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**Underpinning the Importance of the Intention of the Testator**

**Aman Raj Singh Bajwa**

## INTRODUCTION

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Property has been one of the binding forces of families in a country like India. However, at times, this very property becomes an eyesore of other family members as a result of which safeguard of testamentary succession is available. The object of testamentary succession is that the testator has absolute autonomy over devolving his/her property. Section 2(h) of the Indian Succession Act solidifies the importance of intention of the testator in the construction of a will. The courts must ensure that the interpretation of the will is per the intention of the testator.<sup>1</sup> However, the interpretation of wills is not a simple but a complex process requiring adequate legal scrutiny. Courts have devised methods such as; 'Words of the will approach', 'Natural and ordinary meaning approach', 'Liberal interpretation approach', 'Surrounding circumstances approach', to determine the intention of the testator.<sup>2</sup>

A perusal of various judgments on the subject unalienated the fact that these approaches do not work in water-tight compartments and differ from case to case. Further, the sociological context in which these approaches are being applied, have a direct impact on the outcome which will be unveiled in the sections to come in this paper.

## EMERGING IMPORTANCE OF 'INTENTION OF THE TESTATOR'

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Historically, classical Hindu law was oblivious to the concept of wills.<sup>3</sup> The inference that can be drawn here is that under classical Hindu law there wasn't absolute autonomy over the devolvement of property as a result of which 'intention' didn't have a role to play because property used to devolve according to the existing norms of survivorship. Before 1956, it was impermissible for a Hindu to devolve property over which he did not have the right of alienation.<sup>4</sup> However, modern Hindu law has recognized the method of testamentary succession.<sup>5</sup> At this stage, it is important to reproduce the relevant portion of section 30 of the Hindu Succession Act, 1956. "Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him, per

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<sup>1</sup> Dinshaw Fardunji Mulla, Hindu Law 552 (22<sup>nd</sup> ed., Lexis Nexis)

<sup>2</sup> Albert M. Kales, Considerations preliminary to the practice of the art of interpreting writings- more especially wills

<sup>3</sup> Dinshaw Fardunji Mulla, Hindu Law 552 (22<sup>nd</sup> ed., Lexis Nexis)

<sup>4</sup> B.M. Gandhi, Hindu Law 202 (4<sup>th</sup> ed., Eastern Book Company)

<sup>5</sup> Soorjeemoney Dossee v Denobundoo Mullick, (1862) 9 MIA 123

the provisions of the Indian Succession Act, 1925”.<sup>6</sup> This implies a shift in legal ideology towards autonomy over devolvement of property which puts the concept of ‘intention of the testator’ in the spotlight. It is to be kept in mind that the shift in legal ideology has been affected by the shift in sociological context because the two operate simultaneously.

## **DETERMINING INTENTION OF THE TESTATOR**

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Courts have devised the methods of; ‘Words of the will’, ‘Natural and ordinary meaning’, ‘Liberal interpretation’, and ‘Surrounding circumstances’, to facilitate the process of determining the intention of the testator.<sup>7</sup> According to ‘Words of the will approach’ it is an established principle of law that intention of the testator is determined through the language of the will irrespective of which language it is in.<sup>8</sup> The subject matter of scrutiny in the process of determination of the testator’s intention has to be looked at in its entirety.<sup>9</sup> As per the landmark judgment on this approach, the intention of the testator is locked within the words of the document which rules out the possibility of any speculation as to what could have been intended. An interconnected reading of the document, that is, words in their literal sense read in light of the language conveys the intention of the testator. When the testator’s intention is ascertainable from the document then there is no need for contemplating surrounding circumstances.<sup>10</sup> However, not all balls are in the testator’s court as the courts have a privilege in this method to ease the process of deciphering the testator’s intention. While construing the will if it appears that some words are missing then the courts have the power to supply those words to pragmatically construe the testator’s intention.<sup>11</sup> Since, this approach takes into account vernaculars as well while construing intention, one of the main critiques of it is that to make pragmatic sense of the vernaculars, it gives it a meaning that is at times more than adequate and sometimes inadequate.<sup>12</sup>

The ‘Natural and ordinary meaning’ approach is based on the objective subjectivity of the wordings of the will. It is not focused or aimed at deciphering the true definition of the wording of the will. Instead, the wordings of the will have to be seen through the lens of an ordinary person placed in

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<sup>6</sup> Section 30, Hindu Succession Act

<sup>7</sup> Albert M. Kales, Considerations preliminary to the practice of the art of interpreting writings- more especially wills

<sup>8</sup> 1985 AIR 1359

<sup>9</sup> C. Cheriathan v P. Narayanan Embranthiri

<sup>10</sup> (2012) 13 SCC 80

<sup>11</sup> Pramod Kumar v Om Prakash Bhatia

<sup>12</sup> AIR 1925 Pat 442



similar circumstances.<sup>13</sup> In my opinion, this is the most problematic approach as it purports to judge the testator's intention through a normal or ordinary person standard which essentially means that it determines the testator's intention through a third person. This kind of determination of intention defeats the purpose of section 2(h) of the Indian Succession Act, 1956. Further, it is more detrimental to those testators who are not legally eloquent or privy to technical terms as they would make their will at a vernacular level. When such a will is subjected to the objective subjectivity test of a normal person, it would materially change in its essence and meaning.

The 'Liberal interpretation approach' is limited in its scope of interpretation to the contents of the will.<sup>14</sup> It is distinct from other approaches as it does not look at the will through a normal person standard without any objectivity.<sup>15</sup> Once the intention of the testator is determined then wordings of the will are also liberally interpreted per the intention.<sup>16</sup> Therefore, this approach is called the 'liberal interpretation approach'.<sup>17</sup> In a particular case, the testator had used the word 'malik' for the person to whom the property was to devolve.<sup>18</sup> However, the terms of the will restrict the said person from alienating the property.<sup>19</sup> Therefore, the court determined that the testator's intention was to create a life interest and not absolute interest as a result of which the term 'malik' was liberally interpreted per the intention of the testator.<sup>20</sup>

The 'surrounding circumstances' approach suggests that while construing a will, evidence of surrounding circumstances determining the testator's intention apart from the words of the will can be taken into consideration.<sup>21</sup> "They must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense."<sup>22</sup> All the provisions of the will have to be looked at together, in its entirety.<sup>23</sup>

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<sup>13</sup> 1955 AIR 566

<sup>14</sup> *ibid*

<sup>15</sup> *ibid*

<sup>16</sup> *ibid*

<sup>17</sup> *ibid*

<sup>18</sup> 7 1953 SCR 232

<sup>19</sup> *Ibid*

<sup>20</sup> *ibid*

<sup>21</sup> 1976 AIR 794

<sup>22</sup> *Ibid*

<sup>23</sup> *ibid*

## **“ARMCHAIR DOCTRINE”**

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The courts while interpreting a will and its language have to look at the words of the will along with the surrounding circumstance to ascertain the testator’s intention.<sup>24</sup> This essentially has the effect of putting oneself in the armchair of the testator.<sup>25</sup> It is imperative that each provision should be judicially scanned and none of the provisions should be isolated while determining the intention of the testator.<sup>26</sup> The only exception to this mandate is that where provisions of the will are unlawful then they shall not be considered while determining the intention.<sup>27</sup> In a recent judgment, the court affirmed the application of the armchair doctrine.<sup>28</sup> The armchair doctrine is the epitome of subjective interpretation which is why it is the most efficient method of ascertaining the testator’s intention. It strives to delve into the psyche of the testator based on the will and surrounding circumstances and then make an assessment and give effect to his intention.

## **NEITHER THORNS NOR ROSES<sup>29</sup>**

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The methods of interpretation discussed in the paper are well thought out, however, the application of these methods is problematic. These methods are intrinsically linked with the sociological context in which they operate. According to the armchair doctrine, one of the most pivotal considerations are ‘race and religious opinions’.<sup>30</sup> Giving sacrosanct consideration to religious opinions in the interpretation of the testator’s intention gives a backward result. For instance, before coming into effect of section 14 of the Hindu Succession Act, any will, that would prima facie devolve absolute interest in the property on a woman, would not fructify. The religious presumption would create a certain sociological context in which women do not get absolute interest in the property as a result of which testator’s true intention would not be affected and section 2(h) of the Indian succession act would stand violated. Only after section 14 of the Hindu Succession Act came into effect could a will devolving absolute interest in the property to women fructify.<sup>31</sup> This is the role that the sociological context plays in the application of a will. The sociological context acts as a bar that thwarts wills that

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<sup>24</sup> *ibid*

<sup>25</sup> *ibid*

<sup>26</sup> *ibid*

<sup>27</sup> *ibid*

<sup>28</sup> 2007 (7) SCC 183

<sup>29</sup> H.R. Khanna, *neither roses nor thorns*, (EBC)

<sup>30</sup> Dinshaw Fardunji Mulla, *Hindu Law* 561 (22<sup>nd</sup> ed., Lexis Nexis)

<sup>31</sup> 1968 AIR 365

are ahead of the curve from fructifying. Therefore, solely based on application, the methods of interpreting the testator's intention are neither thorns nor roses.<sup>32</sup>

## **SOLUTION**

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The solution to the problem of ascertaining the intention of the testator and making the four methods of interpretation more effective is by way of bringing objective subjectivity. Objective subjectivity essentially implies the application of prudent human being standard but the only catch point is that the prudent human being standard is applied in accordance with and based on prudent human beings placed similarly with the testator. The subjectivity of the testator would be ascertained through an inquiry about him from his family members, friends, relatives, other material on record, etc. This objective subjectivity could be sought by modifying the 'armchair doctrine' and carving scope for partial objectivity or the prudent human being test in addition to already existing subjective doctrine. This would counter the problem of female legatees and more such problems. A corollary provision that could pave the path for judicial interpretation of the testator's intention could be video recording the testator explaining his final will and the beneficiaries thereunder.

## **HYPOTHETICAL SOLUTION**

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A, who is an active feminist and cannot tolerate people who disrespect women, has three children; two daughters and one son. His son, Charlie, is a man of moral turpitude and treats women as objects for the fulfillment of his baser desires. A is aware of his son's character and therefore decides to distribute his entire property between his three daughters through a will leaving out A. A is also extremely concerned about animals therefore he buys an additional property for the animals and assigns the duty of looking after the property to B, the family caretaker. Upon the death of A, the property will devolve according to his will. Charlie, who is now living on the streets because he did not get any property in the will decides to claim the property bought for the animals. Applying the method of objective subjectivity in ascertaining the intention of the testator will lead us to the conclusion that Charlie is not entitled to that property. Looking at the issue subjectively, it is given that A was completely averse to people who do not treat women with respect and Charlie does not respect women. Further, he deliberately left out Charlie from any property whatsoever. This proves that he did not intend to transfer any property to Charlie because of his moral values. Furthermore, the property that Charlie wants was specifically bought for animals and since there wasn't any interest created in it shall continue to be treated as a property for animals but Charlie should not get an interest

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<sup>32</sup> H.R. Khanna, neither roses nor thorns, (EBC)

in the property because that would be an incomplete contradiction with the intention of the testator. While looking at this issue what is also to be taken into consideration is that A was extremely concerned about animals and giving the property to Charlie would mean that the animals would not be looked after which A would have never intended. Now, looking at it objectively would lead us to the conclusion that any prudent human being with the moral values of A would not want Charlie to get the property. Therefore, the test of objective subjectivity is the most valid one as it does not account for biases of the society because it is restricted in its application to the testator giving true effect to section 2(h) of the Indian Succession Act.