

## **Inheritance under Muslim law**

### **Muslim law of succession constitutes four sources of Islamic law –**

1. The Holy Quran
2. The Sunna - that is, the practice of the Prophet
3. The Ijma - that is, the consensus of the learned men of the community on what should be the decision on a particular point
4. The Qiya - that is, an analogical deduction of what is right and just in accordance with the good principles laid down by God.

Muslim law recognizes two types of heirs, Sharers and Residuaries. Sharers are the ones who are entitled to a certain share in the deceased's property and Residuaries would take up the share in the property that is left over after the sharers have taken their part.

### **Sharers:**

The Sharers are 12 in number and are as follows: (1) Husband, (2) Wife, (3) Daughter, (4) Daughter of a son (or son's son or son's son and so on), (5) Father, (6) Paternal Grandfather, (7) Mother, (8) Grandmother on the male line, (9) Full sister (10) Consanguine sister (11) Uterine sister, and (12) Uterine brother.

The share taken by each sharer will vary in certain conditions. For instance, a wife takes 1/4th of share in a case where the couple is without lineal descendants, and a one-eighth share otherwise. A husband (in the case of succession to the wife's estate) takes a half share in a case where the couple is without lineal descendants, and a one-fourth share otherwise. A sole daughter takes a half share. Where the deceased has left behind more than one daughter, all daughters jointly take two-thirds.

If the deceased had left behind son(s) and daughter(s), then, the daughters cease to be sharers and become residuaries instead, with the residue being so distributed as to ensure that each son gets double of what each daughter gets.

### **Non-Testamentary and Testamentary succession under Muslim law:**

In Non-testamentary succession, the Muslim Personal Law (Shariat) Application Act, 1937 gets applied. On the other hand, in case of a person who dies testate i.e.

one who has created his will before death, the inheritance is governed under the relevant Muslim Shariat Law as applicable to the Shias and the Sunnis.

In cases where the subject matter of property is an immovable property, situated in the state of West Bengal, Chennai and Bombay, the Muslims shall be bound by the Indian Succession Act, 1925. This exception is only for the purposes of testamentary succession.

**Birthright:**

Inheritance of property in Muslim law comes only after the death of a person, any child born into a Muslim family does not get his right to property on his birth. If an heir lives even after the death of the ancestor, he becomes a legal heir and is therefore entitled to a share in the property. However, if the apparent heir does not survive his ancestor, then no such right of inheritance or share in the property shall exist.

**Distribution of the Property:**

Under the Muslim law, distribution of property can be made in two ways – per capita or per strip distribution.

The per capita distribution method is majorly used in the Sunni law. According to this method, the estate left over by the ancestors gets equally distributed among the heirs. Therefore, the share of each person depends on the number of heirs.

The per strip distribution method is recognised in the Shia law. According to this method of property inheritance, the property gets distributed among the heirs according to the strip they belong to. Hence the quantum of their inheritance also depends upon the branch and the number of persons that belong to the branch.

**Rights of females:**

Muslim does not create any distinction between the rights of men and women. On the death of their ancestor, nothing can prevent both girl and boy child to become the legal heirs of inheritable property. However, it is generally found that the quantum of the share of a female heir is half of that of the male heirs. The reason

behind this is that under the Muslim law a female shall upon marriage receive mehr and maintenance from her husband whereas males will have only the property of the ancestors for inheritance. Also, males have the duty of maintaining their wife and children.

**Widow's right to succession:**

Under Muslim law, no widow is excluded from the succession. A childless Muslim widow is entitled to one-fourth of the property of the deceased husband, after meeting his funeral and legal expenses and debts. However, a widow who has children or grandchildren is entitled to one-eighth of the deceased husband's property. If a Muslim man marries during an illness and subsequently dies of that medical condition without brief recovery or consummating the marriage, his widow has no right of inheritance. But if her ailing husband divorces her and afterwards, he dies from that illness, the widow's right to a share of inheritance continues until she remarries.

**A Child in the Womb:**

A child in the womb of its mother is competent to inherit provided it is born alive. A child in the embryo is regarded as a living person and, as such, the property vests immediately in that child. But, if such a child in the womb is not born alive, the share already vested in it is divested and, it is presumed as if there was no such heir (in the womb) at all.

**Escheat:**

Where a deceased Muslim has no legal heir under Muslim law, his properties are inherited by Government through the process of escheat.

**Marriage under the Special Marriage Act, 1954:**

Where a Muslim contracts his marriage under the Special Marriage Act, 1954, he ceases to be a Muslim for purposes of inheritance. Accordingly, after the death of such a Muslim his (or her) properties do not devolve under Muslim law of inheritance. The inheritance of the properties of such Muslims is governed by the provisions of the Indian Succession Act, 1925 and Muslim law of inheritance is not applicable.

**LAW RELATING TO SUCCESSION CERTIFICATES UNDER INDIAN  
SUCCESSION ACT, 1925**

The Indian Succession Act, 1925 defines a succession certificate as a certificate issued by a court to the legal heirs of a deceased to establish the authenticity of the heirs and give them the authority to inherit debts, securities and other assets of the deceased. The purpose of a succession certificate is limited in respect of debts and securities such as provident fund, insurance, deposits in banks, shares, or any other security of the central government or the state government to which the deceased was entitled. Its main objective is to facilitate collection of debts on succession and afford protection to the parties paying debts to the representatives of the deceased person.

A succession certificate may be used in situations where banks, financial and private institutions release funds to the nominee (where such nominee is not the legal beneficiary of the asset) and the nominee refuses to cooperate in distribution of the asset to the legal beneficiary. Similarly, a succession certificate may be useful to prove genuineness of the claimant where the inheritance amount is substantial. Additionally, in certain states, a probate (meaning a copy of the will, if it exists, authenticated by the Court) and a succession certificate are compulsory to transfer the title of an immovable property.

**Procuring a Succession Certificate**

A few important pointers for procuring a succession certificate are as follows:

The beneficiary/ legal heir is required to approach a competent court and file a petition for a succession certificate.

The District Judge within whose jurisdiction the deceased ordinarily resided at the time of his death, or, if at that time had no fixed place of residence, the District Judge, within whose jurisdiction any part of the property of the deceased may be found, may grant the succession certificate.

The petition should mention important details such as the name of petitioner, relationship with the deceased, names of all heirs of the deceased, time, date and place of death. Along with the petition, death certificate and any other document that the court may require should also be attached.

The court, after examining the petition, issues a notice to all concerned parties and also issues a notice in a newspaper and specifies a time frame (usually one and a half months) within which anyone who has objections may raise them. If no one contests the notice and the court is satisfied, it passes an order to issue a succession certificate to the petitioner.

If there is more than one petitioner, then the court may jointly grant them a certificate but it will not grant more than one certificate for a single asset.

When the District Judge grants a succession certificate, he shall specify the debts and securities set forth in the application for the certificate, and may thereby empower the person to whom the certificate is granted (i) to receive interest or dividends on the securities; or (ii) to negotiate or transfer the securities; or (iii) both to receive interest or dividends or negotiate or transfer the securities.

With respect to costs involved, the Court typically levies a fixed percentage of the value of the estate as its fees (which is more particularly prescribed under the Court-fees Act, 1870, (7 of 1870)). This fee is to be paid in the form of judicial stamp papers of the said amount. In addition to Court fees, the applicant will also be required to pay requisite fees to its lawyer.

### **Succession Certificate vis-a-vis Wills**

In the event a person dies leaving a Will, a succession certificate may not be required for inheriting the assets of the deceased since the entire estate of the deceased shall vest on the executor of the Will for distribution as per the instructions set forth in the Will. Although Section 370 of the Indian Succession Act, 1925, specifically provides that a succession certificate shall not be granted with respect to any debt or security in cases where a right to such property is required to be established by obtaining letters of administration or a probate, in certain states, a probate and a succession certificate are compulsory to transfer the title of an immovable property. It is to be further noted that in the absence of a Will, banks and financial institutions typically rely on the succession certificate and/or a legal heirship certificate.

#### **B. Legal Heirship Certificate**

##### **Purpose of a Legal Heirship Certificate**

A number of other documents such as legal heirship certificate, nominations and death certificate may be procured, as an alternative to a succession certificate, for the purpose of establishing an inheritance or aiding in the transfer of assets from the deceased. It is comparatively easier to obtain these documents.

In some cases, a legal heirship certificate may be relied upon in the place of a succession certificate merely because family members are able to obtain a legal heirship certificate with much ease and speed. Therefore, families typically first apply for a legal heirship certificate and in the event a legal heirship certificate is not accepted by the relevant authority for any reason, then a succession certificate is applied for.

A legal heirship certificate establishes the relationship of the heirs to the deceased for claims relating to pension, provident fund, gratuity or other service benefits of central and state government departments, specifically when the deceased has not selected a nominee. Banks and private companies also accept such certificates for allowing transfer of deposits, balances, investments, shares, etc.

### **Procedure for procuring a Legal Heirship Certificate**

While the Indian Succession Act, 1925 does not prescribe a method for obtaining a legal heirship certificate, it can be easily issued by revenue officers such as tahsildars, revenue mandal officers or talukdars, in every taluk. A legal heirship certificate can be issued and relied upon for certain limited purposes only. Legal heirship certificates are not conclusive when it comes to determining the legitimate class of heirs of a deceased person under the laws of succession or the title of heirs to any disputed property that belonged to the deceased. In case of any disputes between the heirs of the deceased, the revenue officer cannot issue a legal heirship certificate and is required to direct the heirs to approach a civil court for determination of the rightful heirs.

### **Legal Heirship Certificate vis-à-vis Succession Certificate**

A legal heirship certificate is issued to identify the living heirs of a deceased person whereas succession certificate is issued to establish the authenticity of the heirs and give them the authority to inherit debts, securities and other assets that the deceased may have left behind.

## **Succession under Indian Succession Act 1925 in respect of Christians**

## **Introduction**

Christianity is the third most populous religion in India. Indian Christians, though united in the essence of their faith, are diverse in their practices with different denominations. 1 Synergetic influences have led to cultural variations that have gained legal recognition either statutorily or judicially. This has led to multiplicity in application of laws whereas ambiguity most noticeable is in the laws of succession for Christians. It is this multiplicity and ambiguity that led to enactment of the Indian Succession Act, 1865 2 and finally the Indian Succession Act, 1925. Succession, in brief, deals with how the property of a deceased person devolves on his heirs. This property may be ancestral or self-acquired, and may devolve in two ways:

1. By Testamentary Succession, i.e. when the deceased has left a will bequeathing his property to specific heirs
2. By Intestate Succession, i.e. when the deceased has not left a will, whereby the law governing the deceased (according to his religion) steps in, and determines how his estate will devolve.

## **Effect of conversion**

At this juncture in the year 1863 the effect of conversion from one religion to another on the law applicable to the convert was considered by the Privy Council in *Abraham v. Abraham*. 3 M. Abraham's ancestors were Hindus who were converted into Christianity. On the death of M. Abraham his widow brought the suit for recovery of his property. This suit was resisted by his brother F. Abraham who contended that his ancestors continued to be governed by the Hindu Law in spite of conversion. He accordingly claimed that he was entitled to the entire property according to the Hindu Law of survivorship applicable to a joint Hindu family.

The Privy Council in *Abraham v. Abraham* 4 held that upon the conversion of a Hindu to Christianity the Hindu Law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his religion, or if he thinks fit, he may abide by the old law notwithstanding he has renounced the old religion.

### **The Privy Council held: —**

- (1) The effect of conversion of a Hindu to Christianity is to sever his connection with the Hindu family.
- (2) Such a person may renounce the Hindu Law but is not bound to do so. He may elect 'to abide by the old law, notwithstanding that he has renounced the old religion'.
- (3) The course of conduct of the convert after his conversion would show by what law he had elected to be governed.

Under the third principle it was found that M. Abraham had married a Christian woman who was born to an English father and a Portuguese mother, that he adopted English dress and manner. It was clear, therefore, that he had elected against the Hindu Law and so the defendant's contention based upon the Hindu Law of survivorship was rejected.

The principle in *Abraham v. Abraham* 6 was also found favour in *Sri Gajapathi Radhika v. Sri Gajapathi Nilamani* 7 The Privy Council reiterating *Abraham* principle held that on own volition a converted Christian can either renounce Hindu Law or impliedly continue to be governed by Hindu Law. In *Sri Gajapathi Radhika v. Sri Gajapathi Nilamani* 8 it was said by their Lordships that the case of *Abraham v. Abraham* shows that a family ceasing to be Hindus in religion may still enjoy their property under Hindu Law.

At this juncture the Indian Succession Act, 1865 for the first time enacted to govern mainly the principles of succession for the British Christians including Indian Hindu converts and exempted Hindus and Muslims from its scope, but the utility of the Act lay in the codification of law of succession as regards other persons. In *Ponnusami Nadan v. Dorasami Ayyan* 9 it was held after Act 1865, the members of native Christian families, cannot adhere to Hindu Law of succession, though such converts who were governed by Hindu Law of succession cannot be deprived of their rights acquired by them under Hindu Law prior to their conversion to Christianity. To the same effect is another decision of Madras High Court in *Tellis v. Saldanha*. 10 Bombay High Court in *Francis Ghosal .v. Gabri Gosa*, 11 did not agree with the view of Madras High Court in *Tellis v. Saldanha*. It was held that Act 1865 does not affect the right of coparcenary as between those to whom it applies and that coparcenarship can be part of law governing the rights of the Christian family converted into Christian religion. Calcutta High Court in *Kulada Prasad Pandey .v. Haripada Chatterjee*, 12 while holding that if one member of joint family converts to Christianity, it would result in complete dissolution of entire family and from that time, the members of Hindu family cannot be treated as members of Joint Hindu Family. It was also held that if all the members of family become Christians, it would not affect the right of coparcenarship as they can still adhere to old law notwithstanding conversion.

### **The Indian Succession Act, 1925**

In view of vast scatteredness, the British Parliament felt the need for consolidation of law of succession. Responding to this need that the British legislatures enacted Indian Succession Act, 1925 . 13 Succession among Hindus is governed by the Hindu Succession Act, 1956. As such, Christians in general are governed by the Act 1925 for succession purposes. Act 1925 is primarily a consolidating Act. This Act 1925 was enacted by Parliament with a view to consolidate the law applicable to intestate and testamentary succession. This Act being a consolidating act replaced many enactments 14 which were in force at that time dealing with intestate and testamentary succession including the Indian succession Act, 1865. The Act consists of 11 parts, 391 sections and 7 schedules. This Act is applicable to intestate and testamentary succession.

**Consanguinity** : Part IV of the Act 1925 deals with Consanguinity. This part does not apply to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh, Jain or Parsi. Consanguinity is the connection or relation of persons descended from the same stock or common ancestor. For the purpose of succession, there is no distinction—

- (a) between those who are related to a person deceased through his father, and those who are related to him through his mother; or
- (b) between those who are related to a person deceased by the full blood, and those who are related to him by the half blood; or
- (c) between those who were actually born in the lifetime of a person deceased, and those who at the date of his death were only conceived in the womb, but who have been subsequently born alive.

Intestate Succession : Part V of the Indian Succession Act deals with Intestate Succession. This part will not apply to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jain. Under the Indian Succession Act, a man's widow and children, male and female, inherit equally. However, a man may, by Will can bequeath his or her property to anyone, totally disinheriting his own children and widow. Part V of the Act relates to intestate succession and it consists of a fasciculus of sections beginning with Section 29 and going upto Section 56. The rules relating to testate succession are to be found in Part VI of the Act which comprised 23 Chapters commencing from Section 57 and ending with Section 191. 15 So far as Indian Christians are concerned, Chapter II of Part V contains rules relating to intestate succession. 16

It will thus be seen that so far as Indian Christians are concerned, Chapter II of Part V contains rules relating to intestate succession and a fortiori on the extension of the Act 1925 to Part State of Travancore Cochin, the rules relating to intestate succession enacted in Chapter II of Part V would be applicable equally to Indian Christians in the territories of the former State of Travancore.

### **...to whom the Indian succession act 1925 applies**

- (1) Europeans by birth or descent domiciled in India 17 .
- (2) Persons of mixed European and Native blood and East Indians.
- (3) Indian Christians: For the purposes of the Indian Succession Act, a Christian is a person who professes any form of the Christian religion. 18 Section 33 A of the Act is not made applicable to them.
- (4) Jews: After the Indian Succession Act 1865 was passed it was held that the Jews were governed by that Act and the personal laws of the Jews were not recognized as regards testamentary and intestate jurisdiction. 19
- (5) Parsis: All Sections of Part VI of the Act, relating to testamentary succession, apply to Parsees

(6) Hindus: The word "Hindu" is used in the Act in a theological sense as distinguished from a national or racial sense. The word Hindu includes Arya Samajis 20 and Brahmos. 21

(7) Jains: Although Jains are governed by Hindu Law ordinarily, 22 yet they possess the privilege of being governed by their own peculiarities and customs. 23 Nonetheless, the term Hindu includes Jains too. 24

(8) Sikhs: the terms Hindu, it was held that, includes Sikhs too. 25 But Sikh converts to Christianity are governed by this Act and not by laws and customs of the community to which they belong. 26

(9) Buddhists: It was held that Burmese known as Kalias who married Burmese women were governed by this Act. 27

### **Mrs. Mary Roy .v. State of Kerala 28**

The Travancore Christians were governed by the provisions of the Travancore Christian Succession Act, 1916 and the Cochin Christians were governed by the provisions of the Cochin Christian Succession Act, 1921. Christians in other parts of India were governed by the provisions of the Indian Succession Act, 1925 with such exceptions as provided in the Act. The Travancore-Cochin High Court in Kurian Augusthy v. Devassy Aley 29 and Madras High Court in D. Chelliah v. G. Lalitha Bai, 30 affirmed and reaffirmed that the Travancore Act still remained in force, in spite of the Part B States (Laws) Act, 1951. It was in this settled 'state of affairs' that the Supreme Court rendered the decision in Mrs. Mary Roy .v. State of Kerala 31 . Intestate succession among Travancore- Cochin Christians has been a subject of public debate ever since the decision of the Supreme Court in Mrs. Mary Roy .v. State of Kerala. 32 This decision has created considerable confusion among the members of the Christian community in Kerala.

The following two questions were arose before the Hon'ble Supreme Court, for consideration;

1. Whether the provisions of the Travancore Christian Succession Act were ultra vires the Constitution.
2. The impact of the Part B States (Laws) Act, 1951, on the Travancore Act.

It was held that the law applicable to intestate succession among Christians of Travancore area of the State of Kerala is the Indian Succession Act, 1925, from April 1, 1951. Following this decision, the High Court of Kerala ruled that the Cochin Christian Succession Act, 1921 also stood repealed by Part B States (Laws) Act, 1951.

The consequence of this decision is that under the Travancore-Cochin Acts probating of wills was not mandatorily applicable to the Travancore-Cochin Christians. But under Section 213 of the Indian Succession Act it is mandatory for the Christians to get their wills probated. Therefore, as a consequence of the decision family settlement deeds based on wills that were not probated have

suddenly become invalid in view of the application of Section 213 with effect from April 1, 1951. In the case of intestate succession, partitions or family settlements made in accordance with the provisions of the Travancore Act also became defective. Such documents, now, cannot be used as securities for financial transactions, and further, daughters (sisters) who were excluded from the share (under the provisions of the Travancore or Cochin Acts) can now reopen the matter both for genuine and mala fide reasons. In short, many a title deed in the hands of Christians remain defective and this would adversely affect the stability and progress of the community as all the settled property relations may have to be unsettled and resettled.

In an illustrated case, a brother who excluded his sister from the sharing of property, pledged the document relating to his property as security for a loan. On default of payment, the bank instituted a suit and the property was sold in execution. When delivery of the property was to be effected, the sister, apparently at the instance of her brother, filed a suit claiming her right in the property and moved for stay of delivery of the property. In short, there are difficulties arising out of the decision in *Mary Roy 1*, as limitation cannot be effectively established in many cases.

### **Intestate Succession among Indian Christians**

S. 30 of the Indian Succession Act, 1925 defines intestate succession thus: 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. Thus any property which has not already been bequeathed or allocated as per legal process, will, upon the death of the owner, insofar as he is an Indian Christian, devolve as per the rules contained in Chapter II of the Act. It would be worthwhile to note at this point that intestacy is either total or partial. There is a total intestacy where the deceased does not effectively dispose of any beneficial interest in any of his property by will. There is a partial intestacy where the deceased effectively disposes of some, but not all, of the beneficial interest in his property by will.

### **Domicile**

The Domicile of the deceased plays an integral role in determining the method of devolution of his property. Halsbury defined 'domicile' thus: "A person's domicile is that country in which he either has or is deemed by law to have his permanent home." S.5 of the Act categorically states that succession to the movable property of the deceased will be governed by the *lex loci* as per where he had his domicile at the time of his death; whereas succession to his immovable property will be governed by the law of India (*lex loci rei sitae*), no matter where he was domiciled at the time of his death. Also, S. 6 further qualifies this provision by stating that a person can have only one domicile for the purpose of succession to his movable property. It must be noted that domicile and nationality differ from each other - domicile deals with immediate residence, whereas nationality implies the original allegiance borne by the person. S. 15 lays down that upon and during subsistence of marriage, the wife acquires the domicile of her husband automatically.

### **Kindred or Consanguinity**

S. 24 of the Act makes an initial reference to the concept of kindred and consanguinity, defining it as “the connection or relation of persons descended from the same stock or common ancestor.” S. 25 qualifies ‘lineal consanguinity’ with regard to descent in a direct line. Under this head fall those relations who are descendants from one another or both from the same common ancestor. Now, succession can be either ‘per capita’ (one share to each heir, when they are all of the same degree of relationship) or ‘per stirpes’ (division according to branches when degrees of relationship are discrete). For Christians, if one were to claim through a relative who was of the same degree as the nearest kindred to the deceased, one would be deemed to stand in the shoes of such relative and claim ‘per stirpes.’

S. 26 qualifies ‘collateral consanguinity’ as occurring when persons are descended from the same stock or common ancestor, but not in a direct line (for example, two brothers). It is interesting to note that the law for Christians does not make any distinction between relations through the father or the mother. If the relations from the paternal and maternal sides are equally related to the intestate, they are all entitled to succeed and will take equal share among themselves. Also, no distinction is made between full- blood/half-blood/uterine relations; and a posthumous child is treated as a child who was present when the intestate died, so long as the child has been born alive and was in the womb when the intestate died.

Christian law does not recognise children born out of wedlock; it only deals with legitimate marriages. Furthermore it does not recognise polygamous marriages either. However, a decision has been made to the effect that it does recognise adoption and an adopted child is deemed to have all the rights of a child natural-born, although the law does not expressly say so.

The law of intestate succession under S. 32 states that: The property of an intestate devolves upon the wife or husband or upon those who are of the kindred of the deceased,<sup>8</sup> in the order and according to the rules hereinafter contained in this Chapter. However, as aforementioned, the Act recognises three types of heirs for Christians: the spouse, the lineal descendants, and the kindred. These shall be dealt with now.

### **Rights of the Widow and Widower**

S. 33, S. 33-A, S. 34 of the Act govern succession to the widow. Together they lay down that if the deceased has left behind both a widow and lineal descendants, she will get one-third share in his estate while the remaining two-thirds will go to the latter. If no lineal descendants have been left but other kindred are alive, one-half of the estate passes to the widow and the rest to the kindred. And if no kindred are left either, the whole of the estate shall belong to his widow. Where, however, 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 the property will go to the widow - but this provision does not apply to Indian Christians.

S. 35 lays down the rights of the widower of the deceased. It says quite simply that he shall have the same rights in respect of her property as she would in the event that he predeceased her (intestate).

### **Rights of Children and Other Lineal Descendants**

If the widow is still alive, the lineal descendants will take two-thirds of the estate; if not, they will take it in whole. Per capita (equal division of shares) applies if they stand in the same degree of relationship to the deceased. This is as per Sections 36-40 of the Act. Importantly, case law has determined that the heirs to a Christian shall take his property as tenants-in-common and not as joint tenants. Also, the religion of the heirs will not act as estoppel with regard to succession. Even the Hindu father of a son who had converted to Christianity was held entitled to inherit from him after his death.

As per S. 48, where the intestate has left neither lineal descendant, nor parent, nor sibling, his property shall be divided equally among those of his relatives who are in the nearest degree of kin to him. If there are no heirs whatsoever to the intestate, the doctrine of escheat can be invoked by the Government, whereupon the estate of the deceased will revert to the State.

### **Testamentary Succession among Indian Christians**

A will is the expression by a person of wishes which he intends to take effect only at his death. In order to make a valid will, a testator must have a testamentary intention i.e. he must intend the wishes to which he gives deliberate expression to take effect only at his death.

Testamentary Succession is dealt with under Part VI of the Indian Succession Act, 1925. According to S. 59, every person of sound mind, not being a minor, may dispose of his property by will. The explanations to this Section further expand the ambit of testamentary disposition of estate by categorically stating that married women as also deaf/dumb/blind persons who are not thereby incapacitated to make a will are all entitled to disposing their property by will. Soundness of mind and freedom from intoxication or any illness that render a person incapable of knowing what he is doing are also laid down as prerequisites to the process. Part VI of the Act encompasses 134 Sections from S. 57 to S. 191, that comprehensively deal with all issues connected with wills and codicils, and the making and enforcing of the same, including capacity to make a will, formalities needed for wills, bequests which can be validly made etc.

### **Effect of section 26 of the Hindu Succession Act:**

Section 26 of Hindu Succession Act, which reads thus:

26. Convert's descendants disqualified.--Where, before or after the commencement of this Act, a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens.

Section 26 is a specific section on the point of disqualification due to conversion wherein the legislature could have mentioned the "convert" along with the "converts descendants", however, the convert himself is not included under the ambit of Section 26 and hence not disqualified. It is logically also very consistent as discussed earlier. The Personal Law is applicable to a person who is converted into Islam, Christian or any other religion for the purpose of marriage, guardianship etc., however, while deciding the inheritance, the fact of the religion of the person at the time of birth has to be taken into account to eliminate legal anomaly. Therefore, under Section 26 the children of converts are not Hindu by birth due to conversion of their parents and so they are not covered under the Hindu Succession Act. However, their parents, who are Hindu by birth, cannot be disqualified for inheritance of their father who is Hindu because their father's property and inheritance governed under the Hindu Succession Act.

The Andhra Pradesh High Court, Madras High Court, Calcutta High Court in *Shabana Khan .v. D.B. Sulochana* 35 , *E. Ramesh .v. P. Rajini* 36 , *Asoke Naidu .v. Raymond S. Mulu* 37 have considered Section 26 of Hindu Succession Act and held that the Hindu Succession Act is not applicable to the children of the convert. However, a convert himself or herself is not excluded from the application of the Act by virtue of this Section.

Answering an appeal in *Balchand Jairamdas Lalwani .v. Nazneen Khalid Qureshi* 38 the Bombay High Court which questioned the claim over property of a Hindu converted to another religion, Islam in this case, the Court observed that a Hindu converted into another religion is not disqualified to claim the property under Section 26 of the Hindu Succession Act, 1956.

The right to inheritance is not a choice but it is by birth and in some case by marriage, it is acquired. Therefore, renouncing a particular religion and to get converted is a matter of choice and cannot cease relationships which are established and exist by birth. Therefore, a Hindu convert is entitled to his/her father's property, if father died intestate, but the children of the convert cease to claim right as descendant of grandparent.

### **End Notes**

Champapilly, Sebastian, "Christian Law of Succession and Mary Roy's Case," (1994) 4 SCC (Jour) 9

Champapilly, Sebastian, "Reforms in Christian law of succession in India," (1999) 4 SCC (Jour) 7

### **Latest trends in Succession among Hindus**

The object of this paper is to discuss about the recent legal position on the aspect of succession among Hindus in relation to Coparcenary property, rights of a widow in the property of an intestate in the family of her deceased husband after her remarriage and right of a female member to claim partition in dwelling house etc.

This paper is not exhaustive. It covers only some important aspects which are having importance in our day to day work.

In first, I would like to deal about the Coparcenery property and rights of Coparceners in the Coparcenery property in the light of the judicial precedents and amended provisions of Hindu Succession Act.

**Coparceners and rights of Coparceners  
in Coparcenery property :**

The word Coparcener has been used very widely in relation to the Hindu law and the Hindu Undivided Family. In relation to Hindu Undivided Family Property, a Coparcener is a person who acquires a right in the ancestral property by birth and a person who has a right to demand partition in the Hindu Undivided Family property. Prior to the amendments made by the Hindu Succession (Amendment) Act, 2005, only male members of a family had a right to claim interest in the ancestral property by birth and they are only entitled to demand partition in the Hindu Undivided Family Property and thus only male members were called Coparceners. Under the principles of Hindu law, male members up to three lineal descendants from one common male ancestor are Coparceners. As per law prior to the amendments made to Hindu Succession Act in the year 2005, if a family consisting of father, his son, son's son and son's grand son, then they are Coparceners for the Hindu Joint family property. The genesis of Coparcenary thus is a common male ancestor with his lineal descendants in the male line within three degrees excluding him e.g. his son, son's son and son's grandson. This genesis is so long as the male ancestor is alive and after his death, the three degrees can consist of collaterals such as brothers, uncles, nephews and cousins etc. By reason of amendments made by Hindu succession (amendment) Act, 2005 more particularly, to Sec.6 of the Act daughters have been included within the term Coparceners. Any member other than the above who are not entitled to right in the Hindu Undivided Family property by birth or who did not have a right to demand partition. for example a person X who has acquired property by his own labour then that property becomes his self acquired property. If he has a son, then the said son does not acquire any interest in the self acquired property of his father during the lifetime of his father, But on death of the ancestor, his son inherits the self acquired property of his father as Class-I heir under Sec.8 of Hindu Succession Act. By the time of death of original ancestor, his son has a son or daughter the said property would become a Joint Hindu family property in the hands of son or daughter. Supposing, in case grand son is having a son i.e great grand son, then the said great grand son also would become Coparcener.

While enacting the Hindu Succession Act in the year 1956 and also at the time of making amendments to the said Act in the year 2005, legislature has no intention to wipe of the concept of Coparcenery. As seen from the objects and reasons for the amendments made to Hindu Succession Act in the year 2005, it is clear that legislature has no such intention. For better understanding, I would like to extract the objects and reasons in introducing the amendments in the years 2005 to Hindu Succession Act. They are

1. The Hindu Succession Act, 1956 has amended and codified the law relating to intestate succession Hindus and gave rights which were till then unknown in

relation to women's property. However, it does not interfere with the special rights of those who are members of Hindu Mitakshara Coparcenary except to provide rules for devolution of the interest of a deceased male in certain cases. The Act lays down a uniform and comprehensive system of inheritance and applies, inter alia, to persons governed previously by the Murumakkattayam, Aliyasantana and Nambudir laws. The Act applies to every person who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Parathana or Arya Samaj; or to any person who is Buddhist, Jain or Sikh by religion; or to any other person who is not a Muslim, Christian, Parsi or Jew by religion. In the case of a testamentary disposition, this Act does not apply and the interest of the deceased is governed by the Indian Succession Act, 1925.

2. Section 6 of the Act deals with devolution of interest of a male Hindu in Coparcenary property and recognizes the rule of devolution by survivorship among the members of the Coparcenary. The retention of the Mitakshara Coparcenary property without including the females in it means that the females can not inherit in ancestral property as their male counterparts do. The law by excluding the daughter from participating in the Coparcenary ownership not only contributes to her discrimination on the ground of gender but also has led to oppression and negation of her fundamental right of equality guaranteed by the Constitution. Having regard to the need to render social justice to women, the States of Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra have made necessary changes in the law giving equal right to daughters in Hindu Mitakshara coparcenary property, The Kerala Legislature has enacted the Kerala Joint Hindu Family System (Abolition) Act, 1975.

3. It is proposed to remove the discrimination as contained in section 6 of the Hindu Succession Act, 1956 by giving equal rights to daughters in the Hindu Mitakshara Coparcenary property as the sons have. Section 23 of the Act dis entitles a female heir to ask for partition in respect of a dwelling house wholly occupied by joint family until the male heirs choose to divide their respective shares therein. It is also proposed to omit the said section so as to remove the disability on female heirs contained in that section.

Legislature has intention to continue the concept of Coparcenary in the statute of Hindu Succession Act and therefore, even after amendments to the Act in the year 2005, continued the same in the statute and to remove discrimination, included the daughter as Coparcener along with son and rewritten Sec.6 of Hindu Succession Act by way of amendment by including certain precautions to protect the transactions made by the earlier Coparceners by way of registered documents taken place prior to the amendment Act 2005.

It is true as per Sec.4 of Hindu Succession Act, 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. Hindu Succession Act 1956 itself recognised the concept of Coparcenary under Sec.6 of Hindu Succession Act which creates special rights. Therefore, the concept of Coparcenary is not inconsistent to other provisions of this Act. Prior to amendment to Sec.6 of Hindu Succession Act, daughter is not a Coparcener. Even then, to avoid injustice to female legal heirs or the male descendants of such female heirs covered by Schedule-I, a proviso was

incorporated about the devolution of property of a male Coparcener died by leaving female heirs in this Section itself by way of proviso.

After considering the provisions of Sec.6 and 8 of Hindu Succession Act, it is clear that Sec.6 recognizes the special right of the Coparceners in the Coparcenary property which was in force prior to codification. Sec.8 of Hindu Succession Act not creates special rights and it deals only the mode of division of property among the legal heirs of a Hindu male who died intestate by leaving his separate property or share in a Coparcenary property. The proviso to old Sec.6 of Hindu Succession Act is incorporated as Sub-Section 3 in the amended Sec.6 of Hindu Succession Act with some modifications by removing the gender difference. As seen from the wording of amended Sec.6 of Hindu Succession Act, where a Hindu died intestate by leaving interest in the property of joint Hindu family governed by Mithakshra law shall devolve by testamentary or intestate succession as the case may be. What is the interest of the said Hindu Coparcener is subject to the rights of other Coparceners under the provisions of Sec.6 of Hindu Succession Act and after ascertaining the shares of the Coparceners survived by that time including the deceased Coparcener, notionally and decide the share of the deceased Hindu Coparcener in the entire Coparcenary property and thereafter only the legal heirs of deceased Hindu Coparcener would take their shares under Sec.8 of Hindu Succession Act. By reason of Sec.8 of Hindu Succession Act, the concept of Coparcenary not loses its enforceability. Sec.8 is supplemental to Sec.6 of Hindu Succession Act and it lays down the rules of succession among legal heirs and not effects the special rights of Coparceners. Sec.8 of Hindu Succession Act not overrides Sec.6 of Hindu Succession Act. As long as the concept of Coparcenary is continuing in the statute, the same must be applied. Whether there is a Coparcenary property is in existence or not is a question of fact. When Coparcenary property is in existence, in first, notionally divide the property among Coparceners including deceased Coparcener and then divide the share of property in which the deceased Coparceners had under Sec.8 of Hindu Succession Act among the heirs of him.

In Commissioner of Wealth tax Kanpur Vs Chander Sen and ors reported in AIR 1986 SC 1753 Hon'ble Supreme Court at Paras 19, 20 and 22 observed that

19] It is necessary to bear in mind the Preamble to the Hindu Succession Act, 1956. The Preamble states that it was an Act to amend and codify the law relating to intestate succession among Hindus.

[20] In view of the Preamble to the Act i.e. that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in Class I and only includes son and does not include son's son but does include son of a predeceased son, to say that when son inherits the property in the situation contemplated by S. 8 he takes it as karta of his own undivided family. The Gujarat High Court's view noted above, if accepted, would mean that though the son of a predeceased son and not the son of a son who is intended to be excluded under S. 8 to inherit, the latter would by applying the old Hindu law get a right by birth of the said property contrary to the scheme outlined in S. 8. Furthermore, as noted by the Andhra Pradesh High Court the Act makes it clear by S. 4 that one should look to the Act in case of doubt and not to the pre-existing Hindu law. It would be difficult to hold today the property which devolved on a Hindu under S. 8 of the

Hindu Succession Act would be HUF property in his hand vis-a-vis his own son: that would amount to creating two classes among the heirs mentioned in Class 1, the male heirs in whose hands it will be joint Hindu family property and vis-a-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in Class I of Schedule under S. 8 of the Act included widow, mother, daughter of predeceased son etc.

[22] The express words of S. 8 of The Hindu Succession Act, 1956 can not be ignored and must prevail. The Preamble to the Act reiterates that the Act is, inter alia, to 'amend' the law, With that background the express language which excludes son's son but included son of a predeceased son cannot be ignored.

In the above judgment, Hon'ble Supreme Court at para 20 of its judgment observed that Sec.4 of the Act makes it clear that when there is doubt, one should see the Act and not the pre-existing law. As seen from the old as well as amended Sec.6 of Hindu Succession Act, legislature recognised the special rights under the concept of Coparcenery. It is a statutorily recognised concept and special right and therefore, courts can consider this concept and by reason of Sec.4 of Hindu Succession Act, Sec.6 not loses its applicability by reason of Codification of the principles of Succession under Hindu Succession Act.

Another two judges bench of Hon'ble Supreme Court in Bhanwar Singh Vs Puran and others reported in 2008(2) ALT 80 relied on the decision of Chandra Sen referred above. On this aspect, from time to time different view were expressed by different benches of Hon'ble Supreme Court and other High Courts. Recently again two judge's bench of Hon'ble Supreme Court in Shyam Narayan Prasad Vs Krishna Prasad reported in 2018 (4) ALT 40 by relying on the earlier decisions of it rendered in M.Yogendra and others Vs Leelamma N and others reported in 2009 (6) ALT 8 and Rohit Chouhan Vs Surinder Singh and others reported in 2013 (6) ALT 1 accepted the principle that if any Coparcener taken share in the Coparcenery property under a partition, his share of property to the extent of others is his separate property but the same is Coparcenery property to the extent of his sons and daughters born after partition. In the subsequent judgments, Hon'ble Supreme court not held that the rights of Coparceners are governed by Sec.8 of Hindu Succession Act and not under Sec.6 of the Act.

After considering the statutory provisions, objects and reasons of the enactment of Hindu Succession Act 1956 and subsequent amendments to it and recent judgments of Hon'ble Supreme Court, I am of the considered view that Sec.8 of Hindu Succession Act is not effects the rights of Coparceners in the Coparcenery property which is a special right created and recognised by statute and it deals only the rules of succession in relation to the separate property of a male Hindu died intestate or the share of the Coparcener in the Coparcenery property.

**Right of female heir claiming partition dwelling house:**

Prior to the amendments to Hindu Succession Act 2005, under Sec.23 of the Act, female heir is dis entitles to ask for partition in respect of a dwelling house wholly occupied by joint family until the male heirs choose to divide their respective shares therein. Under the Amendment Act 2005, deleted Sec.23 of the Act and thereby

removed the discrimination between male and female heirs in this regard. Now the female heirs are entitled to file suit for partition of dwelling house even though male persons who are in occupation of property not filed the suit for partition.

Re-marriage of a widow - her right in the  
of her deceased husband.  
Property

Prior to the amendments to Hindu Succession Act 2005, any heir who is related to an intestate as the widow of pre-deceased son, the widow of pre-deceased son of a pre-deceased son or widow of brother shall not be entitled to succeed to the property of intestate as such widow, if on the date of the succession opens, she has re-married. By making amendments to Hindu Succession Act in the year 2005, deleted Sec.24 of the Act. Therefore, now the widow of a pre-deceased son, widow of predeceased son of pre-deceased son and widow of brother is entitled to succeed the property of an intestate even if she re-married before opening of succession of an intestate as widow of pre-deceased son or widow of pre-deceased son of a pre-deceased son or widow of a brother. By reason of deletion of Sec.24 from the Act, now a female continues as a legal heir in the family of her deceased husband though she re-married before opening the succession of an intestate in the family of her deceased husband.

### **Addition of some more Class-I legal heirs**

While making amendments to Hindu Succession Act in the year 2005, some more heirs were added in the list of Class-I heirs of Schedule under Sec.8 of Hindu Succession Act. They are (1) son of predeceased daughter of pre-deceased daughter, (2) daughter of pre-deceased daughter of pre-deceased daughter, (3) daughter of a pre-deceased son of pre-deceased daughter and (4) daughter of a pre-deceased daughter of pre-deceased son. With this I conclude my paper