.
- In the light of the above discussion, one may consider that the supply of services by Midas would fall in the tax-net, fastening tax burden of 18% (9% CGST + 9% SGCT) under Services Tariff Heading no.9997 (residuary entry).

8. Now, therefore, the CGST/SGST will be payable in the Taxable Territory on account of the 'place of supply', being the place where the Supplier, i.e. Midas, is registered, that is in the State of Maharashtra.

9. In the context of the case on hand, the aforesaid interpretative process makes taxable "intermediary services" rendered by Midas to the recipient abroad in non-taxable territory, liable tax in Maharashtra State, which is the place where the Supplier (Midas) is Registered and happens to the place of supply; and fortunately further also the "destination state " or "consumption State"; because the Laboratory Equipment imported by M/S Panama Laboratory, Mumbai, would

be used by the Purchasing Customer, who is also residing in the State of Maharashtra.

10. Before looking at another example, a few words on new taxation Policy. Effective July 1, 2017 there has been a paradigm shift in taxation Policy, now, adopting the destination based tax. The basic difference between the ***Destination*** based tax **and** *origin based* tax lies in the fact that origin based taxation seeks to levy and collect tax on the basis of location of production and destination based taxation seeks to levy and collect tax on the basis of location of consumption. Further, a fundamental proposition under the new GST regime is that the concept of "place of consumption" also called and known as the "Place of supply", merely determines that **the tax would accrue to the Sate of consumption.**

11. Now, look at another case, in which Midas procures the P.O. from the Customer at Vadodara (formerly known as Baroda), in the State of Gujarat, for purchase of Laboratory Equipment from the same M/S Fisher & CO., France. By virtue of section 13 (8) (b) read with 2(13) of IGST Act, the "place of supply" remains the same i.e. "the place of Supplier", State of Maharashtra. But the destination based or consumption based taxation Policy would get a jolt; because the actual use of the goods imported would be in the State of Gujarat, whereas the tax will accrue to the state of Maharashtra, where the place of supplier and the place of supply synchronize.

12. The matter needs to be examined further.

13. Actually, the "nature of supply" is determined under Section 7 and 8 of the IGST Act, which reads:

CHAPTER IV

DETERMINATION OF NATURE OF SUPPLY

7. Inter-State supply.- (1) Subject to the provisions of section 10, supply of goods, where the location of the supplier and the place of supply are in -

(a) two different States;

(b) two different Union territories; or

(c) a State and a Union territory,

shall be treated as a supply of goods in the course of inter-State trade or commerce.

(2) Supply of goods imported into the territory of India, till they cross the customs frontiers of India, shall be treated to be a supply of goods in the course of inter-State trade or commerce.

(3) Subject to the provisions of section 12, supply of services, where the location of the supplier and the place of supply are in -

(a) two different States;

(b) two different Union territories; or

(c) a State and a Union territory,

shall be treated as a supply of services in the course of inter-State trade or commerce.

(4) Supply of services imported into the territory of India shall be treated to be a supply of services in the course of inter-State trade or commerce.

(5) Supply of goods or services or both, -

(a) when the supplier is located in India and the place of supply is outside India;

(b) to or by a Special Economic Zone developer or a Special Economic Zone unit; or

(c) in the taxable territory, not being an intra-State supply and not covered elsewhere in this section,

shall be treated to be a supply of goods or services or both in the course of inter-State trade or commerce.

14. It is manifestly clear from the conjoint reading of section 7 (5) of the IGST Act read with Section 13 (8) (b) that the nature of transaction on hand is taken out of the IGST Act and by virtue of the Supplier's Location and the Place of Supply make the transaction fall into the trap of the "intra-state" service and hence would attract 9% CGST+ 9% SGST, in the aggregate 18%, the services being Classifiable under the Residuary Tariff Classification, namely, 9997.

15. With the result that the benefit of "Zero rated tax" defined under Section 16 of the IGST Act is unavailable, simply because the role played by the Midas is treated as **"Intermediary Services"** under section 13 (8) (b) of the IGST Act.

16. As a direct consequence of this situation, although all other transactions of export of goods or service or both get the advantage of zero tax burden, the case on hand gets discriminatory dispensation by saddling it with unintended cost burden of 18%, (with another Income Tax burden @ 30%); and to add salt to the injury, Refund of such CGST/SGCT is unavailable, being "forward charge".

17. However, **there is another way to look at the transaction**.

18. Now, for this new approach two definitions are important:

- **Section 2(13) of the IGST Act**

(13) **"intermediary**" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates the supply of goods or services or both, or securities, between two or more

persons, but does not include a person who supplies such goods or services or both or securities on his own account;

- **Section 2(5) of the CGST Act**

(5) **"agent"** means a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, **who carries on the business of supply or receipt of goods or services or both on behalf of another;**

15. Since Midas does not supply or receive goods /services on behalf of anyone, Midas carries on business of its own, it is certainly not an **"Agent"** as defined in section 2 (5) of the CGST Act. But surely, the activities of Midas are in the nature of **"intermediary"** as defined in section 2 (13) of the IGST Act, for bringing together the Principals abroad (M/S Fisher & CO., France,) and the Indian Customer (M/S Panama Laboratory) , who wants to buy a high-end product. What is received by Midas may be called "brokerage" for the sale of goods. Even if it is called "commission" it is specifically understood as being in respect of and in relation to the transaction of sale of goods directly made by the France –seller and the Indian buyer, and which at the hands of the Indian-buyer, M/S Panama Laboratory, is an Import in every sense of the term. In other words, the nature of supply is intended and actually a cross-border transaction, export/ import of goods simpliciter, which under the GST regime is "an inter-state supply, covered by the IGST Act.

16. All the analysis & discussion above**,** finally boils down to and depends on the true meaning and purport of the expression: **"intermediary services" in section 13 (8) (b) of the IGST Act.** If it is not the same thing as **"Intermediary"**, the provisions of section 13 (8) (b) will not apply; and consequently, provisions of section 7 (5) (a) of the IGST Act will get attracted, as can be seen from the quoted provision:

(5) Supply of goods or services or both, -

(a) when the supplier is located in India and the place of supply is outside India;

In that case, Section 16 of IGST Act will apply and there would be two options available: (i) export the services under bond/LOU without payment of IGST Act and claim refund of un-utilized input tax credit; OR (ii) Sully export services on payment of IGST and then claim refund of such tax under section 54 of the CGST Act/Rules,2017. Section 16 of the IGST Act, reads:

CHAPTER VII

ZERO RATED SUPPLY

16. Zero rated supply.- "Zero rated supply" means — (1) any of the following supplies of goods or services or both, namely:-

(a) export of goods or services or both; or

(b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.

(2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply.

(3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely:-

(a) **he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of un-utilised input tax credit; or**

(b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied, in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder.

17. Now, the crucial question is: what is the true meaning & purport of the expression "intermediary services" appearing in section 13 (8) (b) of the IGST Act. **It may be added that the term "intermediary" has been defined in section 2(13) of the IGST Act, but the expression "intermediary services" appearing in section 13 (8) (b) has not been defined.**

18. What is the significance of use of the two terms/expressions, apparently looking similar, by the Legislature in the GST statute. One thing is clear that they are not synonymous terms or expressions, having the same meaning as another word or phrase in the same language.

19. One has to construe the true meaning of the undefined expression, namely, ""intermediary services", which is not simply a coined expression, but seems to have acquired a well set connotation. This expression is not used for the first time by the Legislature.

20. It may be added that this precise expression: 'Intermediary service" was adopted by the Delegated Legislation while framing the Place of Provision of Service Rules, 2012 (POPS Rules, 2012). In those Rules, Rule 2 (f) had defined "intermediary" as below:

(f) "intermediary" means a broker, an agent or any other person, by whatever name called, **who arranges or facilitates a provision of a service (**hereinafter called the "main" service**) between two or more persons**, but does not include a person who provides the main service on his account.;

· The POPS Rules, 2012 came into force effective 01-07-2012 and Rule

9 of the said Rules, 2012 is exactly the same as now bodily lifted and placed in its new GST 'avatar' as section 13 (8) (b) of the IGST Act.

- The said Rule 9 of the POPS Rules, 2012 and the clarification issued by the Board (C.B.E.C.) on the concept of "Intermediary Services" appearing Rule 9 (C) is reproduced below:

9. Place of provision of specified services.-

The **place of provision of following services** shall be the location of the service provider:-

(a) Services provided by a banking company, or a financial institution, or a non-banking financial company, to account holders;

(b) Online information and database access or retrieval services;

(c) Intermediary services;

(d) Service consisting of hiring of means of transport, up to a period of one month.

21. Clarification and Legal nemesis:

An Education Guide ('Guidance Note') on June 20, 2012 issued by the Central Board of Excise and Customs clarifying the meaning of intermediary states:

QUOTE:

5.9.6 What are "Intermediary Services"?

Generally, an "intermediary" is a person who arranges or facilitates a supply of goods, or a provision of service, or both, between two persons, without material alteration or further processing. Thus, an intermediary is involved with two supplies at any one time:

i) the supply between the principal and the third party; and

ii) the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.

- For the purpose of this rule, '**an intermediary' in respect of goods (**such as a commission agent i.e. a buying or selling agent, or a stockbroker**) is excluded by definition.** VIDE Rule 2 (f) of the POPS Rules, 2012 (supra).

- Also excluded from this sub-rule is a person who arranges or facilitates a provision of a service (referred to in the rules as "the main service"), but provides the main service on his own account.

UNQUOTE:

—-Rule 2(f) defines 'intermediary' to mean a broker, any agent or any other person, by whatever name called, who arranges or facilitates a provision of a service(hereinafter called the **'main service'**) between two or more persons(it doesn't include a person who provides service on his own account).

– Thus an **intermediary service** is involved with two supplies at one time. In other words, the expression "intermediary" connotes distinctness/detachment from the "main" service. The expression "intermediary service" is nomen juris and its use is having a specific legal concept.

22. In this connection one must take a note of the Amendment to the definition of "intermediary" in Rule 2 (f) of the POPS Rules, 2012.

23. By Notification No. 14/2014 – Service Tax , dated the 11th July, 2014, The Place of Provision of Services (Amendment) Rules, 2014, were brought into force on the **1st day of October, 2014**:

(1) In the Place of Provision of Services Rules, 2012,–

(a) in rule 2 for clause (f), the following clause shall be substituted, namely:-

'(f) "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (**hereinafter called the 'main' service**) or a supply of goods, between two or more persons, but does not include a person who provides the main service or supplies the goods on his account

· Therefore, the definition of "intermediary" was then amended to include the intermediary of goods in its scope.

· Accordingly, with effect from 1.10.2014, an intermediary of goods, such as a commission agent **or consignment agent** shall be covered under rule 9(c) of the Place of Supply of Services Rules.

24. When this modified version of "intermediary" as of 01-10-2014, was re-bottled in the GST law, two changes happened:

(i) the original and basic distinction as to the "main" service and "intermediary" in the context of two co-existing services did not figure in the new definition in 2(13) IGST Act;

(ii) And the definition of Consignment Agent was shifted to Section 2(5) of the CGST Act.

25. Further, as stated earlier, there is one term: "intermediary", which is defined (section 2(13) IGST Act), and entirely different expression : "intermediary services" is used in section 13 (8) (b) of the IGST Act, which is handpicked from

the Legislative phraseology adopted in Rule 9 (c) of the POPS Ruls,2012 as it existed pre-Amendment of 2014, effective 01-10-2014 of section 2 (f) of the POPS Rules, 2012. **The pivotal issue in the case on hand turns on the interpretation of the expression: "intermediary services" in Section 13 (8) (b) of the IGST Act.**

26. At this stage, it is necessary to refer to some well known Rules of Interpretation of statues before embarking on the interpretative process:

(i) Legislative enactment is an edict. One has to read what is expressly stated in the enactment.

(ii) It is not necessary to survey innumerable Apex Court decisions on the Statutory Rules of Interpretation. Suffice it to quote one:

- Raghunath Rai Bareja And Another vs Punjab National Bank And Others (CASE NO. :Appeal (civil) 5634 of 2006 Decided on 6 December, 2006

  (a) It may be mentioned in this connection that the first and foremost principle of interpretation of a statute in every system of interpretation is the literal rule of interpretation.

  (b) The other rules of interpretation e.g. the mischief rule, purposive interpretation etc. can only be resorted to when the plain words of a statute are ambiguous or lead to no intelligible results or if read literally would nullify the very object of the statute.

  (c) Where the words of a statute are absolutely clear and unambiguous, recourse cannot be had to the principles of interpretation other than the literal rule, vide Swedish Match AB vs. Securities and Exchange Board, India, AIR 2004 SC 4219.

  (d) As held in Prakash Nath Khanna vs. C.I.T. 2004 (9) SCC 686, **the language employed in a statute is the determinative factor of the legislative intent.** \

  (e) The legislature is presumed to have made no mistake.

  (f) The presumption is that it intended to say what it has said.

  (g) Assuming there is a defect or an omission in the words used by the legislature, the Court cannot correct or make up the deficiency, especially when a literal reading thereof produces an intelligible result, vide Delhi Financial Corporation vs. Rajiv Anand 2004 (11) SCC 625.

  (h) Where the legislative intent is clear from the language, the Court should give effect to it, vide Government of Andhra

Pradesh vs. Road Rollers Owners Welfare Association 2004(6) SCC 210, **and the Court should not seek to amend the law in the grab of interpretation.**

27. In the light of the aforesaid rules of interpretation, it can be said that when the Legislature has used two un-identical and non-synonymous terms/ expression, it has to be inferred that it did not want to convey the same meaning. It may also be noted that the Legislature does not use any surplusage or superficial words or phrases.

If the provisions of section 13 (8) (b) of the IGST Act, were to cover and encompass both the types of Brokers, Agents in relation to goods and services, nothing was simpler than to re-draft section 13 (8) (b) as below and say:

- Section 13(8) (b) **"services of intermediary"**, and
- Then the word "intermediary" being defined, it would have covered the services of the Broker /Agent in relation to either the "goods" or "services" or even both.

(i) Instead, section 13(8)(b) has adopted the expression: "**intermediary services**" which expression was prevalent prior to 2014-Amendment of POPS Rules, 2012, which distinguishes it from the **"main service"**,

(ii) Another reason is that that the term; **Agent**, appearing in the definition of "intermediary" has to be understood as excluding "consignment agent", which stands defined in section 2(5) of the CGST Act.

(iii) As laid down by the Apex Court (Delhi Transport Corporation vs. D.T.C. Mazdoor Congress on 4 September, 1990), the doctrine of reading down is applied where the provisions of the statute are vague and ambiguous and it is possible to gather the intention of the legislature from the object of the statute, the context in which the provision occurs and the purpose for which it is made.

(iv) In the case on hand, the section 13(8) of the IGST Act is intended to apply to specified "services", and clauses (a) and (c) relate to "pure services". Clause (b) cannot take in its fold "services in relation to goods"; because the entire GST Law maintains dichotomy between the "goods" and "services".

(v) Further, it is well settled that every word or phrase in a clause takes colour from the other related clauses in the same section, namely, sub-section (8), section 13 of IGST Act.

(vi) As stated earlier, if the Legislature wanted to have wider meaning of "services", it would have used the phraseology **"services of intermediary" rather than "Intermediary services".**

(vii) It is not open to inject definition of "intermediary" as Amended in 2014, by interpretative process when the context of Rule 13 (8) is specifically restricted & made applicable to specified/selected services.

(viii) When reading **"intermediary" as an adjective**, one has to give due meaning to it and read that expression to convey those "services" which are contradistinguished from the "main" services.

(ix) In other words, the clause must be held as applicable if the intermediary is acting as broker /agent in the main transaction of supply of services between the service provider and the service recipient; and not where the seller is supplying "goods" to the buyer or recipient of supply /goods.

(x) Any other interpretation would be against the Legislative mandate expressed from the phraseology used to pin-point its intention. Moreover, it is settled law that by an interpretative process the legislative edict cannot be altered or re-written to bring out presumed intention.

28. In conclusion:

(a) The defined term or phrase must receive the same meaning throughout the statute.

(b) When the Legislature uses a particular phraseology, full meaning must be given by following the rules of English grammar. In that sense, the word: "intermediary" being an adjective of services, in section 13(8) (b), the defined word: "intermediary" cannot be brought-in to inject the concept of services relating to goods.

(c) The expression, "intermediary services" had acquired definite connotation when the POPS Rules, 2012 were brought in to play, namely, the service s differentiated from the "main services". Since the term "intermediary services" is nomen juris, the GST Law when it uses it, then it must be understood in that sense only.

It therefore, follows that the section 13(8) (b) cannot be held as taking away the benefit of export service to Midas as the supplier of service is in the Taxable Territory and the recipient is in the non-taxable territory . Therefore section 7 (5) (a) of the IGST Act:

(5) Supply of goods or services or both, -

(a) when the supplier is located in India and the place of supply is outside India;

Will apply, and consequently "zero-rated tax" benefit under section 16 would be available.

29. Therefore, there will be no CGST/SGST applicable on the services provided by the Intermediary (Midas) acting as a Broker to facilitate Imports of goods by the Indian Customer from the Seller-supplier (M/S Fisher & CO., France) under the cross-border transaction.

As the answer to the first question is in the negative, there is no need to examine further related questions. So, far as the procedural requirements like issuance of tax invoice/Debit Note is concerned, these issues can be sorted out under the existing guidelines of the CBEC/Department.

30. If the view taken in the preceding paragraphs is not the true legal position, then CGST + SGST aggregating to 18% will apply making a mockery of "zero-rated Export of goods/Services" concept enshrined in Section 16 of the IGST Act (supra).

Further, a representation may have to be made to the Central Government/ CBEC/GST Council requesting that either amendment in law be carried out, or give relief to eliminate 18% tax incidence, and to avoid the violation of Article 14 of the Constitution of India, or the discriminatory treatment to intermediary facilitating Export/Import of goods and bringing in valuable Foreign Exchange. If the situation remains ambiguous or unclear, the possibility of litigation cannot be rules out.

As the Central Government has the responsibility to ensure seamless implementation of the new GST Regime, it is felt that the Government must iron out creases as soon as possible and relieve the avoidable burden on the overloaded judiciary.

NOMINEE,
A STOP-GAP
MEMBER IN
HOUSING SOCIETY

Alias

तथा

नामनिर्देशित व्यक्ती—

औट घटकेचा सभासद

NOMINEE,ASTOP-GAP MEMBER IN HOUSING SOCIETY

By Adv. Dinakar Parashram Bhave
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1. INTRODUCTION: All classes of Co-operative Societies including the Housing Co-operative Societies in the State of Maharashtra were governed by an umbrella law, called the Maharashtra Co-operative Societies Act, 1960.

2. Even though the affairs of the co-operative housing societies are distinct and peculiar; till October 30, 2018**,** they were regulated in the same manner as per the general provisions of the said Act, 1960 as applicable for all classes of co-operative societies, such as Co-operative Sugar Factories, District Central Co-operative Banks, Co-operative Spinning Mills, etc. The uniform application of the provisions of the said Act, 1960 despite the peculiarities of the co-operative housing societies, created problems leading to a large number of disputes and litigations, which were further fuelled by clumsy bye-laws and non-clarification from time to time by the Co-operative Department.

3. Federations of Housing Societies in the State and many Activists had persistently represented to the State Government for decades to de-link the Co-operative Housing Society rules and frame a separate enactment governing exclusively Co-operative Housing Societies, so as to avoid confusion and reduce litigation by giving timely clarifications on matters of dispute or potential disputes.

Finally, the Maharashtra State has promulgated an Ordinance no. XXV amending the Maharashtra Co-operative Societies Act, 1960 which has come into force on 30th October 2018, whereby a new Chapter XIII-B has been inserted in the said Act.1960 dealing exclusively with the Co-operative Housing Societies.

4. New Definition of a "Member": The purpose of this article is not to deal with all the new provisions introduced by the Ordinance no. xxv dated 30-10-2018, but mainly to deal with the provisions relating to admission of persons as

Members, and the Definition of "Member" in terms of newly inserted Section 154B-1, sub-section (18) thereof, which reads:

(18) **"Member"** means a person joining in an application for the registration of a housing society which is subsequently registered, or a person duly admitted to Membership of a society after its registration and includes associate or joint or provisional Member;

(a) **"Associate Member"** means a person duly admitted to Membership of a housing society on written recommendation of a Member to exercise his rights and duties with his written prior consent and whose name does not stand in the share certificate;

(b) **"Joint Member"** means a person joining in an application for the registration of a housing society jointly, which is subsequently registered or a person who is duly admitted to Membership after its registration and who holds share, right, title and interest in the flat jointly but whose name does not stand first in the share certificate ;

(c) **"provisional Member"** means a person who is duly admitted as a Member of a society temporarily after death of a Member on the basis of nomination till the admission of legal heir or heirs as the Member of the society in place of deceased Member

5. The Amended law is a welcome step as it ushers in clarity and for the first time, defines and distinguishes the concept of a "Joint Member" and an "Associate member", with reference to the share in the ownership of property of the Society. There was a good deal of confusion and misunderstanding as some societies were treating these terms as interchangeable. In legal sense, a Joint owner is a person who has made some contribution in the Purchase of a Flat in a building owned by the Society, which is in occupation of the Member; whereas an Associate Member, in pith and substance, was a category of Member injected to carry out certain functions on behalf of a member like representing the Member & Voting at the meeting; as the co-operative law did not recognize "proxy system" widely prevalent in the joint stock companies for decades.

6. In the context of the definition of a "Provisional Member", and the onerous responsibility saddled on him under the amended Maharashtra Co-operative Societies Act, 1960 effective 30th October 2018, one must look at the law prevalent on that date and the controversy on the pivotal issue: "whether the Nominee, appointed under the procedure established by law, be it a Banking Law or Post Office Rules or the Companies Act, 2013 or any other law for the time being prescribing the procedure of nomination, who is entitled to receive the bank deposits, or small savings deposits or the Company shares in the event of the death of the person, is to be regarded as "the Nominee-collector" or "the Nominee-beneficiary"?

7. The controversy surrounding the Nominee was the subject matter of judicial scrutiny in a number of cases before the Hon'ble Apex Court.

8. In my booklet titled: "Joint property" or "property held in joint names", published in April 2016, I have had examined in depth the concept whether the "nomination procedure" is a third stream of transmission of property on the death of a person (the other two being: (i) Testamentary succession and (ii) intestate succession, that is where the person dies without making a Will & Last Testament). I had concluded that it all depends on the law governing the Nomination rules and procedure.

9. The Honourable Supreme Court had discussed this matter at length in the case Indrani Wahi vs. Registrar of Coop. Societies & Ors, (Division Bench Judgment dated 10th March 2016) wherein it had been held that once there is a valid nomination with the society, the society is bound to transfer the share or interest of the deceased member in a cooperative society, **to such nominee alone.**

10. A few observations, findings and conclusions from Indrani Wahi case were referred to in my Booklet:

Quote:

"There were two vital issues involved:

(a) The objection of the brother of Indrani was that on marriage she did not remain a member of "the family" & so the Nomination was invalid,

(b) The Division Bench of the Kolkata High Court had on Appeal preferred by her mother and brother, held that shares and interest can only be transferred by expressing consent of all the heirs. The Honourable High Court had, inter alia, held:

"We do not propose to hold that the writ petitioner, in whose favour nomination has been made, shall not be made a member of the said society and having regard to the legislature intent contained in sub-section (4) of Section 69 it may not be possible for us to direct the appellants to be joint members along with the writ petitioner, but to protect the interest of the appellants in the flat which they have inherited, it is necessary for the said Society to record their interest expressly in the share Certificate as well as in its records pertaining to members and, in particular in the register of members so that one of the joint owners merely because of the nomination in her favour cannot transfer either the share, in which she has a part interest, or the allotment, where also she has a part interest, for the same is expressly declared to be transferable and, accordingly, can only be transferred by expressing consent of all the heirs. With the above we dispose of the appeal without, however, any order as to costs."

(Underlining supplied)

- The aforesaid conclusion & direction to the Society, to add in the share certificate expressly the interest of the mother/brother (without adding their names as "joint members"), was to ensure that the nominee, one of the joint owners, cannot transfer either the share in which she has part interest or the allotment, without the "consent of all heirs".

UQUOTE:

- The Honourable Supreme Court, on appeal, vacated that direction and asked the Society to transfer the share / interest in the name of the nominee **and de-linked the succession, inheritance issue to be agitated separately.**

11. In this context, reference is made to the last paragraph in my Booklet, which reads: Quote:

"36. In Conclusion:

(i) Looking to the true legal meaning & purport of the "Joint Ownership" of the estate, movable or immovable, one thing appears clear that the person must bear in mind the consequences that flow from the concept of "joint tenants" and "tenants-in-common". In the case of "joint tenants" the property automatically goes to the other owner/s if one dies; whereas in the case of "tenants-in-common" it is not automatic.

(ii) The rule of English law is to presume that a transfer to a plurality of persons creates a "joint tenancy" unless there are words of severance. The law in India is different. It has always been held in this country that where there is a transfer to two or more persons, they must be presumed to take as "tenants-in-common" unless there are clear words conveying a contrary intention.

(iii) The discussion hereinabove would make it abundantly clear that it is important to file "nomination" forms, in all cases, to protect the interest in the property even when the Deposit or other Accounts are in "joint names", and even with "E or S" mandate; and make a Will based on such nomination and declare unequivocally in the Will that the person in whose favour a Nomination has been filed would be the exclusive owner of that particular property, with all rights to hold, enjoy or dispose of the property at the sole discretion of such person; and no one else shall have any right, title or interest therein whatsoever.

(iv) A nomination in respect of each property coupled with the relative will in favour of the nominee would avoid complications and may perhaps render the property litigation–free; whether the Kokate case is endorsed or overruled by a superior Court in the years ahead."

- In fact, the Division Bench of the Bombay High Court has, in Shakti Yezdani And Anr vs. Jayanand Jayant Salgonkar decided on 1st December, 2016, held:

> **"**35. Considering the consistent view taken by the Apex Court while interpreting the provisions relating to nominations under various Statutes (including the view in the recent decision in the case of Indrani Wahi), there is no reason to make a departure from the consistent view. The provisions of the Companies Act including Sections 109A and 109B, in the light of the object of the said Enactment, do not warrant any such departure. The so called vesting under Section 109A does not create a third mode of succession. It is not intended to create a third mode of succession. The Companies Act has nothing to do with the law of succession. We have gone through every decision and material relied upon by the Appellants to which we have not made a specific reference in this Judgment. We hold that there was no reason to take a view which is contrary to the view taken in the long line of the decisions of the Apex Court on interpretation of provisions regarding nominations. Hence, the view taken in Kokate's case is not correct. We answer the first question in the negative and the third question in the affirmative. The second question is answered accordingly".

12. With due respect, the decision of the Honourable Bombay High Court needs re-consideration in the light of the provisions of section 72 of the Companies Act, 2013, which is the law made by the Parliament, which, in unequivocal terms says that the valid nomination would override testamentary or any other disposition.

Companies Act, 2013

72. Power to nominate.

1. Every holder of securities of a company may, at any time, nominate, in the prescribed manner, any person to whom his securities shall vest in the event of his death.

2. Where the securities of a company are held by more than one person jointly, the joint holders may together nominate, in the prescribed manner, any person to whom all the rights in the securities shall vest in the event of death of all the joint holders.

3. Notwithstanding anything contained in any other law for the time being in force or in any disposition, whether testamentary or otherwise, in respect of the securities of a company, where a nomination made in the prescribed manner purports to confer on any person the right to vest the securities of the company, the nominee shall, on the death of the holder of securities or, as the case may be, on the death of the joint holders, become entitled to all the rights in the securities,

of the holder or, as the case may be, of all the joint holders, in relation to such securities, to the exclusion of all other persons, unless the nomination is varied or cancelled in the prescribed manner.

4. Where the nominee is a minor, it shall be lawful for the holder of the securities, making the nomination to appoint, in the prescribed manner, any person to become entitled to the securities of the company, in the event of the death of the nominee during his minority.

Unquote:

13. PRE-AMENDMENT CO-OPERTIVE LAW: The Maharashtra Co-operative Societies Act, 1960 as amended by Maharashtra (Amendment) Act, 2013 effective 14th February 2013 clearly provided for the transfer of share or interest of the deceased Member to the person nominated as per the rules. Section 30 of the said Act, 1960 reads:

30. Transfer of interest on death of member. - (1) On the death of a member of a society, the society shall transfer the share or interest of the deceased member to a person or persons nominated in accordance with the rules, or, if no person has been so nominated to such person as may appear to the committee to be the heir or legal representative of the deceased member:

Provided that, such nominee, heir or legal representative, as the case may be, is duly admitted as a member of the society:

Provided further that, nothing in this sub-section or in section 22 shall prevent a minor or a person of unsound mind from acquiring by inheritance or otherwise, any share or interest of a deceased member in a society.

(2) Notwithstanding anything contained in sub-section (1), any such nominee, heir or legal representative, as the case may be, may require the society to pay to him the value of the share or interest of the deceased member, ascertained in accordance with the rules.

(3) A society may pay all other moneys due to the deceased member from the society to such nominee, heir or legal representative, as the case may be.

(4) All transfers and payments duly made by a society in accordance with the provisions of this section shall be valid and effectual against any demand made upon the society by any other person.

- Sub-section (4) of section 30 gave enough protection to the Housing Society against any demand or claim, by any other person, that is, any person other than the Nominee. Therefore, whether the Nominee was merely a hand to “collect” or “beneficiary” of the share or interest was a matter to be sorted out by the legal heirs or any other claimants. Moreover, the Housing Society was taking an Indemnity

Bond on a Stamp Paper of Rs. 500/- which was a complete protection to the Society.

14. Further, around the same time in 2013, the Parliament had passed the Companies Act, 2013, that also provided for **"Power to Nominate"** and the Nominee of shares and securities was placed on a higher pedestal, as is evident from section 72(3) of the Companies Act,2013 , which , inter alia, uses unequivocal and categorical expressions, reproduced below, suggesting that "vesting" of shares in the Nominee was not mere "possessory right" but unquestionably "ownership rights" to the exclusion of all other persons.

Analysis sub-section (3) f Section 72 demonstrates:

- Notwithstanding anything contained in any other law for the time being in force or
- in any disposition, whether testamentary or otherwise,
- in respect of the securities of a company,
- where a nomination ...purports to confer on any **person the right to vest the securities of the company,**
- **the nominee shall, on the death of the holder of securities or,** as the case may be, on the death of the joint holders**, become entitled to all the rights** in the securities,
- **to the exclusion of all other persons**, unless the nomination is varied or cancelled in the prescribed manner.

The phraseology used is both affirmative and negative and it emphatically says "**the nominee shall be entitled to "all rights**". On the face of this law, it is rather difficult to appreciate the theory of Nominee being merely "a collecting-hand".

Therefore, notwithstanding the opinion expressed by the Division Bench of the Honourable High Court, in Shakti Yezdani's case, the Companies Act, 2013, section 72 therein, shall stand unaffected and would prove that the Nominee is not always a mere custodian, and can be the owner as well; and even if it is assumed that he is merely a "collecting –hand" in terms of the Honourable Bombay High Court decision, the Will of the deceased person could clothe the Nominee with all the rights of ownership to the exclusion of any person including any legal heir or anyone having beneficial interest in the property.

15. BURDEN ON THE NOMINEE TO PROVE OWNERSHIP RIGHTS: At this stage it is necessary to see the new provisions of the Maharashtra Ordinance no. xxv of 2018, effective 30th October 2018, where-under the following two new Sections are inserted in the Maharashtra Co-operative Societies Act, 1960:

Quote:

"**154B-12.** A Member may transfer his share, right, title and interest of his property in the society by way of registered document by following the due procedure as provided in the rules or bye-laws.

154B-13. On the death of a Member of a society, the society shall transfer share, right, title and interest in the property of the deceased Member in the society to a person or persons on the basis of testamentary documents or succession certificate or legal heir-ship certificate or document of family arrangement executed by the persons, who are entitled to inherit the property of the deceased Member or **to a person duly nominated in accordance with the rules:**

Provided that, **society shall admit nominee as a provisional Member** after the death of a Member till legal heir or heirs or a person who is entitled to the flat and shares in accordance with succession Act or under will or testamentary document are admitted as Member in place of such deceased Member:

Provided further that, if no person has been so nominated, society shall admit such person as provisional Member as may appear to the Committee to be the heir or legal representative of the deceased Member in the manner as may be prescribed".

UNQUOTE

16. NOMINEE TO PROVE RIGHTS TO INHEIRT PROPERTY: On a true and proper interpretation of the aforesaid two sections, it appears that the entire thrust of the scheme unveiled reveals that the Society has a statutory obligation to admit as Members only those persons, who are able to prove their legal rights to hold the property, through the title deeds, when the property is purchased by the original member, and subsequently, when the share or interest in the capital of the society is transferred to the nominee, who proves that he is the legal heir under any of the following title/ownership documents:

(i) On the basis of testamentary documents, or

(ii) Succession certificate, or

(iii) Legal heir-ship certificate, or

(iv) Document of family arrangement executed by the persons, who are entitled to inherit the property of the deceased Member

17. UNWARRANTED SADDLING OF COSTS: If a Nominee has to produce any of the listed documents at (i) to (iv) above, it would amount to saddling the Nominee with huge burden of expenditure, apart from going from pillar to post and wasting time & energy.

• **First,** one fails to understand, why the Society is given the Licence for peeping into the "private life" of a deceased Member by asking the Nominee to file "Testamentary documents" like Will of the deceased-Member, which has all the financial details of the property-holdings and inter-personal equations amongst the members of the family.

• **Secondly,** the Will document alone has no use, unless a Probate or letters of administration are obtained. For getting the Probate, the Stamp Duty itself would be Rs. 75,000 looking to the Market Value of a house property in the large Towns in the State; then Advocate would have to be engaged for a high fees, and other charges incurred, apart from about six months' minimum time required to get the document.

It may be added that the probated Will may at the most mention that the Nominee is the legatee, **but the title of the property itself may not stand proved**, because the Honourable Supreme Court has held in the case of Mrs. Hem Nolini Judah (Since ... vs. Mrs. Isolyne Sarojbashini, decided on 16th February, 1962 : 1962 AIR 1471, held:

"Now it is not in dispute that, the grant of probate or letters of administration does not establish that the person making the Will was the owner of the property which he may have given away by the will, and any person interested in the property included in the will can always file a suit to establish his right to the property to the exclusion of the testator in spite of the grant of probate or letters of administration to the legatee or the executor, **the reason being that proceedings for probate or letters of administration are not concerned with titles to property but, are only concerned with the due execution of the will**".

If the purpose behind the requirement of obtaining Probate is only to have authentication of the signature of the deceased-member on the Will, then, by the same token even the signature on the nomination Form would be questionable. How can the Society be permitted to admit the Nominee as "provisional Member" and give him possession, confer on him voting rights etc. Just for proving that the Will has been executed by the deceased Member, it is unreasonable to put the Nominee in jeopardy.

Further, the Member so admitted "provisionally" can act as if he is the full fledged Member, year after year!!

• **Secondly**, when for nearly 60 years (from the time the Act, 1960 came in force in 1961) the Member's wish expressed though the prescribed "Nomination Form" duly executed by the Member, attested by two witnesses & scrutinized, approved and endorsed by the Managing Committee was treated as sacrosanct, for handing over the possession of the Flat, and the provisions of section 30 had given statutory protection to the Society against any third-party

claim/s coupled with the Indemnity Bond, then, where was the need for present draconian move?

- **Thirdly,** let us have a look at the other three documents listed:
- succession certificate, or
- legal heir-ship certificate, or
- document of family arrangement executed **by the persons, who are entitled to inherit** the property of the deceased Member

18. SUCCESSION CERTIFICATE: (a) Section 370 of the Indian Succession Act, 1925: Restriction on grant of certificates under this Part: (1) A succession certificate (hereinafter in this Part referred to as **a certificate**) shall not be granted under this Part with respect to any debt or security to which a right is required by Section 212 or Section 213 to be established by letters of administration or probate:

(b) Thus, the succession Certificate is a certificate granted by the Courts in India to the legal heirs of **a person dying intestate leaving "debts and securities".** A person is said to have passed away intestate when he/she does not leave a legal Will. Succession certificate entitles the holder of debt to make payment of debt or transfer securities to the certificate-holder without having to ascertain the legal heir entitled to it.

(c) A succession certificate is issued by a civil court to the legal heirs of a deceased person. If a person dies without leaving a will, a **succession certificate** can be granted by the court to realise the **debts and securities** of the deceased.

(d) The purpose of a succession certificate is limited in respect of debts and securities such as provident fund, insurance, deposits in banks, shares, or any other security of the central government or the state government to which the deceased was entitled.

(e) A succession certificate may be useful to prove genuineness of the claimant where the inheritance amount is substantial.

Procuring a Succession Certificate

(f) The beneficiary/ legal heir is required to approach a competent court and file a petition for a succession certificate.

- **The District Judge** within whose jurisdiction the deceased ordinarily resided at the time of his death, or, if at that time had no fixed place of residence, the District Judge, within whose jurisdiction any part of the property of the deceased may be found, may grant the succession certificate.

- The petition should mention important details: such as the name of petitioner, relationship with the deceased, names of all heirs of the deceased; time, date and place of death. Along with the petition, death certificate and any other document that the court may require should also be attached.
- The court, after examining the petition, issues a notice to all concerned parties and also issues a notice in a newspaper and specifies a time frame (usually one and a half months) within which anyone who has objections may raise them. If no one contests the notice and the court is satisfied, **it passes an order to issue a succession certificate to the petitioner.**
- If there is more than one petitioner, then the court may jointly grant them a certificate but it will not grant more than one certificate for a single asset.
- As regards the costs involved**,** the Court typically levies a fixed percentage of the value of the estate as its fees (which is more particularly prescribed under the Court-fees Act, 1870, (7 of 1870)). This fee is to be paid in the form of judicial stamp papers of the said amount.
- In addition to the Court fees, the applicant will also be required to pay requisite fees to its lawyer.

19. LEGAL HEIRSHIP CERTIFICATE: (a) A legal heir-ship certificate establishes the relationship of the heirs to the deceased for claims relating to pension, provident fund, gratuity or other service benefits of central and state government departments, specifically **when the deceased has not selected a nominee.** Banks and private companies also accept such certificates for allowing transfer of deposits, balances, investments, shares, etc.

(b) Legal heir-ship certificates are not conclusive when it comes to determining the legitimate class of heirs of a deceased person under the laws of succession or the title of heirs to any disputed property that belonged to the deceased.

(c) In case of any disputes between the heirs of the deceased, the Revenue officer cannot issue a legal heir-ship certificate.

- Documents with the application
- Name of the deceased
- Death certificate original
- Service certificate issued by the head of the department/office in case of serving employee
- Ration card and Aadhaar card

- Pensioner payment slip issued by the office of accountant general in case of pensioner
- Family members names and relationship
- Applicant's signature
- Date of application
- Residential address
- An affidavit on a stamp paper

(d) After submission of the application, an inquiry will take place for the verification by the local Revenue officers as well as village administrative officials. (Tahsildar, Talathi)

- On verification, the officials will submit their report in the prescribed form.

(e) After the due inquiry, based on the report presented by the revenue officer and village administrative officials the certificate will be issued by the competent authority in which names of all the legal heirs will be mentioned.

20. FMILY ARRANGEMENT DOCUMENT: This is one of the listed documents which the Nominee can produce to discharge the burden of proof that he is the legal heir.

(a) Here the section mandates that **the family arrangement document is admissible, ONLY when the same is amongst the "legal heirs".**

- This is contrary to law laid down by the Honourable Supreme Court in a catena of decisions. (Exhaustively discussed in my third published book, "Memorandum of Family Arrangement"). The law does not restrict such arrangement amongst the legal heirs alone, but it may extend to all relatives, who may not be legal heirs.

(b) In the oft quoted case: **Kale & Others vs. Deputy Director of Consolidation** (1976 AIR 807), the Honourable Supreme Court held:

> "(v) The parties to the family arrangement must have some antecedent title, claim or interest, even a possible claim in the property which is acknowledged by the parties to the settlement. But, even where a party has no title and the other party relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then, the antecedent title must be assumed and the family arrangement will be upheld by the courts; (vi) Where bona fide disputes are settled by a bona fide family arrangement, such family arrangement is final and binding on the parties to settlement.

(c) The Court did not say that all the parties to the Family Arrangement must be "legal heirs". Then, why the Maharashtra Government insists on having Family Arrangement document executed by "legal heirs" alone? Neither there is any logic nor any lawful authority.

(d) Now, suppose the "Nominee" is not among the list of legal heirs as per the Succession Act, but the deceased Member has desired to give Flat property to him, how can any legal heir object to it, when the property is self-acquired property?

21. NOMINEE TO PRODUCE LEGAL HEIRSHIP PROOF: Procurement of any of the listed documents discussed in the preceding paragraph is a draconian requirement and undue burden on the Nominee, apart from the associated costs, including 'hidden costs' involved and time & energy consumed in the proceedings before the Court or any Authority.

22. It is beyond comprehension, why indirectly the State Government is encouraging "litigation", "Court proceedings"; when the Courts of Law are already having huge backlog of cases for years, rather decades. Production of the simple "legal heir-ship Certificate" from the Revenue Department involves "hidden costs", and if the Certificate is in relation to a property like a Flat, then the "invisible costs" may run in lakhs, as everyone knows.

23. PROVISO TO SECTION 154B-13: The proviso reads:

"Provided that, society shall admit nominee as a provisional Member after the death of a Member **till legal heir or heirs or a person who is entitled to the flat and shares in accordance with succession Act or under will or testamentary document are admitted** as Member in place of such deceased Member"

(a) This proviso manifestly and unmistakably mandates that the Legally Valid Nomination on the records of the Society is to be ignored, disregarded; and the Nominee/s, all legal heirs or claimants interested in the House Property or Flat are inevitably, driven to the Court of Law or to the Revenue Authority to have the legal heir-ship document; and eventually get the Court decree in the regular title suit, if the word: "Provisional" is to be dropped, and the Nominee is to be admitted as a "Member" of the Society.

(b) Why the Government wants the Society to play the role of a policeman to guard the property of the deceased Member? It is his private property, and he is the best judge to decide about it.

24. DISCRIMINATION AS TO APPLICABILITY OF SECTION 30: In terms of Section 154B (2), the provisions of the "Principal Act" i.e. The Maharashtra Co-operative Societies Act, 1960, (wrongly mentioned: "this Act" in the Ordinance xxv) mentioned therein, are "not applicable" to the Housing

Societies, which, inter alia, includes "section 30" regarding transmission of property to the Nominee.

25. However, Section 30 is still on the Statute Book and is applicable to all other Co-operative Societies and the shares or interest in those societies will continue to be transmitted to the Nominee on records, without any hassel. Some may arguably justify such discriminatory application of section 30, on the premise that "the category of Housing Societies" is a different class. However, one must bear in mind the resounding words of the Honourable Supreme Court in a catena of decisions:

"Article 14 of the Constitution of India forbids class legislation; it does not forbid reasonable classification of persons, objects, and transactions by the Legislature for the purpose of achieving specific ends. Classification must be reasonable. It should not be arbitrary, artificial or evasive. It should be based on an intelligible differentia, some real and substantial distinction, which distinguishes persons or things grouped together in the class from another left out of it."

It is submitted that there is no earthly purpose in such obnoxious and invidious discrimination at the drop of a hat. Why the State wants to have litigation galore and hidden costs in the process of transmission of Flat property. The State cannot justify it to be a welfare measure, in any case.

26, EPILOGUE: The upshot of the newly implanted onerous requirements mandating admission of persons legally entitled to inheritance of a Flat in a Housing Society & compelling the Nominee to produce legal heir-ship documents would fuel disputes and burden the Nominee with avoidable costs & expenditure. The Ordinance has unsettled the law qua nomination process, for benefit to none.

Let the wish of a deceased-member reflected in the nomination process be held as sacrosanct & respected by the Housing Society. Let the time-tested good practices, freedom of action and co-operative spirit prevail, and status quo ante restored.

WHAT SOLUTION OR REMEDY?

State Government:

(c) It is unlikely that the Government would change its stand, unless loud & large number of protests are hurled at the State

(d) Article 213 empowers the Governor to promulgate an Ordinance, an executive order, on urgent matters when the Assembly is not in session.

(e) It remains valid for 6 months and six weeks. If not replaced by an Act, it lapses. In the present case, the Ordinance dated 30-10-2018 is valid law up to **15 June 2019**.

(f) After 15 June 2019, it can be re-issued 2nd time, 3rd time etc.

(g) It is assumed that the present State Government will remain in power and with its numerical strength shall have the Ordinance replaced without any difficulty.

Suggest: A member may consider the following action-plan:

(i) Make a separate Will for the Flat in the Housing Society and another Will for other Assets, so that it does not reveal to the Society or anyone else, any other "private" matters of property and financial holding or family feud etc.

(ii) File regular Nomination papers as per Bye-laws in the prescribed Form with attestation by two witnesses and get third copy back showing entry no. date in Society Register.

(iii) To avoid Hassel, **make a gift deed & Register it** so that one can take advantage of "Joint Member" definition.

(iv) Let Nominee remain "provisional member", all along, no harm; property can be "sold" by "provisional Member".

ANCESTRAL PROPERTY CONCEPT FADING AWAY

Alias

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वडिलोपार्जित-संपत्ती संकल्पनेचे विलोपन

ANCESTRAL PROPERTY CONCEPT FADING AWAY

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INTRODUCTION:

Under generally approved and accepted sense, the term "ancestral property" means any property inherited up to four generations (including the holder of the property) of male lineage from the father or father's father or father's father's father i.e. father, grandfather, great grandfather. In other words, property inherited from mother, grandmother, uncle and even brother is not an ancestral property. The essential feature of the **"**ancestral property**"** is that if the person inheriting it has sons, grandsons or great-grandsons, they become jointly owners-coparceners with him, and have equal share with the person inheriting. They become entitled to it due to their birth, unlike other forms of inheritance, where inheritance opens only on the death of the owner.

2. The dominance of "male lineage" as a core concept and hallmark of the ancestral property got a jolt when the Hindu Succession (Amendment) Act, 2005, declared that a daughter 'shall by birth' became a coparcener in her own right in the same manner as a son. Hence, effective 9th September 2005 the daughters got equal rights in the ancestral property, even if they were born before the enactment of Hindu Succession Act, 1956, ruled the Apex Court recently on 1st February 2018 (Danamma & Suman Surpur vs. Amar)

The essential attributes of the "ancestral property" and their implications are elaborated in the latter paragraphs.

3. This monograph attempts to trace the origin of the un-codified Hindu Law, especially with reference to the Joint Family Property and inheritance rules and other aspects concerning gender inequality in holding the property under the personal laws and its gradual fading away with the onslaught of the Legislative dispensation commencing from the end of the nineteenth century, and further accentuated post–Independence with passing of the piecemeal Hindu

Code Bills, one of them being the Hindu Succession Act, 1956, having colossal impact on the unique concept of ancestral property under the Hindu personal law.

4. In truth and substance, it is not the Hindu Succession amendment Act, 2005, that made the history; but it was the State of Kerala that took lead & put the death knell on the ancestral property concept by passing "The Kerala Joint Hindu Family System (Abolition) Act, 1975", effective 01-12-1976.

- **Section 4 (1) of the said Act, 1975 proclaimed:**

"4. (1) All members of an undivided Hindu Family governed by the Mitakshara law holding any coparcenary property on the day this Act comes into force shall with effect from that day, be deemed to hold it as tenants-in-common as if a partition had taken place among all the members of that undivided Hindu family as respects such property and as if each one of them is holding his or her share separately as full owner thereof".

5. The State Amendments, such as the Hindu Succession (Andhra Pradesh Amendment) Act, 1986, and similar Amendments in the States of Tamil Nadu, Karnataka and Maharashtra giving a daughter equal status as that of a son, by birth, vastly diluted the ancient concept of the 'ancestral property' being exclusive privilege of the male lineage. A daughter could claim not only equal share in the ancestral property, but could, being a coparcener, on par with the son, demand 'at will' (whenever she wanted) partition of the ancestral property. This accelerated the downturn of the ancestral property concept.

6. By an interpretative process, the Honourable Supreme Court has demonstrated in the case of Prakash & Ors. Vs. Phulavati & Ors., decided 16-10-2015, that the concept of ancestral Property will go extinct sooner than later, when Sections 4, 6 and 8 of the Hindu Succession Act, 1956, are properly construed in accordance with the textual phraseology used therein on the contextual backdrop & environment.

The process of gradual fading away of the ancestral property in the light of these developments of law is discussed in the latter part.

HINDU LAW: HISTORICAL BACKGROUND

7. The broad concept of property ownership with equal rights to the male lineage up to three degrees, dominated unique "Hindu Joint Family" system. The family generally consisted of males/females, and other relatives living under the common roof, taking food & performing prayers jointly, caring for each other and sacrificing for the common goal of keeping the family and the society at large united. Everyone had a dogmatic belief in the rules, traditional practices & custom compendiously known as Hindu Dharmashatra OeceMeem$e, which prescribed rules of conduct, duties and obligations to different castes, groups and sects living in harmony to sustain common social fabric of material & spiritual life, popularly known as "Hinduism".

8. Half a century ago, a five-judge constitution bench of the Honourable Supreme Court of India in 'Sastri Yagnapurushadji' case [1966 SCR (3) 242 Swaminarayan sect] had attempted to narrate historical and etymological genesis of the word 'Hindu'. In no judgment has the Apex Court even remotely defined the term "Hindu" or "Hinduism", with any specificity.

In retrospect, it can be seen that "Hindu law", as a historical term, refers to the code of laws applied to Hindus, Buddhists, Jains and Sikhs in British India. Hindu law, in modern scholarship, also refers to the legal theory, jurisprudence and philosophical reflections on the nature of law discovered in ancient and medieval-era Indian texts. It is one of the oldest known jurisprudence theories in the world. The term 'Hindu' in these ancient records is an ethno-geographical term and did not refer to a religion.

9. Hindu tradition, strictly speaking, does not express the law in the orthodox sense of jus or of lex.https://en.wikipedia.org/wiki/Hindu_law - cite_note-ludorocherhcl-6 'Jus' was law in the abstract, right or duty. The actual laws were only the specific tool through which jus was applied. This division persisted for a long time. For example, the Fourteenth Amendment of the United States Constitution, distinguishes "due process of law", means 'by the law of the land', from "equal protection of the laws", means the State guarantees the same rights, privileges, and protection to all citizens.

10. The term "Hindu law" is a colonial construct, when the British colonial officials decided that European common law system would not be implemented in India, that Hindus of India would be ruled under their "Hindu law", and Muslims of India would be ruled under "Muslim law" (Sharia). Prior to the British colonial rule, Muslim law was codified as Fatawa-e-Alamgiri (a compilation of law), but laws for non-Muslims –such as Hindus, Sikhs, Jains, Parsis –were not codified during the 600 years of Islamic rule.

EVOLUTION OF HINDU LAW:

11. The Hindu law has had been evolved over successive generations, from Dharmaúâstra ÛeceMeem$e consisting of many texts; Manusmriti, cevemcelee being one of the many treatises (úâstra) on Dharma. The British, however, mistook the Dharmaúâstra as codes of law and failed to recognize that these Sanskrit texts were not used as statements of positive law until the British colonial officials chose to do so. Actually, Dharmaúâstra contained jurisprudence commentary, i.e., a theoretical reflection upon practical law, but not the law of the land.https://en.wikipedia.org/wiki/Hindu_law - cite_note-13 The British conveniently used Manusmruti cevemcelee as the standard, to settle the disputes among Hindus with regard to matters of inheritance, family disputes, marriage, and Royal succession, so as to perpetuate divide amongst the Hindus.

12. During the British colonial rule an attempt was made at "legal pluralism". Legal scholars stated that the Indian law and politics have ever since vacillated

between "legal pluralism— the notion that religion is the basic unit of society and different religions must have "different legal rights and obligations" and "legal universalism – the notion that individuals are the basic unit of society and all citizens must have "uniform legal rights and obligations". While the Hindus and other non-Muslims in India favor "legal universalism" based on Parliamentary laws; however, the Muslims favor "legal pluralism" with Sharia (Mejelle) as the source of law in relation to marriage, divorce and inheritance laws, for all Muslims in India.

JOINT FAMILY SYSTEM:

13. The joint and undivided Hindu family was the normal condition of the Hindu society from times immemorial, perhaps, as a social necessity. The joint family system comes first, and law of inheritance is of later growth; the senior-most male member exercised control over all affairs of the family and its property.

MEANING, AMBIT OF ANCESTRAL PROPERTY:-

14. The Hindu law or customary law refers to rules that are transmitted from one generation to another. Customary law means: "obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws".

15. Sir Dinshaw Mulla (1868-1934) was an Attorney-at-Law of Bombay high court and a Member of the Judicial Committee of the Privy Council, India. His book, titled: "**Principles of Hindu Law**", is acclaimed as most authoritative commentary on Hindu Law.

16. The Courts, the Privy Council and the text-books writers have indiscriminately used the expressions, 'joint property', 'joint family property', 'ancestral property' and 'coparcenary property' to denote one and the same property.

Ancestral property and separate property mans:

(a) Property inherited by a Hindu from his father, or father's father or father's fathers' father, is ancestral property.

(b) Property inherited by him from other relations is his separate property.

17. The Bombay High Court (in Shalini Sumant Raut & Ors vs. Milind Sumant Raut & Ors) has succinctly stated the principles of Hindu Joint family property. Some important aspects:

(i) A Hindu coparcenary is a narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property. (Hence joint property and coparcenary property or joint Hindu family property or coparcenary property is synonymous). -page 359

(ii) Ancestral property and separate property are distinct. The property inherited by a Hindu from his father, father's father, father's father's father is

ancestral property. The property inherited by him from other relations is his separate property.

Illustration: If A inherits property from his father, his two sons B & C, would become coparceners with him as regards such ancestral property. If B has a son D and C has a son E, the coparcenary will consists of the father, sons and grandsons. -page 361

(iii) The right to enforce a partition and the right of survivorship go hand in hand.

(iv) The Mitakshara law itself says that in the ancestral or grandfather's property in the hands of the father, the son has equal rights with his father; while in the self-acquired property of the father, his rights are unequal by reason of the father having an independent power over or pre-dominant interest in the same. [1953 AIR 495 S. C.].

JOINT FAMILY PROPERTY – DÂYABHÂGA:

18. The Smruti thesis authored by Sage Yadnyawalkya and a critique written thereon by Sage Vidnyaneshwar is known as Mitakshar. On the other hand, the Sampatti-Vibhaajan (division of property) thesis authored by Sage Jimootvaahan is known as **Dâyabhâga.**

Some eminent jurists have taken a view that the dichotomy between two systems: Mitakshara and **Dâyabhâga** was due to two different interpretations given to a single word "sapinda" (meeHe[).

(a) Manu has written that when a man dies, his property goes to his nearest "sapinda". The question is: What is the meaning of the word: "sapind?"

(b) That depends upon the meaning of the word "pinda" (eHe[).

(c) According to Dayabhaga, "pinda" means the 'rice balls' offered in the Shraddha (pee×) ceremony to one's deceased ancestors.

(d) On the other hand, according to the Mitakshara the word "pinda" does not mean the rice balls offered at the Shraddha; but it means the particles of the body of the deceased.

(e) The difference between the texts is based upon when one becomes the owner of property.

(f) The Dâyabhâga does not give the sons a right to their father's ancestral property until after his death, unlike Mitâkcarâ, which gives the sons the right to ancestral property upon their birth.

19. The Dâyabhâga School philosophy:

(i) Under the Dâyabhâga system, sapinda is any relative who can offer 'pindas', the balls of rice offered during the funeral of the deceased, or at the Shraddha (pee×) ceremony. This would include cognates, the women in the family as well, allowing them to freely inherit property.

(ii) The Dâyabhâga School neither accords a right by birth nor by survivorship, though a joint family and joint property is recognized.

(iii) It lays down only one mode of succession. Neither sons nor daughters become coparceners at birth nor do they have rights in the family property during their father's lifetime. However, on his death, the daughters also get equal shares along with their brothers, who all inherit as tenants-in-common.

(iv) Under the Dâyabhâga, the father is regarded as the absolute owner of his property whether it is self-acquired or inherited from his ancestors.

- To sum up: Joint family property under Dâyabhâga school:

  (a) Succession opens to a son only after the death of the father. A Dâyabhâga father is competent to make a testamentary disposition of the whole of property. A son has got no right to object to it, or claim partition in it.

  (b) Property passes by inheritance only and may go to female heirs like widows, daughter etc.

MITAKSHARA vs. DÂYABHÂGA:

20. The two main streams or schools of thought in patriarchic systems were Mitakshara and Dâyabhâga , which primarily differed in regard to rules of inheritance. While the joint family property concept under patriarchy system has been reviewed, it is important to examine the manner of succession to ancestral property under the matrilineal system, which was mainly prevalent in some parts of Madras (now Tamil Nadu, Chennai) and Cochin (now Kochi) in the State of Kerala.

JOINT FAMILY SYSTEM- MATRILENIAL INHERITANCE:

21. In the context of the Hindu Joint Family, which existed in ancient India, one cannot overlook the Definition in Section 3(1) (e) (ii) of the Hindu Succession Act, 1956 which speaks about "a common ancestress".

"Explanation", below the section says: 'In this clause "ancestor" includes the father and "ancestress" the mother'.

MATRILENIAL OWNERSHIP PATTERN:

22. Except in former Madras (now Tamil Nadu) & Cochin (Kochi, Kerala), all over India, a Hindu joint family, based on patriarchy, consisted of male members descended lineally from a common male ancestor, together with their mothers, wives or widows and unmarried daughters. The cord that knits the members of the family is not property but the relationship of one another.

23. Marumakkattayam Tradition**:** In the Marumakkattayam law, which prevailed in Kerala wherein the families were joint families, a household consisted of the mother and her children with joint rights in property. The lineage

was traced through the female line. Daughters and their children were thus an integral part of the household and of the property ownership, as the families were matrilineal. It is applicable to a considerable section of people in Travancore-Cochin and districts of Malabar and South Kanara.

Under the Marumakkattayam system of inheritance, descent and succession to the property was traced through females.

• The joint family under matrilineal system is known as Tarawad and it formed the nucleus of the society in Malabar.

24. The customary law of inheritance was codified by the Madras Marumakkathayam Act, 1932.

(i) As per the said Act, 1932, 'Marumakkattayam' means the system of inheritance in which descent is traced in the female line and 'Marumakkattayee' means a person governed by Marumakkathayam Law of Inheritance.

(ii) 'Tarawad' means the group of person forming a joint family with community of property governed by Marumakkathayam Law of Inheritance.

(iii) A Tavazhi used in relation to the female, is defined as the group of person consisting of that female, her children and all her descendants in the female line.

25. Section 3(1)(h) of the Hindu Succession Act, 1956, covers the system of "Marumakkattayam law" to include various enactments e.g. the Madras Marumakkattayam Act, 1932, the Travancore Nayar Act, the Travancore Ezhava Act, the Travancore Nanjinad Vellala Act, the Travacore Kshatriya Act, the Travancore Krishnanavaka Marumakkathayee Act, the Cochin Marumakkathayam Act, or the Cochin Nayar Act with respect to the matters for which provision is made in this Act.

26. For some time, there had been an urge for a thorough change in the old family customs. Accordingly, the Kerala Joint Hindu Family System (Abolition) Act, 1975, was passed by the State Legislature. By this measure, the joint family system among Hindus in the state of Kerala was obliterated. By force of Section 4 of that Act, joint family ownership was converted into tenancy-in-common as if partition had taken place among all the members.

• We may read s. 4 (2) at this point.

> (2) All members of a joint Hindu family, other than an undivided Hindu family referred to in sub-section (1) holding any joint family property on the day this act comes into force, shall, with effect from that day be deemed to hold it as tenants in common, as if a partition of such property per capita had taken place among all the members of the family living on the day aforesaid, whether such members were entitled to claim such partition or not under the law applicable to them, and as if each one of the members is holding his or her share separately as

full owner thereof. The emphasis, from the point of view of the date of transformation into tenancy-in-common, is on the date of coming into force of Act 30 of 1976. From that date (1-12-76) onwards a division in status and a quantification of shares per capita must be deemed to have occurred.

27. However, some Muslim families in Malabar and people of Lakshadweep are still governed by this customary law system of inheritance as the Abolition Act 1975 applies only to Hindus. Muslims in Malabar happened to follow this system as they were originally Hindu converts and Lakshadweep people are believed to be persons migrated from Malabar.

TRADITIONAL HINDU PERSONAL LAW:

28. In the Vedic era, women were economically treated on par with men. Wives had equal rights over their husbands' properties. Women's property rights were improved and defined during the time of eminent jurists like Yajnavalka, **Kâtyâyana** and Narada, who strived to promote the idea of women exercising their right to property. Streedhan (m$eeOeve), which translates literally to "woman's wealth", and denotes a type of property unique to women, was a term coined by the Smritikars. This was a woman's separate property. The Honourable Supreme Court has held: "The 'streedhan,' is her "exclusive and absolute property." Vide Pratibha Rani vs. Suraj Kumar & Anr.

INROADS INTO HINDU PERSONAL LAW:

29. "Hindu personal law" refers to the laws of the Hindus as it applied during the colonial period (British Raj) of India. The British found neither a uniform general principle administering law for the diverse communities, nor a Pope or a Shankaracharya (MekeÀjeÛ®ee³e) whose law or writ applied throughout the country. Due to discrepancies in opinions of pandits (Heeí[le) on the same matter, the East India Company began training pandits for its own Legal Service leading to the setting up of a Sanskrit (meimkeÀle) College, to help them arrive at a definitive idea of the Indian legal system.

30. It is from here that the modern Hindu Personal Law had its beginnings; and more appropriately so in 1772, when Warren Hastings appointed ten Brahmin pandits from Bengal to compile a digest of the Hindu scriptural law in four main civil matters—marriage, divorce, inheritance and succession.

31. Although the British did not directly interfere in the personal Laws of Hindus and Muslims; however, their judicial mechanism considerably influenced the growth of these laws. The plan of 1772 to place the administration of justice in the hands of English judges, although this change was innocent, inoffensive, tended to mould traditional concepts. The English judges used to consult Pandits (Heeí[le) and Mullas or Mawlawis, (ceuueeÙ, ceeueJeeÙ öa learned teacher or doctor of Islamic law) in matters relating to personal laws of Hindus and Muslims, but nonetheless the judge was a foreigner with a foreign background. He could only make his judgment conform to what he thought was the law; his principal task was to

search out a legal solution. Needless to say, the role of judges was primarily to put an end to disputes brought before them, but when the administration of justice fell into the hands of the British, the doctrine of precedent or stare decisis was introduced, which gradually made inroads into the scripture-rules governing the personal laws of Hindus and Muslims.

Thus, the law which had existed in scriptural work and treatises now came to be fixed in the "case laws" of the Courts.

HINDU LAW – NEVER A RIGID LEGAL CODE:

32. Before the advent of the British judicial system, the Hindu law was developed by commentaries and digests written by Hindu Jurists, who interpreted the scriptural law to meet the exigencies of the changing time.

(i) Religious legal systems, such as Hindu law shows that law's domain is co-extensive with life itself. While it has a high textual tradition, Hindu law was never envisaged as a fixed legal code valid for all time and place. Key provisions such as divorce and inheritance were revised depending on region, community and the ethos of the times.

(ii) The concept of Dharma Oece represents a comprehensive and consolidating view of life. This contextual specificity of Dharma permits a continuous adaptation to changing social situations and times. Oeej³eele Fele Oece: | The word "dharma" is derived from verb "dhaaraNa" "OeejCee" (beholds).

(iii) The principles of Hindu jurisprudence are not confined to the texts in Sanskrit. **Manu attests that custom is the foremost basis of jurisprudence.** Meem$eele ©{eyeuee³emee | Customary law delimits the legal theory.

(a) The Privy Council pointed out that it was not open to the judges to embark upon an independent enquiry into the meaning of the dharmaúâstra text. The text is to be understood only in the light of the actual practice.

(b) In Collector of Madura vs. Mottoo Ramalinga (1868), the Privy Council considering the importance of customs, said: "that under the system of Hindu law, clear proof of usage will outweigh the written texts of law".

(c) Custom in its legal sense means a rule which in a particular family, a particular class or caste or in a particular local area, has, from long usage, obtained the force of law.

BRITISH RULERS' INTERFEARANCE:

33. The Courts no longer made decisions based on changing contexts and relied instead on medieval Commentators. With the growth of case law, the innate flexibility to move with the times was lost.

Similarly, in the case of Muslim law certain misleading decisions were given by the English judges. The classic example is the Privy Council judgment in 1894in the Abul Fatah vs. Rassomoydhar Chaudhry' holding the family Wakf invlid.

• But the decisions of Abul Fata's case caused great dissatisfaction in the Muslim community, which eventually obtained not only the Mussalman Wakf Validating Act, 1913, but with retrospective validation in 1930.

34. One way to introduce English notions in Hindu and Muslim, personal laws was to adopt the formula of "justice, equity and good conscience". In fact, in the course of time, justice, equity and good conscience came to mean English law as far as applicable to the Indian situation. After consolidating their rule, they gradually changed criminal law and injected their own system in civil laws including the Personal laws of Hindus and Muslims, whenever the religious practices were not in line with their system of law.

LEGISLATIVE INROADS IN HINDU PERSONAL LAWS:

35. The Hindu Personal Laws underwent major reforms over a period of time, and created social and political controversies throughout India. The Hindu Personal Laws beginning with the creation of the 'Anglo-Hindu Law ' led to widespread changes, controversies and civil suits in Hindu society across all strata.

36. The Charter Act 1833 or Government of India Act 1833 was passed by the British Parliament, which legalized the British colonization of India. In pursuance of section 353 of the Charter Act, 1833, the first Law Commission was appointed in 1834 and Lord Macaulay was appointed as its Chairman, with instructions to prepare a draft penal code for India. The commission prepared the required draft and submitted it to the Government on October 14, 1837, before Lord Macaulay's departure from India.

RECOMMENDATIONS OF LAW COMMISSIONS

37. Meanwhile, the British had penetrated into rural districts of India and the absence of the law of the place posed many problems there. There was no territorial law for persons other than Hindus and Muslims in the Moffussils. Pursuant to different reports submitted by the Commission, many legislative enactments were made, **such as:**

(i) Native Converts Marriage Dissolution Act, 1866, (ii) Indian Divorce Act, 1869. (iii) The Hindu Wills Act, 1870; (iv) The Special Marriage Act, 1872; (v) The Christian Marriage Act, 1872,

Although, the new statutes applied alike to all people irrespective of their religious affiliations, the effect of some of the provisions was to limit the Hindu and Muslim laws in their own spheres of application and to introduce "English common law."

INROADS INTO THE RELIOUS & PROPERTY LAWS:

38. Many laws were passed introducing reforms in the old Hindu law. In most cases, the innovating Acts had the support of Hindu community, but conservative and orthodox Hindus weaved these innovations as encroachment upon their religious practices, e.g.

(i) The Hindu Widow Remarriage Act, 1856. A widow's re-marriage was contrary to Shastric prohibition (OeceMeem$ee³e éve<eOe-).

(ii) The Hindu Wills Act, 1870 conferred a power of testamentary disposition, previously unknown to Hindu law.

(iii) The Hindu Women's Right to Property Act, 1937.

In the field of Muslim law, very little legislative activity is noticed. The four statutes passed were:

(i) The Mussalman Waqf Validating Act, 1913;

(ii) The Muslim Personal Law (Sharia) Application Act, 1937.

(iii) The Insurance Act, 1938

(iv) The Dissolution of Muslim Marriage Act, 1939

HINDU LAW: REFORMS COMMITTEE (1941):

39. The Government of India appointed the Reforms Committee 1941 in the context of the Federal Court ruling that the Hindu Women's Right to Property Act, 1937 and (Amendment) Act, 1938 operated to regulate devolution by survivorship of property other than agricultural land.

- The Hindu Law Reforms Committee drew up two Bills:
- The Hindu Marriage Bill and (ii) The Hindu Intestate Succession Bill.
- These were introduced in the Central Legislature in 1943, but were eventually allowed to lapse, because of the opposition from the conservative elements in the society.

UNIFORM CIVIL CODE: 1947 TO 1955

40. The demand for a uniform civil code was first put forward by women activists, with the objective of women's rights, equality and secularism. India needed a uniform civil code for two main reasons:

(a) First, a secular republic needs a common law for all citizens rather than differentiated rules based on religious practices. This was a key issue debated during the writing of the Constitution, with passionate arguments on both sides. The Constitution was eventually stuck with a compromise solution, a directive principle in Article 44, which says:

"The state shall endeavour to secure for citizens
a uniform civil code throughout the territory of India."

(b) The second reason was gender injustice. The rights of women were usually limited under religious law, be it Hindu or Muslim. Dr. B.R. Ambedkar fought hard for the passage of the Hindu Code Bill, because he saw it as an opportunity to empower women; and eliminate social inequality unwittingly prevailing on account of caste system.

THE HINDU CODE BILL

41. The Constitution of India, 1949 did not recognize religious communities but only individuals, to whom it guaranteed:

Article 25: "Freedom of conscience and free profession, practice and propagation of religion"

This ideal concept of religion as a private matter implied a reduction in its sphere of influence, through the impact of the State in its capacity as the agent of 'modernization'.

42. The Hindu Code Bill was intended to provide a civil code in place of the body of Hindu personal law, and it principally aimed at a complete elevation of the nation as a whole, social up-liftment being a dire necessity along with economic and political up-liftment.

- Prominent ideals proposed under codification were as follows:

  (i) The property of a dying man has to be shared equally among his widow, daughter and son, which according to previous laws was entitled only for his son.

  (ii) The right of any woman over her inherited/self obtained property should not be 'the limited interest known as a Hindu woman's estate', instead it be made absolute, i. e. it can be possessed or disposed of as she wished.

  (iii) Allowing either partner to file for divorce on certain grounds such as domestic violence, infidelity etc. The granting of maintenance to the wife if she decides to live separately due to divorce on grounds as aforementioned.

  (iv) Making monogamy mandatory.

  (v) Allowing inter-caste marriages and adoption of children of any caste.

  (vi) Decisions regarding the guardianship of the child in case of divorce.

43. But even before the bill could be put up to the Legislative Body, some vocal sections of Hindu public opinion raised the bogey: 'Hinduism in danger'.

44. Finally, the Hindu Code bill was broken down it into four laws for the easy passage in the parliament. These four laws were:

(a) The Hindu Marriage Bill outlawed polygamy, dealt with inter-caste marriages and divorce procedures;

(b) The Hindu Adoptions and Maintenance Bill had its main thrust on the adoption of girls, which till then had been little practised;

(®e) The Hindu Succession Bill placed daughters on the same footing as widows and sons, where the inheritance of family property was concerned.

(d) The Hindu Minority and Guardianship Bill specifically defined guardianship, and relationships between adults and minors.

These laws were passed, one by one, during 1955-56 leading to passing of what we call as "Hindu Code Bill".

LEGISLATION OVERRIDES CUSTOM, USAGE:

45. All the four legislative enactments compendiously known as the Hindu Code Bill, declared that in respect of any matter, where the legislative dispensation is handed down, existing text, rule or interpretation of Hindu law or any custom or usage having the force of law would, per se, stand displaced. This is so provided in section 4 of the Hindu Succession Act, 1956, which is in focus, in regard to the subject on hand –the Ancestral Property.

Section 4, The Hindu Succession Act, 1956 reads:

> **4. Over-riding effect of Act.—**
>
> (1) Save as otherwise expressly provided in this Act,—
>
> (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
>
> (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

46. The whole purpose of the Legislation on the Hindu Personal Law was to wipe out the orthodox, incongruous and unjust practices /custom or usage, which had outlived their utility and to take the torch of socio-political ideologies in step with the modern way of thinking enshrined in the preamble to the Constitution of India.

Ancestral Property Concept Fading Away Alias

47. The Hindu Succession Act, 1956, introduced effective 17th June, 1956, inter alia, achieved many objectives and ushered in equality of genders to a great extent.

(i) The idea of 'the limited interest known as a Hindu woman's estate' as provided in the Hindu Women's Rights to Property Act, 1937 was abolished, certainly a progressive step.

(ii) Section 14 provided that any property possessed by a Hindu female, whether acquired before or after the commencement of this 1956 Act shall be held by her as full owner thereof and not as limited owner.

48. However, in truth & in reality, this 1956 Act is quite biased in favour of male heirs.

• An example of this gender based discrimination is the fact that in the presence of both male and female heirs, there being an ancestral dwelling house, the female heir cannot ask for partition of the residence until and unless the male heirs ask for their respective shares.

• Also the right of residence exercised by the daughter is limited by her marital status.

• A female may claim this right if she is unmarried or a widow or a woman who has been divorced from or deserted by her husband. She cannot claim her right to residence if she is happily married to her husband. (In 2005, this provision in section 23, has been "deleted'—yes, it took nearly 50 years)

• Section 14 of Hindu Succession Act is wide in its ambit. The legislation has defined women's property in the widest possible manner. To understand the sweep of the law, it is better to read the section itself, which is self-explanatory:

14. Property of a female Hindu to be her absolute property.—

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation:- In this sub-section, **"property" includes**

(i) both movable and immovable property acquired by a female Hindu

(ii) by inheritance or devise, or

(iii) at a partition, or

(iv) in lieu of maintenance, or

(v) arrears of maintenance, or

(vi) by gift from any person, whether a relative or not; either before, or at or after her marriage, or

(vii) by her own skill or exertion, or

(viii) by purchase or by prescription, or in any other manner whatsoever, and also

(ix) any such property held by her as streedhan immediately before the commencement of this Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

49. One must carefully read section 14 (1) and (2) of the Hindu Succession Act. While section 14 (1) embodies the rule that the property howsoever acquired by a **female Hindu** shall be her absolute property, sub-section (2) dilutes it by a rider to the absolute ownership.

• According to sub-section (2) the female Hindu does not become absolute owner of the property acquired by gift, will or any other instrument, decree or order of a Civil Court or an award if such gift, will or instrument, decree or order or award **gives her only restricted right**.

• In Gaddam Rama Krishna Reddy, v. Gaddam Rami Reddy, the husband created life estate will in favour of his wife; the Honourable Supreme Court held that, wife's rights in properties would be governed by sub-section (2) of Section 14 of Hindu Succession Act, and her right would not blossom into absolute estate as contemplated under sub-section (1) of Section 14. So she has no right to transfer the property by way of sale.

• In other words, Will or Gift instrument giving limited ownership to wife or daughter or mother or sister for her life-time, is perfectly lawful & valid.

ANCESTRAL PROPERTY SURVIVORSHIP OR SUCCESSION:

50. The Hindu Succession Act,1956 made some advancement by providing equal rights to women in the self-acquired property, being specified in Class-I heirs category; but the ancestral property continued to devolve on the male coparceners until 2005, when the daughters were given equal birth-right as sons.

51. Recently, the Honourable Supreme Court has conclusively held in Uttam vs. Saubhag Singh, that the Act envisages that when a male Hindu having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall pass on by (a) survivorship, or (b) in specified circumstances, by testamentary or intestate succession in terms of this Act.

52. One may read the relevant provisions of section 6 of the Hindu Succession Act before its Amendment in 2005:

Section 6:

"6. **Devolution of interest in coparcenary property**.—When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act :

Provided that, if the deceased had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1:- For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2:- Nothing contained in the proviso to this section shall be construed as enabling a

53. The Honourable Supreme Court, in Uttam vs. Saubhag Singh, decided on 2nd March 2016 has summarized the law governing the Mitakshara joint family property, prior to the amendment of 2005.

The Apex Court summarized:

(i) When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (vide Section 6).

To proposition (i),

• **One exception** is contained in Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.

• **A second exception** engrafted on proposition (i) is contained in the **proviso to Section 6**, which states that if such a male Hindu had died leaving behind a female relative specified in ***Class I of the Schedule or a male relative specified in that Class who claims through such female relative surviving him, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and **not by survivorship**.

*** THE SCHEDULE Class I (i) Son; (ii) **daughter; widow; (iii) mother**; (iv) son of a pre-deceased son; (v) daughter of a pre- deceased son; (vi) **son of a pre-deceased daughter**; (vii) xxxx (xi) widow of a pre-deceased son of a pre-deceased son, (xii) **son of a pre-deceased daughter of a pre-deceased daughter**; (xiii) xxx (xv) daughter of a pre-deceased daughter of a pre-deceased son."

(ii) In order to determine the share of the Hindu male coparcener who is governed by Section 6 proviso, a partition is effected by operation of law immediately before his death. **In this partition, all the coparceners and the male Hindu's widow get a share in the joint family property.**

(iii) On the application of Section 8 of the Act, either by reason of the death of a male Hindu leaving self-acquired property or by the application of Section 6 proviso, such property would devolve only by intestacy **and not survivorship**.

(iv) On a conjoint reading of Sections 4, 8 and 19 of the Act, it is clear that on the death of Jagannath Singh in 1973, the joint family property which was ancestral property in the hands of Jagannath Singh and the other coparceners, devolved by succession under Section 8 of the Act.

• This being the case, the ancestral property ceased to be joint family property on the date of death of Jagannath Singh, **and the other coparceners and his widow held the property as tenants in common and not as joint tenants.**

NOTIONAL PARTITION:

54. Section 6 of the Hindu Succession 1956 Act does not interfere with the rights of those, who are members of Mitakshara coparcenary, **except** to the extent that where the coparcener dies intestate leaving behind female heirs specified in Class I of the schedule and also male heirs claiming through such female heirs, like son of a daughter, or of a pre-deceased daughter of a pre-deceased daughter, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and **not by survivorship**.

55. A share of a coparcener in the coparcenary property, in the event of his death is to be determined as of the date of his death, as if a partition had taken place; and the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

• Thus, a notional partition immediately before his death, and carving out his share in the coparcenary property, is mandated.

56. The section proceeds first by making provision for the retention of the right of survivorship and then engrafts on that rule the important qualification enacted by the provision.

(i) The proviso operates only where the deceased has left surviving him a daughter's son, or any female heir specified in Class I of the schedule.

Illustrations –

(a) A and his son B are members of a Mitakshara coparcenary. A dies intestate. Surviving him is his only son B. His undivided interest in the coparcenary property will devolve upon B by survivorship as clearly envisaged in the initial part of the section and not by succession.

(b) A and his sons B and C are members of a Mitakshara coparcenary. A dies intestate in 1958. Surviving him is his widow A1 and his two sons. B and C continue to be members of the joint family. A's undivided interest in the coparcenary property will not devolve by survivorship upon B and C, **but will devolve by succession, equally, upon A1, B, and C.**

(ii) The Amendment Act, 2005 retains the concept of notional partition but modified its application. Prior to this amendment, notional partition was effected only if the undivided male coparcener had died leaving behind any of the eight class I female heirs or the son of a predeceased daughter and did not apply generally in every case of death of a male coparcener.

57. The Amendment Act, 2005 makes application of notional partition in all cases of intestacies.

Section 6(3) states:

Section 6(3) – Where a Hindu dies after the commencement of the Hindu succession Act, 2005 his interest in the property of joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession as the case may be under this Act, **and not by survivorship,** and the coparcenary property shall be deemed to have been divided as if a partition had taken place.

• From the language of the section, two things are clear:

First, the doctrine of survivorship stands abolished in case of male coparceners, and

Secondly, in all cases where a Hindu male dies, his interest in the Mitakshara coparcenary would be ascertained with the help of a deemed partition or a notional partition.

• The Patna High Court in Sheodhar Prasad Singh vs. Jagdhar Prasad Singh And Ors. on 11 December, 1963

16. .... It is also well settled that though a wife cannot herself demand a petition, if a partition takes place between her Husband and his sons, (coparcenaers) she is entitled to receive a share equal to that of a son and to hold and enjoy that share **separately even from her husband**. Where at a partition

between a father and his three sons, the wife was not allotted a share, it was held that she was entitled to reopen the partition, there being no waiver merely by her not asking for a share. (See Section 315 of Mulla's book at page 485).

STATEMENT OF CORRECT LAW:

58. In Gurupad Khandappa Magdum 1978 AIR 1239 S. C., the Honourable Supreme Court held:

" ...Though the plaintiff, not being a coparcener, was not entitled to demand partition yet, if a partition were to take place between her husband and his two sons, she would be entitled to receive a share equal to that of a son. (see Mulla's Hindu Law, Fourteenth Edition, page 403, para 315).

(i) In a partition between Khandappa and his two sons, **there would be four sharers** in the coparcenary property, the fourth being Khandappa's wife, the plaintiff.

(ii) So, Hirabai Khandappa, wife, the Plaintiff would get her 1/6 share, (two sons + three daughters+ herself= 6 shares) and "in addition" her share in the notional partition (actually to work out share of each coparcener) is ¼ (Gurupad Khandappa + two sons + widow=4).

(iii) The Trial Court, following Shiramabai Bhimgonda's decision by the Bombay High Court, simply gave the Plaintiff Khandappa's ¼ share divided by six that is only 1/24 and did not add her own share on notional Partition. The Bombay High Court relying on subsequent decision of its own in Rangubai Lalji v. Laxman Lalji (68 Rom. L.R. 74) accepted the claim, that is 1/24 + ¼ = 7/24.

(iv) This stands "approved and endorsed" by the Honourable Supreme Court. **It is now, the correct law**.

JOINT PROPERTY GETTING DIMNISHED:

59. The share of the holder of the ancestral property dying intestate will devolve upon the heirs by Succession under section 8 of the Hindu Succession Act, and to that extent the total corpus of coparcenary property gets dwindling from generation to generation. {Commissioner of Wealth Tax vs. Chander Sen etc.}

60. In addition, in many cases along with sons, the daughters , who are coparceners after 2005, pan India, and in some states even before that date, can & would demand "partition". Again, the ancestral property gets freed from the coparcenary rules.

• It is for this reason, in the near future, there will be less and less "joint properties" floating around.

STATES STOLE A MARCH ON THE CENTRE:

61. Now, it is interesting to see that before the Parliament brought in the Amendment Act, 2005 by introducing the Bill on 20th December 2004, some of the States had already put in place Laws to wipe out gender "discrimination",

buy putting "daughters" on par with "sons", as coparceners in the Joint family property. While the Maharashtra and other four States gave daughters equal rights with sons, the Kerala State had abolished "coparcenery concept itself".

MAHARASHTRA STATE:

62. A glance at the Hindu Succession (Maharashtra Amendment) Act, 1994 introduced on 22.6.1994.

1. The Government of Maharashtra on 22.6.1994, announced a policy for conferment of the same coparcenary right on the daughters by suitably amending the Hindu Succession Act, 1956 in its application to the State of Maharashtra with a retrospective effect, that is, from the date of official announcement of the said policy.

2. However, the amendments **are made inapplicable** to the daughters married before 22-06-1994.

DAUGHTERS' COPARCENARY RIGHTS:

63. Despite the improvements brought about by the Hindu Succession Act, it remained gender discriminatory, especially where inheritance rights of daughters were concerned. The Hindu Succession (Amendment) Act, 2005 gave equal rights to daughters both in respect of separate property as well as coparcenary property left by the father. The disability of women inheriting their patrimonial i.e. ancestral property was taken away by section 6 of the amended Act.

64. The right accrued to a daughter in the ancestral property, by virtue of the Amendment Act, 2005 is absolute, except, in the circumstances provided in the amended Section-6. **The excepted categories are two, namely,**

(1) where the disposition or alienation including any partition which took place before 20-12-2004 and

(2) where testamentary disposition of the property was made before 20-12-2004.

HINDU LAW- CURRENT UPDATE 2018:

65. In the case of Danamma & Suman Surpur vs. Amar, the Honourable Supreme Court on 1st February, 2018 ruled that under the Hindu Succession Act, daughters were (per Amendment Act,2005) entitled to equal share in ancestral property, irrespective of the year they were born.

(1). The Honourable Court observed:

The issue, as to whether the right would be conferred only upon the daughters who are born after September 9, 2005 when Act came into force, was settled by the Supreme Court in the case of **Prakash & Ors. v. Phulavati & Ors. on October 16, 2015,** wherein it was held that the rights under the amendment are applicable to living daughters of living coparceners as on 9-9-

2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20-12-2004 as per law applicable prior to the said date will remain unaffected.

(2). The Court further observed:

(a) That the Amendment act stipulates that a daughter would be a coparcener from her birth, and would have the same rights and liabilities as that of a son.

(b) That the fundamental changes brought forward are perhaps a realization of the immortal words of Roscoe Pound (an American jurist & an exponent of the 'sociological jurisprudence') that "the law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and the need of change."

DAUGHTERS' SHARE IN THE ANCESTRAL PROPERTY:

66. How the ancestral property would pass on and what would be the shares of the sons and daughters is well illustrated in the case of Mangammal & Thulasi and ANR. Vs. T.B. Raju and Ors. decided on **19th April 2018**.

The Honourable Supreme Court held:

(i) The State Government enacted the Hindu Succession **(Tamil Nadu** Amendment) Act, 1989 effective from March 25, 1989 giving equal rights in coparcenary property **to an unmarried daughter,**

(ii) It is undisputed fact that Late T.G. Basuvan, father of the appellants, **had only ancestral properties** and he had not left behind any self acquired properties.

(iii) On a plain reading of the newly added provision i.e., Section 29-A of the Act, it is evident that, daughter of a coparcener is entitled to claim partition in the Hindu Joint Family Property.

(iv) In the instant case, it is admitted position that both the appellants, namely, Mangammal, got married in the year 1981 and Indira, got married in or about 1984 i.e., prior to the commencement of the 1989 amendment. Therefore, in view of clause (iv) of the Section 29-A of the Hindu Succession (Tamil Nadu Amendment) Act, 1989, appellants were not the coparceners.

DIVISION OF THE ANCESTRAL PROPERTY:-

67. In the above Mangammal case, with a view to doing complete justice, the Supreme Court observed:

(a) The ancestral property in the hand of Late T.G. Basuvan got divided between him and his son T.B.Raju-Respondent No. 1. In such partition, **Late T.G. Basuvan got 1/2 share** and T. B. Raju also got 1/2 share. Now the property left in the hand of Late T. G. Basuvan **would be his separate property**.

(b) On his death, such separate property would devolve through succession by applying the rules of Sections 8, 9 & 10 of the Hindu Succession Act, 1956 in the following manner:

- Widow i.e. mother of the appellants would get 1/4 of the half share which stands at 1/8.
- Daughter Mangammal-Appellant No. 1 would get 1/4 of the half share which stands at 1/8.
- Daughter Indira-Appellant No. 2 would get the 1/4 of the half share which stands at 1/8.
- Son T. B. Raju-Respondent No. 1 would get the 1/4 of the half share which stands at 1/8. This 1/8 share would be in addition of 1/2 share which he got in partition.

(c) On the death of the widow i.e., mother of the appellants, her 1/8 share which she got in succession, would devolve through succession by applying the rules of Sections 15 & 16 of the Hindu Succession Act, 1956 in the following manner:

- Daughter Mangammal-Appellant No. 1 would get the 1/3 of the 1/8 which stands at 1/24.
- Daughter Indira-Appellant No. 2 would get the 1/3 of the 1/8 which stands at 1/24.
- Son T. B. Raju-Respondent No. 1 would get the 1/3 of the 1/8 which stands at 1/24.

(d) Final Share of Each Person:-

1. Daughter Mangammal-Appellant No .1, total share would be 1/8 + 1/24 = 4/24 or 1/6.
2. Daughter Indira-Appellant No. 2, total share would be 1/8 + 1/24 = 4/24 or 1/6.
3. Son T.B.-Respondent No. 1, total share would be 1/2 + 1/8 + 1/24 = 16/24 or **2/3.**

ANCESTRAL PROPERTY BECOMES SEPARATE PROPERTY:

68. The above analysis of ancestral property division brought out lucidly by the Honourable Supreme Court in Mangammal case (supra) demonstrates unmistakenly that with each partition and with each demise of a coparncener dying intestate, the chunk of the 'ancestral property' passing hands gets a new 'label': "separate property", and generation after generation from 1956 onwards the aggregate Joint Family property gets diminished bit by bit; and the process would have got a multiplier effect ever since the State after State brought out Amendments to the Hindu Succession Act, 1956 by conferring 'equal status' on

the daughters on par with the sons, in relation to the ancestral property, emboldening the daughters to demand the 'partition at will' before they get 'married' so as to reap the benefit that may otherwise be stolen from their hands post-marriage.

Incidentally, the Amendment Act, 2005, deletes section 23 of the 1956 Act, which placed restrictions on the daughter to claim partition of the dwelling house. Now, they can claim partition, even if the male members do not ask partition.

EPILOGUE:

69. From the foregoing discussion, one thing appears clear that the days of the concept **of the coparcenary property** are numbered:

(a) The Hindu Succession Act, 1956 (HSA) & then Hindu Succession (Amendment) Act, 2005 witnessed a paradigm shift in the concept of coparcenary property.

(i) Section 4 of the HSA gave an overriding effect by abrogating all the rules of succession hitherto applicable to the Hindus.

(ii) The HSA gave a woman greater property rights. Section 14 declared that any property possessed by a female Hindu, shall be held by her as full owner thereof and not as a limited owner, with a fresh stock of heirs under sections 15, 16 of the HSA.

(iii) For intestate, the HSA lays down a set of general rules in sections 8 to 13.

(iv) Under section 6 of the HSA Coparcenary property, devolved upon surviving coparceners. However, if there is a female relative specified in class I of schedule I, or a male relative claiming through such female relative, then the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession under this Act **and not by survivorship.**

(v) Further, section 30 of the HSA entitles a coparcener to make a testamentary disposition and after the Amendment Act,2005, the daughters as 'coparceners' can ask for 'partition' or make a will of her share in the Joint property.

(vi) Five States in India have amended the law relating to coparcenary property. Four States, viz., Maharashtra, Andhra Pradesh, Tamil Nadu and Karnataka, adopt a common pattern & have conferred upon daughters a birth-right in coparcenary property on prospective. The Maharashtra Amendment operates retrospectively from 22-6-1994. A daughter married before the date of operation of the Act is excluded from these benefits.

(vii) The Kerala Joint Hindu Family System (Abolition) Act, 1975 abolishes coparcenary system governed by Mitakshara law and declares coparceners as tenants in common and full owners of their share.

(viii) Section 6(3) of the Hindu Succession (Amendment) Act 2005 provides that where a Hindu dies after commencement of the Act, 2005, his interest in the property of a joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession as the case may be under this act and not by survivorship and the coparcenary property shall be deemed to have been divided as if a partition had taken place.

(ix) Thus, the traditional concept of coparcenary property with incidents of survivorship stands abolished expressly by section 6 (3) of the Amendment Act, 2005.

With the heavy blow of the Amendment Act, 2005, and in particular, section 6 (3), generation after generation would find the diminishing stock of joint property, coupled with the Kerala State taking the lead in complete abolition of concept of joint family ownership. It appears that it may be just a matter of time when the family property would be held by "tenants-in-common", rather than by "joint-tenants".

Perhaps, sooner than later, the concept of ancestral property would be relegated to the history of the Hindu Personal Law.

WEALTH TRANSFERENCE MODES: TESTATE, INTESTATE OR IN PRESENTI

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संपत्ती हस्तांतरणपद्धती: इच्छा पत्र, वारसाकायदा, अथवावर्तमानांत

WEALTH TRANSFERENCE MODES: TESTATE, INTESTATE OR IN PRESENTI ALIAS

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INTRODUCTION:

The entire estate of any person can be categorized either as movable or immovable and further divided as being either self-earned or ancestral. In the case of a female Hindu, under section 14 of the Hindu Succession Act, 1956, all the property of a female whether movable or immovable, self-earned by her skill or exertion, or acquired by gift /inheritance or in any other manner or held by her as streedhan (m$eeOeve) is her absolute property over which she alone has ownership rights.

Irrespective of the categorization, all properties can, generally, be transferred in any of the following three ways: –

- In presenti:
- Through Last Will and Testament, and
- Per law of Succession, where a person dies intestate

(1) <u>First mode of transfer</u> – In this mode of transferring property, ownership rights belonging to a person are transferred 'in presenti' (Latin, 'at the present time') i.e. during the lifetime of the concerned person. During such transfer, ownership rights, right of possession and all interests in the property are transferred in the name of the donee, where the transfer is through a gift deed; or the purchaser, where the transfer is through a sale-purchase deed. After such deed is duly registered the donee /purchaser is deemed as 'full owner' of the property when the possession of the said property is simultaneously transferred to him/her.

(2) Second mode of transfer –

(a) This entails making of a Last Will and testament. A Will is a written legal declaration of one's intention as to whom property is to be bequeathed/devised and in what proportion. A Will is signed by its maker in the presence of at least two witnesses, who sign in the presence of the maker and each other. It comes into force and becomes alive and gets implemented only after the death of its maker.

(b) The Indian Succession Act, 1925 governs the Testamentary disposition in the case of a Hindus (including Buddhists, Jains, and Sikhs) Christians, Parsees. Under the Act, 1925 applicable to Parsees and Christians, a witness cannot be an executor or legatee. However, under the said Act, 1925 as applicable to Hindus, a witness can be a legatee or an executor. A Muslim is not required to have his Will attested if it is in writing.

(c) Here it must be noted that the Last Will and testament declaration by itself does not, automatically effectuate or transfer any rights or interests in the property itself.

(d) For such a transfer of rights or interests in the property through a Will, the Will needs to be proved as 'valid' declaration, properly executed in accordance with law. It is also a requirement on the part of a legatee to secure 'letters of administration', where no 'probate' of the Will is obtainable for the reason that the maker of the Will had not appointed, in terms of the Will, any "executor/s" for administration of the estate. It may be noted that the High Court/ District Court issues "Probate". The term "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; Schedule VI of the Indian Succession Act, 1925 gives "Format of Probate", wherein the Judge, inter alia, states that "the Last Will of the Testator was proved and registered before me".

(e) Thereafter, either a legatee who has obtained 'letters of Administration" or the executor, who has obtained Probate, as the case may be, in whom the entire estate of the deceased vests immediately upon the real owner's death, has to marshal all assets and property of the deceased, render an account to the Court and then proceed to distribute the estate in terms of the Will. In either case, the Administrator / Executor shall either give an oral consent or sign an 'instrument of assent' with regard to possession of the property. While the 'movable' property can be handed over by physical delivery to the

legatee, in the case of an immovable property assent/possession has to be through a written instrument to facilitate 'registration processes'.

(f) Only after all these pre-requisites are met, the process of property transfer shall become complete so as to facilitate registration or mutation entry in the Register of property- ownership in the records of the different entities like revenue department, municipality or the housing co-operative society.

(3) Third mode of transfer –

(a) Where any person dies intestate (i.e. without making a Will) or where the Will made by the deceased is found to be invalid (e.g. signed by only a single witness) then, the entire movable, immovable property of such person gets transferred in accordance with the Succession Act, applicable to him/her.

(b) As regards, intestate succession, for Christians/Parsees the Indian Succession Act 1925 applies, which determines share/s of each survivor. For Hindus (including Buddhists, Jains, and Sikhs) it is the Hindu Succession Act, 1956 that is applicable in the case of intestate succession.

(c) For Muslims:

- In Non-testamentary succession, the Muslim Personal Law (Shariat) Application Act, 1937 is applicable.
- On the other hand, in case of a person who dies testate i.e. one who has created his Will before death, the inheritance is governed under the relevant Muslim Shariat Law as applicable to the Shias and the Sunnis.
- Further, in cases where the subject matter of property is an **immovable property** situated in the then presidency towns: Calcutta (Kolkata), Madras (Chennai) and Bombay (Mumbai), the Muslims shall be bound by the Indian Succession Act, 1925. This exception is only for the purposes of **testamentary succession**.

In this third mode of transfer, an heir or a legatee is required to obtain letters of Administration (L/A) from a competent Court of law and it is only after obtaining such L/A that the property in question can be distributed as per the Court's orders. As seen above, for Hindus (including Buddhists, Jains, and Sikhs) Christians, Parsees and Muslims different rules apply for determining legal heirs and their respective shares.

PROS AND CONS:

2. In the first mode of transfer, the property is transferred while its owner is still alive. However, in the second and third modes of transfer, the process and execution of transfer is carried out after the demise of the property-owner. The first mode of transfer may be taken to its fulfillment without resorting to a Court of law while the transfer effectuated after the death of the property-holder invariably includes interference of a Court; it doesn't matter whether a Will exists or not.

Each of the above modes of property transfer has certain pros and cons to it. For instance:

Property transfer in presenti: Property once transferred through a sale Deed or through a gift Deed cannot be retrieved in times of need. One cannot fall back on the asset already parted with. However, such property transfer occurs in full view of the transferor and after his demise the issue of any probable, potential dispute is nipped in the bud as the property so transferred is not "a part of distributable property" of the deceased.

In the case of other two modes, the owner of the property retains full control on the property and can sell off the same if need be. However, the probability of litigation cannot be ruled out.

One has to make an informed choice looking to one's financial position, age of the life–partner, needs of future, sources of income, liabilities—present or potential.

What exactly is the connotation of "OWNERSHIP TITLE"?

3. In terms of property laws, ownership or proprietary-rights of a movable or immovable property boils down to a bouquet-like bundle of rights, some decisively prominent while others take a secondary position.

Rights which are prominent:

(1) To have exclusive, single-handed possession of property in the capacity of an owner,

(2) To utilize and enjoy property at one's own discretion,

(3) Right to sell or mortgage property or dispose it in any other way, without consent or concurrence of anyone else.

Other rights of 'interests' –

(a) If the property happens to be a piece of land then the right to draw

income from it by setting up a mine or cutting timbre from a forest thereon.

(b) Right of water, right of coastal land.

Easement rights: (sort of greenery in a bouquet of rights!)

- Just as a bouquet contains multi-coloured flowers and some greenery, these bundle of rights contain such easement rights as are mentioned below –

  (1) Easement right to clear air and light, (2) right of entry through neighbour's land (3) certain easement rights are expressly documented while some are implied in nature.

Note:

- The concept of easement has been defined under Section 4 of The Indian Easements Act, 1882. According to the provisions of Section 4, an *easementary right is a right possessed by the owner or occupier of the* land on some other land, not his own, the purpose of which is to provide the beneficial enjoyment of the land.
- The word 'land' refers to everything permanently attached to the earth and the words 'beneficial enjoyment' denotes convenience, advantage or any amenity or any necessity. The owner or occupier referred to in the provision is known as the Dominant Owner and the land for the benefit of which the easementary right exists is called Dominant Heritage. Whereas the owner upon whose land the liability is imposed is known as the Serviant Owner and the land on which such a liability is imposed to do or prevent something, is known as the Servient Heritage.
- An easement cannot be transferred apart from the dominant heritage. This means, an interest in property restricted in its enjoyment to the owner personally cannot be transferred by him. (Sec. 6, of the Transfer of Property Act).

DIVISION OF OWNERSHIP RIGHTS:

4. A person is said to be 'complete owner' of a property when he has: (a) actual possession of the property plus (b) right of possessing that property plus (c) ownership title thereof. Such a property is deemed sellable or having marketable title.

5. In several cases, ownership rights and actual possession may be held by different persons. This can be clearly seen in the well- known categorization of co-operative housing societies.

(a) 'Tenant Ownership Housing Society'

In this category, the lease of land or its entire ownership is held by the concerned co-operative society; and the members of the society, after they are allotted plots of land, construct houses from their own funds and ownership therein vests in them. Thus, the land is owned by the Society, but a part of it is in possession of a Member, who constructs his own house.

(b) 'Tenant Coparcener Housing Society'

In this category, the entire ownership of the land and the building thereon belongs solely to the housing society and flats are allotted to Members, who have rights of occupancy. The meaning of the term 'ownership flat' means a member has incurred expenditure of one single flat while the building was being constructed. The member, thereby, holds 'right of residence' in such a flat, and has physical possession; but not the 'Ownership title', which exclusively vests in the Society.

- It is clear that the ownership rights and right of possession thereof are separated from each other. Thus, the 'owner' may not 'occupy, enjoy', while the occupant may not be a full-fledged 'owner'.

TRANSFER OF MOVABLE OR IMMOVABLE PROPERTY:

6. Though the Transfer of Property Act of 1882 pertains to transfer of property occurring by the act of parties concerned; (Inter vivos (Latin, between the living) is a legal term referring to a transfer or gift made during one's lifetime, as opposed to a testamentary transfer**)**, the principles governing it also apply to the transfer of property occurring through Will or intestate; because, after the death of a person, his Will-executor or heirs are required to legally represent him. After a Will- executor gives his consent, the equitable rights of a legatee are converted into ownership rights.

Let's see the difference between transfer of movable and immovable property, under the provisions of the Transfer of Property Act, 1882, reproduced below:

Chapter III: OF SALES OF IMMOVABLE PROPERTY

54. "Sale" defined

- "**Sale**" is a transfer of ownership in exchange for a price paid or promised or part- paid and part-promised.
- **Sale how made**: Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property**.**

Delivery of tangible immovable property takes place when the seller places the buyer or such person as he directs, in possession of the property.

- **Contract for sale:** A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property.

UNQUOTE:

- The aforesaid provisions would make it clear that transfer of immovable property can be effectuated through a written instrument. However, movable property can be transferred only by giving delivery of possession, just like 'delivery of goods' under the Sale of Goods Act.
- Hence, movable properties such as bank accounts, bank deposits etc. can be and are transferred to the "nominee" thereof by the bank automatically. If the nominee himself happens to be the "beneficiary" of such property by dint of a Will, then no other formalities need to be carried out to effectuate "ownership title".
- However, in the case of immovable property such as residential house, commercial tenement, Land or agricultural land, a written instrument duly executed on the stamp paper and registration thereof under the Registration Act,1908 coupled with actual and physical possession of the property are essential for its transfer. When these formalities are completed the tile gets transferred.
- It is a very tedious process to register mutations in titles in all government offices, municipal bodies and now, even in the case Co-operative Housing Societies.

'OWNERSHIP OF PROPERTY':

6. In the first mode of property transfer, a person who is a full owner of a property gives away his ownership rights, and the process occurs in present times and transfer reaches completion.

7. However, in other two modes of property transfer, the process of transfer of property itself begins only when the original owner is no more alive.

Mode of Transfer: through Will

(a) Though a Will confers a share in the property upon a person, called legatee or devisee, what such person actually gets in his hands is the 'right of receiving property' under the Will.

(b) Such person neither gets ownership nor actual possession.

(c) This right of receiving property is termed as **'equitable title'** i.e. the right in a person to whom it belongs, to have legal title transferred to him. Thus, transfer of ownership rights remains to be effected. Possession of a property is an independent matter which is elaborated in depth later on.

Mode of Transfer: Intestate

(a) In absence of a Will, no one knows the magnitude of total property, its ownership, its location-details etc. In the case of a common house property, the question of how to break it up in parts among brothers/sisters etc. also surfaces.

(b) In this mode of property transfer, though the sharers or the shares are pre-determined the process of determining the volume of property, and arranging distribution thereof necessarily involves the Court's intervention.

'WILL' AND THE RIGHTS OF A LEGATEE:

8. In the second mode of property transfer, a Will is made and there are details of all movable and immovable property owned by the Will-maker and the names of persons to whom and in what proportion it is bequeathed or devised.

However, the question arises: How a third party can accept ex-facie validity or genuineness of a Will? Surely, a Will is not something like a valid legal tender or a currency Note, say a rupee 500 Note, which may be acceptable to one and all.

If one feels that everybody should recognize and accept the Will, then it comes with all the baggage of appointing an executor, securing a probate or, in cases where no executor has been appointed, the requirement on the part of the legatee or heir to obtain letters of administration from a competent court of law etc.

Suppose, the legatee produces the Will, (even original copy) how can any third party vouch for the authenticity/validity or genuineness of the signature of the maker or those of witnesses? A third party holding the property of the deceased, in trust, would be within its right in declining to part with such property unless appropriate Indemnity Bond, or Guarantors having adequate worth, are ready to back the request of the legatee for return of property. In practical life, no third party would take a risk in such financial dealings pregnant with potential litigation.

This mode of transfer would involve intervention by the Court of law for a Probate, where an 'executor' is appointed or where no executor, a Letter of administration issued by the Court of law.

INTESTATE SUCCESSION:

9. The third mode of property transfer is where a person dies intestate, that is, when the person makes no Will or the Will, if made, is not valid, like signature of only one witness.

- In such a situation, there are two alternatives available:
  - (a) One course open to the legal heir/s is to approach the competent Court of law and get the Letter of Administration (Format-Schedule VII to the Indian Succession Act, 1925) and then the legatee obtaining Letter of Administration can make an inventory of assets, find out the shares of the successors and then distribute the property as directed by the Court. Thereafter, based on the Court order, get the mutation entries carried out.
  - (b) Another alternative, equally efficacious, is having a Memorandum of Family Arrangement. One of the relatives must take a lead, and bring all the other relatives on the round table, have the "equitable distribution' agreed upon, implement it, and then record such arrangement by way of aid memoir. Such an Agreement can be made on a nominal stamp paper and can be registered. Based on this , the mutation entries can be done, in Government records, land Revenue Records , Municipal records and even in the Co—operative Housing Society records.
- It is felt, that the second alternative is without Court intervention, less costly and equally efficacious.

PROPERTY TITLE TRANSFER

UNDER WILL OR INTESTATE:

10. It would be useful to refer to the Indian Succession Act, 1925 to understand the exact definition of a 'Will' and important provisions made in relation thereto.

- **A Will** is a legal declaration of the intention of the Will-maker with respect to his property which he desires to be carried out after he has passed away.
- One's legal declaration alone cannot, by itself, transfer his/her wealth automatically; the reason is that such a declaration becomes alive only after the demise of the concerned person.

- Property gets transferred after actual possession is handed over to the Legatee. (Section 54, The Indian Property Transfer Act, 1882).
- Therefore, in Section 332 of the Indian Succession Act, it has been clarified that the rights of a legatee are fulfilled only after the consent of the executor of the Will or administrator thereof.

It may so happen that a third Party who is in possession of the property hands it over to the "nominee" and if the Will in respect of that property has conferred ownership title to the nominee, then the oral consent of the executor of the Will or administrator may fulfill the rights of the legatee and such legatee may enjoy such property or dispose it of at his own discretion. But the real problem arises where immovable property is involved. In the case of immovable property, its registration is a requirement after the executor of Will gives its consent for transfer of the asset, and hands over possession.

THE INDIAN SUCCESSION ACT, 1925

– SOME IMPORTANT PROVISIONS REPRODUCED BELOW:

2. Definitions. - In this Act, unless there is anything repugnant in the subject or context,--

(a) "administrator" means a person appointed by competent authority to administer the estate of a deceased person when there is no executor;

(b) "codicil" means an instrument made in relation to a will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the will;

[3]*[(bb) "District Judge" means the Judge of a principal Civil Court of original jurisdiction;]

(c) "executor" means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided;

(f) "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;

(h) "will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

REPRESENTATIVE TITLE TO PROPERTY OF DECEASED PERSON

211. Character and property of executor or administrator as such.-

(1) The executor or administrator, as the case may be, of a deceased person is

his legal representative for all purposes and all the property of the deceased person vests in him as such.

(2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh, 1*[Jain or Parsee] or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

332. Assent necessary to complete legatee's title**-**The assent of the executor or administrator is necessary to complete a legatee's title to his legacy.

Illustrations

(i) A by his will bequeaths to B his Government paper which is in deposit with the Imperial Bank of India. **The Bank has no authority to deliver the securities, nor B a right to take possession of them, without the assent of the executor.**

(ii) A by his will has bequeathed to C his house in Calcutta in the tenancy of B. C is not entitled to receive the rents without the assent of the executor or administrator.

333. Effect of executor's assent to specific legacy.-

(1) The assent of the executor or administrator to a specific bequest shall be sufficient to divest his interest as executor or administrator therein, and to transfer the subject of the bequest of the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way.

(2) This assent may be verbal, and it may be either express or implied from the conduct of the executor or administrator.

11. From the above discussion, it can be understood that despite making or not making a Will, a legatees' titles are not fulfilled until the property in question is actually handed over to the heirs and they take possession of the same. Such property cannot be enjoyed as having a 'marketable title' without the aforesaid two requirements being fulfilled.

WHICH MODE TO OPT?

12. Property is a paradox! Inadequate property creates problems of fulfilling needs, while more than adequate creates problems of its proper disposal. Since one earns property by the sweat of one's brow, it is natural to feel that it should end up in good hands, please the holder and grow even further. If one really yearns this, why not make provisions for it while one is breathing, hale and hearty?

It is felt that one should arrange for disposal of ones property during one's own lifetime after having kept aside enough for one's own needs, actual and potential.

All the three modes of property transfer are more or less prone to error. Transferring property during one's lifetime has the only shortcoming that the gift or sale deed cannot be revoked once it is implemented. Here the nagging question is what if one requires the gifted movable or immovable property in future?

13. GIFT OF RESIDENTIAL HOUSE:

(i) Sans possession:

It is expedient to clarify here that even if a person gifts a residential house to his son/daughter, and continues to stay with his son/daughter, it would not be possible for the son/daughter to evict such donor in future; if one has not given up "actual possession of the house". Giving away ownership title does not imply full ownership, when possession is retained by the Donor. Failing to comply with this advice has led many to misery.

One must avert a situation where one gifts away one's residence to his son or daughter and later on, the ungrateful kids ask the parents to vacate the residence by dint of their possession of the property. Hence, one must never hand over actual possession of the house. This would retain the entitlement of the parents to live in the gifted house because the law recognizes, approves, and allows "ownership" without possession. (Refer to the Larger Bench judgment of the Supreme Court in case of S. Sarojini Amma vs. Vellayudhan Pillai Srikumar Dated 26th October 2018).

(ii) Conditional with possession:

In this context one may refer to the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. It is a legislation enacted in 2007, effective December 31, 2007, to provide more effective provision for maintenance and welfare of parents and senior citizens.

Some Highlights:

(a) The Act makes it a legal obligation for children and heirs to provide maintenance to senior citizens and parents, by monthly allowance.

(b) This Act casts obligations on children to maintain their parents/grandparents and also the relative of childless senior citizen who is in possession of or who would inherit his property after death to maintain such senior citizens

(c) A senior citizen including parent who is unable to maintain himself from his own earning or out of the property owned by him, is entitled to get relief under this Act.

(d) Children/grand-children are under obligation to maintain his or her parent, either father or mother or both.

(e) If such children or relative is not maintaining his parents or senior citizen respectively, then the parents/senior citizen can seek the assistance of Tribunal constituted under this Act, to enforce the remedy of maintenance. Such parents/ senior citizen can file an application before the Tribunal, claiming maintenance and other reliefs from their children/relatives as the case may be.

(f) The maximum amount of maintenance that can be allowed by the Tribunal is Rs. Ten Thousand per month.

(g) This Act also provides that state governments may establish old age homes at least one in one district to accommodate indigent senior citizens. State governments may also ensure proper medical care for senior citizens.

(h) Protection of property of senior citizen

•Section 23 in the Maintenance and Welfare of Parents and Senior Citizens Act, 2007

> **23 Transfer of property to be void in certain circumstances.-**
>
> (1) Where any senior citizen who, after the commencement of this Act, has **transferred by way of gift or otherwise, his property**, subject to the condition that the transferee shall provide the basic amenities and basic physical needs to the transferor and such transferee refuses or fails to provide such amenities and physical needs, the said transfer of property shall be deemed to have been made by fraud or coercion or under undue influence **and shall at the option of the transferor be declared void by the Tribunal.**

•Thus, after the due process of law, the senior citizen (age 60) can re-claim his property; and if one is not a senior citizen, this section will not protect his Gift of house property unless the Gift Deed itself has a conditionality spelt out and consented by the Donee as required by.

It is felt that the giving of Gift of residential house-property sans (=without) possession has an added advantage because the Donor's right to stay in the

house exists at all times; and in the latter case "a due process of law" is involved for the Donor to step in his own house, after the statutory Tribunal or the Appellate Tribunal under the aforesaid Act, 2007 declares the Gift as void and allows the Donor to re-claim possession of his own house.

14. SUMMARY: MODES OF TRANSFERENCE

A table below may give at a glance the salient points of three modes of transfer of wealth: comparative position:

Conditions	Gift	Will	Inheritance
Giver & Receiver	Between two living persons; & donee must "accept"	Giver is no more alive, receiver has an equitable title or right to receive	Giver is no more alive & died intestate, receiver to move court of law,
Property – movable or immovable	Property existing at the time of making the Gift	Property "receivable" can also be given	All property "owned" by the deceased.
Whether to third party	Yes	Yes	No, only among blood relations & kins as per Succession Laws.
What formalities	Agreement giving Movable property, if not oral, requires Stamp duty, And for immovable property both stamp duty & Registration; and in both the cases "physical/actual possession"	The Document, namely Will needs no Stamp duty or Registration; but may have to be proved, if property in possession of third –party.	Legal heir has to prove his claim – obtain Succession Certificate- A succession certificate is a document that is granted by a civil court to the legal heirs of a deceased person who dies without leaving a will.
Tax payable	Recipient has to pay Income Tax where the amount exceeds Rs. 50,000=00, in a Year; but no tax if received from specified 22 relatives.	Recipient pays No Income tax or any other tax	Recipient pays No Income tax or any other tax

Conditions	Gift	Will	Inheritance
Limitations	No ceiling, when given to or received by specified "relatives"; except that Clubbing applies if wife or Minor children earn income on such Gift.	No ceiling; but ONLY from Self –earned property after providing for "wife" & "dependents",	Shares are pre-determined as per Succession Laws: -no choice.
Title transfer and mutation entry in Property Records	Gift deed must be registered and possession given to complete title transfer	Equitable tittle needs to be perfected by consent of Executor, and possession received.	When the Administrator gives assent, and possession received and registration formalities completed.

EPILOGUE:

15. Let's summarize in brief –

(a) Make sure to appoint nominee/s with respect to each and every property– movable or immovable – and go on altering nomination/s as and when need be.

(b) Make separate Wills for movable and immovable properties and give cross references in both the Wills.

(c) Only one Will, duly executed, must exist at any given point of time, all previous Wills, if any, need to be 'destroyed'.

(d) Movable property-ownership is changed by transfer of possession. So, the nominee named as 'beneficiary' in the Will gets full ownership when the third party hands over the asset.

(e) Immovable property can be transferred only by written Deed which is duly registered and 'full ownership' is transferred only after "actual possession" is given/taken over.

- **In conclusion**: One cannot predict what might transpire after one has breathed one's last! Whether the survivors honour the Will or the property gets embroiled in litigations is uncertain.
- But, if one chooses the option of disposing of property, in presenti, then one should be absolutely cautious about not being rendered homeless like the ill-fated thespian Natasamrat *ve¤imece¤*. You should never bring upon yourself the situation of begging for a few morsels or shelter.

Wisdom lies in making a well informed choice!

NON-RESIDENT INDIAN'S WILL

Alias

तथा

अनिवासी भारतीयाचे

इच्छापत्र

NON-RESIDENT INDIAN'S WILL

By Adv. Dinakar Parashram Bhave
Mobile: 9820529371

Executive Summary:

An elixir of immortality is more philosophical than practicable. No one can have eternal life. So, one has to plan about one's exit leaving behind all material gains like movable/immovable property to survivors, kith and kin.

A citizen of India having chosen to stay abroad for an employment or other purposes may have acquired nationality, domicile there, { an NRI status} would need to take extra care to void possible hurdles in transference of wealth on account of complex laws and conflict of jurisdictions involved in the process when estate is scattered in more countries than one.

Given the situation that there is a lack of internationallyaccepted mode of testamentary & intestate succession for the estate spread over the world, one is advised to traverse on the suggested lines more specifically detailed in the monograph.

A need to have properly crafted will and corresponding declaration, for each Asset separately can hardly be overemphasized. It is desirable in this context to have proper guidance from a well –versed Attorney to avoid pitfalls.

It is preferable if one considers disposal of major estate during one's life-time and the remainder through well-conceived will format recommended by the Hague Conference on Private International Law (HCCH).

If the **will** is executed in the manner indicated in the Uniform International Wills Act, 1973 (UIWA) and the basic requirements in paragraph 39 below are followed along with guidance from end-Annexure, the essential validity of the testamentary disposition may be somewhat free from challenges.

It is trite saying that most people don't plan to fail, they fail to plan.Kindly remember that planning is bringing the future into the present so that you can do something about it now.

Non-Resident Indian's will

In the recent past, a booklet on the subject: "Your Wealth, Your **will**" written by the Author in Marathi was published in the Maharashtra Times during January-March 2015. Later on its English version was published by the New Book Corporation, Mumbai in its taxation Bulletins in January 2016; and thereafter, in February 2016 these versions in Marathi & English had been released in the Book-form. In July 2016, its Hindi version was published in a Book-form.

2. The main focus of these Booklets was on the awareness aspect and acquainting readers with fundamentals governing the functional & operational areas concerning the disposition of wealth through testamentary & non-testamentary trajectories, in a non-technical & simple language, without much of legalistic jargon so as to make it easily digestible, palatable to a legendary "common-man" depicted by Late R. K. Laxman.

3. The areas involving some complicated aspects where multi-national jurisdictions & laws may come into play were left open for subsequent monograph. Now, it is proposed to take those areas involving conflict of laws and jurisdictions affecting Non-Resident Indians or Persons of Indian Origin (NRIs & PIOs) primarily in relation to the disposition of their estate in India or the country, where they have chosen to residewith intention to stay permanently, a domicile of choice.

What exactly is meant by Conflict of laws?

4. 'Conflict of laws' is a term used mainly in the United States, Canada, and, increasingly, in the United Kingdom. In most other countries, historically, the term 'private international law' is used. The latter term derives from the civil-law distinction between 'private' and 'public' law, whereby 'private law' addresses the legal relationships between and among individuals, while 'public law' deals with the law governing State institutions as well as governmentalagencies' relationship with private parties.

5. 'Private international law' thus emphasizes the differences between national legal systems;and the term conflict of laws refers primarily to rules that are solely national in origin and are explicitly not a part of **international law**. (Except insofar as countries have concluded treaties concerning them.)

6. A 'conflict' case is a case containing a foreign element. 'Conflict of laws' must address three principal questions:

- First, when a legal problem touches upon more than one country, it must be determined which court has jurisdiction to adjudicate the matter.
- Secondly, once a court has taken/assumed jurisdiction, it must decide which law it should apply to the question before it. The rules governing the court may direct it to apply its own law or call for the application of the law of another country.

- Thirdly, assuming that the court ultimately renders a judgment in favour of the plaintiff, conflict-law must address the enforcement of the judgment. Where the defendant has insufficient assets locally, enforcement of the judgment must be sought in a country where he holds sufficient assets.

These three questions take the centre stage in this monograph seeking to analyze in detail the jurisdictional and legal systems governing the cases involving foreign element in India and other countries; and efforts made by International bodies likethe Hague Conference on Private International Law (HCCH),an intergovernmental organization working for the progressive unification of the rules, principles of conflict of laws.

Dissension and Family Arrangement:

7. In the previous booklet: "Your Wealth ,Your will", the emphasis was on avoidance or minimization of litigation by proper planning through the sacred document called will; and the dispute area emerging as a fall out of the defective, deficient wills or disagreement among members of family concerning implementation of a will was deliberately left untouched.

8. Looking to the growing trend of the courts in India and the central government's litigation policy, the dispute resolution out-of-court has had assumed greater importance, weightage and hence it was considered more appropriate to deal with the dispute resolution through "Family Arrangements", which have been upheld by the highest court of Law in India: the supreme court of India. Abooklet has already been published with a title: "Memorandum of Family Arrangements" dealing with the subject in detail: formation of arrangement/agreement, documentation, payment of stamp duty, registration & mutation entries relating to the properties, in the Government as also municipal records to give finality to the dispute resolution.The booklet contains a specimen copy of the Memorandum of Family Arrangement to give an idea of the legal requirements.

Present monograph:

9. As adverted to in paragraph 3 (supra), this monograph deals with the disposition of the estate through the will of an NRI and applicability of the domestic law or foreign law in the context of conflict of laws. If the will is defunct a reference may be made to the booklet on "Memorandum of Family Arrangements", where the dispute concerning the willis to be resolved "out-of-court".

10. The subject matter of the present monograph does involve some kind of technical & legal complexities, but an attempt is made to place it in a simple phraseology for ease in understanding by common readers as well.However, reference to accepted legal& technical definitions and allied settled principles of law is inevitable for the proper understanding of thesubject matter,which hasmultiple facets & complex dimensions conceptually & in practical application.

Non-Resident Indian's will:

11. As the title suggests, the subject concerns a will prepared or to be prepared by a person who is a citizen of India but who is staying in some other country for employment or other purposes,called an NRI, or is a spouse or dependent person on such NRI. As the NRI is staying for some time in the country other than India, he mayhave,in all probability,acquired both movable & immovable properties either on purchase/ sale basis or by acquiring interest in immovable properties by way of creating mortgages or in some other permissible manner;and he may also have some movable & immovable properties in India as well. Disposal of the entire estate in India and abroad needs timely and proper planning to avoid costly litigation, and ensure that the assets get transferred to near relatives in a smooth manner. An attempt is made to suggest technique of navigating through the maze of widely varying legal systems in the world dealing with cases involving a 'foreign element'.

Baffling questions:

12. In this context, a question that may arise is: "which law would govern the testamentary or non-testamentary disposition of an NRI"? Well, the answer is neither easy nor simple by any standard. Another question is:"whether the same law would apply equally for the properties in India and abroad"? Certainly not. Yet another questionwould be:"whether the law applies for the movable and immovable properties alike"? Surely not.

This monograph attempts to examine these vex & complex issues and seeks to suggest some fair to middling solution based on the current understanding of the Conflict of Laws or choice of law as in force or implemented internationally.

13. To begin with one must understand who isan "NRI" and who is a"PIO"?In the context, one must also familiarize with the Overseas Citizenship of India {OCI} Scheme applicable to both: NRIs and PIOs, which, in India, confers partial citizenship status on NRIs.

Non-resident Indian (NRI):

(a) A Non-Resident Indian (NRI) is a citizen of India who holds an Indian passport and has temporarily immigrated to another country for six months or more for employment, residence, education or any other purpose.

Person of Indian Origin (PIO):

(b) Person of Indian Origin (PIO) is a person of Indian ancestry,but who is not a citizen of India and is the citizen of another country. PIO is an identification status given to a personwho's any of the ancestors was a permanent Indian resident/citizen, and who is presently holding valid citizenship and passport of another country.

- Other terms with vaguely the same meaning are overseas Indian and expatriate Indian.
- In common usage, this often includes Indian-born individuals (and also people of other nations with Indian ancestry) who have taken the citizenship of other countries.

Legal definitions: Non-Resident Indian (NRI)

(i) Strictly speaking, the term **non-resident** refers only to the **tax status** of a person who, as per section 6 of the Income-tax Act, 1961, has not resided in India for a specified period for the purposes of the Income Tax Act. The rates of income tax are different for persons who are "resident in India" and for "NRIs".

- According to the Income Tax Act, any Indian citizen who does not meet the criteria as a "resident of India", is a non-resident of India and is treated as an NRI for paying income tax.
- It needs to be mentioned that the Tax Laws in India are fluid and one is advised to check the "current law".
- Till end of FY 2019-20, NRIs (i.e. Indian citizens and Persons of Indian Origin) included those individuals who **visited India for less than 182 days** in a financial year.
- The Finance Act 2020, w.e.f. 1st April 2021, has reduced this period to 120 days for all NRIs.

Legal Definition:Person of Indian Origin (PIO)

(ii) The Government of India considers anyone of Indian origin up to four generations removed to be a PIO, with the exception of those who were ever nationals of Afghanistan, Bangladesh, Bhutan, Nepal, Pakistan, or Sri Lanka. The prohibited list periodically includes China and Iran as well.

- The government issues a PIO Card to a PIO after verification of his or her origin or ancestry and this card entitles a PIO to enter India without a visa.
- On 9th January 2015, PIO Card scheme was withdrawn, and merged with OCI scheme, as outlined below.

Overseas Citizenship of India (OCI) Scheme: a Partial Citizenship

(c) The **Pravasi Bharatiya Divas** (Overseas Indians' Day)is being celebrated on the 9th January, to "mark the contribution of Overseas Indian community in the development of India".

- From January 2006, the Indian government has introduced the **"Overseas Citizenship of India (OCI)"** scheme to allow **a limited form of dual citizenship** to Indians, NRIs, and PIOs.

Dual Citizenship outlawed in India:

(d) Article 9 of Indian Constitution says that a person who voluntarily acquires citizenship of any other country is no longer an Indian citizen.

- **About 60 countries:** USA, UK,Bangladesh etc. allow dual Citizenship, **whereas about 28 countries: India,** China, Japan, Nepal, Malaysia, UAE etc. **do not allow dual Citizenship**)
- The Overseas Citizenship of India (OCI) is an immigration status and removes all barriers to entering, exiting India.
- To apply for and use an OCI document, a holder must be a citizen of and hold a passport of another country, except that of Pakistan or Bangladesh.
- The OCI status amounts to **partial citizenship**, sans right of voting or participating in governmental decision making.
- In 2015, the PIO card scheme is merged with the OCI scheme.

Jurisdiction and choice of law:

14. The conceptual understanding of the term "NRI" is clear that a person who is not a "resident of India", that is, he is not living in India for at least six months (April 2021, four months) in a year, is an NRI.Now, such an NRI staying most of the time abroad (say in UK or USA), may create after say about 3/5 years substantial wealth in that country in the form of movable & immovable properties. Such an NRI may have also retained links in India & may have also some properties in India.

Suppose, a person having properties, both movable & immovable in both the countries disposes of these properties, under the will, a question may arise as to which legal system will apply in his/her case & which Court of law will give a definitive decision on disputes, if any, arising from & out of implementation of his/her **last will** & testament?

One can add further complexness to this array of questions by saying that the NRI married to an English woman and both of them also lived together in France for say 5-6 years and they had two children and all four of them are currently domiciled in Germany. How to decide whether the legal system of Germany or UK or France or India would apply? Which Court of law would be competent to adjudicate on the execution of the willmade in Germany disposing of property in UK, India and Germany?

Foreign element:

15. Why these questions arise? The reason is that all facts do not happen or co-exist in the boundaries of **one political State**. Therefore, when a given set of facts has mixed colours involving different nationality, citizenship, domicile and location of assets, choice of law becomes inevitable;e.g. a person may be

Indian national, wife a British national, children French nationals & the family is, now, domiciled in"Germany".

Each country has its own legal system, earmarked forum for adjudicatory process & set of Rules including the Rules in relation to conflict of laws, with superimposing doctrine of "public policy" for rejecting foreign law as being distasteful to the value system of the domestic forum, that is,local courts of law.

This conflict of laws & jurisdictions have foxed many a jurists, legal luminaries for decades, centuries and many attempts made to devise a uniform system were unsuccessful. However, the recent developments in that direction by the Hague Conference (HCCH)are somewhat encouraging.

Connotation of nationality, citizenship and domicile:

16. It is necessary to familiarize with the conceptual parameters of two/three terms generally usedin cases of conflict of laws, namely, "nationality, citizenship and domicile". Even though the line dividing the conceptual diversity or operating sphere of each term may not be discernible with clarity; the broad idea is perspicuous or comprehensible.

Nationality:

(i) Nationality is the legal relationship between a person and a political State.

(ii) Nationality grants the State jurisdiction over the person and affords the person the protection of the State.

(iii) By custom and international conventions, it is the right of each State to determine who its nationals are. Such determinations are a part of nationality law.

(iv) In some cases, determinations of nationality are also governed by public international law—for example, by treatieson statelessness, theEU Convention on Nationality.

- {**Statelessness** is an international problem. The international legal definition of a stateless person is "a person who is not considered as a national by any State under the operation of its law".}

(v) Indian nationality law largely follows the jus sanguinis (by right of blood) as opposed to the jus soli (by right of birth within the territory).In most modern countries all nationals are citizens of the State.

Citizenship:

(a) Nationality differs technically and legally from citizenship, which is a different legal relationship between a person and a state/country.

(b) Nationality and citizenship are two terms that are sometimes used interchangeably, as synonyms. But this is not true and they differ in many respects.

(c) Similarly the rules governing nationality and citizenship differ from country to country.

Nationality vs. citizenship:

• In simple words, nationality is connected with country where an individual was born. The citizenship is a legal status, which means that an individual has been registered with the government in some country.

(a) The most common distinguishing feature of citizenship is that citizens have the right to participate in the political life of the State, such as by **voting** or **standing** for election.

(b) In the comity of nations, a State may have its own rules to recognize who are her citizens.

• **In India**, there is a Citizenship Act, 1955 which defines the concept of citizenship. Various types of citizenship are: citizenship by birth; citizenship by descent; citizenship by registration; citizenship by naturalization,Renunciation and termination of Indian citizenship.

Domicile:

(i) In law, domicile is the status or attribution of being a lawful permanent resident in a particular jurisdiction. Indian law generally follows English common law principles on issues of conflict of laws.

(ii) When you are born, **you are automatically assigned to the same domicile as your parents**. This is your "domicile of origin"; and may be changed subsequently by aconscious act of the individual, called "domicile of choice".

(iii) Indian law lays down a specific test for "domicile of origin", and domicile of origin may not necessarily be the same as the place of birth. **Domicile of origin means the home of an individual's parents.** It does not mean the place where the child was born; thus, domicile of origin is different from accidental place of birth.

(iv) A person can remain domiciled in a jurisdiction even after he has left it, if he has maintained sufficient links with that jurisdiction or has not displayed an intention to leave permanently.

(v) **A person cannot be without a domicile and cannot have more than one domicile at any one time; he acquires a domicile of origin at birth;** the wife follows the domicile of her husband (Uxor sequitur domicilium viri).

(vi) Indian Succession Act, 1925, sections 4 to 19thereof lay down general principles as to domicile. (Vide: ANNEXURE-II).

Case Law:

• In the case of **Dr. Pradeep Jain vs. Union of India andothers. [1984 AIR 1420]** the Honourable Supreme Court has very succinctly set out the concept of "domicile". Following are excerpts:

(1) Now there are in our country in almost all States residence requirements for admission to a medical college. Sometimes the requirement is phrased by saying that the applicant must have his domicile in the State. **We must protest against the use of the word 'domicile' in relation to "a state" within the union of India.**

(2) The word 'domicile' is to identify the personal law by which an individual is governed in respect of various matters such as the essential validity of a marriage, jurisdiction in divorce and .....**It is well settled that the domicile of a person is in that country in which he either has or is deemed by law to have,his permanent home. ...**Now the area of domicile, whether it be domicile of origin or domicile of choice, is the country which has the distinctive legal system and not merely the particular place in the country where the individual resides.

(3) The Constitution of India recognizes only one domicile namely, domicile in India. Article 5 of the Constitution of India is clear and explicit on this point and it refers only to one domicile, namely, **"domicile in the territory of India."** When a person who is permanently resident in one state goes to another state with intention to reside there permanently or indefinitely, his domicile does not undergo any change: he does not acquire a new domicile of choice.

(4) We would also, therefore, interpret the word 'domicile' used in the Rules regulating admissions to medical colleges framed by some of the states **in the same loose sense of permanent residence** and **not in the technical sense in which it is used in private international law.**

17. The broad outline of the three concepts, namely, nationality, citizenship & domicile have material significance in the field of conflict of laws. While the Nationality and citizenship have their role, the domicile has a pre-eminent place in conflict of laws. **The domicile plays a vital role and applies to disposition of all movable property in the jurisdiction where the person has his domicile.**

The nature of conflict of laws:

18. Conflict of laws involves number of complexities in its application to many situations like marriage, divorce, inheritance or ownership concepts of movable and immovable properties. This subject has occupied the attention and talents of some of the most learned jurists, and their labours are comprised in many volumes. The branch of Indian law, in contradistinction to the ordinary local or domestic law of India, which is concerned with cases having a foreign element , is known as the conflict of laws. A **foreign element means a contact with some system of law other than the Indian law.**

19. In the preceding paragraph 14 an example was taken. Thus when the given set of facts has mixed colours involving different nationality, citizenship, domicile and location of assets, choice of law becomes inevitable.

Now, the person is domiciled in Germany & wants to file petition for divorce. Which law would apply? Or, suppose he dies intestate, how his estate would be disposed of, both movable & immovable? Answers to these questions would push one to examine the operation of German legal system & the Indian legal system as well.

20. Each country has its own legal system, an earmarked forum for adjudicatory process & set of rules including the Rules in relation to Conflict of laws with superimposing doctrine of "public policy" for rejecting foreign law as being distasteful to the value system of the domestic forum, that is, local courts of law.

Selecting legal system:

21. Generally speaking many legal systems world over follow some common rules.

(a) A court can apply the law of the forum (lex fori)— which is usually the result, when the question of what law to apply is **procedural**, or

(b) The court can apply the law of the site of the transaction, or occurrence that gave rise to the litigation in the first place (lex loci), this is usually the controlling law selected when the matter is **substantive**.

Conflict of laws: some illustrations:

22. It is better to take some familiar illustration:

The traditional tests for the validity of a marriage in Canada was that a marriage had to be valid,

(i) where it was performed, by the lex loci celebrationis, and

(ii) by the law of the parties' ante-nuptial domicile, usually referred to as the question of "essential validity".

(a) With respect to the lex loci celebrationis, the ceremony had to comply with the rules of the place where it occurred—the minister had to be licensed, a licence obtained by the parties, etc.

(b) In the eighteenth century, the English courts recognized as a valid English marriage, a marriage performed in Scotland, notwithstanding that the parties, usually being under 21, could not validly marry in England without parental consent.

- In Brook v. Brook (1861), the House of Lords dealt with the question of **essential validity** and held that the marriage of a man

to his deceased wife's sister in Denmark was invalid because such a marriage was within the prohibited degrees of affinity under English law, **the law of the parties' ante-nuptial domiciles**, though not under Danish law.

- Today's Justices may not toe the line of Brook's case.
- Today, undoubtedly private international law **is a national law**. There exists "an English private international law" as distinct from French or German or an Indianprivate international law.

Doctrine of public policy or public order:

23. In deciding a conflict of laws question, a judge will sometimes say: **"The foreign law ordinarily applicable will not be applied in this case because to do so would violate our public policy."**

(i) It is commonly perceived that to reject the application of foreign law on public policy grounds is to say that somehow the content of the foreign law, when tested by notions at the forum, is seriously deficient in quality. Thus, in effect, the forum's public policy sits in judgment over the wisdom and fairness of the foreign law.

(ii) A plaintiff in a conflict of laws case does not seek to do something that is against public policy in its local sense. He is asking the court to give legal effect to acts done elsewhere and in accordance with the law prevailing there.When a judge rejects the application of a foreign law on public policy grounds, it must appear 'pernicious and detestable' or, 'violate some fundamental principle of justice', some deep-rooted tradition of the community.

(iii) In conflict cases, no court will apply a "foreign" law if the result of its application would be contrary to public policy. This is problematic because excluding the application of foreign laws would defeat the purpose of conflict of laws by giving automatic preference to the forum court's domestic law. Thus, for the most part, courts are slower to invoke public policy in cases involving a foreign element than when a domestic legal issue is involved.

Illustrative application:

24. A concrete perspective of the nature and character of the Conflict law can be perceived where referents are from everyday happening or an oversimplifiedexample of a legal situation calling for the application of rules of conflict of laws.

• A Dutch sailor employed on an American ship is injured in the course of work by allegedly faulty equipment while the ship is at anchor in a Japanese port.

• He sued for recovery in a Dutch court and sought application of the American law on the subject because it leads to the largest recovery with the smallest burden of proof.

• The American ship-owner, as defendant, contended that the negligence of the seaman was the cause of the accident and argues for the application of Japanese law, presumably it being least generous in awarding compensatory damages.

• Which legal system and what legal rules would be chosen **by a Dutch court** (the Netherlands) as providing the governing law?

• Would the same governing law be chosen for this kind ofcase by a court in the United States or Japan?

In a nut-shell, the choice of jurisdiction and the legal system applicable is at the core of the conflict of laws.

Common rules and principles:

25. While it is the prerogative and privilege of each jurisdiction to evolve and apply its own system of conflict of laws, a critical study of various systems, over a period of time, reveals that several jurisdictions follow a few general rules, which can be summarized as below:

(i) Every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The laws of every State, therefore, bind directly all property, whether real or personal, within its territory; and all persons who are residents within it, whether citizens or foreigners; and also all contracts made, performed or done within it. Vide Lex Loci;

(ii) It be noted that ambassadors and other public ministers, while in the territory of the State, to which they are delegates, are exempt from the local jurisdiction.

(iii) With exclusive authority, a State may regulate the manner, circumstances under which property shall be held, transmitted or transferred; the condition, capacity, validity of contracts and the remedies and modes of administering justice in all cases.

Legal systems, an overview:

26. Generally considered,there are five legal systems in the world today: (i) civil law, (ii) common law, (iii) customary law, (iv) religious law, and (v) mixed legal systems.

• Legal systems in countries around the world generally fall into one of two main categories:

(i) common law systems and

(ii) Civil law systems.

The main difference between the two systems is:

(i) in common law countries, case law, in the form of published judicial opinions, is of primary importance,

(ii) whereas in civil law systems, codified statutes predominate.

- There are roughly 150 countries that have primarily 'civil law systems', whereas there are about 80 'common law countries'.
- But these divisions are not as clear-cut as they might seem. In fact, many countries use a mix of features from common and civil law systems.

India maintains a hybrid legal system with a mixture of civil, common law and customary, Islamic ethics, or religious law within the legal framework inherited from the British colonial era and various legislation introduced by the British are still in vogue.

Common principles:

27. Although no uniform international conflict law rules exist, there are a number of common principles that are recognized to a varying extent throughout the world.

(a) Legal systems have established different criteria for the selection of one country's law over that of another for application to a particular case or problem. There are, however, some widely shared general principles.

- For questions of **family law**, **inheritance**, and (in limited types of cases) even liability in **tort**, legal systems will consider the **nationality** or, alternatively, **domicile** or habitual residence of a person.
- F**or commercial transactions**, a transaction's "closest connection" to a legal system may be emphasized over traditional connecting factors such as where the transaction was concluded.

(b) For cases involving legal persons **(& corporations)**, many countries, particularly those of the common-law tradition, prefer the law of the State where the entity is incorporated, but others with dominance of civil-law, prefer the law of the corporate "seat," defined as the place of central management and decision making. **Among the EU countries, there is a trend to change to the place-of-incorporation rule.**

(c) With respect to commercial transactions (e.g., contracts), modern conflicts law emphasizes flexibility. Most countries **allow the parties to agree to the jurisdiction of a court.** Consent may take the form of an express agreement in the initial business contract. Even where both parties consent to a court's jurisdiction, the courts in a common-law country may decline to hear the case, when neither of the parties nor the controversy has a connection to the country.

When the parties have not submitted to the forum, Civil-law countries start from the premise that there is one principal place where a suit can be filed: thedomicile of an individual or the seat of legal persons such as a Corporation ("general jurisdiction").

(d) In addition to these general bases of jurisdiction, a suit ordinarily may be brought in the courts of the place to which the suit has a special connection: e.g. where a tort was committed or where its effects were felt, or where the alleged breach of a contract occurred,

(e) If title to real property is involved, where the property is located ("specific jurisdiction").

(f) Increasingly, countries have limited the exercise of jurisdiction for the protection of weaker parties, such as employees and consumers. Such a pattern has emerged, for example, in the procedural lawof the EU.

(g) Courts in common-law countries, particularly the United States, U.K., assert jurisdiction over a defendant if he has been served with the documents commencing the suit in the territory of the state in which the court is located, even if he was there only temporarily or while in transit ("transient jurisdiction").

- Most countries provide some bases of jurisdiction for the benefit of local plaintiffs. French law, for example, grants jurisdiction if the plaintiff possesses French nationality, and German statutory law permits a local plaintiff to sue an absentee defendant on the basis of any property the defendant may have in Germany.

The supreme court of India

case laws:

28. In Y. Narasimha Rao case {1991 SCR (2) 821 } the Apex Court made some pertinent observations on the Conflict of laws:

QUOTE:

> 9. The rules of Private International Law in this country are not codified and are scattered in different enactments such as the Civil Procedure Code, the Contract Act, the Indian Succession Act, the Indian Divorce Act, the Special Marriage Act etc. .....In addition, some rules have also been evolved by judicial decisions. In matters of status or legal capacity of natural persons, matrimonial disputes, custody of children, adoption, testamentary and intestate succession etc. the problem in this country is complicated by the fact that there exist different personal laws and no uniform rule can be laid down for all citizens. .....Hence, in almost all the countries the jurisdictional procedural and substantive rules which are applied to disputes arising in this area are significantly different from those applied to claims in other areas. That is as it ought to be. .....
>
> 10. We are in the present case concerned only with the matrimonial law **and what we state here will apply strictly to matters arising out of and ancillary to matrimonial disputes**. The Courts in this country have so far tried to follow in these matters the English rules of Private International Law, whether common law rules or statutory rules. .....The

Court referred to Section 13 of the Civil Procedure Code, 1908, and held: Under Section 13 of the Code of Civil Procedure 1908 (hereinafter referred to as the "Code"), a foreign judgment is not conclusive as to any matter thereby directly adjudicated upon between the parties if conditions therein are not fulfilled.....

UNQUOTE

Thus, relying on above rules, the Court dismissed the application and held:

"The decree dissolving the marriage passed by the foreign court is without jurisdiction according to the Hindu Marriage Act as neither the marriage was celebrated nor the parties last resided together nor the respondent resided within the jurisdiction of that Court. Further, irretrievable breakdown of marriage is not one of the grounds recognized by the Act of dissolution of marriage. Hence, the decree of the divorce passed by the foreign court was on a ground unavailable under the Act which is applicable to the marriage. Since with regard to the jurisdiction of the forum as well as the ground on which it is passed the foreign decree in the present case is not in accordance with the Act under which the parties were married, and the respondent had not submitted to the jurisdiction of the court or consented to its passing, it cannot be recognized by the courts in this country and is therefore, unenforceable."

Benchmarkprinciples:

29. It is pertinent to mention that the Honourable Supreme Court has handed down about **more than 100 judgments ever since January 1950, involving "foreign element" and these are all now a part of the 'private international law of India'**. A passing reference is made to a few cases where some legal principles are enunciated:

General:

• **R. Viswanathan's case:** The main source of conflict of laws is the decisions of the courts. However, certain statutes and juristic writings have also contributed to the development of this aspect of law. **Cheshire has rightly pointed out that** Private International Lawasfound "is almost entirely the result of judicial decisions."

Immovable property:

• **In Satya v Teja Singh:** The Court relied on Dicey's Conflict of Laws to the effect: 'The courts of a foreign country have no jurisdiction to adjudicate upon the title or the right to the possession of any immoveable property not situate in such country.

Meaning ofdomicile:

• **In Central Bank of India v Ram Narain,** the Court noted that it isnot possible to define domicile. The termlendsitself toillustrationand nota defini-

tion. That domicile means permanent home. Explaining the meaning ofdomicile the court said that domicile denotes the relation between aperson and aparticular territorial unit possessing its own system of law.The traditional statement, that to establish domicile there must beapresent intention ofpermanent residence, has been affirmed in almost all decisions involving issueson domicile.

Domicile of corporations:

• **Turner Morrison &Co. v Hungeiford,** case was concerned with the residence of a corporation having transnational business dealings. It was held that such a corporation 'resided' in India if it is involved in doing business in India and 'more generally that corporation can have multiple residences and domiciles. According tothe English law, place of incorporation constitutes the domicile of the corporation, while the country where the central management and control is exercised becomes its residence.

Marriage and divorce:

• In Sarrala Mudgal Case: "Answering the questions posed by us in the beginning of the judgment, we hold that the second marriage of a Hindu- husband after conversion to Islam, without having his first marriage dissolved under law, would be invalid. The second marriage would be void in terms of the provisions of Section 494 IPC and the apostate-husband would be guilty of the offence under Section 494 IPC."

Contracts

• 'The parties to acontract ininternationaltradeorcommerce may **agree in advance on the forum which is to have jurisdiction** to determine disputes. This autonomy of the parties to choose the governing law of the contract is part of the proper law of contract practised by almost all countries.The proper law of contract is ascertained by express choice of the parties. The Courts have a residual power to strike down, a choice of law clause, totally unconnected with the contract. The chosen proper law must be the law at the time when the contract was made. There can be no 'floating proper law'.

Arbitration:

• **In NTPC:** The Tribunal has rightly held that the 'substantive law of the contract is Indian law'; the laws of England govern procedural matters in the arbitration. All substantive rights including that which is contained in the arbitration clause are governed by the laws of India. The jurisdiction exercisable by the English courts in procedural matters must be viewed as concurrent.

Tapering differences:

30. With a view to narrowing down the wide gap in legal systems of different countries, the **Hague Conference on Private International Law** sought to formulate an international convention on jurisdiction and judgment recogni-

tion. The effort was abandoned when the differences proved too large to bridge.

The Hague Conference on Private International Law (HCCH), for Hague Conference/Conférence de La Haye) is the pre-eminent organization working in the area of private international law.

31. The HCCH was formed in 1893 to "work for the progressive unification of the rules of private international law". It has pursued this goal by creating and assisting in the implementation of multilateralconventions promoting harmonisation of conflict of laws principles in diverse subject matters.

32. The Conference has developed thirty-eight (38) International Conventions. A significant number of these Conventions are currently in force and mostly focus on conflict of laws rules, administrative co-operation, jurisdiction and applicable law, e.g. law applicable to matrimonial or inheritance.

33. HCCH Conventions are open for adoption or ratification by non-members of HCCH.As of 2019, 85 countriesare members of the Hague Conference. Besides all member states of the European Union, the European Union is itself also a member. India joined this august body on 13th March 2008.

34. A reference may be made to the Convention on the Form of testamentary disposition, that is **the will** format: (Excerpts)

Convention on the conflicts of laws:

The Form of Testamentary Dispositions

(Concluded 5 October 1961-Entry in force: 05-01-1964)

The States signatory to the present Convention, Desiring to establish common provisions on the conflicts of laws relating to **the form of testamentary dispositions**, have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

Article 1

A testamentary disposition shall be valid **as regards form** if its form complies **with the internal law**:

a) of the place where the testator made it, or

b) of a nationality possessed by the testator, either at the time when he made the disposition, or at the time of his death, or

c) of a place in which the testator had his domicile either at the time when he made the disposition, or at the time of his death, or

d) of the place in which the testator had his habitual residence either at the time when he made the disposition, or at the time of his death, or

e) so far as immovable are concerned, of the place where they are situated.

……..

Article 2

Article 1 shall apply to testamentary dispositions revoking an earlier testamentary disposition. .....

35. In terms of the Article 11, of the Convention on the Form of Testamentary Disposition, the State **where property is situated** has "a right of refusal" by virtue of provisions of its own law relating thereto, **forms of testamentary dispositions made abroad**,

If all four conditions exist:

(i) the testamentary disposition is valid as to form by reason only of a law solely applicable to the place where the testator made his disposition,

(ii) the testator was domiciled in the situs state,

(iii) the testator had his habitual residence in the situs state,

(iv) the testator died not the in situs state, but elsewhere.

• This right to de-recognize the form which is otherwise valid by virtue of non-presence of the testator at the time of death in that place is giving superiority to the forum law, where the property is situated and it may be prejudicial to the testator, who may not be fully aware of that internal law where the property is situate.

36. In this context, it may be worthwhile to make a reference to one more convention,which has proximate connection to the subject on hand.

Convention on Law: Succession to the Estates of Deceased Persons:

1st August 1989

The States signatory to this Convention, desiring to establish common provisions concerning the law applicable to succession to the estates of deceased persons, have resolved to conclude a Convention for this purpose **and have agreed upon the following provisions –(Excerpts)**

CHAPTER I - SCOPE OF THE CONVENTION

Article 1

(1) This Convention determines **the law applicable to succession to the estates of deceased persons**.

(2) The Convention does not apply to -

a) the form of dispositions of property upon death;

b) capacity to dispose of property upon death;

c) issues pertaining to matrimonial property;

d) property rights, interests or assets created or transferred otherwise than by succession, **such as in joint ownership with right of survival, pension plans, insurance contracts, or arrangements of a similar nature.**

CHAPTER II - APPLICABLE LAW:

Article 3

(1) Succession is governed by the law of the State in which the deceased at the time of his death was habitually resident, **if he was then a national of that State**.

(2) Succession is also governed by the law of the State in which the deceased at the time of his death was **habitually resident if he had been resident there for a period of no less than five years immediately preceding his death**. xxx

Article 5

(1) A person may designate the law of a particular State to govern the succession to the whole of his estate. The designation will be effective only if at the time of the designation or of his death such person was a national of that State or had his habitual residence there.

(2) xxx (3) xxx. (4) xxx.

1989 Convention: lacks universal acceptability

37. From the 1989 convention on the law applicable to succession to the estate of the deceased person, it appears clear that:

- It excludes matrimonial property, jointly held property.
- Further, it does not concern about the formal validity or even capacity to dispose of property.
- **As far as merits are concerned**, Article 3 and 5(1) are mandatory provisions and the declaration will govern the succession **to the entire estate** provided the declarant at the time of his death or at the time of making declaration was the national of that state or habitual resident in that state.
- Article 6 permits a person to designate one or more state to govern succession to particular assets in his estate, without prejudice to Article 3 & 5(1) which provisions or rules are mandatory.
- **Even assuming that it not subscribed by India, the convention on succession to the estate has many trappings and may not be a very useful tool.**

The Uniform International Wills Act, 1973:

38. One may refer to the HCCH convention on the Uniform International Wills Act. (UIWA).

The Form of an International Will was drafted and presented to the international community in 1973. The Convention was signed and ratified by a number of countries. The Convention concluded at Washington, USA on 26th October 1973.

(1) The Convention arrived at some acceptable rules & certification procedure to give formal validity to the testamentary disposition, no matter whether the Testator is the national, citizen or domiciled at the place where the willis made, and no matter where the property is situate.

(2) The UIWA does not, however, apply to "joint wills," meaning those made by two or more persons in one document.

(3) Invalidity under the UIWA, however, does not affect validity as a will executed in compliance with state law; a will which is invalid under the UIWA may still be valid under state law.

Essential features:

(a) The UIWA establishes internationally accepted standards for what constitutes a validly created **will**.

(b) While states recognize the validity of **a will** that is executed in accordance with the laws of the jurisdiction in which **the will** was executed; it is sometimes difficult to convince a probate court judge that a will that was executed internationally was properly executed.

(c) The UIWA is intended to reduce problems associated with proving that **a will** executed in another country was properly executed, by internationally accepted standards.

(d) Several countries in addition to the United States have adopted the UIWA.

(e) **In 1973 the UK,** together with a number of other nations, signed up to the "Convention providing a Uniform Law on the Form of an International Will".

(f) The provisions of the convention were introduced into the UK by the passing of the Administration of Justice Act 1982. Annnex, Schedule 2, gives modifications to UIWA.(vide Annexure-I)

Basic prerequisites: UIWA

39. The basic requisitesfor essential validity of the will are: :

a) **The will** must be in writing;

Non-Resident Indian's will

a) **The will** must be witnessed by two individuals **and an authorized person** (an attorney licensed to practice in the jurisdiction where **the will** is signed, or certain members of the diplomatic and consular services);

b) The person creating **the will** (the "testator") must sign each page of **the will**;

c) The witnesses and authorized person must attest **the will** by signing in the presence of the testator;

d) Each page of **the will** must be numbered;

e) The authorized person will need to note the date of his or her signature at the end of **the will**. The date noted will be treated as being the date of **the will**.

f) Currently there is no requirement in England and Wales (or in India) that **a will** be stored in a particular place. This being the case, the authorized person will need to ask the testator whether he or she wishes to make a declaration as to the safe-keeping of **the will**.

g) The authorized person will need to attach to **the will** a certificate confirming that the requirements set out above have been met. If the testator makes a declaration as to the safe-keeping of **the will**, the place where it shall be storedshould be recorded in the certificate.

k) A certificate, the form of which is provided by the Act, must be attached to **the will**;and the Authorized person must give a copy to the testator & retain one for him.

IJ) An international will may be revoked by the testator.If the testator is unable to sign the will, he or she will have to explain to the authorized person why he or she cannot sign it. In such circumstances the authorized person will have to make a note of this on the will.

l) If the testator cannot sign **the will** the testator will be able to direct someone to sign **the will** on his or her behalf.

m) The testator's signature or that of the person signing on his or her behalf will need to be placed at the end of **the will** and if **the will** consists of more than one page the testator or person signing on his or her behalf will need to sign each page.

n) The form of Certificate by the Authorized person may be in the format below or near similar to that.

The certificate drawn up by the authorized person shall be in the following form or in a substantially similar form:

CERTIFICATE

(Convention of October 26, 1973)

1. I, ... (Name, address and capacity), aperson authorized to act in connection with international wills

Certify that on ..... (Date) at ..... (Place)

(Testator)..... (Name, address, date and place of birth) in my presence and that of the witnesses

(a)..... (Name, address, date and place of birth)

(b)..... (Name, address, date and place of birth)

has declared that the attached document is his will and that he knows the contents thereof.

2. I furthermore certify that:

(a) in my presence and in that of the witnesses

(1) the testator has signed the will or has acknowledged his signature previously affixed.

(2) following a declaration of the testator stating that he was unable to sign his will for the following reason ..... I have mentioned this declaration on the will - the signature has been affixed by .....(name, address)

(b) the witnesses and I have signed the will;

*(c) each page of the will has been signed by ..... and numbered;

(d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;

(e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;

*(f) the testator has requested me to include the following statement concerning the safekeeping of his will: .....

PLACE ..... DATE SIGNATURE and, if necessary, SEAL

40. The basic requirements of the UIWA are mostly in line with the law on testamentary disposition as in force in India, and as such it appears that an NRI or PIO can safely adopt the same with minor modifications as per the local needs, as may be advised by the Attorney in the State of domicile or nationality where **the will** is made.

Options for an NRI:

41. From the aforesaid discussion it is manifestly clear that the two Hague Conventions: one on Form of **will** or second on succession of estate are not widely endorsed by the International comity of nations; nor is the International Wills Act endorsed & accepted by various nations including India.

The question then is: "How should an NRI navigate in the cobweb of conflicting jurisdictions & multiple legal systems and plan his affairs so that the essen-

tial validity of the testamentary succession faces no challenges by the local forum on technicality or on the grounds of public policy?"

42. It is submitted that individuals who own assets in different countries, the viable & less bothersome proposition would be to make independent & separate testamentary disposition of the assets in different countries (by giving cross-reference in each separate **will**) so as to be in line with lex terrae, the law of the land; & lex fori, the law of the forum or court; and qua the immovable property lex loci, the law of the place; and avoid as far as possible mixing up jurisdictions based on nationality or citizenship or for that matter even domicile.

43. Once the above decision is taken **the will** may be executed in the manner indicated in the Uniform International Wills Act, (UIWA) although the same is not an "accepted" convention at large; or for that matter India may not have ratified it.

• One can say with certainty that the principles embodied in the International Wills Act appear to be sound and would avoid much of the complications to the formulation of **wills**.

• Well, the dispute on the contents of **the will** can hardly be forestalled, except when the person makes up his mind to divest himself most of the property during the lifetime, leaving behind sufficient property for hisown sustenance thereafter.

44. While there cannot be any hard and fast rule in dealing with the properties –both movable & immovable—by an individual having an NRI status, one can say that appropriate guidance be taken at the right time so that those who survive him/her face less problems & they get the possession of the properties without facing multiple courts and legal systems.

Epilogue:

45. It can be said that given the conflict of laws and the lack of internationally accepted mode of testamentary & intestate succession, across the world, there is one hope that under the HCCH **"Convention providing Uniform Law on the Form of an International Will"**, a set of minimum requirement is established for a legally accepted **will** through the (UIWA).

Even if the aforesaid Washington convention is not endorsed by many countries or for that matter by India, the principles laid down therein are worth adopting in conjunction with the 1st August 1989 Convention "On the Law Applicable to Succession to The Estates of Deceased Persons"to the extent that the declaration could be filed separately for assets in different countries, coupled with an independent **will** supporting such declaration for Assets in different countries, giving cross–references to all **wills** in the Format with the Certificate prescribed in the Uniform International Wills Act.

In India, the Advocates are not permitted to 'Certify' or authenticate a docu-

ment, as the Notaries alone are authorized, an Advocate can make an "attestation" and give the particulars in the Certificate format. That may help clarify that the document was also attested by person unconnected with the **will** or the Testator or the witnesses or the legatee or a devisee, and in all probability add to the probative value of **the will**.

If the NRI is well advised to dispose of the major portion of his property during the life-time, retaining bare essential as protective covering for expected life span ahead, the hassels of estate transmission could be minimized.

Hopefully, the above approach may be the best bet in the complex labyrinth of the jurisdictions & forums world over.

ANNEXURE - I

(UK) Administration of Justice Act 1982:

SCHEDULE 2 —The Annex to the Convention:

On International Wills

UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

Article 1

1. **A will** shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international **will** complying with the provisions set out in Articles 2 to 5 hereinafter.

2. The invalidity of the will as an international **will** shall not affect its formal validity as a will of another kind.

Article 2

This law shall not apply to the form of testamentary dispositions made by two or more persons in one instrument.

Article 3

1. The will shall be made in writing.

2. It need not be written by the testator himself.

3. It may be written in any language, by hand or by any other means.

Article 4

1. The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof.

2. The testator need not inform the witnesses, or the authorized person, of the contents of the will.

Article 5

1. In the presence of the witnesses and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.

2. When the testator is unable to sign, he shall indicate the reason therefor to the authorized person who shall make note of this on the will. Moreover, the testator may be authorized by the law under which the authorized person was designated to direct another person to sign on his behalf.

3. The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

Article 6

1. The signatures shall be placed at the end of the will.

2. If the will consists of several sheets, each sheet shall be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

Article 7

1. The date of the will shall be the date of its signature by the authorized person.

2. This date shall be noted at the end of the will by the authorized person.

Article 8

In the absence of any mandatory rule pertaining to the safekeeping of the will, the authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator the place where he intends to have his will kept shall be mentioned in the certificate provided for in Article 9.

Article 9

The authorized person shall attach to the will a certificate in the form prescribed in Article 10 establishing that the obligations of this law have been complied with.

Article 10

The certificate drawn up by the authorized person shall be in the following form or in a substantially similar form:

CERTIFICATE

1. I, ... (name, address and capacity), a person authorized to act in connection with international wills

2. Certify that on ..... (date) at ..... (place)

3. (testator) ..... (name, address, date and place of birth) in my presence and that of the witnesses

4. (a) ..... (name, address, date and place of birth)

(b) ..... (name, address, date and place of birth) has declared that the attached document is his will and that he knows the contents thereof.

5. I furthermore certify that:

6. (a) in my presence and in that of the witnesses]

(1) the testator has signed the will or has acknowledged his signature previously affixed.

*(2) following a declaration of the testator stating that he was unable to sign his will for the following reason ...

— I have mentioned this declaration on the will

*— the signature has been affixed by ..... (name, address)

7. (b) the witnesses and I have signed the will;

8. *(c) each page of the will has been signed by ..... and numbered:

9. (d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;

10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;

11. *(f) the testator has requested me to include the following statement concerning the safekeeping of his will:

12. Place

13. Date

14. Signature and, if necessary, Seal *To be completed if appropriate.

Article 11

The authorized person shall keep a copy of the certificate and deliver another to the testator.

Article 12

In the absence of evidence to the contrary, the certificate of the authorized person shall be conclusive of the formal validity of the instrument as a will under this Law.

Article 13

The absence or irregularity of a certificate shall not affect the formal validity of a will under this Law.

Article 14

The international will shall be subject to the ordinary rules of revocation of wills.

Article 15

In interpreting and applying the provisions of this law, regard shall be had as to its international origin and to the need for uniformity in its interpretation.

ANNEXURE - II

The Indian Succession Act, 1925

PART II

OF DOMICILE

4. Application of Part.-This Part shall not apply if the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina.

5. Law regulating succession to deceased person's immoveable and moveable **property, respectively.** -(1) Succession to the immoveable 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.

(2) Succession to the moveable property of a person deceased is regulated by the law of the country in which such person had his domicile at the time of his death.

Illustrations

(i) A, having his domicile in [India], dies in France, leaving moveable property in France, moveable property in England, and property, both moveable and immoveable, in [India]. The succession to the whole is regulated by the law of [India].

(ii) A, an Englishman, having his domicile in France, dies in [India], and leaves property, both moveable and immoveable, in [India]. The succession to the moveable property is regulated by the rules which govern, in France, the succession to the moveable property of an Englishman dying domiciled in France, and the succession to the immoveable property is regulated by the law of [India].

6. One domicile only affects succession to moveables.-A person can have only one domicile for the purpose of the succession to his moveable property.

7. Domicile of origin of person of legitimate birth.-The domicile of origin of every person of legitimate birth is in the country in which at the time of his birth his father was domiciled; or, if he is a posthumous child, in the country in which his father was domiciled at the time of the father's death.

Illustration

At the time of the birth of A, his father was domiciled in England. A's domicile of origin is in England, whatever may be the country in which he was born.

8. Domicile of origin of illegitimate child.-The domici le of origin of an illegitimate child is in the country in which, at the time of his birth, his mother was domiciled.

9. Continuance of domicile of origin.-The domi c i l e of origin prevails until a new domicile has been acquired.

10. Acquisition of new domicile. - A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin.

Explanation.- A man is not to be deemed to have taken up his fixed habitation in [India] merely by reason of his residing there in [the civil, military, naval or air force service of Government], or in the exercise of any profession or calling.

Illustrations

(i) A, whose domicile of origin is in England, proceeds to [India], where he settles as a barrister or a merchant, intending to reside there during the remainder of his life. His domicile is now in [India].

(ii) A, whose domicile is in England, goes to Austria, and enters the Austrian service, intending to remain in that service. A has acquired a domicile in Austria.

(iii) A, whose domicile of origin is in France, comes to reside in [India] under an engagement with the Central Government for a certain number of years. It is his intention to return to France, at the end of that period. He does not acquire a domicile in [India].

(iv) A, whose domicile is in England, goes to reside in [India] for the purpose of winding up the affairs of a partnership which has been dissolved, and with the intention of returning to England as soon as that purpose is accomplished. He does not by such residence acquire a domicile in [India], however long the residence may last.

(v) A, having gone to reside in [India] in the circumstances mentioned in the last preceding illustration, afterwards alters his intention, and takes up his fixed habitation in [India]. A has acquired a domicile in [India].

(vi) A, whose domicile is in the French Settlement of Chandernagore, is compelled by political events to take refuge in Calcutta, and resides in Calcutta for many years in the hope of such political changes as may enable him to return with safety to Chandernagore. He does not by such residence acquire a domicile in [India].

(vii) A, having come to Calcutta in the circumstances stated in the last preceding illustration, continues to reside there after such political changes have occurred as would enable him to return with safety to Chandernagore, and he

intends that his residence in Calcutta shall be permanent. A has acquired a domicile in [India].

11. Special mode of acquiring domicile in India.-Any person may acquire a domicile in [India] by making and depositing in some office in [India], appointed in this behalf by the State Government, a declaration in writing under his hand of his desire to acquire such domicile; provided that he has been resident in [India] for one year immediately preceding the time of his making such declaration.

12. Domicile not acquired by residence as representative of foreign Government, or as part of his family. -A person who is appointed by the Government of one country to be its ambassador, consul or other representative in another country does not acquire a domicile in the latter country by reason only of residing there in pursuance of his appointment; nor does any other person acquire such domicile by reason only of residing with such firstmentioned person as part of his family, or as a servant.

13. Continuance of new domicile.-A new domicile continues until the former domicile has been resumed or another has been acquired.

14. Minor's domicile. -The domicile of a minor follows the domicile of the parent from whom he derived his domicile of origin.

Exception.- The domicile of a minor does not change with that of his parent, if the minor is married, or holds any office or employment in the service of Government, or has set up, with the consent of the parent, in any distinct business.

15. Domicile acquired by woman on marriage.-By marriage a woman acquires the domicile of her husband, if she had not the same domicile before.

16. Wife's domicile during marriage.-A wife's domicile during her marriage fol lows the domicile of her husband.

Exception.- The wife's domicile no longer follows that of her husband if they are separated by the sentence of a competent Court, or if the husband is undergoing a sentence of transportation.

17. Minor's acquisition of new domicile.-Save as hereinbefore otherwise provided in this Part, person cannot, during minority, acquire a new domicile.

18. Lunatic's acquisition of new domicile. -An insane person cannot acquire a new domicile in any other way than by his domicile following the domicile of another person.

19. Succession to moveable property in India in absence of proof of domicile elsewhere.- If a person dies leaving moveable property in [India], in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of [India].