CHAPTER – 34

LEGAL OPINION ON PROPERTY MATTERS AND LEASE ADMINISTRATION

ISSUE-1 Whether a lessee of self acquired property (lease in his individual name and not as a Karta of HUF) can throw his property in HUF consisting of himself, his wife, sons / daughters by deed of declaration of Affidavit.

ISSUE-2 Whether the sale deed consisting of the name of the confirming vendor can be accepted.

ISSUE-3 Whether substitution of the name may be done on the basis of relinquishment deed or a Partition Deed may be called for.

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ISSUE-16 Whether a person suffering from profound mental retardation is incapable of holding immovable property in his name as legal heir. Whether it is correct on the part of the applicant to omit the name of Shri Chand from the legal heirs of late allottee because of profound mental retardation.

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Whether in terms of the award, the property was required to be sold but the applicants are insisting for mutation on the said award.

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Whether the legality of adoption can be examined only on the basis of an invitation for marriage of the adopted son.

ISSUE-36 Whether correspondence from DIG, CID, Rajasthan and the certificate issued by Superintendent, district Hospital, Mathura who had performed post-mortem examination, can be taken into consideration as sufficient proof of death of a person, in lieu of death certificate issued by the Registrar of Births and Deaths.

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ISSUE-38 Whether a divorced wife has a right in the property of her ex-husband after his death.

ISSUE-39 Whether release of interests on one or more co-lessee in favour of another co-lessee amount to transfer so as to attract the convenient relating to unearned increased.

ISSUE-40 Whether a 'Will' can be witnessed by the sons of the testator of the Will

ISSUE-41 Whether GPA must be registered in case the Sale Deed is to be executed by the Attorney

ISSUE-42 Whether relinquishment deed executed in foreign country and attested by counsellor agent, Embassy of Tokyo may be accepted without its registration in India.

ISSUE-43 Whether a sale by public auction as per court order in which the ultimate purchaser happen to be one of the co-lessee should be treated as transfer or not.

ISSUE-44 Whether the fact of adoption can be accepted on the basis of Matric Certificate and Character Certificate only.

ISSUE-45 Whether a probate granted by a foreign court holding the genuineness of Will can be enforceable in India.

OPINION 1

The above question was decided by the Law Ministry on the basis of the decision in the case of Mallessappa Vs. Mallappa, AIR 1961 SC, 1268, wherein examining the incidence of throwing self acquired property into the common stock, the Superme Court observed as under:-

"Property which is separately acquired, has been deliberately and voluntarily thrown by the owner into the joint stock with the clear intention of abandoning his claim on the said property and with the object of assimilating it to the joint family property, than the said property, becomes a part of the joint family estate. In other words, the separate property of a coparcener losses its separate character by reason of the owners conduct and got thrown into the common stock of which it becomes a part. This doctrine, therefore, inevitable, postulates that the owner of the separate property is a coparcener who has interest in the coparcenary property and desires to blend his separate property with the coparcenary property. There should be no doubt that the conduct on which a plea of blending is based must clearly and unequivocally show the intention of the owner of the separate property to convert his property into an item of joint family property. A mere intention to benefit the members of the family by allowing them the use of the income coming from the said property may not necessarily be enough to justify the interference of blending, but the basis of the doctrine is the existence of the separate property of a coparcenary."

The existence of joint family as well as the joint family property is therefore a pre-condition for blending one's self acquired property with that of joint family property. On being thrown into the common stock, the self acquired property becomes one of the items of joint property. If there is no such property of the joint family, then the deed of declaration will not be valid and will not have the effect of changing the character of the property. If on the other hand, there is any evidence to show that the joint family had its own common stock of property, then the deed of declaration may be treated as valid, having the effect of impressing the self acquired property with the character of joint family property.

The acceptance of formulation of HUF by the Income Tax authorities of HUF by the Income Tax authorities is no doubt a relevant evidence in the

formulation of HUF. But the Department would not be bound by the rulings of Income Tax.

OPINION 2

The question as to whether Smt. Chander Kanta, the confirming vendor had any right to be a party in the sale deed. It appears that by the agreement to sell between Shri Deva Singh and original lessee and Smt. Chander Kanta, the right of specific performance of contract accrued in favour of Smt. Chander Kanta, which she has foregone for consideration. As such, she became a party to the sale deed as a confirming vendor. It has been held in a Madras case [1947 Mad. 335A (361)(DB)] that contracts capable of specific performance are assignable. Therefore, a person who has a right of specific performance can transfer it, with due consideration.

In view of the above view, I do not see any ambiguity in the sale deed which can make it unacceptable.

OPINION 3

It may also be kept into mind that the lease hold property cannot be divided by metes and bounds. If the department itself will ask for partition deed, it may create estopple against the department in future to deny the partition of lease hold property be metes and bounds. This has been reflected by Shri Mulla in his book " Principles of Hindu Law" (15th Edition), para 322 as under:

" Once the shares are defined whether by an agreement between parties or otherwise, the partition is complete. After the shares are so defined, the parties may divided the properties by metes and bounds or they may continue to live together and enjoy the property in common as before. But where they do the one or the other, it effects only the mode of enjoyment but the shares

are defined and thenceforth the parties hold the property as tenants in common. If there be a conversion of the joint tenancy by an undivided family into a tenancy in common of the members of the undivided family, the undivided family becomes divided family with reference to the property that is the subject matter of that agreement and that is separation in interest and in right. Although, not immediately followed by a de-facto actual division of the subject matter. This may at any time be claimed by virtue of separate right."

Anyhow it is always safe to mutate in the joint name of all the share or if there is a relinquishment deed then in the name of the person in whose name a relinquishment deefd has been made. But we should avoid to call for partition deed in view of the above discussion made by Shri Mulla in his above named book.

[M-85-86 WPN]

OPINION 4

Attestation by the Witnesses to the documents is an essential ingredient as provided in the Transfer of Property Act. The registration of a document, without attestation, cannot fulfill the requirement of attestation. As such the Sale Deed without the signature of two witnesses, though registered cannot be presumed to be valid.

OPINION 5

The following are the requisites of a valid will:-

i. Due execution in accordance with the statute.
ii. Animus testandi
iii. Revocability
iv. Disposition of property

The second thing required to the making of a good testament is that he that both make it have, at the time of making it, animus testandi, i.e. a mind to dispose, a firm resolution and advised determination to make a testament; otherwise the testament will be void. For it is the mind, not the words, of the testator that gives life to the Will; since if a man rashly, unadvisedly, incidentally, jestingly or boastingly, and not seriously writes or says that such a one shall be his executor, or shall have all his gods or that he will give to such a one, such a thing, this is no will; not to be regarded.

From the perusal of the cases-Lister Vs. Smith tr. 282=33 LJ 29; Trevelyan Vs. Trevelyen I Phill, 149; Nicolus Vs. Nicolus, it transpires that a paper, though testamentary on face of it, and duly executed, may be executed by the deceased with no animus testandi or in other words it may be executed as a sham Will. In such a case it may be shown that it is in reality the offspring of a jest or the result of a contrivance to effect some Collateral object and never intended seriously as a disposition of property.

From the above it is clear that the animus testandi is the main criteria on the basis of which a document can be treated as a Will, otherwise that will be treated as a sham transation or sham document. Moreover, if the existence of some consideration is proved, it can be outright rejected.

OPINION 6

In Kalyani Vs Narayanan AIR 1980 SC 1173, it was held "a Hindu father joined with his sons and covered by the Mitakshara Law, in contradistinction to other managers of Hindu Undivided family or an ordinary coparcener, enjoys the larger power to impose a partition of his sons with himself as well as amongst

his sons inter se without their consent and that large power to divide the property by metes and bounds and to allocate the shares to each of his son and to himself would certainly comprehend within its sweep the initial step viz., to disrupt the joint family states which must either proceed or be simultaneously taken with the partition of property by metes and bounds". In Hindu Law " partition does not mean simply division of property into specific share. It covers both division of title and division of property.

[LI.9/2(6)/91]

OPINION 7

Section 2 Clause 2 of the Companies Act defines the word Company "Company, means a Company formed and registered under the Companies Act or an existing Company". In any law a Company is a "legal entity" separate from, and capable of surviving beyond the lifes of its members. In the case of Salomon Vs. Solomon and Company it was held "like any juristice person, a company is legally an entity apart from its members, capable of rights and duties of its own and endowed with the potential of perpetual succession". A company, being a legal person, is capable of owning, enjoying and disposing of property in its own name. The Company becames the owner of its capital and assets. The shareholders are not the private or joint owners of the Company's property. "Company is the real person in which all its property is vested, and by which it is controlled, managed and disposed of" (M/s Bacha F Guzgar Vs. The Commissioner of Income Tax, Bombay, AIR 1955 SC 74). R.T. Perumal Vs. H. John Davin, AIR 1960 Madras, where their lordship observed that "no member can claim himself to be the owner of the Company's property during its existence or in its winding up".

It may further be seen that the certificate of Incorporation brings the Company into existence as a legal person and that all the capital and assets belongs to the company and not to its members/shareholder.

OPINION 8

Section 15 of the Hindu Succession Act deals with the succession of property of a female Hindu. Section 15, Clause-I, Sub-clause (a) enumerate the heirs of a female Hindu which includes Sons, Daughter & the Husband. Sub-clause (b) provides "upon the heirs of the husband".

The word upon the heirs of the husband may be seen in context with the heirs of a male Hindu defined in Section 8 of the Hindu Succession Act the first priority is given to class-I heirs which includes son, daughter, mother, widow, son of a pre-deceased son, daughter of a pre-deceased daughter, son of a pre-deceased son of a pre-deceased son, daughter of a pre-deceased son of a pre-deceased son and widow of a ..... (nine) categories. Category-1 includes single heir viz. Father, Category-2 includes son, son's daughter's daughter, brother and sister. The brother-in-law being the brother of the husband of female Hindu will fall at the No.3 Category-2, Class-II heirs. In absence of the heirs enumerate in Class-I and Class-II Category-I and Category-II item-2, a brother can be taken to in direct line.

[19/116-116A, LPN]

OPINION 9

It appears from the referring note that the lease deed was executed on 24.3.1992 in the name of the testator, Shri Nathu Ram. It also appear that Shri Nathu Ram died on 4.7.1993.

Section 90 of the Indian Succession Act provides as under:-

" The description contained in a Will or property, the subject of gift, shall, unless a contrary intention appears by the will, be deemed to refer to and

comprise the property answering that description at the death of the testator."

It is one of the established principle of law of Wills that a Will speaks from the date of the death of the testator and not from the date of its execution. According to Section 90, the description of property, the subject matter of beques, contained in will shall deemed to refer to and comprise of the property answering that description at the death of the testator, unless any contrary intention is expressed in the Will.

The instant case may be dealt with in accordance with the above provision.

OPINION 10

Section 7 of the Transfer of Property Act provides that " every person competent to contract and entitled to transferable property is competent to transfer such property" but it is not provided any where in the Act that a person not competent to contract is incapable of being a transferee of property. Transfers in favour of a minor stands on a different footing. A duly executed transfer by way of sale or mortgage, or sale in favour of a minor who has paid the consideration is not void, and is enforceable by the minor, or any one on his behalf.

In the instant case it appears that it is not a purchase of a free hold property but a lease hold right in the property only. The ownership of the property still vest with the Department. A lease imposes upon the minor obligations to pay rent and perform covenants. Consequently, it has been held that a lease to a minor is void (Pramila Bali Das Vs. Jagesher, A.I.R./- 1918-PAT-626) the only exception to this proposition is that a dejure guardian may be appointed by the court in respect of such transfers. As such in the instant case it is not advisable to issue Sale Permission in respect of the lease hold right in favour of a minor.

[Stall No.7, Rani Jhansi Mkt.]

OPINION 11

In cases where the administrator expired without issuing the consent affidavit, the Department may act as per advise of the Ministry of Law & Justice dated 31.8.90 in file No. L-I-9/80(35-36)/89, Property No. 69-71, Panchkuin Road". The testator in this case has died. She had appointed two executors for the administration of the Will in which her daughter-in-law was the beneficiary. These two executors were her husband and her son. They have also died, of course, before their death, they did not file with the mutation authorities a letter of assent to the effect that they had not objection to the property being mutated in the name of the beneficiary.

Mutation is an administrative act. The mutating authority can mutate the property if it is satisfied that the title in the property had passed to the beneficiary. I do not find that there is any reason to withhold this satisfaction since a probate has been granted in respect of the Will. This suggests that the Will was a genuine one. Hence, the mutating authorities can mutate the property in favour of the beneficiary."

OPINION 12

In so far the legal position of a Will is concerned, it is clear that the beneficiaries named in the Will are the real claimants of the property under Will. It appears that in the instant Will the propety was bequeath by the original lessee in the name of his two sins namely Baldev Raj and Dharam Vir, It appears from the office note that Shri Baldev Raj died leaving behind his widow, son and daughter. It also appears from the office note that the wife of the original lessee had also expired. Under the circumstances after the death of the wife of original lessee, the property devolved only to beneficiaries

named in the Will. After the death of Smt. Tehli Bai, the property will devolve to the beneficiaries named in the Will in equal shares, since the Will shall take effect from the date of the death of original lessee sand not the date of the limited owners. It also appears from the note of the Department that the other legal heirs of Shri Baldev Raj, the late beneficiary has relinquished their shares in favour of their mother Smt. Kailash Wadhwa by way of Registered Relinquishment Deed, as such she became entitle to the half share of Shri Baldev Raj and the property may be mutated in favour of both the beneficiaries subject to verification from the applicant as regards the compliance of the order of the District Judge dated 9.10.1990, in writing about the proper administration and submission of inventory and payment of credits which was to be submitted in the Court within the time prescribed therein.

OPINION 13

It is an established principle that a General Power of Attorney is liable to be revoked in toto if the Principal exercises in person any of the functions delegated to the attorney.

OPINION 14

The said certificate reads as under "the said Shri Ram Kakkar by virtue hereof is entitled to receive, realise and deal with the said assets here-under-mentioned left by the said deceased and the said Shri Ram Kakkar undertake to administer the estate of the said deceased in accordance with law".

Section 29 of the Administrator General Act lays down "Whenever any person has died leaving assets with in any state and the Administrator General of

such state is satisfied that such assets, excluding any sum of money deposited in a Govt. Saving Bank or in any Provident Fund to which the provisions of provided funds act apply, did not at the date of death exceed in the whole (15 thousands rupees) in value, he may grant to any person, claiming otherwise than as a creditor to be interested in such assets or in the due administrator thereof, a certificate under his hand entitling the claimant to receive the assets their in mentioned left by the deceased within the state to a value not exceeding in the whole (Rs. 15,000/-)".

Section 32 of the Administrator General Act lays down the older of certificate granted in accordance with the provision of Section 29 or Section 30 shall here in respect of the assets specified in such certificate the some powers and duties and be subject to the some liabilities as he could have had or being subject to if letters of administration had been granted to him". It is clear from the above Section that the effect of the certificate issued under Section 29 of the Administrator General Act is limited only to the extent of the powers, duties and liabilities in respect of the assets in question. It no where speak about the right, title and interest in respect or the property in question.

In A.I.R. 1929 PAT-356 Kamala Prasad Vs. Murli Manohar and also in Chetty Vs. Chetty 1916 A.C. 603, it was held " that a granted of administration does not decide any question of title. It merely decides the right to administer". While dealing with the topic of letter of administration under the head Section 218 of Indian Succession Act, Dr. Paras Dewan in his book of law of Intestate and Testamentary Succession has emphasised that the object of proceedings under this section is to determine the question of representation of the deceased for the purpose of administration of his estate and not to determine the question of succession". From the above discussion it appears to me that the certificate in question merely entitles the applicant to receive, realise, deal with and administer the said assets and do not confer the right of owner shop on him. As such his name can be mutated as administrator. The department is free to get their procedure complied with and may substitute his name on the basis of the present certificate as an Administrator unless they are satisfied that the applicant is the only successor in interest in the natural course of succession.

OPINION 15

In this case there is a request for mutation of the property in question in the name of Smt. Kamala Jain, having a life interest. By way of Will executed by the original lessee, the property was bequeathed to his wife Mrs. Kamala Jain for her life and thereafter to his daughter Miss. Manju absolutely and for ever. Miss. Manju had released her interest, which she cdould have got after the death of Mrs. Kamala Jain, a life interest holder, in favour of Smt. Kamala Jain. A perusal of AIR 1956 SC 1395 reveal as under:-

"a release can be usefully employed as form of conveyance by person having some right or interest to another having a limited estate and release then operates as enlargement of limited estate" - A vested interest in a remainder, even though it is subject to a power of appointment of the first takee, i.e., the person taking the life estate, is assignable. A vested remainder as though created under a Will, is transferable. It is immaterial that such a right falls into possession on the termination of an earlier life interest created in the property.

[B-39, AB, Kalkaji]

OPINION 16

Section 2 of the Hindu Inheritance (Removal of Disabilities) Act, 1928 provides "notwithstanding any rule of Hindu Law or custom to the contrary, no person governed by Hindu Law, other than a person who is and has been from birth a lunatic, idiot shall be excluded from inheritance or from any right or share in joint family property by reason only of any disease, deformity, or physical or mental defect."

Prior to the Act of 1928, one who was a lunatic at the time of succession even though the lunacy was not congenital, was disqualified from taking the inheritance. But in order to disqualify a person from inheritance on the ground of lunacy, idiocy, he had to be shown that he was not capable of distinguishing between right and wrong. (Bhagawati Saran Vs. Parameshwari ILR (1992), ALL, 518). Test of lunacy a person who is incapable of protecting his own interest although capable of understanding simple words of command is insane in the sense that he is debarred from participation in the ancestral estate. Under the Hindu Law governed by the Mistakshasra, is right as a co-parcener was not so effected by the qualification to prevent him taking the whole estate by survivors after the death of the co-parceners. (DEV NATH LEKHA, 1946 PAT 419). It was further held in SURTI Vs. NARAIN 12-A530 that where a person is sought to be excluded on the ground of his mental defect, the onus is on the party alleging it to make out his allegation.

Section 28 of the Hindu Succession Act also deal with disease, defect etc. On page 2.168 of the book Law of Intestate and Testamentary Succession by Dr. Paras Dewan, certain diseases have been mentioned as the disqualification prescribed in the Mitakshara Law. It includes congenital, or idiocy.

From the above discussion, it is clear that the only disqualification in inheriting the property is congenital, lunacy or idiocy. The medical report on record mentions "Profound mental retardation". They have further stated that this condition is likely to have been present since early childhood. It means that the Board issuing the medical certificate had no firm view about the disease being present by birth which is required under the Act for disqualifying a person from inheriting such disease.

In my opinion, a judicial pronouncement to this effect will only be a perfect evidence for debarring such persons from inheritance.

[C/77-78, WPN]

OPINION 17

In so far as the point No.1 is concerned, the decree in which the department was not a party, is not binding on the department.

Secondly, as per award, the property was required to be sold and the sale proceed was required to be divided amongst the legal heirs, so the mutation on the basis of this award may not be claimed.

Thirdly, the department is free to call for the necessary document as per their procedure in this regard.

Any how, it appears from the note that the property would have passed on to all the five legal heirs in natural course of succession after the death of the lessee, as their sons and daughters, had there been no decree of the court.

[L-IV/48/103, Diplomatic Enclave]

OPINION 18

Section 15 Clause (2) of Hindu Succession Act lays down:-

"Notwithstanding anything contained in sub-section 1(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased not upon the other heirs referred to in sub-section (1) in the order specified therein but upon the heirs of the father.

The perusal of clause (2) of Section 15 reveal that the property inherited by a female Hindu from her father or mother shall devolve on her sons and daughters and in absence of sons and daughter, it will devolve on the heirs of the father.

[10/14, East Patel Nagar]

OPINION 19

Section 17 (1) (b) of Indian Registration Act provided "Other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right title, or interest, whether vested or contingent of the value of Rs. 100 and upwards, of immovable property, shall be registered".

The instant Deed of Disclaimer extinguishes the right of Mrs. Nancy Chawla in respect of the property in question after the death of her husband Mr. Anil Chawla. As such, this deed of Disclaimer is required to be registered under Section 17 (1)(b).

Section 23 of Indian Registration Act provides "subject to the provisions contained in Section 24, 25 and 26, no document other than a Will shall be accepted for registration unless presented for that purpose to the proper officer within four months from the date of its execution".

In view of the above discussion, I am of the opinion that the Deed of Disclaimer must be registered as required under Section 17 (1)(b) of Indian Registration Act.

[R/804, New Rajinder Nagar]

OPINION 20

Wife's sister do not fall in the direct line of succession. As such it is for the department to decide whether, to realise unearned increase from her under office order No. 1/88 dated 1.2.88.

OPINION 21

The property stands in the joint names of co-lessees. As such they are the co-owners of the property in question. The position of a co-owner was clarified in Mohesh NarainVs. Nawbat I.C.L.J. 437; 32-CAL. 837 " each co-owner is in theory interested inevery infinitesimal portion of the subject matter and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property, jointly with other". From the above precedent it is clear that unless there is a partition both the co-lessee have interest in every part and parcel of the property in question. As such the consent of the other co-lessee appears to be reasonable.

OPINION 22

Section 50 of the Indian Registration Act lays down: (I) every document of the kinds mentioned in Clause a, b, c and d of Section 17, sub-section 1 and clauses a, b of Section 18, shall, if duly registered take effect as regards the property comprised therein against every unregistered document relating to the same property and not being a decree or orders whether such unregistered document be of the same nature as the registered document or not.

The perusal of the above Section reveal that a document which is required to be registered under Section 17 clause a, b, c and d or had been registered under Section 18 clause a and b, shall take effect against every unregistered document relating to the same property.

In the instant case the Agreement to Sell falls under Clause ‘b’ of Section 18 and since it is registered it will take effect as regard the property comprised therein, against every unregistered document relating to the same property whether it is a Cancellation Deed or any other document.

As such, a registered deed can be cancelled only by a Registered Cancellation Deed.

OPINION 23

A Hindu Joint Family has been defined at page 201 of Hindu Law by Professor S. Venkataraman as "A Hindu Joint Family consists of male members descended lineally from a common male ancestor, together with their mothers, wives or widows and unmarried daughters bound together by the fundamental principle of Sapindaship or family relationship which is the essence and distinguishing feature of the institution (Karson Das Vs. Ganga Bai, 32 B-479, Gowli Buddana Vs. Commissioner of Income Tax 1966, 60 I.T.R. 293).

OPINION 24

Shri Sudershan Dayal Mathur had been granted a letter of administration for proper administration of the Will. As such he can only be mutated as an administrator having no right to transfer the property without previous permission of the court and not as legal heirs.

[25, Abul Fazal Road]

OPINION 25

The administrative department is not a judicial body to assess the medical certificates and come to a conclusion that the person in question is of unsound mind. It is for the court to assess the question of unsound mind on the basis of necessary medical certificate after cross examining the authorities issuing the same.

[39/11, Tehar-II]

OPINION 26

Section 107, Indian Evidence Act lays down that when the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirm it.

Section 108, Indian Evidence Act lays down that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of himself he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.

These presumptions can be drawn only by the Competent Judicial Courts on the facts made available to them by the party who alleges the presumption of death. It is not for the administrative authority to straightaway presume the death of a person who has not been heard for the last seven years, in absence of any judicial pronouncement.

[4/19, West Patel Nagar]

OPINION 27

The very material point in regard of partition is that partition can take place between the co-owner only. If a property is possessed by individual who are co-owners, all co-owners have equal rights and coordinate interest in the property. Each co-owner is in theory interested in every infinitesimal portion of the subject and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property jointly with the others (Mohan Narain Vs. Naubat, I-CNJ-437: 32 CAL. 837). Each joint owner has the right to the possession of all the property and in common equal to the right of each of his companions in interest and superior to that of all others. He has the same right to use and enjoyment of the common property that he has to his sole property, except in so far as it is limited by the equal right of his co-sharers (Devendra narain Vs. Narendra 23 CWN-900: 29 CLJ-504). Every co-owner is entitled to dispose off his interest in the joint property, unless prevented from doing so under any law, e.g. a co-partner under the Mitakshara law. The test of co-ownership is co-ordinate interest. If the interest of one is subordinate or higher in degree to the other, there is no co-ownership between the two.

OPINION 28

Section 32, clause (c) of the Indian Registration Act provides about presenting documents for registration by an agent. It lays down "by the agent of such person, representative, or assign duly authorised by power of Attorney executed and authenticated in the manner herein after mentioned".

Section 33 (1)(a) provides " for the purposes of Section 32, the following Power of Attorney shall alone be recognised (a) if the principal at the time of executing the Power of Attorney resides in any part of India in which the Act is for the time being in force, the Power of Attorney executed before and authenticated by the Registrar or Sub-Registrar within whose District or Sub-district the principal resides".

In view of the above provisions a GPA not duly executed and authenticated as per provisions of Section 33 (1) (a) of Indian Registration Act, i.e. for presentation of any deed for registration.

[2IV/4 Old D/S Lajpat Nagar]

OPINION 29

The word release as defined at page 1101 in the Law Lexicon is "The gift of discharge of a right of action which anyone has against another or his land".

The word release as defined in the Mitra's Legal Dictionary is "To give up or relinquish any right or claim upon another person or against any property".

Article 55 of Indian Stamp Act defines "release that is to say, any instrument (not being such a release as is provided for by Section 25-A) where by a person renounces a claim upon another person or against any specific property.

[Shop No. 40, Khurshid Market]

OPINION 30

The probate granted by the High Court of Punjab is perfectly Legal and conclusive as provided under Section 273 of Indian Succession Act. The instant case is covered under the provision of the said Section, which provides "provided that probate and letters of administration granted [a] by a High Court or [b] by a District Judge, where the deceased at the time of his death had a fixed place of abode situated within the jurisdiction of such Judge, and such Judge certifies that the value of the property and estate effected beyond the limit of the estate does not exceed Rs. 10,000/- shall, unless, otherwise directed by the grant, has like effect through-out the other states".

[C/438, Defence Colony]

OPINION 31

In so far as the testamentary succession is concerned, it is totally governed by the terms of the testament and not under the rule of General Succession. Since in the instant case, there is a 'Will' the property will devolve on the beneficiary of the 'Will' for her use and benefit. The question of devolution of the share to the mother will arrives only in case where there is no 'Will' and the succession took place under the Law of Hindu Succession Act.

(A-317, Defence Colony)

OPINION 32

Section 28 of the Registration Act provides for the place for Registration of documents relating to land. Under the said provision the said documents shall be presented for registration in the office of the Sub-Registrar within whose Sub-District the whole or the some portion of the property to which such documents relate is situate. The instant relinquishment deed has neither been registered in accordance with Section 28, nor has been registered in any Presidency Town of India. As such, the registration of the deed can only be done as provided under Section 28 of the Registration Act.

(86, SPN)

OPINION 33

Once a valid gift has been made and registered which had been duly accepted by the donee and the possession had been delivered accordingly, it can not be revoked. The salient feature of a gift under Hindu Law is that it cannot be revoked. A gift once completed is binding upon the donor and it cannot be revoked by him unless it was obtained by fraud or undue influence.

OPINION 34

Section 2 of the Power of Attorney Act, 1882 provides as follows:-

The Donee of a Power of Attorney, may, if he thinks fit, execute or do any assurance instrument or thing, in and with his own name and signature, and his own seal, where sealing if required, by the authority of the Doner of the Power; and every assurance, instrument and thing so executed and done shall be as effectual in law as if it had been executed or done by the Donee of the Power in the name, and with the signature and seal of the Donar thereof".

In this case, the deed of Power of Attorney provide as under:-

"I, Mool Raj Malhotra nominate Shri Jaswant Lal Khurana as my General Attorney, to do the following acts, deeds and thing in my name and on my behalf".

The above wording of the Power of Attorney requires that the work should be done only in the name and on behalf of Shri Mool Chand Malhotra. On the other hand the sale deed though has a mention but is not in consonance with the wordings of the Power of Attorney.

Though the instant problem is covered under Section 2 above of the Power of Attorney Act but for precaution, we may ask for an affidavit from Shri Mool Raj Malhotra recognising the sale deed made by attorney in favour of Ravi Kumar Khurana.

OPINION 35

Prior to the Hindu Adoption and Maintenance Act, 1956, the adoption was to be made under the Hindu Code. The essential ingredience of valid adoption were as under:-

1. The Person adopting is lawfully capable of taking in adoption.
2. The Person giving in adoption is lawfully capable of giving in adoption.
3. The person adopted is lawfully capable of being taken in adoption.
4. The adoption is completed by an actual giving and taking.
5. The ceremony called Datta homam has been performed. It is, however, doubtful whether the Datta homam caremony is essential in all cases to the validity of adoption.

There was certain prohibition in respect of a person who may be lawfully taken in adoption. One of the restrictions was that "he must not be a boy whose mother the adopting father could not have legally married; but this rule has been restricted in many recent cases to the daughter's son, sister's son, and mother's sister's son.

In view of the above restrictions, it is clear that a father cannot adopt the son of his daughter because he could not have married his mother being his own daughter. In the instant case the father-in-law has adopted the son of his son-in-law. As such, the instant adoption is perfectly invalid.

The second essential ingredient of a valid adoption under the Hindu Code was the physical act of giving and receiving, with intent to transfer the boy from one family into another. This ceremony was the essence of adoption, and the law does not accept any substitute for it. To constitute giving and taking in adoption all that is necessary is that there should be some overt act to signify the delivery of the boy from one family to another. The law required that the natural parent should hand over the adopted boy and the adopting parent should receive him. In the instant case, this essential ingredient is also absent. The mere submission of marriage card showing the parents cannot be taken into consideration as a relevant proof of adoption.

On the basis of above discussion it is clear that two essential ingredience of a valid adoption i.e. the adopting father could have legally married the mother of the son taken into adoption and secondly the ceremony of physical giving and taking, are totally absent.

OPINION 36

The registration of birth and death had been made compulsory by the Registration of Birth and Death Act, 1969. In so far as the fact of birth and death is concerned, that can be established by way of the certificate issued by the Registarar concerned.

In the instant case, the applicant had submitted certificate correspondence from DIG, CID (Crime), Rajasthan and the Superintendent, District Hospital, Mathura. These evidences are presumptive in nature and can be taken into consideration by any judicial authority while confirming the death of particular person. The Administrative Ministry can not sit on judgement and therefore they can not come to a conclusion regarding the factum of death on the basis of the documentary evidence produced by the applicant.

The applicant may be asked to produce the death certificate issued from the office of the Registrar of Birth and Death or to produce an order confirming death by a judicial authority.

Section 13 (3) hays down "any birth or death which has not been registered within one year of its occurrence shall be registered only on an order made by a Magistrate after verifying the correctness of birth and death and on payment of prescribed fee".

In my opinion, the applicant may be advised to taken recourse of Section 13 (3) of the Registration of Births and Deaths Act. It is also felt that the authorities concerned where the death took place, are required by the said Act the Superintendent of the Hospital where the post-mortem was done and the corpus was kept might have given the information to the Registrar concerned. In case, they have not done it, the applicant may act in

accordance with Section 13 (3) of Act and get the certificate. Otherwise, he may seek proper remedy in a Judicial Court and obtain the necessary certificate.

OPINION 37

This point was earlier considered by the then A.L.A. who opined as under:-

"The lease was granted in the name of two persons (1) Champa Devi and (2) Raj Kumar. The one co-lessee Champa Devi died and on her death Shri Krishan Kumar stepped into her shoes. Hence, Shri Krishan Kumar and Raj Kumar are owners of co-ordinate estates and are not concurrent owners. The owner of one coordinate estate cannot transfer his similar estate to augment the right by executing a Relinquishment Deed. Therefore, the applicant may be advised to execute a duly registered conveyance deed i.e. gift deed or the sale deed".

It may be seen that where the aggregate of rights, which form the ownership, is held and enjoyed by one person, he is the sole owner of the property. He may enjoy all these rights exclusively or he may assign or part with some of them. If the assignment relates to a portion of the owner's right as for example by way of lease or mortgage, the assignee acquires a limited right and the ownership of the asssigner is to that extent limited. But if the assignment is of some interest or share of the ownership itself, both the assigner and the assignee becomes holder of coordinate interest in the property and they hold as co-owners. In the same way, when several persons acquired any property either in equal or in unequal shares, they become co-owners in respect of such property. These are some of the modes in which co-ownership comes into existence.

All co-owners have equal rights and coordinate interest in the property. But their shares may be either fixed or indeterminate. If the shares are known, they need not be equal. But whether the shares are known or indeterminate and whether the share are equal or unequal every co-owner has a right of enjoyment and possession equal to that of the other co-owners. Each co-owner is in theory interested in every infinitesimal portion of the subject matter and each has the right, irrespective of the quantity of his interest, to be in possession of every part and parcel of the property, jointly with the others. Each joint owner has the right to possession of all the property held in common

equal to the right of each of his companions in interest and superior to that of all other persons. He has the same right to the use and enjoyment of the common property that he has to his sloe property, except in so far as it is limited by the equal right of his co-sharers. Every co-owner is entitled to dispose of his interest in the joint property, unless prevented from doing so under any law, e.g. a co-parcener under the Mitakshara law.

From the above discussion, it is clear that a co-owner can dispose of his property to another co-owner. The word "dispose of" can not be legally termed 'transfer' as defined in TPA. It may include relinquishment too.
(Shop No. 15, SPN)

OPINION 38

Section 21 of Special Marriage Act provides "notwithstanding any restriction contained in the Indian Succession Act, 1925 with respect to its application to members of certain communities, succession to the property of any person whose marriage is solemnized under this Act and to the property of the issue of such marriage shall be regulated by the provisions of the said Act and for the purpose of this Section, that Act shall have effect as if Chapter-III of para-V (special rules for parcy intestate) has been omitted therefrom.

The perusal of page 2,220 of Book on Law of Intestate and Testamentary Succession by Dr. paras Dewan that succession to the persons who marry or whose marriage is registered under the provisions of Special Marriage Act is regulated not by the personal law of the party concerned but by the provisions of the Act. However, if both the parties who have solemnized their marriage under the Special Marriage Act are Hindus, then succession to the property of either party will be governed by the Hindu Law, i.e., the Hindu Succession Act and not by the Act.

It further appears from the facts of the case that the parties were Hindus. As such, the succession will be governed as per provisions of Hindu Succession Act as stated above. In so far as the Hindu Succession Act is concerned, Section 8 provides the persons who will succeed as Class I heirs on the death of an intestate male Hindu. It includes widow, son, daughters, mother etc.

The word 'widow' as explained therein do not include a divorced wife. Anyhow, it is very clear that once a divorce has been granted by the court, the said relation between

the wife and husband ceased and the lady cannot be termed as a widow of the said husband. As such, she cannot succeed to the property of her divorced husband. [Plot No. 12, NH-IV, Lajpat Nagar]

OPINION 39

The release of interest of one or more co-lessee in favour of another co-lessee does not amount to transfer so as to attract the covenant relating to unearned increase. This would apply to the following cases:-

1. Where a lease was initially executed by the lessor in favor of joint lessee, and one more co-lessee execute Release Deed in favour of the other co-lessee(s)
2. The original lessee may transfer his lease hold interests in favour of more than one person. Such transfer, of course, would be effected subject to payment of unearned increase. On transfer, such persons would become joint lessee. If one of such joint lessee execute a Release Deed in favour of his co-lessee it will not amount to transfer for the purpose of unearned increase.
3. It is possible that an existing lessee may admit another person or persons to have share in his lease hold interests, by any mode amounting to transfer inter vivos (that is between the parties). This would amount to transfer so as to attract the unearned increase covenant and the transaction should first be regularised as such. Such new person would become joint lessee after regularisation of transfer of the existing joint lessee's interests in his favour to the extent agreed to by the existing lessee. In other words, such transaction would amount to transfer of interests by a existing lessee to a stranger to the lease. Such transfer could be either of whole of the interests of an existing lessee or any specified part thereof. The new lessee, therefore, should not be treated at par with the co-lessee referred to (i) and (ii) above. Therefore a Release by the existing lessee in respect of his remaining share, in favour of a new co-lessee should be treated as transfer and not Release

The above would show that unearned increase becomes payable at the stage of each transfer to the extent the lease hold interests are transferred on each occasion, whereas it remains permissible for the transferee of one transaction of transfer to have nay transactions or arrangement among themselves without any further because in such arrangements the question of payment of an unearned increase, having been already paid, does not arise. But where the transfer at one stage is not of the whole interest, an unearned increase for the remaining interest becomes payable, as and when such remaining interest is transferred.

No un-earned increase will be payable in the case of Release by one co-lessee in favour of the other if such lessee have acquired the lease hold interests, jointly with others by way of succession, intestate or testamentary.

OPINION 40

Under the provisions of Indian Succession Act, a Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will in the presence and by the direction of the testator, or has received from the testator, a personal acknowledgement of his signature or mark, or of the signature of such other person and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more that one witness be present at the same time and no particular form at attestation shall be necessary. Under the provision of the same Act, no person, even if he or she is a beneficiary in the Will of the bequeathed property, shall debarred from being a witness of the Will.

It has, therefore, been established by the relevant sections of the said Act that a son is also not debarred to be an attesting witness in a Will. At the same time the beneficiary in the Will can also be a valid witness. [D-213-214, West Patel Nagar]

OPINION 41

In case, it is the Attorney who has to execute a registered sale deed on behalf of the original lessee in favour of the vendees, the Power of Attorney must be registered. In case the Power of Attorney is not registered, a registered sale deed cannot be made on the basis of an un-registered Power of Attorney. Section 49 of the Indian Registration Act lays down "No document required by Section 17 (or by any provision of the T.P.A. 1882) to be registered shall:-

- (a) affect any immovable property comprised therein, or
- (b) confer any power to adopt, or

- (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered (provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 to be registered may be received as evidence of a contract in a suit for specific performance under Chapter-II of the Specific Relief Act, 1877, or as evidence of part-performance of a contract for the purposes of Section 53-A of the T.P.A. 1882, or as evidence of any collateral transaction not required to be effected by registered instrument).

In view of the above provision, in case the Sale Deed is to be executed on the basis of the Power of Attorney, the same must be a registered one.

[C-502, Defence Colony]

OPINION 42

Section 17 (i)(b) provides as under:-

"Other non-testamentary instruments which purport or operate to create, declare, assign limit or extinguish whether in present or in future, any right, title or interest, whether vested or contingent of the value of Rs. 100/- or upward of immovable property shall be registered. The perusal of the above clause reveal that in a non-testamentary instrument extinguish the right of a person is required to be registered under Section 17 (i)(b) of the Indian Registration Act".

In AIR 1969 Orissa page 11 it was held that relinquishment of the immovable property valued over Rs. 100/- can only be by a registered document.

In AIR 1967 SC page 401 it was observed "a deed of relinquishment is in the nature of a gift". A gift deed is required to be registered under Section 17(i)(a) of the Indian Registration Act.

On the above discussion it is clear that Relinquishment Deed in order to be operative in law must be registered under Section 17 of the Registration Act, when the

amount of the claim to the interest in the immovable property which is extinguished of the value of Rs. 100/- of upward.

Further, Section 23 of the Indian Registration Act lays down "subject to the provision contained in Section 24, 25 and 26 no document other than a Will shall be accepted for registration unless presented for that purpose to the proper officer within four months from the date of its execution.

Section 26 of the Indian Registration Act provides the procedure for documents executed out of India. It lays down "when a document purporting to have been executed by all or any of the parties out of India is not presented for registration till after the expiration of the time herein before prescribed on that behalf the Registering Officer, if satisfied:-

- (a) that the instrument was so executed.
- (b) that it has been presented for registration within four months after its arrival in India may on payment of the proper registration fee, except such document for registration.

It was held in Nensukh Vs. Goverdhan Dass AIR 1948 NAG 110 where a document affects immovable property situated in India, it cannot be valid unless registered, even if it is executed outside India.

With the above discussion it is clear that the relinquishment deed executed outside India cannot be taken into consideration for want of registration.
[M-11/20, Lajpat Nagar]

OPINION 43

In Law Lexicon at page 1293 it is stated " the expression 'transfer' by itself is not all together appropriate to indicate a sale in invitum by the court and therefore, provision regarding Voluntary transfers will not apply to transfer by court sale (AIR-1928-MAD-571)".

The word public auction as defined in the Law Lexicon is "a sale of property on auction, where any and all persons who choose are permitted to attend and offer bids. Though this phrase is frequently used, it is doubtful whether the word public adds any thing to the force of the expression since auction itself imports publicity. If there can be such a thing as a private auction it must be one where the property is sold to the highest bidder, but only certain persons or a certain class of persons are permitted to be

present or offer bids, as in the case of an auction sale of property under the Partition Act, where the right to bid is confined to the co-sharers".

"Transfer is a word of wider import than sale. A transfer may be by means of a lease or mortgage or sale or by any other mode. (Union of India Vs. Maksud Ahmed, A.I.R. 1963-BOM-1110).

I have seen the decree dated 19.1.1985 passed by Smt. Urmila Rani in suit No. 103/63 & 436/83 Kanhiya Lal Vs. Smt. Jamuna Devi & others. The learned court has ordered "this property shall be sold by public auction and the said proceed thereof shall be distributed amongst the above mentioned persons in the said proportion". This was passed in a suit for partition of joint Hindu family.

In view of the above discussion it is clear that as per definition of the word transfer as given in Law Lexicon, it is not appropriate to indicate a sale in invitum by the court and the provision regarding voluntary transfer will not apply to transfers by court sale.

For argument sale if we term it a transfer, it may make no difference in case where the purchasers are co-lessees because in public auction, the purchaser can be any one. Moreover, in the case of an auction of property under the partition act, the right to bid is confined to the co-sharers. Though it is not clear from the wording of the decree as to whether it was confined to the co-sharers or not but it being a suit for partition and a rendition on account, such presumption is more likely.

OPINION 44

Section 5, Chapter-2 of Hindu Adoption and Maintenance Act, 1956 provides:-

- (1) No adoption shall be made after the commencement of this Act by or to a Hindu except in accordance with the provisions contained in this chapter, and any adoption made in contravention of the said provisions shall be void.
- (2) An adoption which is void shall neither create any right in the adoptive family in favour of any person which he or she could not have acquired except by the reason of the adoption, not destroy the rights of any person in the family of his or her birth.

Section 6 of the Adoption Act lays down the requisites of valid adoption. No adoption shall be valid unless:-

- (i) the person adopting has the capacity, and also the right, to take in adoption;
- (ii) the person giving in adoption has the capacity to do so;
- (iii) the person adopted is capable of being taken in adoption;
- (iv) the adoption is made in compliance with the other conditions mentioned in this chapter.

The other conditions have been mentioned in section 11 of the Adoption and Maintenance Act. Clause (VI) of Section 11 lays down that:

"The child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under this authority or under their authority with intent to transfer the child from the family of its birth to the family of its adoption. The performance of the ceremony of giving and taking is a mandatory requirement for a valid adoption". (Laxman Singh Vs. Roop Kumar AIR 1961 SC 1878, Kasinath Vs. Mahadev AIR 1977 PAT 199, Krishna Chander Sahu Vs. Pradipta Dass AIR 1982 Orissa 114. All that is required is that the natural parent or guardian of the child as the case may be shall hand over the child and the adoptive parents receive the same. (Devi Prasad Vs. Triveni Devi 1970 SC 1286). The very ceremony of giving and taking is in itself symbolic of transplanting the adoptive child from the family of its birth to the adoptive family. (Kartar Singh Vs. Surjan Singh 1974 SC 2161). Where the ceremony of giving and taking is lacking, the adoption is invalid.

In so far as the presumption as to the act of giving and taking is concerned, it is not to be made unless the following conditions are complied with:-

(1) There must be a document.

- (2) It must be registered under law in force.
- (3) It must purport to record an adoption which has taken place.
- (4) The document must be signed by both the giver and taker of the child in adoption and not by of them.
- (5) It must be produced before the Court. (Mohd. Aftabuddin Khan Vs. Chandan Vilasini AIR 1977 Orissa 69).

The presumption under Section 16 of the Hindu Adoption and Maintenance Act arises only if the adoption deed is executed and registered in manner specified. (Gazzan Singh Vs. Bachan Singh 1974 PUN LR 50).

In view of the above discussion, it is clear that the administrative department being not a judicial body can not presume a valid adoption on the basis of School Certificate and Character Certificate.
[205-B/49]

OPINION 45

Section 228 of the Indian Succession Act provides as under:-

"When a Will has been proved and deposited in a Court of Competent Jurisdiction situated beyond the limits of the state. Whether within or beyond the limits of India, and property authenticated copy of the Will is produced, letters of administration may be granted with a copy of such copy annexed". In Blockwood & Sons Ltd., Vs. Parasuraman, AIR 1959, Madras, 410, the Court observed that failure to obtain an ancillary probate under this Section might constitute a bar under Section-218 to the enforcement of a right.

In another case, Sukumar Vs, Rageswari, AIR 1939 CAL 237, a Will of a testatrix who belonged to Chander Nagore, then part of French territory, had executed a Will under which she provided for the administration of her assets at 21 paragana in Bengal. An authenticated copy of the Will under the seal and signature of Notaire, the presiding judge of the tribunal and the administrator of Chander Nagore, was annexed with the petition for grant of letters of administration before the District Judge of 21 paragana. The original Will, as required under the French Law, was kept in Nataire's Office and could not be parted with. It was held that the Will was valid by French Law and therefore, submission of an authenticated copy was sufficient compliance of this Section. The Court observed that the word "proved" is not equivalent to "admitted to probate" but means authoritatively established as valid according to the Law of the place where it was made.

Under this Section, ancillary grant is obtained in order to give effectively to a grant already made in a foreign country. It is not a grant of probate or letter of administration either with or without the copy of the Will annexed within the meaning of the Act, but merely a grant of administration with a copy of the authenticated Will annexed.

In view of the above discussion, it is clear that the instant probate can not be enforced unless an ancillary grant is issued by the Indian Courts.

[A-300, Defence Colony]