CHAPTER-V

WILL UNDER DIFFERENT LAWS –

A COMPARATIVE STUDY

The law of wills is contained in Part–VI of the Indian Succession Act, 1925. All the provisions of Part–VI do not apply to Hindus, Buddhists, Sikhs and Jains. The provisions of this part which apply to Hindus, Buddhist, Sikh and Jains are enumerated in schedule III of the Act. But by virtue of section 30 of the Hindi succession Act, 1956, a Hindu, Buddhist, Sikh or Jaina may execute a will in accordance with the provisions of Indian Succession Act. Wills made by Muslims are governed by the Muhammadan Law. Generally, speaking the Indian succession Act, 1925 is applicable to all Indians other than Muslims. However certain provisions of the Act are not applicable to Hindus and apply only to non-Hindus such as Christians, Parsis and Jews.

5.1 Wills under Muslims Law:

Muslim law is founded upon Quran. Which is believed by Muslims to have existed from Eternity. The Quran is effectively the revelations of God which were made to Prophet Mohamad at different times. The Quran besides being the holy book for Muslims, also contains references to law which forms the basis of Shara. However, Quran is not a legal text as such and wherever the Quran is silent on aspects of law recourse is taken to the Sunnat and the
**Hadis** which are respectively the acts and approvals of the Prophet and his sayings respectively.

Muslim Law is therefore a combination of revelations from God i.e., the Quran as also the sayings and actions of the Prophet in the form of the **Hadis** and the **Sunnat**.

Muslims can be broadly divided into three sects:

1. The followers of the Sunni School which would include the **Hanifis, Malikis, Shafis** and **Ambalis**.

2. The Shias which include within their fold the **Ismailyas, Zaidyas** and **Imamias**.
   The Ismailyas in turn include Khojas and Bohras.
   The Imamias include Akhabari and Usuli.

3. **Motazila**
   The Muslim Law of Succession varies from sect to sect.

### 5.1.1 Who can Make a Will under Muslim Law:

Under the Muslim Law, a Will may be made both by males and females. Will made by pardanashin women, is also valid but much stronger evidence is needed for obtaining a probate of her Will. 'Will can be made by a minor also if it is ratified by him after his attaining age of majority i.e. age of 18 years where the minor has a natural guardian and 21 years where he has a guardian appointed by the Court. The testator must be sane at the time of making the Will.

Muslim's law limits the power of bequests to one-third of the net assets. The two-third must in any case be distributed according to rules of intestacy, unless there are
no heirs at all claiming adversely to the legatees, which is a rather remote contingency. Thus, a Muslims can validly bequeath only one-third of his net assets, when there are heirs. The net assets are ascertained after payment of the funeral expenses of the deceased, his debts etc.

This rule is based on a tradition of the Prophet and the courts in India have enforced the rule from early times. Where, however, there are no heirs or when all the heirs agree and give their consent the one-third limit may be exceeded. If there are no heirs, testamentary power can be exercised over the entire property of the testator. Where the bequest is in excess of the one-third of net assets, the consent of the heirs must be given after the death of the testator.

5.1.2 Mode of Making Will by Muslims:

Muslims can make a Will in any manner showing a clear intention to make it. Thus they can make a Will orally or in writing or where there is inability to do so they can make the Will by signs. When a Muslim makes a Will in writing the Will needs neither signature nor attestation. The important factor in determining the validity of the Will is the existence of an unambiguous intention on the part of the testator and task of proving of an oral Will is much more difficult than that of written Will. It is, therefore, advised that Muslims should make the Will in writing.

3 *Abdul Karim v. Abdul Qayum*, ILR 28 All 324.
5.1.3 In whose favour Muslims can Make a Will:

Disposition by a Muslims in favour of any of his heirs not consented by all other heirs after his death is void. A bequest to a heir is not valid unless the other heirs consent to the bequest after the death of the testator. The policy of this law is to prevent the testator from interfering by Will with the course of devolution of property according to law among his heirs, although he may give specified portion as much as a third to a stranger. The reason that a bequest in favour of a heir would be an injury to other heir as it would reduce their share, and would consequently induce breach of the ties of kindred. The bequests in excess of the bequeathable third and/or in favour of any heir, are validated and will be given effect to if after the testator's death the heirs whose; rights are affected by such dispositions consent thereto, expressly or impliedly.

In Salayjee v. Fatima Bibi,\(^5\) it was observed by their Lordships that the Mohammedan law does not allow a testator to leave legacy to any of his heirs unless the other heirs agree. It was further held that the burden of proving the consent was on party claiming under the Will. Thus there is no doubt that bequest under Mohammedan law to an heir even to the extent one-third cannot be upheld unless the other heirs consent to the, bequest after the death of the testator.

A bequest to a person entitled to succeed as heir to the prejudice of the other heirs is void in Mohammedan law. An

\(^5\) AIR 1922 PC 391.
unfair distribution would be an injury to the other heirs and induce a breach of ties kindred. But a bequest in favour of an heir may be validated if other heirs give their consent. If only some of the heirs give their assent, it may bind their shares only. The consent must be given after the death of the testator. If the heirs are minors at the time of testator’s death, consent must be given only after attaining majority. A guardian is not competent to give consent on behalf of a minor. A bequest may be made for the benefit of any institution or in favour of any person or jointly of more-than one capable of holding property provided that the legatee is in existence at the time of the testator’s death. A bequest in favour of an unborn person is void unless such person is child in the womb and is born within 6 months of the date of the Will. The Shia Law, however, recognises the bequest to a child in the womb if it is born more than 6 months after the date of the Will but within the longest period of gestation from the date of the bequest.

5.1.4 When does a Muslim Will become Effective:

A Muslim will becomes effective and the title to the property bequeathed is completed only with the legatee’s acceptance express or implied, after the death of the testator. If a legatee accepts a bequest after the death of the testator it is valid even if he may have rejected it during his life time. If however the legate survives the testator and dies without assenting to the Will the assent is presumed.

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6 Abdul Rahman v. Uthumansa, AIR 1925 Mad 997.  
7 Salayjee v. Fatima, AIR 1922 PC 391  
8 Ghulam Mohammad v. Ghulam Hussain, ILR 54 All 93 (PC).
Acceptance of Will is presumed in case of infant or child in the womb unless it would cause injury to the legatee. The position under the Shia Law is that if a legatee rejects his share after testator’s death without having accepted it during testator’s life time, the legacy stands cancelled even if the legatee has taken possession of it. But if the legatee rejects after death or after acceptance, the legacy stands valid. The acceptance of the legacy may be made by the legatee’s heirs in the event of a legatee dying without expressing assent and coming into possession of the legacy.

5.1.5 Abatement of Legacy by Muslims:

Where the legacy exceeds the limit permitted by the law, the legacy abates in the following manner:

The bequest will be divided into those for pious purposes and those for other purposes and a proportionately reduced portion will be allotted to each side. In the case of bequest for pious purposes, following priority shall follow:

(a) Bequests for faraiz, that is, for the purposes of expiation ordained in the Quran. They, are (i) Haj (pilgrimage); (ii) Zakat (charity of a portion for the poor and (iii) expiation, e.g. for prayers missed. The priority will be in the same order.

(b) Bequests for wajibat, that is, for purposes which are not expressly ordained but which are considered to be necessary and proper; for example, alms of fitr and charity on the day of breaking the fast.
(c) Bequest for nawaiil, that is, bequests of a voluntary nature, e.g., non-obligatory charity to the poor, the building of mosques or voluntary pilgrimage, etc. In the case of bequests made for secular purposes, priority not observed; they are reduced rateably.

5.1.6 Shia Law on Abatement of Legacies:

The governing principles for abatement of legacies made beyond permitted limits are as follows:

1. If a bequest is made partly for performance of incumbent and partly for discretionary duties and one-third is not sufficient for both, then if the heirs refuse their consent, the incumbent duties must be discharged from the general mass of the estate and the others from one-third of the remaining property in the order in which they are mentioned by the testator.

2. If a second Will clearly shows the intention of the testator to revoke the first Will, the second bequest shall alone take effect. Such an intention shall be presumed in the case of bequest of exactly one-third to two different persons.

3. If no such intention appears, bequests will be entitled to priority in the order in which they were made.

Let us explain these principles by Illustrations:

1. X bequeaths one-third of his property first to Y and than again bequeaths one-third of his property to Z. The heirs do not consent, The latter bequest will amount to a revocation of the former. Z will take one-third and Y will get nothing.
(ii) X first bequeaths one-third of his estate to Y and one-fourth to Z and finally one-sixth to W. The heirs do not consent the bequest. Y will take one-third but Z and W will nothing.

(iii) X bequeaths his property to the extent of one-ninth to Y, one-third to Z, five-ninth to W. The heirs do not consent to the bequest. Y will get one-ninth and Z only two-ninth (thus making up one-third) and W will get nothing.

5.1.7 Revocation of Will by Muslims:

A Muslim Will can be revoked expressly or impliedly by the testator. The revocation can be oral or in writing. In case it is in writing - signatures, ‘attestation etc. are not required. Further a subsequent Will will have the effect of revoking the previous Will. Revocation of the Will can also be inferred from the conduct of the testator. For example Mr. X has made a Will bequeathing his Car in favour of Y, yet subsequently he makes a gift of it to Z, the implication is that the bequest has been revoked. Under the Muslim Law a condition which derogates from the completeness of the grant is invalid. If such a condition is attached to the bequest, the bequest would take effect as if there were no conditions. The conditions shall be invalid but the bequest will not be affected. In case the beneficiary dies prior to the death of the testator the legacy is said to have lapsed and forms part of the estate of the testator. The legal heirs of beneficiary shall have no right in respect of the bequest. However, under the law applicable to Shias the legacy does
not lapse on the death of the beneficiary prior to the death of testator. The legacy would be received by the heirs of beneficiary after the testator’s death unless the testator has specifically revoked the bequest.

So long as the provisions of the Indian Succession Act, 1925 are not in conflict with the recognised canons of Muslim Law, the Act shall also apply to Wills made by Muslims.

5.2 Wills under Hindu Law:

The idea of a will is wholly unknown to Hindu Law of the Shastra. The origin and growth of the testamentary power among Hindus has always been a puzzle to Hindu lawyer. According to Colebrooke testament was unknown to Hindu law. The Sanskrit expression Sankalpa is explained by Jagannatha as the nearest term for a will. The word used Marna Sadana which may be translated as the last will and testament' is after all a modern expression. The Hindu family system is inconsistent with independent dominion over property and would necessarily not recognize any testamentary disposition. The Hindu law has no chapter dealing with the dispositions of property which would come within the definition of a will. The branch of Hindu law which closely resembles a will is that of gift. But is so far as immediate possession is required to be given to the Donee, under the Hindu Law of Gift, it is different from will. The concept of wills was unknown to Hindu Law. The Hindu

Wills Act was enacted in 1870 and it was repealed by Indian Succession Act, 1925. This Act consolidating the law applicable to Intestate and Testamentary succession in India. Section 57 of the Indian succession Act reads:

The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply—

(a) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such wills and codicils made outside those territories and limits so far as relates to immoveable property situated within those territories or limits; and

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

Provided that marriage shall not revoke any such will or codicil.12

The provisions of this Part shall not apply to testamentary succession to the property of any Muhammadan nor, save as provided by Section 57, to testamentary succession to the property of any Hindu,

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12 Section 57, Indian Succession Act, 1925.
Buddhist, Sikh or Jaina; nor shall they apply to any will made before the first day of January, 1866.\textsuperscript{13}

5.2.1 Testamentary succession \textsuperscript{14}:

Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus.

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 section.

Cutchi Memons are not Hindus.\textsuperscript{15} Under old Hindu Law the testamentary power of a Hindu to make a gift by a will was first recognised.\textsuperscript{16} A plain reading of Sections 213 (2) and 57 of the Indian Succession Act, 1925 would make it clear that whatever prohibition contained in sub-section (1) of Section 213 has no application in respect of Wills executed by Hindus within the State of Andhra Pradesh in respect of immovable properties situated within the territorial limits of the State of Andhra Pradesh. It is not necessary to obtain probate of a Will or letters of

\textsuperscript{13} Section 58, Indian Succession Act, 1925.
\textsuperscript{14} Section 30, The Hindu Succession Act, 1956.
\textsuperscript{15} Haji Ismail in re 6 Bom. 452.
\textsuperscript{16} \textit{Tagore v. Tagore}, (1872) 9 BLR 377.
administration, The Wills upon which reliance is sought to be placed can always be permitted to be proved in any civil proceeding.\textsuperscript{17}

The execution of the Will itself pre-supposes a change in the normal rule of succession. But if the natural heir is disinherited it may give rise to a suspicion, which has to be explained.\textsuperscript{18}

\textbf{5.2.2 Joint Family Property}:

In \textit{Sarojani Chandrakant Tirhekor v. Yamunabai Sopan Zol},\textsuperscript{19} it is held--

As per the Hindu Law there is no dispute that the male issues do not acquire by birth alone any interest in the separate property or self acquired property of a male Hindu whether the property is immovable or movable. A male Hindu may acquire and possess individual or separate property even where he is member of joint undivided family for it is not the law that the Hindu is incapable (while in a State or Union) of holding any property of his own apart from that of the family property. Hindu Law recognises separte property of individual members of a joint family as well as of separated members. A Hindu may make a gift of his entire property to a stranger or even disinherit by Will his Sons and other heirs. The expression separate property’ is different from the expression self acquired property’. The term ‘separate property is used to distinguish the individual property of a male Hindu from the joint property of the

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  \item 2008 (1) Civil. LJ 250.
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family or rather his interest in the joint family property. A separate property would, therefore, include property howsoever acquired so long as it is not joint family property for one reason or another. Thus the property acquired by a male Hindu by inheritance or gift as well as the property acquired by his labour or exertions is a separate property. Self-acquired property, on the other hand, means a self-acquisition property so called. Thus the property acquired by a person by his own labour or exertions is self-acquired property, but that acquired, say, by inheritance is not. Hence self-acquired property is only one of the forms or species of separate property. In the cases of joint family with parents and children and without any inheritance of ancestral property, it is possible that the father and other members of the family would treat such property acquired by the father as a family property by their own actions like cultivation etc. and if in law it has become a family property, it cannot be willed and disposed by the father as per his choice.

The burden is not on person who propounds will to establish the same. In a suit for partition of alleged joint family properties, the burden is on the plaintiff to plead and prove that subject properties of the suit are joint family properties. The quality of the evidence does not depend upon the number of witnesses examined. A Hindu migrating to Burma marrying a Burmese woman, may not deprive him of his Hindu status as such.


21 V. Srisailam v. Maung Chit, AIR 1922 PC 197

In case of joint family property, the Hon'ble Supreme Court of India in a recent case\textsuperscript{22a} has held that once the execution of second will is held as duly proved, earlier will automatically become redundant. The second Will represents the last wish of the testator.

5.2.3 Undivided interest of a Hindu:

Benefit to a female could be given under Section 14(1) of the Hindu Succession Act, 1956 where her claim is based on her pre-existing right over her husband's property.\textsuperscript{23} After coming into force of the Hindu Succession Act an undivided interest of a Hindu would devolve as provided under Section 7 (2) while in the case of separate property it would devolve on his heirs as provided for in the Hindu Succession Act. Benefit to a female could be given under Section 14(1) of the Hindu Succession Act, 1956 where her claim is based on her pre-existing right over her husband property. In \textit{Sundasi v. LAXMI},\textsuperscript{24} it was observed—

\textbf{The scheme of the Hindu Succession Act in the matter of succession in the property of a Hindu dying intestate is provided in Sections 8 to 13. Sections 15 and 16 provide for the succession to the property of a female dying intestate. Section 17 specifically provides for application of the Hindu Succession Act to persons governed by Malabar and Aliyasanthana Law. Section 14 does not relate to succession but provides that any property possessed by a female Hindu whether acquired before or after the commencement of this Act shall be held}

\textsuperscript{22a} \textit{Mahesh Kumar (Dead) by L.Rs. v. Vinod Kumar}, (SC) 2012(2) R.C.R. (Civil) 493.

\textsuperscript{23} \textit{Velamuri Venkata Sivaprasad (dead) by L.Rs., v. Kothari v. Kothari Venkateswarlu} (dead) by L.Rs. and others, 2000 (2) SCC 139.

\textsuperscript{24} \textit{AIR} 1980 SC 198.
by her as full owner thereof and not as limited owner.

Section 7 (2) is the section which relates to the devolution of an undivided interest in the property of a Kutumba or Kavaru and may be extracted in full.

"7 (2) When a Hindu to whom the Ahyasanthana Law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an undivided interest in the property of Kutumba or Kavaru, as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the Ahyasanthana Law.

Explanation :— For the purpose of this subsection, the interest of a Hindu in the property of a Kutumba or Kavaru shall be deemed to be the share in the property of the Kutumba or Kavaru, as the case may be, that would have fallen to him or her if a partition of that property per capita had been made immediately before his or her death among all the members of the Kutumba or Kavaru, as the case may be, then living whether he or she was entitled to claim such partition or not under the Ahyasanthana law, and such share shall be deemed to have been allotted to him or her absolutely."

Under the customary law and under the Madras Ahyasanthana Act, 1949 the undivided interest in the property of a Hindu in Ahyasanthana Kutumba or Kavaru devolved according to the provisions of the Ahyasanthana law but after the introduction of Section 7 (2) the devolution
by testamentary or intestate succession is under the provisions of the Hindu Succession Act. The explanation to Section 7 (2) provides that the interest in the property of the Kutumba or Kavaru of a Hindu shall be deemed to be the share in the property of the Kutumba or Kavaru, as the case may be, that would have fallen to her if a partition of that property per capita had been made immediately before his or her death among all the members of the Kutumba or Kavaru, as the case may be, then living whether he or she was entitled to claim such partition or not under the Aliyasanthana law, and such share shall be deemed to have been allotted to him or her absolutely. The result of the Explanation is that the undivided interest in the property of the Hindu in the Aliyasanthana Kutumba or Kavaru shall devolve as provided for under the Hindu Succession Act and that the share of the Hindu shall be deemed to have been allotted to him absolutely. The Explanation to Section 30, Hindu Succession Act provides that a member of an Aliyasanthana Kutumba or Kavaru can dispose of his interest in the Kutumba properties by a will. Under the Aliyasanthana law the individual cannot dispose of his interest in the Kutumba by a will. Explanation to Section 30 (I) enables the male Hindu in a Kutumba or Kavaru to dispose of his interest in a Kutumba or Kavaru which is deemed to be property capable of being disposed of by him. Thus while section 7 (2) provides that when a Hindu to whom the Aliyasanthana Law would have applied if this Act had not been passed dies after the commencement of this
Act, having at the time of his or her death an undivided interest in the property of Itutumba or Ravaru, as the case may be, under the Hindu Succession Act, Section 30 enables the male Hindu to dispose of his undivided interest in a Kutumba or Kavaru by a will. While these two sections relate to undivided interest in the property of the Kutumba or Kavaru, Section 17 deals with the succession to the separate property of a Hindu male under the Aliyasanthana law. It provides that Section 8, 10, 15 and 23 shall have effect with certain modification in relation to persons who would have been governed by the Aliyasanthana Law. Section 8 provides that the property of a male Hindu dying intestate shall devolve as specified in the section. The succession to the property of a male Hindu belonging to a Kutumba or Kavaru of Aliyasanthana Law dying intestate would be governed by the provisions of Section 8 as modified by Section 17 the effect being that the succession as provided for under the Aliyasanthana law would not be applicable. Section 10 provides for the distribution of property among heirs in Class I of the Schedule. Section 15 provides the general rule of succession in the case of Hindu females. The rule as to the succession is also made applicable to Hindu female under the Aliyasanthana law with the modifications provided for under subsection (2) of Section 17. Section 23 of the Hindu Succession Act is not applicable to a Hindu governed by Aliyasanthana Law. Thus Section 17 which makes Sections 8, 10, 15 and 23 applicable with certain modifications to a Hindu under the
Aliyasanthana Law provides for succession of the separate property of a Hindu male and a female. After the coming into force of the Hindu Succession Act, the provisions of Section 7 (2) is applicable as regards undivided interest of a Hindu governed by Aliyasanthana Law while the provisions of the explanation to Section 30 is applicable in the case of a will relating to his interest in the family property. Section 17 provides that Sections 8, 10, 15 and 23 with modifications will apply to the separate property of a Hindu under the Aliyasanthana Law.

Section 14 enlarges the property possessed by a female Hindu whether acquired before or after the commencement of the Hindu Succession Act by providing that she will hold the property as full owner and not as a limited owner. This provision is applicable to Hindu females and does not have the effect of enlarging a limited estate in the hands of a Hindu male. The Hindu male will be entitled only to the limited rights as provided for under the law that is applicable to him. But when once the succession opens by the death of the Hindu Section 7 (2) provides that the share in the undivided interest of the Hindu would devolve on his heirs under the Hindu Succession Act absolutely. A Hindu under Section 30 of the Hindu Succession Act also conferred the right to disposing of by will his interest in the Kutumba or Kavaru. While a Hindu dies intestate his undivided interest devolves absolutely on his heirs, in the case of his separate property the succession is governed by
the provisions of Sections 8, 10 and 15 of the Act as modified by Section 17.

It may be noted that regarding the separate property of a Hindu the Madras Aliyasanthana Act provides that the provisions of Sections 19, 20, 21, 22, 23 and 24 of the Act would be applicable. The separate property does not revert back to the Kutumba or Kavaru of the Aliyasanthana family. At the time of the partition if any Kavaru taking a share is a Nissanthathi Kavaru, it shall have only a life-interest in the properties allotted to it under certain circumstances and the property would revert back to a Santhathi Kavaru if it is in existence, Section 36 (3) of the Madras Aliyasanthana Act provides that the properties allotted to Nissanthathi Kavaru at a partition and in which it had only a life-interest at the time of the death of the last member, shall devolve upon the Kutumba or where the Kutumba has broken up, at the same or at a subsequent partition, into a number of Kavarus, upon the nearest Santhathi Kavaru or kavarus. The devolution of the property allotted to a Nissanthathi Kavaru which has only a life-interest devolves upon a Kutumba or the nearest Santhathi Kavaru. This mode of devolution prescribed by Section 36 (5) of the Aliyasanthana Act has to give way to the provisions of Section 8 of the Hindu Succession Act which prescribed a different mode of succession.

The effect of the provisions of Hindu Succession Act above referred to is that after the coming into force of the Hindu Succession Act an undivided interest of a Hindu
would devolve as provided for under Section 7 (2) while in the case of separate property it would devolve on his heirs as provided for in the Hindu Succession Act. Even though a Nissanthathi Kavaru might have a limited interest as the devolution prescribed for in the Madras Aliyasanthana Act is no more applicable and the devolution will be under the Hindu Succession Act.

As far as Hindu Widow's right and Section 14 (1) of the Hindu Succession Act, 1956 is concerned the Honourable Supreme Court. In *Sharada Subramanyun v. Soumi Mazumdar*,\(^{25}\) the held that since the legatee under the Will did not have a pre-existing right in the property, she would not be entitled to rely on Section 14 (1) of the Hindu Succession Act, 1956 to claim an absolute estate in the property bequeathed to her and her rights were controlled by the terms of the Will and Section 14 (2) of the Hindu Succession Act, 1956.

In *Sadhu Singh v. Gurdwara Sahib Narike*,\(^{26}\) held, it is seen that the antecedents of the property, the possession of the property as on the date of Hindu Succession Act, 1956, and the existence of a right in the female over it, however limited it may be, are the essential ingredients in determining whether sub-section (l) of Section 14 of the Act would come into play.

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\(^{26}\) 2006 (8) SCC 75; AIR 2006 SC 3282.
5.2.4 Testamentary Succession:

For Testamentary Succession of Hindus See Section 30 of Hindu Succession Act, 1956 and undernoted decisions.\(^{27}\)

In Babbo Beer Pratap Sahu us. Maharajah Rajender Pratap Sahu\(^{28}\) it was observed by the Privy Council as under:

“It is too late to contend that because the ancient Hindu Treaties make no mention of wills, a Hindu cannot make a testamentary disposition of his property.”

For Hindu wills - see undernoted cases.\(^{29}\)

In *K. Jwala Narasimha Reddy v. Narayan Reddy*\(^{30}\) while dealing with wills by Hindu widows, the Division Bench observed—

It shall be our endeavour to ascertain the principles deducible from both the statutory law as well as from the case law, applicable to wills by Hindu Widows.

The law governing the Hindu wills by Hindu widows is now contained in the Hindu Succession Act, 1956, a Parliamentary enactment. This Act is enacted, as its preamble discloses, with a view to amending and codifying the law relating to intestate succession among Hindus. Of

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\(^{28}\) 12 MIA 1.

\(^{29}\) *Javerbai v. Katibai* 16 Bom. 492; *Manguldas v. Raechodass* 14 Bom 438; *Commissioner of Weights Tax v. Sampratary and sons* 1981 TaxLR 1550; Rangasami v. Ranga 16 Mad. 146; *Laxmanasami v. Rangamma* 12 Mad. 31; *Atagappa v. Siva Sundra* 19 Mad. 211; 40 Mad. 1122; 43 Mad. 824

\(^{30}\) 1978 (1) ALT 407.
the four chapters it contained, chapter 1 deals with “Preliminary”, Chapter IV with “Repeals”,

Chapter II with ‘interstate Succession” and Chapter III deals with “Testamentary Succession”. This Act applied to any person who is a Hindu by religion in any of its form or developments (Sec. 2).

Being a consolidating statute, the Hindu Succession Act, 1956 is to be interpreted as containing in complete form the whole body of law on the subject it deals with, including “Testamentary Succession” among Hindus, uninfluenced by considerations derived from the previous state of law. It is to be read as a self-contained code and a complete enactment with respect to matters with respect to which it deals with.

It is instructive indeed in this connection to refer to the following famous observation of Lord Horschell in Bank of England v. Vagliano Eros I which has become locus classicus on this subject of interpretation codifying law.

“……………..the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the Jaw, and not to start with enquiring how the Jaw previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears
to me that its utility will be almost entirely destroyed and
the very object with which it was enacted will be frustrated.
The purpose of such a statute surely was that on any point
specifically dealt with by it the law should be ascertained
by interpreting the language used instead of as before, by
reading over a vast number of authorities in order to
discover what the law was, extracting it by a minute critical
examination of the prior decisions”.

Referring to the interpretation of Income Tax Act, 1918
which is a consolidating and amending statute, the Full
Bench of Calcutta High Court in Rogers Pratt Co. v.
Secretary of State.\textsuperscript{31} held as under:

“The Act of 1918 professes to be a consolidating and
amending statute; on any point specifically dealt with in the
Act. The law is to be ascertained by interpreting the
language used in the statute in its natural meaning,
uninfluenced by considerations derived from the previous
state of the law: Administrator General v. Premla;\textsuperscript{32}
Norendera v. Kanzalbasini;\textsuperscript{33} and Ramdas v. Amarchand &
Co.,\textsuperscript{34} Reference to the previous state of the law would be
permissible for the purpose of aiding in the construction of
a new statute if any provisions therein is of doubtful import.
Bank of Engi and Rs.VagJt000 Bros. 1891 AC 107; Robinson
v. Canadian Pacific Rly. Co., 1892 AC 481 and Morsey Docks
v. Cameron.\textsuperscript{35}

\textsuperscript{31} AIR I 925 Cal. page 34.
\textsuperscript{32} (1895) ILR 22 Cal. 788 P.C.
\textsuperscript{33} (1896) ILR 23 Cal. 563 P.C.
\textsuperscript{34} (1916) JLR 40 Bom. 630 = AIR 1916 PC 7.
\textsuperscript{35} 1864 II IILC 443.
“The purpose of a consolidating statute is to present the whole body of the statutory law on a subject in complete form, repealing the former statutes’.

We cannot however ignore the effect of the impact of the over riding effect of the Act secured through Section 4 thereof which provides that--

“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”

The case in hand illustrates the importance of this where the testatrix has had her limited interest inherited in the year 1926 from her husband enlarged into an absolute one under Section 14 of the Act as per which she became the full owner of the property making thus a clear departure from the previous law and such previous law, according to the Supreme Court decision in Punithavalli Animal v Ramalingarn36 should not be used for circumventing the rights under Section 14 of the Act.

Section 30 of the Hindu Succession Act, 1956 deals with testamentary succession and provides that “Any Hindu

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may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus”.

By the Explanation appended thereto, the interest of a male Hindu in a Mitakshara coparcenary property is deemed to be property capable of being disposed of by him by will within the meaning of the aforesaid sub-section. We are not concerned with this explanation.

Satyanarayana Sai, the testatrix who became the full owner under Section 14 of the property she inherited from her husband, is entitled under Section 30 of the Act to dispose of her property by will in accordance with the provisions of the Indian Succession Act, 1925.

5.2.5 Hindu Succession Act & Referential Legislation:

The framers of the Hindu Succession Act through Section 30 resorted to the devise of what has now came to be popularly known as “Referential Legislation in order to obviate the necessity of incorporating into it the relevant provisions contained in the Indian Succession Act, 1925.

The classic exposition of this subject is found in the judgment of Lord Esher MR. in Re Wood’s Estate, Exparte Her Majesty’s Commissioners of Works and Buildings.37 In that case, by Section 9 certain sections of the Act of 1840 are incorporated into the Act of 1855 (Act, 18 & 19 Victoria Chap. 95). The learned Master of Rolls said:-

37. 1886 31 Ch.D. 607.
“…………….It is put them into the Act of 1855 just as if they had been written into it for the first time. If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all. For all practical purposes, therefore, those sections of the Act of 1840 are to be dealt with as if they were actually in the Act of 1855”.38

Speaking about the Legislative practice to incorporate by reference, the Supreme Court of India in AT. Corporation v. Assistant Collector Customs39 has held thus:

“It is a well accepted Legislative practice to incorporate by reference, if the Legislature so chooses, the provisions of some other Act in so far as they are relevant for the purposes of and in furtherance of the scheme and object of that Act

“The effect of incorporating one Act with another is presumably to make them parts of the same Code”.40

That takes us to a consideration of the applicable provisions of the Indian Succession Act, 1925.

38. Ibid., pp. 615-16.
5.3 **Will under Indian Succession Act:**

The expression “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.\(^{41}\)

The contents and the main features of a will are:

(a) There must be a legal declaration of intention by the testator;

(b) that declaration must be with respect to the property of testator; and

(c) that declaration could be effective and operative only after the death of the testator which implies that the testator has liberty to revoke the same at any time during his life time.

Section 59 of the Act provides that every person of sound mind not being a minor may dispose of his property by will.\(^{42}\) “No person can make a will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing”.\(^{43}\)

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

Section 63 prescribes the Rules for the execution of unprivileged wills and requires among other things that the testator shall sign the will, that the signature shall be so

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41. Section 2(h) of Indian Succession Act, 1925.
42. Section 59 *Ibid.*
43. Explanation 4 to Section 59.
placed that it shall appear that it was intended thereby to give effect to the writing as a will and that it shall be attested by two or more witnesses.

Now the question arises how are the contents and conditions of wills to be proved? For that, we shall have to turn to the Indian Evidence Act, 1872. Section 67 provides that “If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person’s handwriting must be proved to be in his handwriting”. “If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, where an attesting witness is alive, and subject to the process of the Court and capable of giving evidence”.44

‘Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person”.45

“A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists”.46

44. Sec. 68 Evidence Act.
45. Section 101 Evidence Act.
46. Sec. 3 Evidence Act.
(1) A Hindu widow who becomes under Section 14 of the Hindu Succession Act, 1956, full owner of the property she inherited with limited interest from her husband prior to the coming into force of the Act, is entitled under Section 30 of the Act to dispose of that property by will in accordance with the provisions of the Indian Succession Act, 1925. The overriding effect secured to the aforesaid provisions of law through Section 4 thereof over any text, rule or interpretation of Hindu law or any custom or usage as part of that law, should not be lost sight of while interpreting the aforesaid provisions of the Hindu Succession Act or any thing done thereunder.

(2) A will is a legal declaration of the intention of a testator with respect to his property which comes into effect after his death. A testator can make a will only when he is in such a state of mind that he knows what he does. He shall have to sign or affix his mark to the will and the signature or the mark shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will. The will shall have to be attested by two or more witnesses. (Indian Succession Act, 1925).

(3) Whoever desires any court to give judgment as to any legal right dependent on the existence of facts which he asserts must prove that those facts exist (Section 101 of Evidence Act). He who claims a right under a will must prove the execution of the will with its
contents. As a will is required by the Indian Succession Act to be attested, it cannot be used as evidence until one attesting witness at least is examined to prove its execution (Sec. 68). If the will is alleged to be signed by the testator, that signature shall have to be proved to be his (Sec. 67).

(4) A will is said to he proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The criteria thus adopted by the Evidence Act are that of the Objective standard of a hypothetical prudent man for the measure of proof. In other words, the standard of proof required is one that satisfies a normal prudent person but not one of mathematical certainty. The method and manner of proving a will does not therefore differ from that of proving any other document. As a Will under Section 2 (h) of the Indian Succession Act becomes effective after the death of the testator, that circumstance only unlike in the case of other documents introduces an element of solemnity in the enquiry pertaining to its validity.

5.4 Theory of Vitiating Suspicious Circumstances:

This summing up of the statutory law position renders it necessary to deal in some depth, the theory or the doctrine of vitiating suspicious circumstances invalidating a Will as evolved by case law,
Suspicion reigns in the realm of proof. In the nature of things, they cannot be either exhaustively enumerated or accurately defined and it is not desirable even if it is possible to do so. But nevertheless, suspicions must be found bottomed or anchored in the facts of a particular case, a court believes to exist or the circumstances of a particular case the existence of which a court considers so probable that a prudent man may act upon the supposition that they exist. It will not do to talk airily about circumstances of suspicions. In other words, suspicions must be inherent in the transaction itself which is challenged. They must not be those arising out of a mere conflict of testimony. They must pertain to one or the other of the ingredient's that go to constitute a Will as defined by the statute.

Where suspicion arises from the nature of the case put forward by the person claiming under the Will, he alone should remove that suspicion which his case creates. If, however, suspicion against the Will arises from the facts and circumstances put forth by the opposite side, then the court should see whether those facts and circumstances giving rise to such a suspicion are proved before calling upon the claimant under the Will to explain or remove such a suspicion. It is well to remember the caution admonished by Lord Due Paroq that "those rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief."

The intention of the testator as declared in the Will disposing his property is, to start with, of paramount
importance. The very first question to be considered is whether the dispositions in the Will are natural, fair, reasonable and probable. That goes a long way in effecting the theory of vitiating suspicious circumstances. It is only from this background the case law developed the theory of suspicions. It shall now be my endeavour to refer to the case law bearing on this aspect of the matter.

In *Barry v. Butliri,* Pendock Berry, the testator executed his Will on the 24th September, 1827 in the house of Percy, his attorney, in the presence of the witnesses whereby he appointed the respondent, James Butlin, sole executor or residuary legatee and amongst other legacies bequeathed to Percy £3000 to Butlin £ 2000 and to Whitehead, his butler, £ 3000. All this was to the entire exclusion of his only son. When the validity of the Will was disputed, Baron Parke, delivering the judgment of the Judicial Committee laid down the following two rules which are generally, if not universally, also followed by courts there in England as well as in India. These rules are two; the first rule is that the onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable Testator. The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court and calls upon it to be vigilant and jealous in examining the evidence in support of

47. MOO PC 480 (1838).
the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.”

The learned Judge considered the circumstances of the exclusion of the son as a suspicious one but found on evidence that there is estrangement between the father and the son and held:

“In this state of complete alienation from his son, it is by no means unnatural to suppose that he would not make him the object of his bounty but that he would bestow it under these circumstances it is highly probable that he would make a will in order to prevent his son enjoying his property. We think, therefore, are, on the whole, that the evidence of the factum, coupled with the strong probabilities of the case, is sufficient to remove the suspicions which naturally belong to the case of all wills prepared by persons in their own favour.............”

The Will was finally held to be valid. This decision as interpreted by the subsequent decisions governs the facts of the present case.

_Tyrrel v. Painton_,48 is a case where plaintiff Tyrrell, a cousin of testatrix, claimed a probate of a will executed on November 7, 1892 by Rebecca Bye by which bulk of her property was given to plaintiff. The defendants alleged that the said will was revoked by another will on November 9, 1892. On that date, Thomas painton son of the defendant

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48. (1894) Probate Division, p. 151.
brought to the testatrix another will which was in his handwriting by which the testatrix purported to devise in his hand writing and bequeath nearly the whole of the property to the defendant Lindley, L.J. referred to the two rules laid down by Baron Parke in *Bornj v. Butlin*, MOO PC 480 (1838) and applied them to the facts of the case observed the learned Lord at page 157 “thomas Painton wrote the will, and it was in favour of his father. The testatrix had omitted him on November 7 had she by the 9th. We pronounce in favour of the will of November 7 Davey, L.J. after referring to *Barry v. Butlin*, MOO PC 480 (838) observed at page 159 the principle is, that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the wish of the testator, the Court ought not to Pronounce in favour of it unless that suspicion is removed.”

In *Jorat. Kurnari Dassi v. Bissessur Dun*, Chief Justice Jenkins, after referring to the above two cases- *Barry v. Butlin*, and *Tyrell v. Painton* observed thus:

“The suspicion to which allusion is made must, I think by one inherent in the transaction itself, and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction”

Justice Woodroffe in a separate but concurring judgment observed at page 261 of the report:

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49. 19-1 1-12 ILR & 39 Cal.) p. 245
50. MOO PC 480 (1838).
51. (1894) Probate Division P. 151 observed at p. 253.
“...............the rule in *Tyrrel v. Pathtort*, 1894 Probate Division P. 151 applies in my opinion to cases where the circumstances of suspicion arise from the nature of the case as put forward by the propounder. In such cases the propounder must remove the suspicion which his own case creates. Where, however, the alleged suspicion against a will arises from facts which form part of the impugnant’s case then the Court must see whether the facts which are said to give rise to the suspicion are proved or whether the plaintiff’s case is proved,

The rule therefore does not apply where the question is simply as to which set of witnesses should be believed.

Justice Biswas speaking for the D.B. of the Calcutta High Court in *K. Gopal v. V. Nath*,\(^{52}\) observed at page 90 of the report thus.

“It will not do to talk fairly about circumstances of suspicion. It is no doubt true that a person who takes it upon himself to dispute the genuineness of a will cannot be expected to prove a negative in many cases. At the same time the difficulty in which, on his own seeking, he places himself, will not relieve him of the burden it may be a heavy burden of displacing the prestige testimony on the other side. If he rests his case on suspicion, the suspicion must be a suspicion inherent in the transaction itself which is challenged and cannot he

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\(^{52}\) AIR 1939 Cal. 87.
‘a suspicion arising out of a mere conflict of testimony’

A Division Bench of our High Court in B, Krijmeshwora Boo v. B. Sunjoprnkosa Boo,53 observed at page 181 of the report:

“The suspicion referred to in the decision of (1894) P. 151 must be, as pointed out by Jenkins C.J. and Woodroffe J. in Jurut Kunwrz Dassi v. Bisse.ssur Dolt, ILR 39 Cal. 245.

“One inherent in the transaction itself, and not the doubt that may arise from a conflict of testimony which becomes apparent on an investigation of the transaction.”

What those suspicious circumstances are, cannot be defined precisely or enumerated exhaustively. They must depend necessarily upon the facts of each case. Though a propounder has the obligation to prove the will in accordance with law and remove all well grounded suspicions the quantum of proof that can be expected cannot conform to scientific exactitude or mathematical precision. The standard of proof can only be one that will satisfy a normal prudent person.”

In H. Venkatachala v. B.N. Thimmajama,54 Justice Gajendragadkar (as he then was) had an occasion to refer elaborately to the case law on the subject of wills. The decisions of English courts referred to heretofore were also considered. The learned Judge held at page 451

53. AIR 1962 AR 178.
54. AIR 1959 S.C. 443.
“It would Prima facie be true to say that the will has to be proved like any other document except as to the special requirement of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the ease proof of wills it would be idle to expect proof with mathematical certainty. The rest to be applied would be the usual test of the satisfaction of the prudent mind in such matters.”

The First question, according to the learned judge to be considered when the execution of a will is surrounded by suspicious circumstances, is “Does the will appear to be on the whole an improbable, unnatural and unfair instrument/’ (page 453).

Justice Wanchoo (as he then was) summed up the position in Shashi Kumar v. Subodh Kumar.55

“The mode of proving a will does not ordinarily differ from that of proving any other document except- as to the special requirement of attestation prescribed in the Case of a will by Section 63 of the Indian Succession Act.” (p 531).

Referring to the suspicious circumstances, the learned Judge proceeded to say—

“The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator’s mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or

55. AIR 1964 SC 529.
there might be other indications in the will to show that the testator’s mind was not free, In such a case the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him. that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even- if the will might he unnatural and might cut off wholly or in part near relations”.

5.4.1 Wills and Muslim Law :

a. Ancient texts :----While applying personal law to Muslims, courts in Indian have to administer the same on the strength of ancient texts.56

b. Muslim :— It is sufficient if a person professes Islam for applicability of Muslim Law and he need not be a born Muslim.57

c. Presumption :—The presumption is that Indian Muslim belongs to Hanafi School and it is for the party who pleads otherwise to establish the same.58

56 *Ibrahim Fatima v. Mohd Saleem* AIR 1980 Mad. 82.
57 AIR 1949 Cal. 436 = AIR 1955 Mys. 26 = (1863) 9 MIA 195.
58 AIR 1967 Ker. 78.
d. **Joint family concept** :—Joint family concept is unknown to Muslim Law.\(^{59}\)

e. **Revocation** :—A bequest can be revoked by express declaration either oral or written under Muslim Law.\(^{60}\)

f. **Bhagdari Lands** :—A will by a Muslim relating to Bhagdari lands is also governed by the rules of Muslim Law.\(^{61}\)

g. **Bequest to the heir and stranger** :—Where a bequest is made by a Muslim to the heir and to a stranger even if it is less than one third, it is not valid without the consent of other heirs but with respect to the portion of the stranger, it is valid without such consent if that portion does not exceed one third of testator’s estate.\(^{62}\)

h. **Bequest to one heir** :—Where bequest is made in favour of one heir, consent of other heirs is necessary.\(^{63}\)

i. **Will by a person of unsound mind** :—A will by a person of unsound mind is not valid.\(^{64}\)

j. **Conversion** :—Where a person changes his religion, the changed personal law will govern the rights of succession. In *Mitar Sen Sirigh v. Maqbul Hascin Khan*\(^{65}\) it was observed—

“it has to be remembered that the law of succession in the case of a Hindu or a

\(^{59}\) AIR 1976 Mad. 84.

\(^{60}\) 3 Cal 626 (PC) = 25 Mad. 678 (PC).


\(^{62}\) *Janaid v. Anlia Bibi* AIR 1920 All. 323.

\(^{63}\) *Salay Bee v. Fatimabi* AIR 1922 PC 291; *Gulam Mohd v. Gulam Hussain* AIR 1932 PC 81; *Rahummath Ammal v. Mohd Mydeen Rowther* 1978 (2) MLJ 499.

\(^{64}\) AIR 1927 All. 340.

\(^{65}\) AIR 1930 PC 251.
Mohammedan depends upon their own personal law: it depends upon the law of their religion, and there can be no question but that in this case, apart from the operation of this Act, inasmuch as the father of these children was in fact a Mohammedan, these children would be the proper heirs according to Mohammedan Law and, even if there was a custom which excluded the daughters, nevertheless the Mohammedan Law would in it itself prevent a Hindu from succeeding as heir; and therefore, if the personal law of Agha Hasan Khan, the grandfather of these children, prevailed then the plaintiff would have failed to establish his case. That is the only point which their Lordships have to determine, and therefore, the plaintiff relies upon this Act and says that Jagardeo Singh renounced his religion but nevertheless the plaintiff was not to have his rights of inheritance impaired by reason of jagardeo Singh having renounced the Hindu religion, and he claims therefore that, as he was a Hindu he was entitled to establish his right of inheritance in accordance with the Hindu Law.

There have been, no doubt, two conflicting lines of decisions on the construction of this Act. One has taken the wide view which is sought to be put upon this Act by the plaintiff in this case, and it cannot be better stated than in the judgment of Sir John Edge, then Chief Justice of Allahabad, in the case of Bhagwant Singh v. Kallu (1). One passage only need be referred to in order to show how the
broad construction relied upon by the plaintiff is expressed. Sir John Edge says at p. 104:

“The latter portion of the section, in my opinion protects any person from having any right of inheritance affected by reason of any person having renounced his religion or having been excluded from caste.”

The consequence of that would be that the plaintiff in this case would succeed in establishing his claim. It would have very far reaching consequences if one tried to apply that principle to ordinary cases, because it would apparently mean that, if a Hindu becomes a Mohammedan, then the descendants of that Mohammedan throughout the ensuing generations, without any limit, would always derive their succession under the Hindu Law of succession and not under the Mohammedan Law of succession. It is unnecessary for their Lordships to discuss the far reaching effects of that decision. On the other hand, there has been another line of decisions which is exemplified by the case of Vaithilinga Odayar v. Ayyathorai Odayar (2) which takes the narrower view, the view, which, in their Lordships’ opinion is the correct view, namely, that the section in terms only applies to protect the actual person who either renounces his religion or has been excluded from the communion of any religion or has been deprived of caste. It is intended to protect such a person from losing any right of property or of succeeding as heir. It appears to their Lordships that when the Act is looked at that is the only reasonable construction that can be put upon it. The first limb of this section says:
So much of any law........ as inflicts on any person forfeiture of rights or property,” and Sir John Edge himself took the view that part of the clause only applied to the person who renounced the second limb proceeds:

“or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing.”

Now it is perfectly true that the words “his or her” are not so easy to apply, because there is not a person expressed in the Act who is represented by “his or her”, but it seems to their Lordships to be plain that the words “or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing,” should be read “any right of inheritance of a person by reason of his or her renouncing.”

The clause is given a simple meaning by this construction and their Lordships think that is the correct view. In other words, when once a person has changed his religion and changed his personal law, that law will govern the rights of succession of his children. It may, of course, work hard to some extent upon expectant heirs, especially if the expectant heirs are the children of the ancestor who does in fact change his religion, but, after all, it inflicts no more hardship in their case than in any other case where the ancestor has changed the law of succession, as, for instance, by acquiring a different domicile, and their Lordships do not find it necessary to consider any questions of hardship that may arise. They will certainly, in their Lordships’ view, be outweighed by the immense difficulties
that would follow if the wider view were to prevail. Their Lordships are definitely of opinion that the construction which was adopted by Sir John Edge was not the right construction and that case and any cases that followed it must be overruled so far as the construction of this Act is concerned.

k. **Burden of proof:** The burden is on the person who claims under a will to establish that other heirs had consented for the same.66

In *Yasin Imambhai Shaikh* by LRs. v. *Hajarabi* 'it was held.

“I am unable to accept this contention since Yasin Imambhai Shaikh, the original Plaintiff, was claiming under a Mohammedan Will and the Will is said to he in writing, it was in the very nature of things for the original Plaintiff to establish that the other heirs had consented to the bequest. The original Plaintiff could not have succeeded in the suit without establishing this fundamental position. Despite this, it appears that Yasin Imambhai Shaikh, the original Plaintiff, did not choose to lead any evidence at the trial on this point, and the said Yasin Imambhai Shaikh hence failed in the suit. The application to adduce the evidence has only been made belatedly at the appellate stage, and if in these circumstances, the Appellate Court has rejected the application, it would be proper. Not only

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66 AIR 1986 Bom. 357.
this, it is also an admitted position that some of the Respondents have been examined in support of their defence. Significantly no question have been put to the Respondents as regards the said Revenue proceedings or as to their statements said to have been made in the said proceedings, which could easily have been done. In other words, their testimony to the effect that there was absence of consent has gone unchallenged. If this is so, then the lower Appellate Court was right in rejecting the application, for it would have meant introducing fresh evidence and reopening of the entire case. In view of this, the contention now canvassed must be negatived.

1. **Will or partition deed** :—Any Muslim of sound mind and not a minor may make a valid Will to dispose of the property. Where the testator clearly expressed herself that after her death, the properties Will devolve upon her heirs in the manner specified, it is a Will. It cannot be construed to be a deed of partition, in as much as in law, the parties thereto except the testator had no interest in the properties in question.  


m. **Oral Will** :—Where a Muslim makes an Oral Will, it is valid.  

68 *AIR 1984 Guj. 127.*

n. **Non-mentioning of one third of testators estate** :—Where there was no mention that the bequest was one third
of the testator’s estate after deducting funeral expenses and debts, it is not a will.\textsuperscript{69}

5.5 Will under Christian Law:

Disposition of property through will is fairly popular among Christians. The number of Christians opting for testamentary succession is much more than any other community in India. As matter of fact, testamentary power of disposition was unknown under the Hindu Law. It came to be recognized by decisions of English Courts and ultimately received statutory recognition in Hindu Wills Act.

According to Indian Succession Act, 1925, Except for Muslims, the process and procedure of making or executing a will is the same for every other community. Therefore, like others, a Christian can make a will only when he is of sound mind and is free from duress or coercion or fraud. Wills by Indian Christians also are governed by the provision of India succession Act, 1925.\textsuperscript{70} The Travancore Christian succession Act was challenged as \textit{ultra vires} and unconstitutional and it was held that Travancore Christian succession Act, stood repealed and the Indian succession Act, 1925, Part–V Chapter II become applicable to the area in question. Christian communities in India:

The following are the Christian communities in India:

1. Jacobites
2. To pass
3. Latin Catholics
4. Catholics
5. Anjooticar
6. Romo-Syrians
7. Anglo-Indian
8. Ezhunooticar

\textsuperscript{69} AIR 1986 A.P. 159.
5.5.1 Christian Communities in India:

The following are the Christian Communities; in Kerala, Andhra Pradesh, Goa, Nagaland, Meghalaya, Manipur, Mizoram, Tamilnadu and Andaman & Nicobar.

- Jacobites
- Anglo – Indians
- Anjooticar
- Latin Catholics

5.5.2 Intestate succession:

Part-V of Indian Succession Act, 1925 deals with Intestate Succession. Chapter 1 dealing with preliminary reads.

Application of Part:—(1) This Part shall not apply to any intestacy occurring before the first day of January, 1866, or to the property of any Hindu, Muslim, Buddhist, Sikh or Jaina.

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72 AIR 1932 Oudh. 85.
(2) Save as provided in so b-section (1) or by any other law for the nine being in force, the provisions of this Part shall constitute the law of 73(India) in all cases of intestacy.

As to what property deceased considered to have died intestate :—A person is deemed to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

Illustrations

(1) A has left no will, He has died intestate in respect of the whole of his property

(ii) A has left a will, whereby he has appointed B his executor; but the will contains no other provision. A has died intestate in respect of the distribution of his property.

(iii) A has bequeathed his whole property for an illegal purpose. A has (died intestate in respect of the distribution of his property.

(iv) A has bequeathed 1000 rupees to B and 1,000 rupees to the eldest son of C, and has made no other bequest; and has died leaving the sum (of 2000 rupees and no other property. C died before A without having ever had a son. A has died intestate in respect of the distribution of 1,000 rupees.

Where the Hindu had converted to Christianity, he is governed by the Act 74 'Any other law for the time being in

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73 Subs. by Act 3 of 1951, Section 3 and Sch., for “the States”.
74 AIR 1922 PC 14.
force” will include Travancore Christian Succession Act, 1925.\(^75\)

**Special provisions where intestate has left widow and no lineal descendants.**

The Indian Succession Act, 1925, Section 33-A reads.

**33-A. Special provision where intestate has left widow and no lineal descendants\(^76\) :—(l) Where the intestate has left a widow but no lineal descendants and the net value of his property does not exceed five thousand rupees, the whole of his property shall belong to the widow—

(2) Where the net value of the property exceeds the sum of five thousand rupees, the widow shall be entitled to five thousand rupees thereof and shall have a charge upon the whole of such property for such sum of five thousand rupees, with interest thereon from the date of the death of the intestate at 4 per cent. per annum until payment.

(3) The provision of the widow made by this section shall be in addition and without prejudice to her interest and share in the residue of the estate of such intestate remaining after payment of the said sum of five thousand rupees with interest as aforesaid, and such residue shall be distributed in accordance with the

(4) The net value of the property shall be ascertained by deducing from the gross value thereof all debts, and all funeral and administration expenses of the intestate, and all other lawful liabilities and charges to which the property shall be subject.

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\(^{75}\) AIR 1974 Ker. 107 = 1973 Ker. LT 728.

\(^{76}\) Ins. by Act 40 of 1926, Sec. 3.
This section shall not apply—

(a) to the property of—

(i) any Indian Christian,

(ii) any child or grandchild of any male person who is or was at the time of his death an Indian Christian, or

(iii) any person professing the Hindu, Buddhist, Sikh or Jaina religion the succession to whose property is, under Section 24 of the Special Marriage Act. 1872 (3 of 1872) regulated by the provisions of this Act;

(b) unless the deceased dies intestate in respect of all his property.

Section 33-A (5) (b) is an independent clause and is not part of Section 33-A-(5) (a) of the Act.77

5.5.3 Effects of Conversion:

Where a son had converted his religion adopting Christianity, a Hindu father can succeed to such converted son. Likewise in the case of brothers and sisters also though one of them had converted to Christianity from Hindu religion, there is no bar imposed on them in the matter of succession.78

In Kailash Shekhar v. Maya Devi,79 question arose as to whether old caste of a barbor or his progeny who belongs to scheduled caste or tribe but had left Hinduism and embraced Christianity or Islam or any other religion

77 AIR 1945 Mad. 47.
78 15 CWN 158.
79 AIR 1984 SC 600.
would revive on his progeny’s recognition to Hinduism. The Supreme Court held that it would depend upon the genuine intention of re-convert to adjure his new religion and completely disassociate himself from it. It is, however, matter of pleading and proof as to whether it has been intended by the convert to follow ever after conversion, the personal law and customs applicable to him at the time of conversion. If on the basis of proper pleading and proof it is established in a given case the convert had to intended and had been practising his personal law, customs and usages even after conversion, he and his progeny would continue to be governed by the same provided that these are not inconsistent with any rule or tenet of the Christianity he has embraced or any statutory enactment.

In *Ranbir Karan Singh v. Jogindra Chandra Bhattacharji*, the view that bringing up a child even within Intention of giving one’s property to that child and loosely describing as having adopted child do not constitute adoption in the technical legal sense as understood in Hindu law and that succession is governed by the Succession Act and not by Rifles of Hindu Law applicable to community to which he belonged before conversion is not in consonance with the law laid down by the Privy Council holding that though the profession of Christianity releases the convert from the trammels of the Hindu Law, but it does not of necessity involve any change of rights or relations of the convert in the matters with which Christianity has no

80 AIR 1940 All. 134.
concern, such as his rights and interests, in, and his powers over, property which finds its approval in *Anthonyswamy v. M.R. Chinaswamy*,\(^{81}\) wherefrom the principle deducible is that it had been intended by a Hindu converted to Christianity to be governed by the law he was governed before and such law had in fact been followed in continuity conversion he would continue to he governed by such law even after embracing Christianity on matters not specifically covered by any Statutory law or tenet or rule of Christianity one is professing. The decision in Ranbir Karan Singh (Supra) therefore, is not a good law.

**Will can be revoked by marriage** :—A will by a Christian can be revoked by marriage of the maker of the will except where it is made in exercise of a power of appointment.

**Unprobated Christian Will** :—On the strength of an unprobated christian will, a suit cannot he maintained. In *Pravin Kumar v. P. Rajeswarau*,\(^{82}\) it was held—

The next piece of evidence available on record is the admission of P.W. 2 that Jimmarammal was buried according to Christian rites. While referring to the admission of P.W. 2, the trial court says that Jimmarammal could not he converted into a Christian after her death and that she had no control over her burial. Unfortunately, the trial court overlooked the fact that in this country or at any rate in this part of the country, the sentiments of family members would be not to wound any feelings or sentiments

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\(^{81}\) AIR 1970 Sc 223.

\(^{82}\) AIR 1988 Mad. 132.
which were entertained by deceased at least for a few days after the death. If Jimmarammal had lived throughout as a Hindu, no member of the family would have dared to bury her according to Christian rites. The very fact that Jimmarammal was buried according to Christian rites, goes a long way to show that she must have lived as a Christian and that her religion was Christianity. Mr. Sampath, appearing for the plaintiff, contends that there is no evidence to prove that she was buried in a cemetery and that no Christian would be buried elsewhere, cannot accept this reasoning. It is not shown before the Courts below or this court that a Christian should be buried only in a Christian cemetery. If the parties had chosen to bury her at a place which they consider proper, then that would not mean that she was not a Christian. Mr. Sampath also relies upon the fact that in the written statement of the first defendant, he had stated that she was a Buddhist in the beginning and got converted later as a Christian. It is argued that having pleaded conversion, the burden was on the defendants to prove such conversion and they have not led in their evidence in this case to prove such conversion. It is the argument of learned counsel for the plaintiff that in the absence of any proof by production of Baptism Certificate or any entry in the register of Christian churches, Jimmarammal cannot be taken to be a Christian. I am of the opinion that it is not open to the plaintiff to raise such an argument. The plaintiff came to court with a definite case that Jimmarammal was a Hindu. The burden
is on him to prove the same. If he fails to do so, he cannot abandon on his own case and turn round to adopt that of the defendant for claiming the relief. (Vide Govindaraj v. Kandaswamy Gounder (1956) 2 Mad. LJ 578:83 and Subramania Mudaliar v. Ammapet Cooperative Weavers’ Production and Sales Society, (1960)2 Mad. LJ 477.84

The lower Appellate Court while dealing with this aspect of the matter simply paraphrased the reasoning given by the trial court and held that the fact of the burial of Jimmarammal as a Christian would have no relevance to the question whether she was a Christian or not. The lower court has thrown the burden on the defendants to prove conversion which they have set up in the written statement. As pointed out earlier, the burden was on the plaintiff to prove that Jimmarammal was a Hindu. Having regard to the circumstances referred to above, I have no hesitation in holding that Jimmarammal was only Christian and not a Hindu. Though the question whether Jimmarammal was a Hindu or a Christian is one of fact the findings arrived at by the Courts below are vitiated as they have ignored the relevant evidence on record. Hence, the findings are not binding on me in second appeal.

Once it is held that Jimmarammal was a Christian, it follows that Ex. A-3 required to be probated and cannot be looked into by any court of law without a probate. Ex. A-3, is not admittedly probated. Hence, the very basis of the plaintiff’s claim that he is entitled to the suit items 1 and 2

83. AIR 1957 Mad. 186.
84. AIR 1961 Mad. 289.
goes. He cannot get a decree in the suit for recovery of possession of items 1 and 2. The suit has to be dismissed on that ground.

5.5.4 Comparative Study of Muslim will and Hindu Will:

“The instincts and affections of mankind, in the vast majority of instances, WILL lead man to make provisions for those who are nearest to them in kindred and who in life have been the objects of their affections.”

A Will or a testament is a declaration of the intention of the person making it with regard to the matters which he wishes to take effect upon or after his death while a codicil is a document which alters any one or more provisions in the Will or adds any provision in the Will or rectifies the mistakes, if any, in the Will. It is supplemental to and considered as annexure to a Will previously made. The concept of wills emanated from the right of absolute ownership in one's property. When a property holder died, leaving heirs and no will, it lead to unnecessary family squabbles. Wills and codicils came to the rescue and aided in a fair distribution of property, as per the prerogative of the executor of the will. Wills were a medium to distribute the property acquired by the testator in his or her life through personal preferences and minimal interference of law (as in case of Muslim Personal Law which allows only one-third of the testator's property to be divested through wills). The fact however was that despite the advantages of executing a will before death, hardly three out of four people
wrote a will for the sheer fear of contemplating and picturing one's death.

While there is evidence of testamentary succession by Muslims, Indian history is silent about the origination of concept of wills in Hindus, though one does find the recurring mention of divesting property as gifts, which by some jurists, is considered a divestiture similar to a will. The Indian Succession Act, 1925 consolidated the laws of intestate (with certain exceptions) and testamentary succession, applying to all the Wills and codicils of Hindus, Buddhists, Sikhs and Jains throughout India. Muslim testamentary succession however was excluded from the ambit of application of this act and remains largely governed by the Muslim Personal Laws.

This paper aims to illuminate the basic tenets of wills executed by Muslims and Hindus and attempts to bring out the distinctions between the two. It proceeds in four parts—part I dealing with the general concept of wills; part II with Muslim testamentary succession; Part III with Hindu succession through wills and in Part IV a comparative analysis of the two, followed by the conclusion. The scope of the project has been narrowed down to the preliminary discussions about the Indian Succession Act, 1925 with special focus on sections distinguishing it from the corresponding rules in Muslim Personal Law. A detailed analysis of the act has been kept outside the scope of this paper. In the part dealing with Muslim testamentary succession, the discussion has been strictly confined to
‘wasiyat’ excluding other instruments like gifts and waqfs from the scope. Also, the discussions about intestate succession in both Hindus and Muslims have been excluded from the purview of this project.

A Will is a legal declaration expressing the wishes of the testator to be carried into effect after his death. The right to alter the Will at any point of time before the execution rests with the testator. A Will may be a simple form of expression, or a complicated disposition. In either case, the beneficiary has to prove it by attesting witnesses, removing all suspicious circumstances surrounding its execution. The onus of proving that the Will designates the beneficiary as the true heir to the property is on him and has to be proved beyond doubt. There may be other suspicious circumstances attending on the execution of the Will and even in such cases it is the duty of the propounder to remove all clouds of doubts and satisfy the conscience of the court that the instrument propounded (that is - the Will) is the last Will of the testator. The essence of every Will is that it is revocable during the lifetime of the testator.

Section 2(h) of the Indian Succession Act, 1925 states the definition of ‘Will’ that is accepted for the purpose of all testamentary successions in the country. It defines ‘Will’ as “the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death”.

What are the necessary qualifications for a will to be valid?
The Indian Succession Act, 1925 (hereinafter the Act) that applies to Hindus, Parsis, Christians, Buddhists and Jains in India, states in section 59, the necessary qualification for a valid will. For executing a valid will, prima facie, the testator should be:

The age of majority is eighteen years, as specified by the Indian Majority Act, provided the Court has not appointed a guardian for him, in which case the age of majority is taken to be twenty-one years. The burden of proving the majority of the testator of the Will is on the person who is to be benefitted from it.

Soundness of mind (as supported by explanation 4 to section 59) refers to the capacity of a person to understand what he is doing while creating the Will, the elements his Will is composed of, and the proportions in which the property is divested in the Will. The test of soundness of mind was laid down in *A.E.G. Carapiet v. A.Y.Derderian* where the Court held that “if a testator has capacity to appreciate the fact that he is making a Will, what are the contents of the Will and ability to appreciate the nature of disposition he is making having regard for the claims of affection and family relationship and also the claims of the society or community to which he belongs.” The question of soundness of mind will therefore is a matter of fact and degree that differs from case to case. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.
Section 59 in the explanation part states that married women can divest by Will, their personal property. This explanation is reinforced by section 14 of the Hindu Succession Act that allows a woman to dispose her streedhan by her Will. It also states that a deaf and dumb person can also execute a Will if he or she is capable of understanding what he is doing. Similarly, an insane person can make a valid will in the interval of sanity and a Will made by a sane person, not in his senses due to intoxication, illness etc, is not valid. Mere old age or illness of the testator however cannot make the Will invalid and has to be substantially established by evidence. Here again, the onus to prove sanity (or insanity) at time of creation of Will is on the person initiating the suit challenging the Will as the presumption of sanity lies with the testator.

Other than section 59, section 61 of the Act declares Wills obtained by fraud, coercion or importunity as invalid as it negates the free consent of the testator which is essential for the validity of the Will. If it can be proved that actual force was used to compel the testator to make the Will, there can be no doubt that although all formalities have been complied with, and the party was perfectly within his senses, yet such a Will can never stand.

The qualifications for a valid Will under Muslim Personal Law are almost similar to those under the Act.
Firstly, the testator should be a major. According to Muslim beliefs, the age of majority is attained at puberty, in absence of signs of which, it is assumed to be fifteen years. However, this is not applicable in India and the age of majority remains as stated in the Indian Majority Act. Secondly, the testator should be in legal capacity to create a Will, bequeathing only that which is his own, and not under any kind of fraud, coercion or influence, with volition. He should be of sound mind while creating the will and should continue to be so subsequently. Also, in Muslim Personal law, a person who has attempted suicide cannot thereafter make a Will, and if he does, the Will shall be considered void. The Courts however, have circumvented this rule as there have been instances where court has regarded the Will made by a Muslim who subsequently poisoned himself as valid as he had contemplated suicide before creating the Will, but not attempted it.

**Wasiyat-Nama**

Will-The Primary Instrument Of Muslim Testamentary Succession.

“A Will from the Muslaman point of view is a divine institution, since its exercise is regulated by the Koran. It offers to the testator the means of correcting to a certain extent the law of succession...of recognizing the services rendered by a stranger, or the devotion to him in his last moments...”

Ameer Ali, citing the Hedaya.
The Muslim testamentary succession is entirely governed by the Muslim Personal Law which covers the powers to make the Will, the nature of the Will, the execution procedure, conditions of validity etc. The term ‘wasiyat' means an endowment with the property of anything after death. To bequeath it, in the language of law, to confer a right of property in a specific thing, or in a profit or advantage in the manner of gratuity postponed till after death of the testator. The document containing the ‘Will' is the "wasiyat-nama". A wasiyat can be made orally or in writing in which case it does not have to be attested. Though if it is in writing, it need not be signed by the testator and attested by the witnesses. The option of revocation or modification in the will is available to the testator in his lifetime. The essential condition for a valid Will in Muslim law (as that in the Hindu testamentary succession) is that only property with absolute ownership of the testator can be bequeathed. A bequest which is contingent, or conditional or in the future or is alternative to another, pre-existing one, would be void.

5.5.4(a) Restrictions on testamentary capacity of Muslims:

Islam recognizes the indispensible necessity that a man should have the power of making bequests. This however does not imply that he has the power to encroach upon the share of his legal heirs as stated in the holy Quran. Quoting Ameer Ali, “the Prophet has declared that power should not be exercised to the injury of lawful heirs”.
Hence there are restrictions imposed on the testamentary capacity of Muslims.

Muslim testamentary capacity is regulated in two ways:

1. The One third rule: This rule states that a Muslim cannot make bequest of more than one-third of his net property, after the discharge of debts and funeral expenses, if there are heirs present. Even for bequeathing the 1/3rd share, the Muslim has to obtain the consent of the other heirs. All schools of Muslim Law except the Ithana Ashari School lay down that bequest of more than one third unless consented to by the heirs is invalid or a custom or usage so permits.

2. The consent of the heirs to confer in excess of one-third through will is also necessary. As mentioned above, a Muslim has to obtain consent of all the surviving heirs to devolve property in excess of one-third through Will. This rule is in place to ensure that the heirs have voluntarily consented to the infringement of their right in the testator's property and are not wronged in anyway. Such consent may be through words or implied conduct, but not through silence.

Another limitation on the testamentary capacity is that this power should not be used to benefit one particular heir, unless consented by other heirs. In the absence of such approval, the Will unjustly enriching one heir over all others shall not be recognized as a valid Will.
5.5.4(b) Hindu Testamentary Succession

Unlike the Muslim Personal Law, Hindu traditional law did not directly recognize the existence of the power to make a Will. However, both traditional and modern jurists often drew the analogy between power to make a ‘gift’ and the Will. While dealing with the analogy of ‘gift’ and Will, the Privy Council has laid down that even if Wills are not universally to be regarded in all respects as gifts to take effect on death, they are generally so to be regarded as to the property which they can transfer and the person to whom it can be transferred.

Section 30 of the Hindu Succession Act, 1956 deals with the testamentary succession by Hindus. It states that all testamentary succession in Hindus has to be governed by the provisions of the Indian Succession Act, 1925. A nuanced reading of this section illuminates the following facts about the testamentary capacity of a Hindu. Firstly, the property to be disposed off should be ‘capable of being disposed off’. This statement implies that a Hindu governed by Mitakshara cannot bequeath in his Will, the share of any other coparcener. The Hindu Succession Act, 1956 has made it possible for a coparcener in a Joint Hindu Family governed by the Mitakshara School to dispose of his share in the undivided coparcenary property by a Will. It can be thus inferred that in such cases, the rules of inheritance do not apply and the property in question is disposed off in accordance to the wishes of the testator as specified in the
Will. Also, after 1927, Hindus can no longer make an oral Will.

However, there are two major limitations imposed by the Indian Succession Act on testamentary capacity of Hindus. Firstly, the property to be divested has to be the testator's self acquired property or share in ancestral property if partition has taken place, i.e., there should be absolute ownership of the testator in the property to be divested (applicable in Mitakshara system). At no point of time can the testator divest in his Will whole property, his share in the undivided property without partition or a share of the property of other coparceners in the ancestral property owned by a Hindu undivided family. Secondly, in Dayabhaga school of Hindu law, the absolute owner of the property can divest it through Will even if the property is ancestral in nature and such divestiture will deprive his heirs or widow of their property share after the partition when he dies. However, the testamentary power of women in Hindu law is limited to the property with their absolute ownership—that is- streedhan. Prior to the Hindu Succession Act, 1956, Hindu women did not have the right to absolute ownership on property—hence the power to bequeath property. This right was given to women by section 14 of the Act.

The detailed discussions in parts II and III of this chapter illuminate the fact that while Hindu traditional law has some influence on the testamentary capacity of Hindus, with respect to the fundamental rights on property as in
Mitakshara and Dayabhaga system respectively, most of the jurisprudence on Hindu testamentary succession is statutory, codified in the form of the Hindu Succession Act, 1956 and the Indian Succession Act, 1925. On the other hand, the Muslim law on succession is entirely personal and traditional in nature, emanating from the sayings in the holy Quran and mandates of the Sharriat.

There are certain fundamental differences between the way property can be disposed off by Hindus and Muslims. Firstly, while the limitations on testamentary capacity of a Hindu are based on the mode of acquisition of property: that is whether the property is ancestral or self-acquired, the limitations in Muslim law are based on the sayings of the Quran limiting the property to be bequeathed by a wasiyat to one-third of the property left after discharging the debts and funeral expenses of the deceased.

The Hindu and Muslim laws of testamentary succession also differ with regards to women. While women in Hindu law have the power to distribute through will, the property they have absolute ownership in, in anyway and to anyone, the rights of Muslim women, there are certain exceptions to the general rules. For instance, generally, the share of property bequeathed in Will cannot exceed a-third unless with consent of other heirs. However, if a Muslim woman has no blood relations and her husband would be the only heir, then she can will two-thirds of her property in his favor. Another stark difference between the two laws is that Muslim women can at no point of time get more than
that inherited by the males in the family, if the bequeathed share exceeds a-third of the property as well as in intestate succession, where women get the exact half of their male counterparts.

Also, until recently, Hindus were restricted in giving away their property through Will for charity by application of section 118 of the Indian Succession Act. The section plainly meant that to the extent to which the bequest is for religious or charitable uses, the application of this section is attracted despite the fact that the bequest may be for only a part of the property or some interest in the property. This section was declared unreasonable, arbitrary and discriminatory and, therefore, violative of Article 14 of the Constitution.

The heterogeneity in the Indian society at times proposes a problem of rational adjudication for the judges when they have to decide on issues as personal as succession and inheritance. Personal laws in succession have not been contested as intensely as the personal laws in marriage, divorce and adoption. Despite this, one often feels that some uniformity in succession laws will ensure equality, thereby abridging the divide between rights of Hindus and Muslims to charity and wills. It is not denied that there are present both personal laws and legislative enactments on whose foundation the cases are to be decided. However, these laws fail to conform to the sacrosanct ideal of equality for all as enshrined in the constitution. There have been suggestions and intensive
debates, starting from the very Constituent Assembly that made our Constitution, to have a Uniform Civil Code, as under the provisions of Article 44 of the Constitution, to give to the Indian society a set of personal laws which ensure more or less an equal treatment to all, without attacking their religious beliefs.

Since testamentary succession is a civil act, introducing some uniformity in the laws followed by Muslims and Hindus will not attack the essence of the two religions. Therefore, there should be no limitations imposed on the extent to which the property can be bequeathed, the persons to whom such property can be bequeath and the donation of the property by will for religious and charitable purpose and this can only be done through a Uniform Civil Code for succession, as envisaged in Article 44 of the Constitution.