PARUCK

THE INDIAN SUCCESSION ACT

11TH EDITION

by

Justice K KANNAN

Judge, Punjab and Haryana High Court

LexisNexis®

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P L PARUCK

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Preface to the Eleventh Edition

It is the reader's trust in the quality of a book that makes multiple editions of it possible. In a little more 10 years, the book has seen three editions and in each of these editions, I have fortunately been associated. The large out turn of decisions re-stating the law over and over again could be of no big interest to anyone. On the other hand, a new interpretation and fresh thinking that catapult staid statutory publications to pulsating judgments while interpreting them alone make the work of a new edition worthwhile, as it could make reading pleasurable.

The law of succession has immense importance in the orderly transmission of property from generation to generation among members of family and close relatives. There are no universal standards of fairness. In India, the various personal laws dictate in varying fashion the class of persons who would figure as heirs among relatives in cases of intestate succession and the persons who could be made beneficiaries through testamentary devolution and the extent to which such power could be exercised. If there was a scope for making possible a uniform civil code for the whole of India to persons of various religious affiliations, the Indian Succession Act could well be the ideal starting point. The Bombay High Court has held provisionally (placed by the single judge before a Division Bench for affirmation) in *Mamta Dinesh Vakil v. Bansi S. Wadhwa*, Testamentary Petition No.917 of 2000 dated 06.11.2012, that provisions of section 15 of the Hindu Succession Act are discriminatory and *ultra vires* the Constitution. In so declaring, it drew inspiration from the fact that the Indian Succession Act distributes the benefit of the succession on the basis of propinquity to the propositus that is gender neutral, while the Hindu Succession Act makes a discriminatory bias to the heirs of husband in case of succession to females. Even all the provisions of Indian Succession Act relating to succession to Christians are perhaps not fair to females. In the absence of children or husband, if distribution of the assets of a male or female were to take place to persons of the third degree, such as uncle, aunt, *et al*, the preference to relatives in the male line still persists. The Law Commission's 247th report (2014) recommends doing away with these provisions and has suggested new provisions for incorporation. The recommendations have been brought under commentaries under appropriate sections. Mohammedan law recognises as primary heirs both mother and father along with spouse and children giving 1/6th share to each of the parents. The Hindu Succession Act recognises only the mother as a heir to a deceased male and assigns to the former an equal share to wife and children. Indian Succession Act does not accord to the parents any share in the presence of the widow and children and if the competing heirs are only widow without children and parents of the deceased husband , the widow takes 1/2 and the father takes 1/2 excluding mother. Do we see some area for a homogenous approach as possible adopting the Mohammedan law of choice of primary heirs as more equitable?

In the area of testamentary law, the provision relating to revocation of Will by marriage is not applicable to Hindus, Muslims and Christians. Should not section 69 be made applicable to all, so that the entry of a spouse in the family makes a compulsory revocation of the Will that could have made no disposition to him/her? Again, the unlimited power of disposition through Will is cause for many a challenge in courts. The disinheritance of near relatives is always a cause for heartaches and regarded as a suspicious circumstance impinging on the genuineness of the Will. It casts a heavy onus on the propounder to explain. Mohammedan law allows for a

disposition of not more than 1/3 without the consent of heirs and with consent, upto 1/2. Shall we bring about a legislative change the way the Shariat mandates, for all sections of the community? If a long drawn litigation about the identity of the testator in the instrument or the mental capacity of the testator has to be established by cogent evidence and different courts in the hierarchical tiers come to different conclusions in the same case, is it not time that we make registration of Will compulsory to bring an element of authenticity and also call to aid tools of modern technology to better use by making available video recordings of the registration process for digital storage and make them available to any party seeking for proof of authenticity of the Will?

There are some interesting judicial approaches while interpreting several provisions and there are some glaring deficiencies also. In *Sanjay Kumar Raha v. Michael Tigga*, 2013 AIR (Jhar) 106, the Jharkand High court made the provisions of the Act applicable to a scheduled tribe convert to Christianity. The Bombay High Court, in *Shobhana Sahadev Shah v. Sangeeta Porbhanderwalla*, 2013 (5) BomCR 92, held that a person cited as a witness to the Will, if he did not say even in chief examination that he saw the testator at the time of affixing his signature, he could not be automatically treated as a hostile witness and it is the duty of the Court to protect the witness to speak the truth. In *M.B. Ramesh v. KM Veerajee Urs*, 2013 (7) SCC 490 : AIR 2013 SC 2088, the Supreme Court was considering the case of the only attesting witness failing to speak about the attestation of the second attestor. The court held that the evidence available about the mere presence of the other witness at the time of execution, must be presumed to have occurred only for the purpose of attestation and such attestation must also be presumed by invoking section 71 of the Indian Evidence Act, 1872. It was surely a case of the gut feeling about the genuineness of the Will to prevail over technicalities and not let a genuine disposition fail by fallibilities in evidence. In *Vasant Narayan Sardal and another v. Ashita Tham and another* (Notice of Motion No 105 in Testamentary Suit 14 of 2004 in Petition 80 of 2004, decided on 9.3.2011), the High Court rejected an attempt of the contesting parties to make serious dents into the trust created through the Will and distribute the properties amongst themselves in purported exercise of the power to compromise the proceedings and held the decree as invalid. The initial confusion created by the judgment of the Supreme Court in *Kunvarjeet Singh Khandpur v. Kirandeep Kaur*, (2008) 8 SCC 463 : AIR 2008 SC 2058 in holding that Article 137 of Limitation Act applied, without clearly explaining the starting point of limitation, to petitions for grant of probate has gradually died down with both the Bombay and the Madras High Court decisions making references to their respective High Court Original Side Rules imposing no more fetter than to explain the cause for delay.

The decisions on caveatable interest are still on shaky wicket and there are little too many divergent views in the Supreme Court as well as the High Courts. The requirement for special government notifications and the relevant provisions of the respective State Civil Courts Acts that delineate the powers and jurisdictions of various Courts for importing the definition of 'district court' to include subordinate courts by reference to the latter as the courts of original jurisdiction have been missed by some High Court decisions. Exemption from payment of court fee for succession certificate or probate could always be done by reference to CPC provisions under O.XXXIII relating to indigency of the person applying for the reliefs but some courts have adopted unrealistic references only to exemption provisions of the Court Fees Acts to deny appropriate reliefs even to proven indigent cases.

Several persons have helped me edit this book. My gratitude goes principally to Justice Roshan Dalvi of the Bombay High Court, who had painstakingly picked up several unreported decisions of her court for the last four years. I felt benefited in understanding the law better and I have incorporated her despatches to me in large measure. To her, my special thanks.

I also would sound a word of gratitude to Justice Soumen Sen who had helped collect many of the decisions of the Calcutta High Court. My ex-colleague in office, Sunil Kumar had spent time and energy to pick up all the decisions from the local journals that reported several decisions of the Madras High Court. The decisions of the Charted High Courts are relatively larger in numbers and enjoy high precedent value in understanding the provisions for probate and letters of administration for obvious reasons that the provisions are compulsorily applicable to the cases that fall within the respective original jurisdictions of the three courts only. Sh. Dr. B.S. Bhesania of M/s Mulla & Mulla & Craigie Blunt & Caroe had pointed out to a serious mistake in the previous edition in not taking note of the 1991 amended provisions of the law relating to Parsi succession and retaining the commentaries of the pre-amended provisions. I regret the faux pas but I have made good the error in this edition. I thank him profusely for taking trouble to write to my publisher pointing out to the lapse.

My own law researcher in the court Ms. Swati Verma had been of immense assistance to me in methodically taking out decisions from various High Courts for their incorporation. I wish her good luck in her career in law. I thank the publisher, M/s Lexis Nexis in reposing confidence in me for placing the work of editing in my hands the third time in succession. I will be grateful to any reader for suggestions for improvement.

The law stated is as per the law as on 30th September 2014.

Chandigarh
6th October 2014

K. Kannan
Judge, Punjab & Haryana High Court

Preface to the Tenth Edition

Since the previous edition in 2002, the single most important amendment to the Succession Act has been the deletion, by Amending Act 26 of 2002, of the provisions requiring the obtaining of grants for validation of Wills executed by Indian Christians. This selective discrimination purely on the ground of religion leaves the provisions as applicable to certain classes of persons open to challenge as to their constitutionality. The retention of the provisions cannot merely be for historical reasons as expatiated in *Clarence Pais v. Union of India*, (2001) 3 SCC 341 and would require re-examination in the light of the Supreme Court's judgment in *John Vellamottam, et al.* However, it is significant to note that the Law Commission has categorically recommended that section 213 of the Succession Act be omitted altogether.

Over the years, matrimonial ties through religious ceremonies and formal registration procedures have given way to live-in relationships. Such ties have been legislatively recognised in the Protection of Women Against Domestic Violence Act, 2005. The legal status of off-spring through such relationships requires legislative approbation in according legitimacy to such persons and making possible for them to claim rights in respect of the properties of father and not merely mother. Over a period of time, dissolution of marriages may also become easier and additional grounds such as, irretrievable breakdown of marriage may become available under the law. The question as to how a marriage impacts the power of a spouse to execute a Will requires examination, as does the present status of the law which makes the provision regarding automatic revocation of a Will upon the marriage of the maker, applicable to all persons without restriction or qualification.

European countries recognise certain limitations on the power of disposition through a Will and save a reserve (called the *legitime* in the French Civil Code), for the heirs. Islam restricts a person from making any testamentary disposition beyond a third share to an heir and to that extent protects an heir from having to claim the share that law otherwise accords in case of intestacy. The power of a coparcener to bequeath through a Will even as regards the undivided share was brought in through section 30 of the Hindu Succession Act. However, if the legal fight amongst the heirs is to stop when anyone among the heirs is totally disinherited or receives a share less than what he or she would have got on intestacy, there ought to be a law that protects the heirs and particularly the spouse from being totally disinherited by a testamentary disposition. Principles of private international law are required to be assimilated through statutory provisions. It is a little incongruous that Indian Courts are required to look to common law practices to cope with situations that call for applicability of private international law. In England, by and large, there are statutory provisions that regulate testamentary and intestate succession of movable and immovable property left behind by nationals and non-nationals in England and outside the country. The inadequacy of law was acutely seen in certain situations that came before the Bombay High Court[1]. For this reason, the present edition incorporates some of the principles of private international law in the commentaries under some of the sections to the extent to which they are relevant to Indian situations.

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1. *Sondur Rajini v. Sondur Gopal*, 2005 (4) MhLJ 688; *Manmit Kaur Gandhi and another v. Budh Singh Anand*, 2009 (1) BomCR 225.

There are some decisions of the Supreme Court that have distanced the Bar and the litigants from the arena of perspicacity. A fairly large amount of theorising on what is 'caveatable interest' for a person to be eligible to contest a Will has occurred since the decision in *Krishna Kumar Birla v. Rejendra Singh Lodha*, (2008) 4 SCC 300. The decision interpreted the expression restrictively and limited it to a class of persons and the nature of interest, but this approach had been discarded in the decision in *G. Gopal v. V.Baskar and others*, (2008) 10 SCC 489. The latter approach was preferred in *Shri Jagjit Singh and others v. Mrs. Paamela Manmohan Singh*, 2010 (2) SCALE 805 and doubting the correctness of the interpretation in *Krishna Kumar Birla*, the court has referred the issue to a larger Bench for fresh consideration.

There is also confusion on the issue of limitation for applying for probate. In *Kunwarjeet Singh Kandpur v. Kirandeep Kaur*, (2008) 8 SCC 463, after laying down that for an application for grant of probate, Article 137 of the Limitation Act providing for limit of three years would apply, the Supreme Court has had difficulty in laying down clearly what is the starting point of limitation. The decision in *Krishna Kumar Sharma v. Rajesh Kumar Sharma*, (2009) 11 SCC 537 lacks clarity. The Madras High Court Original Side Rules themselves merely require reasons to be given in cases where the application for grant of probate or for letters is made after a period of three years from the date of death and does not itself bar the application. There is a large body of case law from various High Courts with cogent reasons as to why petitions for issue of grants are not governed by the law of limitation. Again, the Court interventions on the issue of succession certificates under Chapter X, when rival claims have arisen among persons claiming to be heirs have been slightly erratic and moved away from certitude.

I believe, an author or editor enjoys certain freedoms, while referring to the decisions of the Supreme Court or other High Courts, in articulating criticisms against lines of reasoning adopted in them that a judge does not normally exercise in his own judgments. I have donned the role of an editor in this book and my own reasoning in pointing out what I believe *bona fide* to be erroneous could just as well be wrong. I admit my fallibilities and would invite the academia, the Bar and the Bench to point out my mistakes in reasoning, as also general mistakes in this edition.

I owe my debt of gratitude to the publishers M/s Lexis Nexis Butterworths Wadhwa Nagpur for continuing with me as the revising editor of this celebrated work by a renowned author. I missed my co-editor of the previous edition, Justice S.S.Subramaniam, while undertaking the work in the present edition for the only reason that we have gone away to distant places, one to Kerala and me, to Chandigarh.

The law stated in the book is as on 31st December 2010.

8th February 2011
Chandigarh

K. Kannan
Judge, Punjab & Haryana High Court

Preface to the Ninth Edition

The sustained patronage that this book has enjoyed since its first edition in 1927 through its successive eight editions is justification enough for bringing out this revised version.

There have been no new amendments to the Indian Succession Act since the previous edition in 1992, except in the state of Kerala, where section 213 was amended in so far as its applicability in the state is concerned, but there have been some new statements of law. The Supreme Court in *Naulapati Lakshmamma v. Mupparaju Subbaiah*, (1998) 5 SCC 285 has laid down that unlike the execution of a Will, where the executant can direct another person to sign or affix a mark on his behalf, in respect of attestation, an attestor cannot make such signature or mark through a proxy, setting at rest the divergent views on the subject. The Kerala High Court struck down section 118 of the Indian Succession Act as unconstitutional in *Preman v. Union of India*, AIR 1999 Ker 93, holding the provision regarding the time and circumstances for creation of bequest to charities as discriminatory to Christians. A similar challenge before the Supreme Court about the constitutionality of the provisions requiring probate or letters of administration for Christians under Part IX of the Act in *Clarence Pais & Anor v. Union of India*, AIR 2001 SCW 890 was rejected on the ground that the discrimination complained of was not on the basis of religion alone but due to historical reasons applicable to all persons, irrespective of religion, who are governed by the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay. It is for the future course of decisions to determine whether like historical reasons could afford an intelligible differentia to sustain the challenge under article 14 of the Indian Constitution. The statutory inadequacy of section 297 of generating provisions for protection only for payments made to executor under a probate of a will which is later revoked and not containing provision for sales effected by executor was blotched by innovative approach of the Karnataka[1] and Calcutta High Court[2] in reading into the section for protection as available also to a *bona fide* purchaser from the executor. The law laid down in *Leelavati Bai & Ors v. PV Gangadharan*, (1999) 3 SCC 548 reinforces the primacy of the power of alienation by an executor to the attaching creditor's right to bring to sale for satisfaction of the decree against a beneficiary under a Will.

The Washington Convention on International Wills 1973, requires a contracting state to recognise the format of the International Will as formally valid but India has not adopted the convention as yet. Our Supreme Court and High Courts have also brought into focus some of the shortcomings of the Indian Succession Act, that should serve as a reminder to the Legislature to put on a statute book what is imperative. Rules of Private International Law that may require to be brought into statute to handle situations of execution of testamentary dispositions and their taking effect under different regimes of law (even within India, Goa, Pondicherry and the hilly tribal areas of North-East India offer scope for different systems of law including the law relating to wills) have not been undertaken, forcing the courts to fall back upon precedents which have taken their inspiration from English rules, expounds the Supreme Court in *Narasimha Rao v. Venkatalaxmi*, (1991) 3 SCC 451.

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1. *Valerine Basil Pais* (deceased) *v Gilbert William James Paid & Anor*, (1993) 2 Kant LJ 301.
2. *Archit Banijya Pvt Ltd v Asha Lata Ghosh & Ors*, 2000 (2) CHN 640.

The absence of specific provisions for succession to the property of a priest or nun as also his or her entitlement to succeed as an heir from the natural family has given rise to some inconsistent pronouncements. The provisions in Part VI relating to testamentary succession are applied, subject to restrictions and modifications specified in Schedule III. In so far as they lay down that certain provisions are not applicable to Hindus, Sikhs, Buddhists and Jains, there appears to be no discernible rationale for such exclusion. If a Will executed before marriage is revoked by subsequent marriage of the executant, if he happens to be a Christian, there is no reason why a similar result should not ensue if the executant were to belong to the majority community; or, if an attestor could not also be a beneficiary under a Will for some class of persons, what is the basis for excluding the disability for a Hindu attestor? If rules of appointment are known to Hindus in some way or the other from the days of the old by the contrivance of grant of authority to a widow to adopt a child so as to succeed to the estate of a deceased male propositus, why not apply the provision relating to appointment for Hindus? If estate duty is abolished for succession to property, why retain a levy on the estate by way of court fees for testamentary succession to immovable property situated within the local limits of the ordinary original jurisdiction of Calcutta, Madras and Bombay High Courts; and for properties situated outside the limits in respect of Wills executed within those areas, by the compulsory requirement of probate or letters of administration? These are some of the aspects of the law that cry for legislative attention.

Most of the relevant case law from all High Courts and the Supreme Court in leading law journals have been digested in this edition. Paruck's distinct style of explaining the sections through elaborate treatment of the judicial pronouncements, both of Indian and English courts, have been punctiliously adhered to. The bulk of the case law is in the area of technical rules of execution and attestation of Wills, examination of suspicious circumstances, grounds and circumstances for revocation of probate or letters of administration, issues relating to the grant of succession certificate and also principles relating to interpretation of Wills. Copious references have been made to classic commentaries on the English law relating to Wills and administration by eminent jurists like Jarman, Theobald, Williams and Mortimer in so far as the English law principles are applicable in the Indian context. The reader, it is hoped, will find their references immensely useful.

The editorial team at Butterworths have rendered enormous help in providing excellent research assistance by locating case law from all High Courts, reported in the respective local law journals, which would have been hard to reach for us, sitting as we do, in Chennai. While we gratefully acknowledge the assistance extended by them, errors, if any, in the book are wholly ours. We hope, the book will be of value to the readers, particularly to the legal fraternity.

1st September 2001
Chennai

Justice SS Subramani
K. Kannan

Preface to the Eighth Edition

It goes without saying that Paruck on *The Indian Succession Act, 1925* has established itself as the pioneering treatise in this field. The last edition edited by us was published in 1988 which was exhausted soon thereafter and consequently there was a reprint of the said edition in the same year. Now, it is thought expedient by the publishers to bring out a new edition instead of another reprint of the 1988 edition. During the last few years since the last edition, there have been many important case law both in India and England on the subject, throwing considerable light and direction.

In this edition, we have included changes introduced in the Act relating to Parsi intestate succession under the Indian Succession (Amendment) Act, 1991. All important decisions of different High Courts of India and all the decisions of the Supreme Court of India have been included in this edition. Besides, all relevant English decisions have also been incorporated in appropriate places of this edition. A new feature of this edition is to include synopsis immediately after the text of each section and also in the beginning of each chapter so that the readers may find the points they are searching for.

We have taken all steps to make this edition more useful to the readers, keeping in view the established and well-known features of this work as initiated by the author.

Case law in the Addenda of the last edition (seventh edn) edited by us have been inserted in appropriate places of this edition.

We have included in the addenda of this edition some important and relevant decisions of the Supreme Court, different High Courts and also of the English Courts.

We express our sincere thanks to the publishers for rendering all possible help and assistance to us and also for bringing out this edition as quickly as possible against so many odds.

We sincerely believe that this edition like the previous ones, will also be appreciated by all concerned.

Calcutta
March 1993

Salil K Roy Chowdhury
HK Saharay

Preface to the Fifth Edition

PL Paruck, the learned author of this acknowledged classic in its field—regarded as the most critical and exhaustive commentary on the Indian Succession Act, 1925—died in Bombay in 1957. The fourth edition of this work was published in 1953. Before his death, the author had revised and brought it up to Mid-1957, and if he had lived a year longer, a fifth edition would have probably appeared in 1958. It now appears, revised by the present editor in the light of reported decisions from 1957 to the end of 1965.

In response to the growing demand for a reform of the Act by the legislature, the Act is presently under examination by the Law Commission. The late Mr Paruck had advocated such reform in his preface to the third edition of his work published in 1947. Before his death in 1957, the Hindu Succession Act 1956, was already on the statute book and he had noticed its provisions in their appropriate places in the course of his revision, mentioned above.

Will our statute book be cluttered with different Succession Acts for different communities or will there be a uniform 'Law of Testamentary and Intestate Succession' for all the citizens of the Republic of India, as advocated by the Hon. Shri Bhagwati J, in his foreword to the fourth edition of this work? No prospect of a reasonable answer to the question can be anticipated in the present emotional state of our socio-religious thinking.

All reported Indian decisions as well as relevant English decisions have been included in this edition in their appropriate places and the law in this edition has been brought up to December 1965. It is hoped that this edition, like the previous ones, will be found a reliable work of reference by lawyers and a dependable guide to the Act by students of law.

Bombay
June 1966

JL Joshi

TABLE OF CASES

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