

IN BRIEF

Foreign Wills of Indian Nationals and the Myth of a Separate Indian Will



Introduction

It is increasingly common for Indian nationals who have settled overseas to execute a single will in their country of residence, while continuing to maintain bank accounts, investments and other financial assets in India.

In this background, following the death of a testator, a frequent question which arises is, ‘can a foreign will govern Indian bank accounts, or is a separate Indian will necessary for succession to Indian assets?’

This question assumes significance because foreign executors and beneficiaries are often advised that Indian assets fall outside the scope of a foreign will and must devolve separately in accordance with Indian succession laws.

A review of the statutory framework and judicial precedents, however, suggests that the position is considerably more nuanced.

Validity of a Foreign Will Under Indian Law

Any discussion regarding succession to Indian assets under a foreign will must begin with the question of whether Indian law recognises the validity of a will executed and proved outside India.

For Hindus, Buddhists, Sikhs and Jains, the execution of a will is governed by Section 63 of the Indian Succession Act, 1925 (Indian Succession Act). The provision *inter-alia* requires that the will be signed by the testator and attested by at least two witnesses.

The evidentiary requirements for proving a will are contained in Section 67 of the Bharatiya Sakshya Adhiniyam, 2023, which generally requires examination of at least one attesting witness to prove due execution.

The Supreme Court in *H. Venkatachala Iyengar v. B.N. Thimmajamma*¹ and more recently, in *Meena Pradhan v. Kamla Pradhan*² has consistently held that the propounder of a will must establish that the testator executed the will voluntarily, possessed testamentary capacity, understood the nature of the dispositions contained therein and complied with the statutory requirements relating to execution and attestation.

Where a will, however, has already been admitted to probate by a competent foreign court, the enquiry assumes a different character. The issue is no longer whether the will is capable of proof, but whether Indian law recognises the foreign adjudication regarding its validity.

Recognition of Foreign Probate in India

The Indian Succession Act expressly contemplates recognition of wills proved outside India. Section 228 of the Indian Succession Act provides that where a will has been proved and deposited before a court of competent jurisdiction outside India, letters of administration may be granted in India upon production of a properly authenticated copy of the will.

Section 228 of the Indian Succession Act assumes importance because it provides the statutory mechanism through which a will proved abroad may be recognised in India. The provision proceeds on the basis that a will validly proved before a foreign court need not undergo a complete re-adjudication in India.

In *Roshan Anthony Gunawardhana v. Ministry of Finance*³, the Madras High Court explained that the enforcement of a foreign will in India ordinarily involves two stages. The first is probate before the competent foreign court. The second is an application before the appropriate Indian court seeking ancillary probate or letters

¹ AIR 1959 SC 443

² (2023) 9 SCC 734

³ 2022 (4) CCC 138

of administration, on the basis of the foreign grant.

Similarly, the Delhi High Court in *Narain Malik v. State*⁴ observed that in proceedings under Section 228 of the Indian Succession Act, the Indian court is not required to re-examine the substantive validity of the will but must satisfy itself that the authenticated documents produced fulfil the requirements of the provision.

Section 228 of the Indian Succession Act, read together with the decisions in *Roshan Anthony* and *Narain Malik*, makes it clear that Indian law does not disregard a will merely because it has been executed and proved abroad. Rather, it provides a statutory mechanism through which foreign probate may be recognised and given effect in India.

Do Indian Bank Accounts form part of the Estate governed by a Foreign Will?

The next and most common question that thus arises is whether Indian bank accounts can form part of the estate governed by a foreign will.

The answer depends primarily upon the terms of the will itself. Where the will is expressed to govern all assets of the testator, irrespective of where they are situated, Indian bank accounts may form part of the estate passing under the will.

Many modern wills define the estate broadly to include all property of the testator “wherever situated”. Such provisions are ordinarily sufficient to encompass movable assets maintained across jurisdictions, including bank accounts held in India.

Indian law does not recognize any general principle that excludes Indian bank accounts from the operation of a foreign will merely because the accounts are maintained in India. On the contrary, bank accounts/ deposits constitute movable property⁵ and may form part of the estate disposed of by a valid testamentary instrument.

Indeed, where a will is expressed to govern the testator’s property “wherever situated”, courts have generally construed such language as extending to movable assets maintained across jurisdictions, subject to compliance with the procedural requirements governing recognition of the foreign grant.

In view of the above:

- advice that Indian bank accounts automatically fall outside the purview of a foreign will unless a separate Indian will exists finds little support in the statutory framework governing recognition of foreign wills;
- the mere situs of a bank account in India does not, by itself, require the testator to execute a separate Indian will in respect of that account;
- a single will, where suitably drafted to include the testator’s assets “wherever situated”, may therefore validly extend to Indian bank accounts and other Indian assets, subject to the applicable succession law and the procedural requirements for giving effect to the will in India; and

⁴ 2017 SCC OnLine Del 874

Needless to say, this does not mean that a single will is necessarily the most efficient succession-planning arrangement. Where a testator has assets in multiple jurisdictions, separate wills dealing with assets situated in India may, as a matter of best practice, simplify administration and facilitate the efficient implementation of the testator’s wishes.

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⁵ *Roshan Anthony Gunawardhana v. Ministry of Finance*; 2022 (4) CCC 138