SUCCESSION IN CHRISTIAN COMMUNITY

The Christians in India are governed by the Indian Succession Act 1925 with regard to the matters of succession. The Indian Succession Act, 1925, states that if the deceased is not a Hindu, Mohammedan, Buddhist, Sikh or Jain his succession to immovable property shall be regulated by this Act. Part V of the Indian Succession act, 1925 lays down the rules of succession to the property of a person dying intestate. Chapter I lays down that Part V shall constitute the law of India in all cases of intestacy. Chapter II lays down the rules of succession in cases of intestates other than Parsis and Chapter III lays down the rules of succession for Parsi intestates.

The whole of this Part applies to Europeans, Indian Christians, Jews, Armenians and other persons professing Christian religion domiciled in India. Chapters I and III apply to Parsis. With respect to the Indian Christians, the diversity in inheritance laws is greatly intensified by making domicile a criterion for determining the application of laws. Christians in the State of Kerala are governed by two different Acts-those domiciled in Cochin are subject to the application of the Cochin Christian Succession Act 1921 while the Travancore Christians are governed by the Travancore Christian Succession Act 1916. However, the Travancore Christians following the *Marumakka Avakashi* system (The Travancore Christian Succession Act, 1916, Section 3), Roman Catholics who follow Latin rites[1] and the Protestant Christians living in the five *taluks*, i.e. Karunagapally, Quilon, Chirayinkil, Trivandrum and Neyyattinkara, have their separate customary laws. Similarly, the European Christians, Anglo Indians, Parangi communities of Cochin and the Tamil Christians of Chittur taluk of Cochin are governed by their distinct customary

[1] *Abdurahiman* vs. *Joseph*, AIR 1952 TC 176.

laws[2]. Further, Christians in the State of Goa and the Union Territories of Daman and Diu are governed by the Portuguese Civil Code 1867 while those in Pondicherry adhere to any of the following laws:

(i) Customary Hindu Law

(ii) The Indian Succession Act, 1925

(iii) The French Civil Code, 1804.

Indian Christians who are not subject to any of the above customary or statutory laws are governed by the general scheme of inheritance laid down under the Indian Succession Act, 1925.

Prior to 1961, Goa, Daman and Diu were Portuguese colonies, known as overseas provinces of Portugal to which the Portuguese Civil Code was extended with effect from 1 July 1870. However, its application in matters of inheritance and succession was confined to non-Hindu communities, largely, Christians. The law relating to succession was amended in 1910, though no major change took place till 1961. Goa was liberated and in the following year the Constitution was amended. In 1962 itself, the legislation affecting Goa was passed and that saved the application of the then existing laws to the inhabitants of Goa. Thus, Christians of these areas are still governed by the provisions of the Portuguese Civil Code 1867.

Before the advent of the French in Pondicherry, its population consisted of Hindus, Muslims and a good number of Christians who were new converts from Hinduism following their distinct laws. The French Civil Code 1804 was extended to Pondicherry in 1819. However, it was provided that the population of Indian origin whether Hindus, Muslims or Christians, would continue to be governed by the laws and customs of their respective religion (This was reiterated by the French Constitution of 1946, as well as by the French Constitution of 1958, which provided that French nationals if they were not subjects to the common law of the country, namely the French personal law as embodied in the Civil Code, would continue to be governed by their own

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[2] *Anthony Swamy* vs. *Chinnaswamy* (1969) SCC 18, The Vaniya Tamil Christians of Chittur Taluk are governed by the Mitakshara school of Hindu law in regard to inheritance and

personal law) with the result that Christians of Pondicherry unlike Christians of the rest of India, did not get a separate succession law and continued to be governed by their original law, ie, the customary Hindu law. Nevertheless, in matters of marriage and divorce they were subject to the provisions of the French Civil Code 1804.

The French Civil Code was first applied in Pondicherry to French nationals migrating to India. It provided that Indians (Irrespective of their religion) could renounce their personal law and embrace French law. Many Indians took advantage of this offer (This offer was coupled with the attraction of granting full political rights and preferential appointment to attractive posts in the Metropolitan cadre in the French Army) and became 'Renocants' (Renocants are those Indians who have renounced their personal laws and have embraced the application of French law over them). Consequently, French law became applicable to them and they were no longer subject to their traditional law in personal matters.

The merger of Pondicherry with India [By the Constitution (Fourteenth Amendment) Act made on 16 August 1961] did not affect the legal set-up substantially. The Indian Government in conformity with the Treaty of Cession allowed the Renocants and those who became Indian nationals to continue to be governed by their laws. The Indian succession Act 1925 was extended to Pondicherry in 1984; yet the instrument of extension excluded the application of this Act to the Renocants. Therefore, Christians in Pondicherry are governed by three different laws—The Indian Succession Act 1925, the uncodified customary Hindu law (Louis Marie Antione vs. Alexis Sandanaswamy, AIR 1984 Mad 271; Lucas vs. Jerome Pascal AIR 1977 Mad 270) or the French Civil Code.

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succession.

5.1. RELEVANT PROVISIONS UNDER THE INDIAN SUCCESSION ACT, 1925

Part V of the Act lays down the rules of succession to the property of a person dying intestate. Chapter I (contains sections 29 and 30) lays down that Part V shall constitute the law of India in all cases of intestacy[3]. Chapter II (contains sections 31 to 49) lays down the rules of succession in cases of intestates other than Parsis and Chapter III (contains sections 50 to 56) lays down the rules of succession for Parsi intestates.

Section 29 runs as:

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

(2) Save as provided in sub-section (1) or by any other law for the time being in force, the provisions of this Part shall constitute the law of India in all cases of intestacy.

Sub-section (1) leaves the law applicable to Europeans, Indian Christians and Parsis before the first day of January 1866, untouched; such law was the common law of England except as modified by any customary law applicable to the Parsis or the Indian community.

The opening part of section 29, sub-section (2) is intended to be a qualificatory or excepting provision and not a provision for incorporation by reference.

Any custom pertaining to succession, inheritance, adoption, etc. prevailing amongst the Indian Christians in territories governed by the Bengal, Agra and Assam Civil Courts Act cannot be regarded as a law for the time being in force as contemplated by section 29(2) of the Indian Succession Act and despite any such custom prevailing in any section of the Christian community in the State, the intestate succession in respect of their properties is to be governed by the provisions contained in the Indian Succession Act and

for that purpose any custom or rule of justice, equity and good conscience would be irrelevant. So far as the State of U.P. is concerned intestate succession of Indian Christians is governed by the provisions contained in the Indian Succession Act, 1925 and any custom prevalent in the State in this regard, would for purposes of succession be irrelevant.

The lineal consanguinity contemplated by section 25 of the Act is the real consanguinity and not the notional or fictional consanguinity. The adopted son continues to be the descendant in the direct line of his natural father. Accordingly when section 37 of the Act provides that where the intestate has left surviving him a child or children, but no more remote lineal descendant through a deceased child, the property shall belong to his surviving child, if there is only one, or shall be equally divided among all his surviving children it clearly envisages that such children, whether male or female, who are the lineal descendants of the deceased and are as such his kindred. Thus, the word 'children' in section 37 of the Act will not cover the case of an adopted child who cannot be described as lineal descendant of the person adopting him.

In the result, Court concluded that right to succeed to the properties left by Smt. Maud Datt is governed not by the alleged custom set up by Ajit Datt but is governed by the provisions contained in the Indian Succession Act. Further under the provisions of Indian Succession Act, a child adopted by a person for being brought up as a son, does not inherit the properties left by him.[4]

"Any other law for time being in force"—The special appeal is liable to be dismissed on the finding recorded above but as the learned counsel for the parties have raised some legal submissions, they may also be considered. Learned counsel has submitted that as 'A' was adopted son of Maud Datt, he was entitled to succeed to her estate in accordance with custom of the family of 'E', which continued to follow some principles of Mitakshara Law. In support of this submission reliance is placed on sub-section (2) of Section 29 of Indian

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[3] But subject to any other law for the time being in force.
[4] *Mrs. Ethel Walters* vs. *Ajit Datt*, 1986 All LJ 8 at 12.

Succession Act, which enjoins that save as provided in sub-section (1) or by any other law for the time being in force, the provision of this part shall constitute the law of India in all cases of intestacy. It was urged that the expression any other law for the time being in force used in sub-section (2) would include within its ambit statutory law and also customary law applicable to the concerned parties. According to learned counsel succession in the family of E.E.Datt would be governed by the custom prevailing in the family namely, the principles of Hindu law on adoption where under, an adopted son inherits the property of his adoptive father.[5]

In *Kamawati* vs. *Digbijai Singh*,[6] it has been held that a person who ceases to be a Hindu in religion and becomes a Christian cannot elect to be bound by the Hindu law in the matter of succession after the passing of the Indian Succession Act and a Hindu convert to Christianity is governed solely by the said Act.

A similar contention was repelled by a Division Bench of this Court in *Ranbir Karam Singh* vs. *Jogindra Chandra Bhattacharjaji*,[7] and the Court held that the argument that succession to an estate of an Indian Christian can be governed by the rules applied to the community to which he belonged before his conversion to Christianity is not sound.

In *Anthonyswamy* vs. *M.R.Chinnaswamy*,[8] it was the admitted case that Vanniya Tamil Christians of Chittur Taluk, Kerala, are governed by the Mitakshara School of Hindu law in regard to inheritance and succession and the son of member of such community gets by birth interest in ancestral property owned by the father. It was on this ground that the doctrine of pious obligation was held to be applicable. Therefore, this authority can be of no help to the appellant.

In the matters of adoption and such other matters with which Christianity has no concern. Indian Christian shall in view of the Court be

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[5] See *Anthonyswamy* vs. *M.R.Chnnaswamy*, AIR 1970 SC 223.
[6] AIR 1922 PC 14.
[7] AIR 1940 All 134.
[8] AIR 1970 SC 223.

governed by the law of the land and not by any rule of English law as distinguished from tenets of Christianity. It cannot, therefore, be laid down as rule of general applicability that a custom which has acquired the force of law by reason of its antiquity, continuity, certainty and reasonableness and which has not been repealed or modified by legislation would cease to govern a Hindu after his conversion to Christianity. Customary law comes within the purview of law as defined in Article 13 and is saved by Article 372 of the Constitution. The convert may, if he thinks fit abide by the old usages and customs, which do not interdict any philosophy and ethics or tenets of Christianity he has embraced. The convert and thereafter his progeny may show by their conduct that they continue to be governed by the old customs and usages. It is matter of pleading and proof. Adoption by a Hindu converted to Christianity as a matter of fact, is not opposed to the philosophy and ethics of Christianity, the essence of which lies in the principles of non-violence, love, compassion, sacrifice, service to suffering humanity, truth, goodness and beauty which have endured the Christianity as a religion for long, and not the rituals prescribed for entering into the order of Christianity nor even the rules governing civil life of the Christian community. In case the convert has chosen to abide by the customary law of adoption then the validity of adoption would be tested on the anvil of requisites of adoption as prescribed by the custom and in case, there exists no such custom, a childless Hindu converted to Christianity may in exercise of his fundamental right to life, adopt a child and in the case the only formality in order to constitute valid adoption would be a physical act of giving and taking "a ceremony imperative in all adoptions" and this requisite is satisfied in the essence only by actual delivery and acceptance of boy and since an adopted child seeks to displace the natural succession of property by alleging adoption he must discharge the burden that lies upon him by proof of the factum of adoption and its validity. The evidence in proof of the adoption should be free from all suspicion of fraud and so consistent and probable as to give no occasion as to doubting the truth.[9] Customary law applicable to Indian

[9] *Mahusudan* vs. *Narayani Bai*, AIR 1983 SC 114.

Christians before their conversion to Christianity will continue to govern them in matter not specifically covered by any principles or tenet of Christianity being professed by the individual concerned provided that such customs and usages remained in vogue even after conversion. It may be pertinent to refer to the introductory passages of the Hindu Adoption and Maintenance Bill in which it has been stated thus: "Indian Majority Act, 1875 exempted adoption from the purview of it provisions while Indian Succession Act, 1925, specifically recognized the Hindu usage of adoption". Reference may be had to Schedule III of the Act.

All men and women are endowed by their creator with certain "inherent and unalienable rights". Among these was the most valuable right to life that the man was endowed by birth. The right to life was multifaceted concept and has, indeed, been guaranteed as a fundamental right under Article 21 of the Constitution of Indian life, in every dimension, is paradoxical. The rules governing human life, are therefore, bound to be paradoxical depending on the milieu and ethos of a given time and place. Though notions of happiness may differ from individual to individual depending on socio-political, socio-economic and socio-religious ethos of a given time and place and above all one's own attitude towards life, desire of happiness is inherent in every human being and is, therefore, bound to have its reflection in human activity. In fact our suit of happiness is but a facet of right to life guaranteed by Article 21 of the Constitution son-less person may envisage fulfillment of his happiness in a substitute of a son and therefore, even in the absence of statutory or customary rights of adoption, a son-less person, may adopt a child in exercise of his person right to life as a means of fulfillment of his happiness and as such adoption must be recognized by courts if it is not interdicted by any legislation, established custom or personal law. For a Hindu destitute of a son, adoption has now been given legislative recognition though earlier it was recognized under Hindu law for the sake of funeral cake, water and solemn rights and for the celebrity of one's name but for a non-Hindu say for example on Indian Christian who is destitute of a son, adoption may be a means of fulfillment of

his desire of the celebrity of his name and continuity of his heredity and in that sense, adoption of a child by an issueless couple if viewed from the secular eye, may be regarded as natural and inherent in the right to life and can be freely exercised unless it is forbidden or taken away, expressly or by necessary implication by law including any tenet of the religion one is professing. One may opine that it will be a lawful fact for a person destitute of a son to adopt a child irrespective of his race and domicile save where he is forbidden to do so by law or any tenets of his religion. Such right being inherent in man cannot be taken away except by authority of law. In Islam, adoption is in no Delphic terms, forbidden.[10]

Section 30 deals with preliminary matters and runs as:

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

Illustrations

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

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

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

(iv) A has bequeathed 1,000 rupees to B and 1,000 rupees to the eldest son of C, and has made no other bequest; and has died leaving the sum of 2,000 rupees and no other property. C dies before A without having ever had a son. A has died intestate in respect of the distribution of 1,000 rupees.

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[10] *Ajit Datt* vs. *Ethel Walters*, AIR 2001 All 109 at 122, 130, 131.

When can a person be said to have died intestate has been laid down in this section. The section puts it simply in negative term, that a person would be deemed to have died intestate if he dies without making any testamentary disposition of all his properties, such disposition being capable of taking effect. That is, he will be deemed to have died intestate if he dies without making a valid and effective testamentary disposition of all his property. Thus, two conditions appear to be the essential ingredient of the section, namely: (1) that the person dying has not made a testamentary disposition of "all" his property, and (2) he has not made a valid and effective testamentary disposition of all his property.

The word 'intestate' is defined in section 55 of the Administration of Estates Act as: 'Intestate' includes a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate. Statutory nomination under special enactments like Provident Fund Act, Payment of Gratuity Act, Insurance Act, or a bank account.

Intestacy is of two kinds—total intestacy or partial intestacy. A man may die partly testate and partly intestate, eg where the will contains several bequests to several legatees, but there is no disposition of the residue; he dies intestate as regards the residue.[11]

Whartons in his Law Lexicon[12] lists the following circumstances in which a person may be said to have died intestate, namely:

(1) where he had made no testamentary disposition at all, or

(2) where he has made a testamentary disposition but the same is not valid, legally, or

(3) he had made a testamentary disposition but same is revocable or made useless, or

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[11] *Erasha* vs. *Jerbai* 4 Bom 537.

[12] Third edition, p. 15.

(4) no one became an heir under the testamentary disposition he had made.

A difference, however, be noted between the above enunciation and the term of this section of this Indian Act, viz., Wharton does not mention that where a testamentary disposition, if made, did not include all his property. This section seems to lay emphasis thereon.

According to Halsbury "intestacy may be total or partial. Total intestacy occurs where a man makes no effective testamentary disposition of any of the property of which he is competent to dispose of by will. Partial intestacy occurs where the testators will though partly effective either (1) altogether fails to dispose of some specific property of the testator or (2) having purported to dispose of all his property has failed to dispose effectively of some interest which has arisen in consequence of the will as for instance a limited interest or a life interest. In the first case, the failure occurs at the date of death, whereas in the second it may occur at the death or at some later date.[13]

RULES IN CASES OF INTESTATES OTHER THAN PARSIS

Chapter II of the Indian Succession act, 1925 applies to Europeans, Indian Christians, Jews, Armenians and other persons professing Christian religion domiciled in India.

Section 31. Chapter not to apply to Parsis.—Nothing in this Chapter shall apply to Parsis.

Rules of devolution of the property of a person dying intestate as embodied in Chapter II of Part V have been made inapplicable to Parsi community. Special provisions have been made for the Parsis in the next Chapter (Chapter III).

Section 32. Devolution of such property.—The property of an intestate devolves upon the wife or husband, or upon those who are of the kindred of the

[13] Halsbury, 3rd edition, Vol. 16, p. 394.

deceased, in the order and according to the rules hereinafter contained in this Chapter.

[* * *][14]

Section 33. Where intestate has left widow and lineal descendants, or widow and kindred only, or widow and no kindred.—Where the intestate has left a widow—

(a) if he has also left any lineal descendants, one-third of his property shall belong to his widow, and the remaining two thirds shall go to his lineal descendants, according to the rules hereinafter contained;

(b) save as provided by Section 33-A, if he has left no lineal descendant, but has left persons who are of kindred to him, one-half of his property shall belong to his widow, and the other half shall go to those who are of kindred to him, in the order and according to the rules hereinafter contained;

(c) if he has left none who are of kindred to him, the whole of his property shall belong to his widow.

This section apportions the shares between the wives and lineal descendants or widow and kindred. In the absence of any of these the widow takes the whole property of her intestate deceased husband.

The words 'lineal descendants' refer to those who are descendants in the direct line, and comprising of either sex traveling through them. Sons, daughters and grandsons and granddaughters through them would all be lineal descendants subject to legitimacy.[15] In *Sophia* vs. *David*[16], it was decided that the phrase 'lineal descendants' means descendants born in lawful wedlock only, and does not include descendants of a union which is not that of husband and wife, e.g., the offspring of a polygamous marriage which is void under the

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[14] ***Explanation*** **omitted by the Indian Succession (Amendment) Act, 2002, Section 2. Prior to omission it was as under: -**

Explanation.—A widow is not entitled to the provision hereto made for her if, by a valid contract made before her marriage, she has been excluded from the distributive share of her husband's estate.

[15] *Sophia Blin* vs. *Maria David*, 41 IC 542.

[16] 51 IC 542.

English law. Under the English law also, a son born in Scotland before wedlock, although legitimized by subsequent marriage of his parents, could not inherit any land in England from his father, neither could his father inherit land from him.[17]

The term 'widow' should include 'widows' as the singular should include the plural as such after the death of a man who married a wife under the Special Marriage Act and gets married second time in accordance with Hindu rites during the lifetime of his first wife the second marriage does not become void or illegal. Consequently, on the death of the man property devolves on both of the widows and his lineal descendants.[18]

If a Hindu becomes a convert to Christianity and dies leaving a Christian widow and a Hindu brother and sister the distribution will be according to this Act and the widow will take half and the brother and sister will take half equally (even though they were Hindus).[19] But if a Hindu marries a Hindu girl and then embraces Christianity, whereupon the wife refuses to live with him and renounces all claims on his estate, she is not entitled, after her husband's death, to her share as a widow to which, but for the renunciation, she would have been entitled under this section.[20]

The position under the Special Marriage Act is that succession to the property of any person professing the Hindu, Buddhist, Sikh or Jain religion that marries under this Act, and the property of the issue of such marriage is to be regulated by the provisions of the Succession Act. It is, therefore, obvious that the Hindu, Buddhist, Sikh or Jaina marriages are recognized by the Indian Law as valid marriages even for the purposes of the Succession Act. The learned Judge of the Burma Court was led to hold, as he did, because he considered that under the English Law a polygamist marriage is not considered to be a valid marriage. The Special Marriage Act, however, clearly indicates

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[17] *Re Don's Estate* (1857) 4 Drew 194.
[18] *Shephali Chatterjee & Ors* vs. *Kamala Banerjee & Ors,* AIR 1972 All 531.
[19] *Nepen Bala* vs. *Sita Kanta*, 15 CWN 158 (159).
[20] *Administrator-General* vs. *Anandachari,* 9 Mad 466 (472).

that Hindu, Buddhist, Sikh or Jaina marriages are to be recognized as valid for purposes of succession under the Succession Act.[21]

In *Maneka Gandhi* vs. *Indira Gandhi*[22], it was observed: -

> "We may at this stage take note of the pleadings filed by Smt. Indira Gandhi and the rejoinder the appellant had herself filed in which she had pleaded that late Shri Sanjay Gandhi was a member of a joint family, which concept is known only to Hindu Law and none other. By pleading a joint family it obviously meant that the appellant knew and regarded late Shri Sanjay Gandhi to be a member of a joint Hindu family. Having pleaded this is not open for her learned counsel to have contended that late Shri Sanjay Gandhi neither was a Parsi nor is it opens for the learned counsel to urge before us that he was a Parsi or that the finding to the contrary is not correct. Indeed, it is obviously that a person who ceases to be a Hindu family and Section 19 of the Special Marriage Act mentions this. If Section 21-A of the Special Marriage Act, 1954 is applicable, even that disability will not stand in the way of intestate succession to the estate of late Shri Sanjay Gandhi being governed by the rules of succession postulated by the Hindu Succession Act, 1956."

Under Succession Act, "kindred' means relation by blood through lawful wedlock. So relations by illegitimate mate birth are not recognized as kindreds under this Act. Though kindred is generally spoken as of as including all relation, the expression 'next of kin' does not include the relation by affinity, such as husband or wife or widow or mother-in-law or step mother of an intestate.[23]

In England, under the Intestate's Estate Act 1952 which came into force on 1 January 1953, it is enacted that on the death of a husband intestate, his whole estate will pass to the widow if he leaves no surviving issue, parent, brother or sister of the whole blood or issue of such brother or sister.

Section33-A. Special provision where intestate has left widow and no lineal descendants.—(1) Where the intestate has left a widow but no lineal

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[21] *Ganga Devi* vs. *Bijai Singh*, AIR 1952 All 214.
[22] AIR 1985 Del 114 at 117.
[23] *Emma Agnes Smithy* vs. *Thomas Massey*, ILR 30 Bom 500.

descendants and the net value of his property does not exceed five thousand rupees, the whole of his property shall belong to the widow.

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

(3) The provision for the widow made by this section shall be in addition and without prejudice to her interest and share in the residue of the estate of such intestate remaining after payment of the said sum of five thousand rupees with interest as aforesaid, and such residue shall be distributed in accordance with the provisions of Section 33 as if it were the whole of such intestate property.

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

(5) This section shall not apply,--

(a) to the property of,---

(i) any Indian Christian,

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

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

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

This section was inserted by Act 40 of 1926 in order to make a better provision for the widow when the estate is small. It is based on statutes 53 &

54, vict c 29. But this benefit is available only in the contingency when the husband dies without leaving any lineal descendant.

The benefit conferred is, first, that if the net value of the property of the husband on his dying intestate does not exceed rupees five thousand, the widow will be entitled to the whole of the property, if there be no lineal descendant. If the net value of the property exceeds rupees five thousand, the widow would be entitled to rupees five thousand and shall have a charge on the entire property to the extent of this amount and shall have a charge on the entire property to the extent of this amount and shall also be entitled to interest on that amount at 4 per cent per annum till payment is made, the interest being payable from the date of the death of the husband.

Secondly, in addition, she will retain her interest and share in the residue of the estate remaining after paying her the aforesaid amount of rupees five thousand with interest as aforesaid; her interest and share in residue, however, is to be determined in accordance with Section 33 of this Act, treating the residue as the whole of the intestate husband's property. That is, in accordance with clause (b) of Section 33, where the deceased leaves his widow and kindred but no lineal descendant, the widow will have half of the residue of the property. In the event of there being no kindred even, she will, of course, have the whole of the property.

In *Arulayi* vs. *Antonimuthu*,[24] it was observed as follows: -

> "The main question arising for decision in this second appeal is whether the provisions of Section 33-A (1) of the Act 39 of 1925 of the Succession Act apply to this case so as to benefit the appellant to the extent of property worth Rs. 5000. The appellant is the widow of the Arulandu Nadan who was an Indian Christian. He died in the year 1936 leaving his widow defendant 1, a sister the plaintiff, a brother defendant 2 and two daughters by a deceased sister, defendants 3 and 4. The property left by the deceased Arulandu Nadan is stated in the plaint to be worth Rs. 6,725-14-0. The plaintiff conceded that defendant 1 was entitled exclusively to Rs. 5,000 and interest thereon. Deducting this sum she claimed exclusively to Rs. 5,000 and interest thereon. Deducting this sum she claimed a sixth in the

[24] AIR 1945 Mad 47.

balance and that was mentioned to be Rs. 159-13-10/2/3. It was also stated that defendants 3 and 4 who were her sister's daughters were entitled to a like sum of Rs. 159-13-10-2/3. Defendant 2 was stated to be also entitled to a similar sum and the balance of the excess was stated to be the share of defendant 1, i.e., this is addition to the sum of Rs. 5,000 and interest thereon which was conceded in favour of defendant 1, defendants 3 and 4 submitted to a decree apparently content with the share allotted to them in the plaint. Defendant 1 did not contest the plaintiff's claim. Defendant 2, however, put forward a claim that he was entitled to a sixth not merely in her surplus remaining after setting apart Rs. 5,000 and interest for the sole benefit of defendant 1 but in the entire assets left by Arulandu Nadan. To this claim defendant 1 naturally took objection. The fight was between defendants 1 whose priority to the sum of Rs. 5,000 and the plaintiff and defendant 2 who did not concede this right conceded interest. The Trial Court held in favour of defendant 1 the widow and decreed Rs. 159-13-10-2/3 to each of the three sets of claimants, namely, the plaintiff defendant 2 and defendants 3 and 4. The plaintiff was content as she got what she wanted in her plaint, and being the amount on which she paid the court-fee. Defendants 3 and 4 did not file any appeal; they were also apparently content with what they got. Defendant 2, however, took the matter on appeal to the Appellant Court. The Court agreed with his contention and held that he was entitled to a sixth share in the entire property and did not uphold the exclusive right to Rs. 5,000 and interest put forward by defendant 1. While allowing the appeal, the Appellant Court varied the decree in favour of the plaintiff and defendants 3 and 4 by giving a sixth in the whole of the property to them. Defendant 1 has filed this appeal and urges that the correct view of the law is the one taken by the trial Court and that, at any rate, the appellate Court should not have varied the decree which had been passed in favour of the plaintiff and defendants 3 and 4."

Mr. Umamaheswaram urges that the plaintiff claimed in her plaint only Rs. 159 odd, paid court-fee only on that sum, did not ask for an amendment of the plaint even after defendant 1 appeared and put forward a larger claim and that after the decree of the trial Court, she did not prefer an appeal or even a memorandum of objections as she would be entitled to file as a respondent under Order XLI, Rule 22, Civil Procedure Code. Under that rule one respondent can file a memorandum of objections against another respondent and not merely against the appellant. That being so, it is said that there was no

valid ground for the appellant Court enhancing the amount granted to the plaintiff and for varying a decree in which she acquiesced. Section 33-A was introduced into the Succession Act by Act 40 of 1926. Arulandu Nadan died in 1936. So the amending Act applies to this case. Under Section 33-A (1) where the intestate has left a widow but no lineal descendants and the net value of this property does not exceed five thousand rupees, the whole of his property shall belong to his widow. Under clause (2), where the net value of the property exceeds the sum of five thousand rupees, the widow shall be entitled to five thousand rupees thereof and shall have a charge upon the whole of such property for such sum of the five thousand rupees, with interest thereon from the date of the death of the intestate at four *per cent per annum* payment. Clause (3) says:

> "The provision for the widow made by this section shall be in addition and without prejudice to her interest and share in the residue of the estate of such intestate remaining after payment of the said sum of five thousand rupees, with interest as aforesaid, and such residue shall be distributed in accordance with the provisions of Section 33 as if it, (residue) were the whole of such intestate's property."

Clause (4) is not material, clause (5), which has given rise to the trouble, runs as follows:

"This section shall not apply,--

(a) to the property of: (i) any Indian Christian; (ii) any child or grandchild of any male person who is or was at the time of his death an Indian Christian, or (iii) any person professing the Hindu, Buddhist, Sikh or Jaina religion the succession to whose property is, under Section 24, Special Marriage Act, 1872, regulated by the provisions of this Act;

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

The contention put forward by the appellant which found acceptance in the trial Court in that expression "unless the deceased died intestate in respect

of all his property" occurring in clause (b) is really part of clause (a) and governs the three classes which are mentioned in clause (a). According to the learned advocate, the section will not apply to the property of an Indian Christian unless the deceased died intestate in respect of his property; similarly as regards the persons mentioned in clause (ii) and (iii). If this is correct construction, then the provisions of clause (5), which provide that the section shall not apply to certain cases, will exclude only those cases of Indian Christians who die leaving a will in respect of all his properties. But if the Indian Christians died intestate in respect of all his property, then the provisions in clause (5) will come into operation and, therefore, the right of exclusion enacted in clause (5) would not apply.

This construction ignores the fact that the expression "unless the deceased dies intestate in respect of his property" is put in as a separate and independent clause and it is not made part of clause (a). If the Legislature intended that it should be a clause governing the three clauses of cases mentioned in clause (a), then it ought not to have been put as clause (a). If this construction is correct, then in the case of persons who are not Indian Christians or any persons mentioned in clause (ii) and (iii) of sub-clause (a) of clause (5), the section will apply whether the deceased died intestate in respect of all his property or whether he left a will disposing of some of his property. If an Anglo-Indian or an Englishman domiciled in India or any of the other persons to whom Chapter II would apply other than those mentioned in clauses (i), (ii) and (iii) of clause (5) (a) leaves a will which does not dispose of his property, and who is, therefore, to be deemed to be intestate with respect to the property of which there was no testamentary disposition which was capable of taking effect, the provisions of Section 33-A (1) would apply because clause (5) (b) only qualifies clause (5) (a) (i), (ii) and (iii) and is not an independent clause. In this connection the Preamble to the amending Act is very helpful. The Preamble states:

Whereas it is expedient to amend the provisions of Section 33, Indian Succession Act, 1925, so as to provide more liberally for the surviving widow

or husband where there are no lineal descendants in the case of a total intestacy. It is hereby enacted as follows:

As stated on page 40 of Maxwell's Interpretation of Statutes:

> "The preamble of a statute has been said to be a good means of finding out its meaning, and, as it were, a key to the understanding of it, and as it usually states, or professes to state, the general object and intention of the Legislature in passing the enactment, it may legitimately be consulted to solve any ambiguity, or to fix the meaning of words which may have more than one or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects opens to doubt."

Of course the preamble cannot be used in order to control the plain meaning of provisions of the enacting part. In this case, as the preamble states, the amending Act was passed to provide for a liberal provision in the case of the widow or the husband of the person where there are no lineal descendants "in the case of a total intestacy". For these reasons, it was held that the construction placed upon the preamble by the lower Appellate Court is correct and Court did not accept this argument of the learned Advocate for the appellant. As Mr. Venkatarama Iyer, the learned Advocate for the respondents has suggested, it may be that the Legislature thought that if a person set about making a will, he might well have made a provision if he wanted to benefit his widow and if he did not provide for his widow at all or sufficiently well, the Legislature might well have thought that was not a case in which the Legislature ought to interfere by way of giving this preferential right to the widow. In a case where a person dies intestate, the Legislature might make a provision for the widow, but where the husband has left a will not making a sufficient provision or any provision in favour of the widow, that is an indication that he does not want her to benefit and that might be the reason why the condition of a total intestacy is mentioned in the preamble of the amending Act.

The next argument is that the sister and the sister's children are not entitled to anything more than a sixth in the surplus, which alone the plaint

claimed. The plaintiff did not claim anything more than Rs. 159 odd and paid court-fee only on that sum. She got a decree for that sum and was content with it. Even after she got notice of the appeal filed by defendant 2, she did not chose to come up by way of an independent appeal or if the time for an independent appeal had elapsed by a memorandum of objections. Under these circumstances, the lower appellate court clearly erred in giving the plaintiff a decree for a sum in excess of that upon which she paid court-fee. Even in the case of defendants 3 and 4, they were content apparently with the sum that was stated in the plaint to belong to them. As in the case of the plaintiff, they did not file an appeal or memorandum of objection and there is no justification for the appellate Court to have interfered in their favour either.

Another contention was raised by the Advocate for the appellant that defendant 2 is precluded from setting up a claim to a half of the whole by virtue of certain proceedings that took place in O.S. No. 78 of 1934, District Munsif's Court, Sivaganga. That was a suit, which was filed by the deceased Arulandu Nadan who died during the pendency of that suit, and the brother applied in I.A. No. 232 of 1932 to be brought on record with the widow as a legal representative. The widow contested this claim and stated that the whole of the property was not worth more than three thousand rupees and that, therefore, she was entitled under Section 33-A, Succession Act, to the whole of the property. The Court evidently put a question to the counsel appearing for the widow whether in the event of the property being found ultimately to be worth more than Rs. 5,000, the brother would not have a share. That could not but be conceded and it was so done. Evidently in order to avoid a decision on the question, which has been, agitated in this Court for several hours, the District Munsif appointed a Commissioner to fix the valuation of the estate left by the deceased Arulandu Nadan. Evidently, the view was that in case the property was found to be worth more than Rs. 5,000, the brother would be admittedly entitled to a share and would, therefore, be entitled to come in as a legal representative along with the widow. The Commissioner found that the property was worth over Rs. 6,000. Objection was filed, the Court considered

the objection and found that the property was worth over Rs. 6,000 and it accordingly brought the brother as one of the legal representatives.

Section 34. Where intestate has left no widow and where he has left no kindred. —Where the intestate has left no widow, his property shall go to his lineal descendants or to those who are of kindred to him, not being lineal descendants according to the rules hereinafter contained and if he has left none who are of kindred to him, it shall go to the Government.

Sections 37-40 lay down the shares of the lineal descendants when there is no widow. If there are no lineal descendants, the property goes to those who are kindred to the deceased in the proportions laid down in sections 41-48. The word kindred used in this section excludes the lineal descendants, ie 'not being lineal descendants'.

The Government will take the whole only if there is no widow, no lineal descendants and no kindred. When the State takes the property under this section, if does so by virtue of its prerogative to take the property of one who has no heir at law. The reasons seems to be that the estate as the protector of every citizen during his life is entitled to take his property as a reward for its services where these are no heir to the deceased. When the State takes the property, it does so subject to the liabilities of the deceased.[25]

It is well settled that in a claim of escheat, the onus of proof lies heavily on the Government to prove the absence of any heir of the deceased owner anywhere in the world. Normally, the Court frowns on the estate being taken by escheat unless the essential conditions for escheat are fully satisfied. Before the plea of escheat can be entertained there must be a public notice given by the Government so that if there is any claimant anywhere in the country or for that matter in the world, he may come forward to contest the claim of the State.[26] In the instant case, where a property-owner has not been heard of for more than

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[25] *Secretary of State* vs. *Giridharilal*, ILR 54 All 226.
[26] *State of Bihar* vs. *Radha Krishna Singh*, AIR 1983 SC 684.

seven years and is therefore treated as having died a civil death or who in fact has died without leaving any heirs, his property shall revert to the State.[27]

"Escheat" literally means, "to revert to the State". This event takes place in default of heirs or devisees. Under the Old feudal system, if the person to whom the property was let out or who was in possession of that property, had died intestate or without leaving any heir, the property would revert to the landlord or Zamindar, but if there was no landlord or intermediary, the property would vest in the State or, during the British days, in the Crown (King). This principle was also judicially laid down in *A.G. of Ontario* vs. *Mercer*[28], as also in *St. Catherine's Co.* vs. *Queen*[29]. This was followed and applied in *A.G. for Quebec* vs. *A.G. for Canada*.[30]

This position is also reflected in the English Law, viz. Administration of Estates Act, 1925 (15 & 16 Geo. 5c. 23). According to that law, in default of any person taking an absolute interest under the provisions of the said Act, the Crown or the Duchy of Lancaster or the Duke of Cornwall for the 2time being, as the case may be, takes the residuary estate of the intestate as *bona vacantia* and in lieu of any right to escheat, and does so by statutory and not by prerogative right.[31]

The Indian Court may point out that property vesting in the State by the principle of escheat is not new and should not surprise the counsel for the appellants. Under the Act of 1853, made by the British Parliament (An Act to provide the Government of India, 1853 Statutes 16 and 17, Victoria, C.95, Section 27) it was specifically provided as under: -

> "All real and personal estate within the said territories escheating or lapsing for want of an heir or successor and all property within the said territories devolving, as *bona vacantia* for want of a rightful owner, shall as part of the revenues of India, belong to the East India Company in Trust for Her Majesty for the service of the Government of India."

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[27] *Sheo Nand* vs. *Deputy Director of Consolidation*, AIR 2000 SC 1141.
[28] (1883) 8 AC 767.
[29] 14 AC 46.
[30] (1921) 1 AC 401.
[31] Supra Note No. 13 at 406.

The above provision thus dealt with two situations, namely, (i) where there was no heir or successor; and (ii) where there was even no owner of the property. The first of the two situations was described in terms of "escheat or lapse" and the second in terms of "*bona vacantia*". This provision was retained in Section 54 of the Government of India Act, 1858. The Successor Act, namely, the Government of India Act, 1915 provided in Section 20 (3) (iii) that the Revenues of India received for His Majesty would include all movable or immovable property in British India escheating or lapsing for want of an heir or successor and all property in British India devolving as *bona vacantia* for want of a rightful owner. Thus, the dichotomy between escheat or lapse and *bona vacantia* was retained in this Act.

A similar provision was contained in Section 174 of the Government of India Act, 1935, which provided, *inter alia*, as under: -

> "Subject as hereinafter provided any property in India accruing to His Majesty by escheat or lapse or as *bona vacantia* for want of a rightful owner shall, if it is property situate in a province, vest in His Majesty."

Thus, in this Act also, it was provided that the property would vest by escheat or lapse or as *bona vacantia*.

Coming now to the Constitution of India, we find a similar provision contained in Article 296, which provides as under: -

> "Subject as hereinafter provided any property in the territory of India which, if this Constitution had not come into operation, would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as *bona vacantia* for want of a rightful owner, shall if it is property situate in a State vest in such State, and shall, in any other case, vest in the Union."

Legislative competence to enact legislation as to escheat is relatable to the Entries 35 and 44, in the State List and Entry 32 in the Union List set out in the Seventh Schedule to the Constitution.

Section 35. Rights of widower.—A husband surviving the wife has the same right in respect of her property, if she dies intestate, as a widow has in respect of her husband's property, if he dies intestate.

Under the English Law on the death of the either of the spouses, the surviving spouse, in the absence of any issue, parent, brother or sister of the whole blood; or the issue of a brother or sister of the whole blood, takes the whole residuary estate absolutely.[32]

Under the wordings of section 35, if the husband survives his wife he gets the same share in her property as laid down in sections 33 and 33A, i.e.:

(i) If there are lineal descendants he gets one-third and the remaining two-third will go to the lineal descendants.

(ii) If there are no lineal descendants but kindred, his share is one-half and the remaining one-half will go to the kindred.

(iii) If there are no kindred he takes the whole.

(iv) If the net value of the wife's estate does not exceed Rs 5,000/- and if the wife dies intestate leaving no lineal descendants then also the husband will get the whole property.

(v) If the net value of wife's estate exceeds Rs 5,000/- the share of the husband will be in terms of section 33A (3).

The husband can only succeed to half of the property of his deceased wife, in case she dies intestate leaving no lineal descendant. But in the absence of any next-of-kin the husband would be entitled to the whole of his wife's property as her heir.[33]

Right of the husband to separated wife's property on her dying intestate—If an Order under the Indian Divorce Act, 1869 is passed for judicial separation, whilst the separation continues, the wife is from the date of the Order considered to be an unmarried woman with respect to her property and in case she dies intestate her property becomes distributable as if her husband had

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[32] Intestates Estates Act, 1952 (15 & 16) Geo 6 & 1 Eliz 2c 64.

[33] *Ganta Daniyelu* vs. *Gunti Yesu*, AIR 1925 Mad 110.

been dead The statutory provision made in Section 24 of the Indian Divorce Act, makes a provision in this regard, which runs as follows: -

"In every case of judicial separation under this Act, the wife shall, from the date of the sentence, and whilst the separation continues, be considered as unmarried with respect to property of every description which she may acquire, or which may come to or devolve upon her. Such property may be disposed of by her in all respects as an unmarried woman, and on her decease, the same shall, in case she dies intestate, go as the same would have gone if her husband had been dead;

Provided that if any such wife again co-habit with her husband, all such property as she may be entitled to when such co-habitation takes place, shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate."

Section 36. Rules of distribution.—The rules for the distribution of the intestate's property (after deducting the widow's share, if he has left a widow) amongst his lineal descendants shall be those contained in sections 37 to 40.

The rules of distribution of the property of an intestate are laid down in sections 37 to 40 when there are lineal descendants and in sections 41 to 48 when there are no lineal descendants but kindred and the order of distribution is as follows:

(1) To deduct first the share of the husband or wife as the case may be.

(2) If there are lineal descendants to distribute the residue (or the whole if there is no husband or wife) amongst the lineal descendants in the shares and proportions laid down in sections 37 to 40.

According to clause (a) of Section 33, between the widow and the lineal descendants, the widow is entitled to one-third of the estate and two-thirds thereof is to be distributed to lineal descendants, and such distribution amongst the lineal descendants is to be in accordance with the provisions of sections 37 to 40. If there be no widow, the entire estate is to be distributed amongst the lineal descendants.

Section 37. Where intestate has left child or children only.—Where the intestate has left surviving him a child or children, but no more remote lineal descendants through a deceased child, the property shall belong to his surviving child, if there is only one, or shall be equally divided among all his surviving children.

In order to obviate the problem being faced by childless couple or by abandoned, orphaned or destitute children whom persons are willing to adopt, a comprehensive legislation should be made. However, till such time the legislation was enacted, the problem regarding succession to the property was not insurmountable. A decision to adopt the child was not taken on impulse or in hurry but after cool thinking and deliberations. The selection of a child to be adopted also takes time. Those who want to give their property to the adoptive child can open a bank account or acquired property in his name or make him a nominee in deposits or securities or execute a gift deed or leave a will in his favour. They can take recourse to any mode permissible in law to ensure that the property passes to the adopted child. Assuming that E.E.Datt had taken the appellant in adoption, he could have easily made a provision for him in the will, which he had executed in favour of his wife Maud Flora Datt but he chose not to do so.

Whether the adopted son of an Indian Christian is entitled to succeed to the estate of his adoptive parents in the event of his adoptive father or mother, as the case may be, dying intestate. Section 5 (1) of the Act provides that succession to the immovable property in India of person deceased shall be regulated by the law of India wherever such person may have had his domicile at the time of his death. Part V of the Act contains, "the Law of India" which governs succession to the immovable property in all cases of intestacy. Section 29, which occurs in Part V of the Act, visualizes that except in relation to property of any Hindu, Mohammadan, Buddhist, Sikh or Jain and save as provided by "any other law for the time being in force". The provisions of Chapter V shall constitute "the New of India" in all cases of intestacy.

Section 37 of the Act provides that where the intestate has left surviving him a child or children but no more remote lineal descendant through a deceased child, the property shall belong to his surviving child, if there was only one, or shall be equally divided among all his surviving children. Question that arises for consideration was whether adopted son of an Indian Christian of Hindu origin was entitled to succeed to the estate of his adoptive father or adoptive mother, as the case may be, dying intestate. For the plaintiff-respondent it has been vehemently contended that adoptive son does not come within the purview of lineal consanguinity as the term is defined in section 25 of the Act.

The words 'kindred' and 'consanguinity' used in section 94 of the Act mean the connection of relation of persons descended from the same stock or common ancestor. The word 'son' in the case of any one whose 'personal law' permits adoption shall include an 'adopted son' as provided in section 3 (57) of the General Clauses Act, 1904. The definition of word 'son' as given in section 3 (57) of the General Clauses Act, 1904 will hold good 'unless there is anything repugnant to the subject or context'. The words 'personal law' occurring in section 3 (57) of the General Clauses Act, 1904 in Court's opinion mean, the personal law applicable to (sic) parties at the time of adoption and it may be any personal law applicable to the family including customary law, if any, permitting adoption of children. It may be the law by religion as well. The religion to which the parties belong is, admittedly, Christianity. As discussed above, no tenant of Christianity interdirecting adoption by an Indian Christian of Hindu origin was brought to our notice and on the contrary, various legislative enactments world over as also Declarations made at various International Conventions give legal recognition to adoption. An adopted child of a Christian couple of Hindu origin shall be treated in law as if he has been born in the wedlock of his or her, as the case may be, adoptive parents and for all purposes an adopted child shall be treated as if he/she was not the child of any other person other than the adopters or adopter. There is nothing in the philosophy any ethics of Christianity which might be construed as prohibiting

adoption and what was not expressly or impliedly prohibited by legislature or any tenant of Christianity shall be deemed to be permitted by law and must be accorded recognition by Courts. The life style of Indian Christians is bound to be a blend of the old and the new; the old cannot be completely erased and obliterated so as to effect a complete severance of the old from the new. The cultural milieu and ethics, which dominated the ancestors of the parties, must be borne in mind while appraising the evidence on a question as to whether the parties are governed by the old customary law on a subject not specifically covered by legislation. In case, therefore, adoption was proved and found to be valid, the adopted child will come within the purview of 'lineal consanguinity' in relation to the deceased. The single Judge, in opinion of the Court was not right in his view that the 'lineal consanguinity' contemplated by section 29 of the Act is the real consanguinity and not the notional or fictional consanguinity and that the adopted son continues to be the descendent in the direct line of his natural father. In any case adoption being a facet of right to life, if established, will make the adopted child as a child born in the wedlock of adoptive parents. Therefore, adopted son of an Indian Christian of Hindu origin will come within the purview of 'lineal descendant' or 'lineal consanguinity' shall be entitled, under section 37 of the Indian Succession Act, 1925 to inherit the properties of his adoptive parents dying intestate.[34]

In *Valsamma Paul (Mrs.)* vs. *Cochin University*,[35] it has been held that institutions of marriage and adoption are two important social institutions through which secularism would find its fruitful and solid base for an egalitarian social order under the Constitution and accordingly its recognition must be upheld as valid for social mobility and integration. In *Nabu Jan* vs. *Paushimoni*[36], it has held that if custom is 'shown to be of ancient establishment' and its other requisites are also established, it will in itself be created as being of the force of law and "then it would follow on the plain English of the section that the words that 'any other law for the time being in

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[34] *Ajit Datt* vs. *Ethel Walters*, AIR 2001 All 109 at 128, 132-33.
[35] (1996) 3 SCC 545 : AIR 1996 SC 1011.

force' of section 29 of the Indian Succession Act should be read as saving of a customary law for the Garos". Accordingly, it was held that prohibited degrees mentioned in section 19 of the Indian Divorce Act, 1869 did not necessarily mean the degrees prohibited by Law of England.

In *Charlotte Abraham* vs. *Francis Abraham*[37], it has held, *inter alia*, than upon conversion of a Hindu to Christianity, Hindu Law ceases to have any obligatory force of law upon convert and he may renounce his old law as he has renounced his old religion or if he thinks fit he may abide by old law; that the profession of Christianity releases the convert from the trammels of the Hindu law, but it does not of necessity involve any change or right or relations of the convert in the matters with which Christianity has no concern such as his rights and interests in, and his powers over, property; that the convert, though not bound as to such matters, either by the Hindu law or by any other positive law, may be his course of conduct after his conversion have shown by what law he intended to be governed as to these matters; and that he may have done so either by attaching himself to a class which as to these matters has adopted and acted upon some particular law or by having himself observed some family usage or custom and nothing can surely be more just than the rights and interest in his property and his power over it should be governed by the law which he has adopted, or the rules which he has observed.

In *Anthonyswamy* vs. *M.R. Chinaswamy*[38], a question arose for consideration before the Supreme Court as to whether Mitakshara School of Hindu law, after conversion to Christianity, will be governed as to inheritance and succession by the law of community. The Supreme Court has held that son of a member of such community gets by birth an interest in ancestral property owned by the father and, therefore, the doctrine of pious obligation according to Supreme Court being in consonance with justice, equity and good conscience and being not opposed to any principle of Christianity would continue to govern the parties therein. The Vanniya Tamil Christians of Chittur

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[36] 12 ILR 36 : (1948) 54 CWN 2 DR 14.
[37] 1863 (4) Moores Ind. Appeals 194.

Taluk, it was held would continue to be governed as a matter of custom by Mitakshara School of Hindu Law. It may be opined that this decision supports the view that rights inherent in man by birth are not lost on his conversion to another religion.

In *Kailash Sonkar* vs. *Smt. Maya Devi*[39], question arose as to whether old caste of a barber or his progress who belongs to scheduled caste or tribe but had left Hinduism and embraced Christianity or Islam or any other religion would revive on his progeny's recognition to Hinduism. The Supreme Court held that it would depend upon the genuine intention of re-convert to adjure his new religion and completely disassociate himself from it. It is, however, matter of pleading and proof as to whether it has been intended by the convert to follow even after conversion, the personal law and customs applicable to him at the time of conversion. If on the basis of proper pleading and proof, it was established in a given case the convert had to be intended and had been practicing his personal law. Customs and usage even after conversion, he and his progeny would continue to be governed by the same provided that these are not inconsistent with any rule or tenet of the form of Christianity he has embraced or any statutory enactment.

In *Ranbir Karan Singh* vs. *Jogindra Chandra Bhattacharji*[40] the view that bringing up a child even within intention of giving one's property to that child and loosely describing as having adopted child do not constitute adoption in the technical legal sense as understood in Hindu Law and that succession is governed by the Succession Act and not by Rules of Hindu Law applicable to community to which he belonged before conversion was not in consonance with the laid down by the Privy Council holding that though the profession of Christianity releases the convert from the trammels of the Hindu Law, but it does not of necessity involve any change of rights or relations of the convert in the matters with which Christianity has no concern, such as his rights and interests, in, and his powers over, property which finds its approval in

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[38] AIR 1970 SC 223.
[39] AIR 1984 SC 600.

Anthonyswamy vs. *M.R. Chinaswamy*[41], wherefrom the principle deducible was that is it had been intended by a Hindu converted to Christianity to be governed by the law he was governed before and such law had in fact been followed in continuity conversion he would continue to be governed by such law even after embracing Christianity on matters not specifically covered by any Statutory law or tenet or rule of Christianity one is professing. The decision in *Ranbir Karan Singh* vs. *Jogindra Chandra Bhattacharji*[42], therefore, was not a good law. The learned Single Judge was not right in taking a contrary view on the issue, *Nabu Jan* and *Anthonyswamy* were, perhaps, not perceived and appreciated in correct perspective. The Privy Council decision in *Kamawati*'s cases[43], was unavailing for the reason that, the effect of the exclusionary clause any other law for the time being in force occurring in Section 2 of the Indian Succession Act, 1865 was not examined. Exclusionary clause in Section 29 (2) is clear and unambiguous. It cannot be ignored merely because "in each case an enquiry might have to be entered upon as to whether a deceased subject to the Crown wished or by his acts compelled that the law of the land should not apply to his case". This reasoning in *Kamawati* was fallacious. Section 29 (2) which excludes the applicability of the Act if otherwise was provided "by any law for the time being in force" was as much integral to the Act as any other Section in Part V of the Act. Where the language of the Statute was clear, the results of construction do not matter "even if they may be strange or surprising, unreasonable or unjust or oppressive".[44]

Section 38 Where intestate has left no child, but grandchild or grandchildren.—Where the intestate has not left surviving him any child, but has left a grandchild or grandchildren and no more remote descendants through a deceased grandchild, the property shall belong to his surviving grandchild if

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[40] AIR 1940 All 134.
[41] Supra Note. 38.
[42] Supra Note 40.
[43] AIR 1922 PC 14.
[44] *Ajit Datt* vs. *Ethel Walters*, AIR 2001 All 109 at 133, 134, 135. See also Principle of Statutory Interpretation by G.P.Singh, 6th Edition at 33.

there is only one, or shall be equally divided among all his surviving grandchildren.

Illustrations

(i) A has three children, and no more, John, Mary and Henry. They all die before the father, John, leaving two children, Mary three and Henry four. Afterwards A dies intestate, leaving those nine grandchildren and no descendant of any deceased grandchild. Each of his grandchildren will have one-ninth.

(ii) But if Henry has died, leaving no child, then the whole is equally divided between the intestate's five grandchildren the children of John and Mary.

This section is similar to section 31 of the Old Act. The grandchildren, according to this section, take per capita in their own right and not through parents. When there are grandsons and granddaughters only, ie all lineal descendants of the second degree, they take equally. But under the English law, it has been held in Ross's Trust[45] that such descendants take not per capita but per stripes.

Section 39. Where intestate has left only great grandchildren or remoter lineal descendants.—In like manner the property shall go to the surviving lineal descendants who are nearest in degree to the intestate, where they are all in the degree of great grandchildren to him, or are all in a more remote degree.

The section deals with cases where intestate left only lineal descendants of the same degree and according to rule of Succession they take equally or per capita. When there are great-grandchildren or other remote lineal descendants all in the same degree only, they share equally both males and females.

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[45] LR 13 Eq 286.

Section 40. Where intestate leaves lineal descendants not all in same degree of kindred to him, and those through whom the more remote are descended are dead.—(1) If the intestate has left lineal descendants who do not all stand in the same degree of kindred to him, and the persons through whom the more remote are descended from him are dead, the property shall be divided into such a number of equal shares as may correspond with the number of the lineal descendants of the intestate who either stood in the nearest degree of kindred to him at his decease or having been of the like degree of kindred to him, died before him, leaving lineal descendants who survived him.

(2) One of such shares shall be allotted to each of the lineal descendants who stood in the nearest degree of kindred to the intestate at his deceased; and one of such shares shall be allotted in respect of each of such deceased lineal descendants; and the share allotted in respect of each of such deceased lineal descendants shall belong to his surviving child or children or more remote lineal descendants, as the case may be; such surviving child or children or more remote legal descendants always taking the share which his or their parent or parents would have been entitled to respectively, if such parent or parents had survived the intestate.

Illustrations

(i) A had the three children, John, Mary and Henry; John died, leaving four children, and Mary died, leaving one, and Henry alone survived the father. On the death of A, intestate, one-third is allotted to Henry, one-third to John's four children, and the remaining one-third to Mary's one child.

(ii) A left no child, but left eight grandchildren, and two children of a deceased grandchild. The property is divided into nine parts, one of which is allotted to each grandchild, and the remaining one-ninth is equally divided between the two great grandchildren.

(iii) A has three children, John, Mary and Henry; John dies leaving four children, and one of John's children dies leaving two children. Mary dies leaving one child. A afterwards dies intestate. One-third of his property is allotted to Henry, one-third to Mary's child, and one-third is divided into four parts, one of which is allotted to each of John's three surviving children, and the remaining part is equally divided between John's two grandchildren.

(iv) A has two children, and no more: John and Mary. John dies before his father leaving his wife pregnant. Then A dies leaving Mary surviving him and in due time a child of John is born. A's property is to be equally divided between Mary and the posthumous child.

This section in effect lays down the rule of succession by stirps. That is, where the deceased had four sons, out of which one was living, and the other three had predeceased him, leaving grandsons and great grandsons to the deceased, yet the division would be on the basis of four sons, that is four equal shares, the living son taking one share and the respective shares of the predeceased sons would be distributed amongst their sons and grandsons according to the number of sons of grandsons left by them, that is, the shares of individual predeceased sons would be distributed to the descendants of each equally in proportion to the number of sons or grandsons left by each.

The rule in England was different. Quoting the case of *Re Ross's Trust* (1867), Henderson observes that where the intestate left no children but grandchildren and great-grandchildren, they only take per stripes, the share being calculated with reference to number of children and not with reference to number of grandchildren.[46]

It may also be noted here that in construing a will, where the testator desires his property to be divided amongst his children and their lineal descendants the general rule is to take children as the stock and make division

[46] LR 13 Eq 286 quoted at p. 47 of Henderson.

accordingly. In *Sidey* vs. *Perpetual Trustees Estates Co Ltd*[47], the will contained the clause 'from and after the death of the last survivor of my four children I give devise and bequeath the whole of my residuary estate to and amongst my then surviving descendants in such manner that the same shall be divisible per stirpes among the children, grandchildren and remoter issue of such of my children as shall have left issue.' The testator left four children one of whom died without issue. It was held that the children of the testator formed the stocks of descent and the estate became divisible into three equal parts one of which should go per stripes to the issue of each of the testator's three children who left issue.

Section 41. Rules of distribution where intestate has left no lineal descendants.—Where an intestate has left no lineal descendants, the rules for the distribution of his property (after deducting the widow's share, if he has left a widow) shall be those contained in sections 42 to 48.

Sections 42 to 48 lay down the rules of distribution of the property of an intestate where the intestate had died without leaving children or remoter lineal descendants and the rules of distribution are as under in order of priority.

(1)	Widow 1/2	Father ½	(Section 42)
(2)	Widow 1/2	Mother, Brothers and Sisters 1/2 equally	(Section 43)
(3)	Widow 1/2	Mother, Brothers, Sisters and Children of any deceased Brother or Sister 1/2 equally per stirpes	(Section 44)
(4)	Widow 1/2	Mother and Children of Brothers and Sisters 1/2 equally per stirpes	(Section 45)
(5)	Widow 1/2	Mother 1/2	(Section 46)
(6)	Widow	Brothers and Sisters and Children of predeceased	(Section

[47] (1944) WN 189.

	1/2	Brothers and Sisters 1/2 equally per stirpes	47)
(7)	Widow 1/2	Remote kindred 1/2 (in the nearest degree)	(Section 48)

Section 42. Where intestate's father living.—If the intestate's father living, he shall succeed to the property.

Father's Share—

(1) One-half when the intestate leaves a widow.

(2) Whole when the intestate has left no widow.

Under this section, a Hindu father can succeed to the property of his son who had become a convert to Christianity, because the prohibition contained in section 29 applies only to the property of a Hindu, and there is nothing in this Act to prevent a Hindu from succeeding to the property of a Christian.[48] Where a Christian woman died leaving no lineal descendants but kindred who was none else than her father and a Hindu at that the father was entitled to a share of the assets of the deceased. The religion of the claimant is immaterial but the deceased must have been a Christian at the time of his or her death.[49]

Section 43. Where intestate's father dead, but his mother, brothers and sisters living.—If the intestate's father is dead, but the intestate's mother is living and there are also brothers or sisters of the intestate living, and there is no child living of any deceased brother or sister, the mother and each living brother or sister shall succeed to the property in equal shares.

Illustrations

A dies intestate, survived by his mother and two brothers of the full blood John and Henry and a sister Mary, who is the daughter of his mother but not of his father. The mother takes one-fourth, each brother takes one-fourth and Mary, the sister of half blood takes one fourth.

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[48] *Administrator-General* vs. *Anandachari* 9 Mad 466 (471, 472).

[49] *Trevan* vs. Mathukutty, AIR 1990 NOC 47 (Ker).

Mother shares after the father if there are no lineal descendants. Amongst Parsis the mother shares with the father equally, (section 55). The share of the mother is ascertained as folloes: Widow's half share is to be deducted first if there is a widow of the intestate. The other half is then divided amongst the mother and brothers and sisters per capita equally when there are brothers and sisters only. The brothers and sisters of the intestate whether of full blood or of half blood are equally entitled, (illustration). If there are no brothers or sisters or the children of brothers or sisters, the mother takes the whole (section 46).

A grandfather and a grandmother of the intestate, although they are in the second degree of kindred like the brothers and sisters, are excluded from the distribution, so long as the brothers and sisters are the sharers.

Examples

(1)	Widow 1/2	One brother 1/4	Two children of a deceased sister 1/4 (equally)	Grandfather (takes nothing)
(2)	Widow 1/2	Brother's grandson (takes nothing, grandfather is of nearer degree)		Grandfather 1/2

A stepmother is not a kindred of the intestate and the word 'mother' does not include a stepmother.

Section 44. Where intestate's father dead and his mother, a brother or sister, and children of any deceased brother or sister, living.—If the intestate's father is dead, but the intestate's mother is living, and if any brother or sister and the child or children of any brother or sister who may have died in the intestate's lifetime are also living, then the mother and each living brother or sister, and the living child or children of each deceased brother or sister, shall be entitled to the property in equal shares, such children (if more than

one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Illustration

A, the intestate, leaves his mother, his brothers John and Henry, and also one child of a deceased sister, Mary, and two children of George, a deceased brother of the half blood who was the son of his father but not of his mother. The mother takes one-fifth, John and Henry each take one-fifth, the child of Mary takes one-fifth and the two children of George divide the remaining one-fifth equally between them.

This section deals with the rule of distribution where the intestate dies leaving mother, a brother of sister and nephews or nieces or both. As a general rule the nephews and nieces do not take as representatives of deceased parents unless a brother or sister of the intestate survives him.

Mother, brother or sister and a child or children of any predeceased brother or sister share equally per stirpes. The representation is to be carried up to the children of brothers and sisters and not beyond. If there are no children of brothers and sisters the rule is to count the number of degree of relationship.

Section 45. Where intestate's father dead and his mother and children of any deceased brother or sister living.—If the intestate's father is dead, but the intestate's mother is living, and the brothers and sisters are all dead, but all or any of them have left children who survived the intestate, the mother and the child or children of each deceased brother or sister shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.

Illustration

A, the intestate, leaves no brother or sister, but leaves his mother and one child of a deceased sister, Mary, and two children of a deceased brother, George. The mother takes one-third, the child of Mary takes one-third, and the children of George divide the remaining one-third equally between them.

According to the rules of distribution under the section where the intestate leaves only mother and nephews and nieces, such nephews and nieces take per stirpes.

If there are no lineal descendants, nor father nor brothers nor sisters but mother and children of brothers and sisters (whether of full blood or half blood) the division is equal, ie one share goes to mother and one share to each brother and sister who have predeceased the intestate leaving a child or children him or her surviving.

Example

Mother	Brother's son	Sister's son	Grandfather
1/3	1/3	1/3	(takes nothing)

Section 46. Where intestate's father dead, but his mother living and no brother, sister, nephew or niece.—If the intestate's father is dead, but the intestate's mother is living, and there is neither brother, nor sister, nor child of any brother or sister of the intestate, the property shall belong to the mother.

The section virtually denotes that the presentation should not be extended beyond the children of brothers and sisters of the intestate. But where the intestate leaves no issue nor any brothers or sisters or children of such brothers and sisters, it is the mother who takes as next-of-kin subject to the claim of widow, if any.

Examples

(1)	Widow 1/2	Brother's grandson, (takes nothing, the representation is not to be carried beyond brother's and sister's children)	Mother 1/2
(2)	Mother, (whole)	Grandfather, grandmother (takes nothing)	

Section 47. Where intestate has left neither lineal descendant nor father, nor mother.—Where the intestate has left neither lineal descendant, nor father, nor mother, the property shall be divided equally between his brothers and

sisters and the child or children of such of them as may have died before him such children (if more than one) taking in equal shares only the share which their respective parents would have taken if living at the intestate's death.

The present section also follows the English rule where brothers and sisters who rank in the same degree of kindred with the grandparents are preferred to the later.

If there are neither descendants, nor parents, but a grandparent and brothers and sisters and a child or children of any predeceased brother or sister, the brothers or sisters take the whole in priority to the grandparent, the child or children of any predeceased brother or sister taking equally the share of their respective parents. In a case where the competing claim was between a sister of the deceased and a person claiming to be an adopted son, the former was preferred.[50]

Section 48. Where intestate has left neither lineal descendant, nor parent, nor brother, nor sister.—Where the intestate has left neither lineal descendant, nor parent, nor brother, nor sister, his property shall be divided equally among those of his relatives who are in the nearest degree of kindred to him.

Illustration

(i) A, the intestate, has left a grandfather, and a grandmother and no other relative standing in the same or a nearer degree of kindred to him. They, being in the second degree, will be entitled to the property in equal shares, exclusive of any uncle or aunt of the intestate, uncles and aunts being only in the third degree.

(ii) A, the intestate, has left a great-grandfather, or a great-grandmother, and uncles and aunts, and no other relative standing in the same or a nearer degree of kindred to him. All of these being in the third degree will take equal shares.

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[50] *Rabi* vs. *Josh Leela*, (2000) 3 Mad LW 409.

(iii) A, the intestate, left a great-grandfather, and uncle and a nephew, but no relative standing in a nearer degree of kindred to him. All of these being in the third degree will take equal shares.

(iv) Ten children of one brother or sister of the intestate, and one child of another brother or sister of the intestate, constitute the class of relatives of the nearest degree or kindred to him. They will each take one-eleventh of the property.

This section provides for cases where the deceased had left neither lineal descendants nor parents, nor brother nor sister such as are mentioned in the preceding sections. In such a case, the question of nearness or remoteness of the degree of kindred becomes important, as the estate would go to them who are in the nearest degree of kindred. The illustration to the section indicates the degree in which the relations stand to the deceased as his kindred.

The representation is to be carried up to the brothers and sisters and not beyond. If there are neither lineal descendants, nor parents, nor brother, nor sister, then, subject to the right of the widow, the estate goes to the next of kin who are in the nearest degree of kindred. The degree is ascertained by computing up from the intestate to the common ancestor and then down to the claimant, all the next of kin of equal degree sharing inter se. It should also be noted that although when there are brothers or sisters of the intestate and the children of any deceased brother or sister, such children take per stirpes and not per capita, still when there are no brothers or sisters but only children of brothers or sisters, such children take per capita and not per stirpes see illustration (iv).

Examples

(1)	Widow 1/2	Grandfather 1/4	Grandmother 1/4	Uncle (taking nothing being of third degree)
(2)	Great-	Uncle	Nephew	(All are of the third

	grandfather 1/3	1/3	1/3	degree)
(3)	Widow 1/2	Great-grandfather 1/4		Uncle 1/4

Great-grandfather and uncle both share as they are of the third degree.

None of the provisions of sections 41 to 48 of the Indian Succession Act, 1925 contain any limitation based on religion. In fact, the Succession Act does not concern itself with the religion of the claimant for succession although the religion of the deceased plays an important role, and indeed, it is almost the determining factor in the matter of applicability or otherwise of the rule of succession laid down in the Act to a particular case and that this distinction in the nature of character of the relevant estate depending upon the religion of the deceased owner runs through the Act. But stress is now where laid in the matter of its devolution upon the religion of the heir or the inheritor and that the religion of the claimant as distinguished from the religion of the deceased owner is entirely irrelevant for the purpose. A Christian died intestate and his nearest heir being Hindu inherits the estate of the deceased. On the other hand, a careful reading of the various provisions of the Act shows that succession or a right to succeed to the property is dependent on relationship and consanguinity.[51] It was therein held that a Hindu father was entitled to succeed to his son who accepted Christianity and died as a Christian.[52]

In the case of *Benoy Kumar Mondal* vs. *Panchanon Majumdar*[53], a Division Bench of Calcutta High Court held that a relation, if he is, as a nearest consanguine or blood relation is entitled to letters of administration to the estate of a Christian deceased, even though he is a Hindu and Christian deceased, even though he is a Hindu and it was therein observed that the Succession Act does not concern itself with the religion of the claimant for succession although

[51] ***Siril Christian*** vs. *Monga Mura*, AIR 1964 Assam 58 at 59, 60.
[52] ***Adminiatrator-General of Madras*** vs. *Anandachari*, ILR 9 Mad 466.

the religion of the deceased plays an important role and indeed, it is almost the determining factor, in the matter of applicability or otherwise of the rules of succession, laid down in the Act, to a particular case, and that this distinction in the nature of character of the relevant estate, depending upon the religion of the deceased owner, runs throughout the Act, but stress is nowhere laid in the matter of its devolution upon the religion of the heir or the inheritor, and that the religion of the claimant as distinguished from the religion of the deceased owner is entirely irrelevant for the purpose.

Section 49. Children's Advancements not brought into hotchpot.—Where a distributive share in the property of a person who has died intestate is claimed by a child, or any descendant of a child of such person, no money or other property which the intestate, may, during his life, have paid, given or settled to, or for the advancement of the child by whom or by whose descendant the claim is made shall be taken into account in estimating such distributive share.

An advancement clause in a settlement or will is a provision authorizing the trustees, with the consent of the tenant for life, to pay by anticipation a limited portion of the share to which a remainder man will ultimately be entitled for his benefit or advancement in life.[54] This section seems to exclude the application of English doctrine of advancement. According to the English statute of distribution in case of intestacy, if a child has received payments by way of advances, he must bring that amount into hotchpot before he can get his distinctive share in the estate. Here by this section a child is not required to do so: he can retain the benefits as well as claim a share in the estate.

In India apart from this section, section 82 of the Indian Trust Act enacts in respect of property transferred to another person in whose favour there is no presumption of advancement that the transferee must hold the property for the benefit of the person paying the consideration money. There is, therefore, no presumption of advancement in case of persons of Indian domicile. But in case

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[53] AIR 1956 Cal 177.

[54] Wharton's Law Lexicon, 1976 Reprint Edition at 33.

of persons of British paternity residing in India the rule of English law is made applicable, and is to be presumed.[55] Even in the case of Anglo-Indians, ie persons of mixed European and Asiatic descent in India, such persons are governed by the principles applicable to persons of English descent resident in India and the presumption of intended advancement is allowed to be raised, but this presumption may be rebutted by evidence showing the real nature of transaction.[56]

5.2. SUCCESSION UNDER THE TRAVANCORE CHRISTIAN SUCCESSION ACT 1916 THE COCHIN CHRISTIAN SUCCESSION ACT 1921

The Indian Succession Act, 1925, governs the Christians in India, with regard to the matters of succession. But the Travancore Christian Succession Act and the Cochin Christian Succession Act, being the law for the time being in force, in the respective localities are saved by section 29 (2) of the Indian Succession Act, 1925. Therefore, in the matter of intestate succession their own succession laws govern the Christians of Travancore and Cochin. Intestate succession among Travancore-Cochin Christians has been a subject of public debate ever since the decision of the Supreme Court in *Mary Roy* vs. *State of Kerala*[57] case. It appears that the decision has created considerable confusion not only among the members of the Christian community in Kerala, but also among the other community also. Till the aforesaid decision of the Hon'ble Supreme Court, the provisions of the Travancore Christian Succession Act, 1916, governed the Travancore Christians and the provisions of the Cochin Christian Succession Act, 1921, governed the Cochin Christians. 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.

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[55] *Alice Georgeian* vs. *Suvna Berthar Bertha*, AIR 1930 Oudh 441.
[56] *Saigon* vs. *Saigon*, AIR 1933 Nag 337.
[57] AIR 1986 SC 1011: 2 SCC 209.

The question that arose, before the Hon'ble Supreme Court, for consideration was whether the provisions of the Travancore Christian Succession Act were *ultra vi*res the Constitution. Another related question that was raised before the Court was as to the impact of the Part B States (Laws) Act, 1951, on the Travancore Act. The Court decided the case holding that the Part B States (Laws) Act excluded the operation of the Travancore Act and thereby obviates the need for examining the first question of the constitutionality of the Act. It took the view that by virtue of Section 6[58] of the Part B States (Laws) Act, 1951 and the inclusion of the Indian Succession Act, 1925 in the Schedule to that Act, the Travancore Christian Succession Act stood repealed from the appointed day under the Part B States (Laws) Act, i.e. April 1, 1951. Hence, it reasoned, 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[59]. Though these Courts did not expressly give retrospective effect to the judgments, the mere declaration that the Travancore and Cochin Acts stood repealed on April 1, 1951, gave these judgments retrospective effect overturning the then existing law and practice among the Travancore-Cochin Christians.

The Christians of Travancore and Cochin conducted their property transactions in the belief that the provisions of the Acts of 1916 and 1921 governed them, respectively. The Travancore-Cochin High Court in 1951[60] and Madras High Court in 1978[61] affirmed and reaffirmed that the Travancore Act still remained in force, in spite of the Part B States (Laws) Act, 1951. When the Hon'ble Supreme Court declared in 1986 that that was not the law, the property

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[58] Section 6 lays down: "Repeals and Savings- If immediately before the appointed day, there is in force in any Part B State any law corresponding to any of the Acts or Ordinances now extended to that State, that law shall, save as otherwise expressly provided in the Act, stand repealed."

[59] *V.M.Mathew* vs. *Eliswa*, 1988 (1) KLT 312 (DB).

[60] *Kurian Augusthy* vs. *Devassy Aley*, AIR 1957 TC 1.

[61] *D. Chelliah* vs. *G. Lalitha Bai*, AIR 1978 Mad 66.

transactions of Christians in both testamentary and intestate happen to be illegal.

These decisions have had another impact. 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 malafide 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.

An argument has been advanced that there are not many cases in the matter of Christian intestate succession consequent on the decision of the Supreme Court, and that the law of limitation would put an end to all surviving claims and the matter is only to be ignored, as now the Christian community is not opposed to giving equal share to women in the matter of intestate succession. This complacent conclusion is not sustainable as evidenced by case law. The High Court of Kerala upheld the claim of the woman for share in the property of her father, though she was married in the year 1950 and intestacy occurred in the year 1944. The matter came up for consideration before the High Court in 1988[62]. In another case, the High Court upheld the right of the woman for *streedhanom* alone[63]. There seems to be no consistency in the

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[62] *Joseph* vs. *Mary*, 1988 (2) KLT 27 (DB).
[63] *Sosa* vs. *Varghese*, 1993 (2) KLT 798.

approach of the Court in these matters. The problems created by Mary Roy[64] are thus still alive. There are instances of misuse too. In a recent 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 [65]. In short, there are difficulties arising out of the decision in Mary Roy, as limitation cannot be effectively established in many cases.

In this context, in order to have a better appreciation, it may be appropriate to look into the historical background of the development of the law of succession among Christians of the former Princely States of Travancore and Cochin. The native Christians[66] of Travancore and Cochin followed the Hindu law in matters of succession. Christian women, whether married or not, were excluded from inheritance, even if they had no brothers. Thus, the parent's property passed over to males belonging to a very remote degree of consanguinity and even in the transverse line. This is evident from the decrees of the Synod of Diamper, 1599[67]. The Synod by its 20th decree, declared this mode of succession to be contrary to natural equity and wholly unlawful and decreed that the property must be equally distributed among sons and daughters. Disobedience to this decree was declared to be a sin and whoever refused to observe this law or to make restitution was to be

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[64] Supra No. 57.

[65] Judgment, dated October 28, 1993 in C.M.A. No. 169 of 1993, of the High Court of Kerala.

[66] The native Christians of Travancore and Cochin are also called Syrian Christians or St. Thomas Christians.

[67] The Syrian Christians of Travancore, Cochin and Malabar were under the ecclesiastical control of the Bishops sent from Mesopotamia. On the death of Mar Abraham the Syrian Bishop of the sea of Angamali in 1597, the Archbishop of Goa, Menezes, managed to take control over the Syrian Christians and brought them under the direct control of the Pope, using Portugese support, and he burnt all the collection of books and documents relating to the Syrian Christians maintained in the churches, and this is why we have so little written evidence of the history of the Syrian Christians in India before the 16th century. As part of his strategy to gain control over the Syrian Christians, he called all the representatives of the Syrian Christians from all the parish churches to a Synod at Diamper in 1599. See: C.D.Firth, *An Introduction to Indian Church History*, (1976 Revised Edition) 89.

excommunicated beyond all hope of absolution, until he obeyed the decree and made restitution. The mode of succession was one of the chief customs, which the Synod tried to change. In 1906, the Travancore High Court had an occasion to consider the customary law of succession among Christians[68]. In this case the widow of a Syrian Christian, who died intestate without issue, claimed to be the sole heir to his estate. The mother also claimed to be the sole heir and the court found that there was no specific rule to resolve the dispute. Therefore, the court decided the matter by applying the provisions of the Indian Succession Act, 1865. In the very same year in another case[69], a Full Bench of the Travancore High Court held that in matters of succession, the principles of the Indian Succession Act would apply. This was followed in another decision[70] in the year 1907 also. By now, the courts have had occasions to consider the questions of succession relating to almost all Christians denominations and the final position of law as established by precedent was that though there was no enacted legislation, as a matter of applying the principles of justice, equity and good conscience, the principles embodied in the Indian Succession Act, 1865 would apply to Christians in matters of succession.

It was in these circumstances that the law was codified in Travancore by the Travancore Christian Succession Act, 1916 and in Cochin, by the Cochin Christian Succession Act, 1921. Obviously the Legislature had in mind the earlier decisions rendered by the Court and codified the law in accordance with the customs prevailing in the Christian communities. This is evident from the Preamble of the Act, which categorically declared that it was being enacted to consolidate and amend the rules of law applicable to intestate succession among Indian Christians. These enactments could thus be deemed to have been made after considering the customary law as well as the decisions rendered by the Courts, applying Indian Succession Act, 1865 wherever relevant to the Christians. Therefore it could be concluded that by the time these provincial

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[68] *Geevarghese Maria* vs. *Kochukurian Maria*, 22 TLR 192.
[69] *Ouseph Mathai* vs. *Ouseph Kora*, 22 TLR 205.

enactments consolidating the then existing law and practice came into force, the Indian Succession Act, 1865 was not to be applicable to the Travancore-Cochin Christians.

In this context it is worthwhile to examine the circumstances under which the Indian Succession Act, 1865 came to be enacted. When the British settled down to govern India, they found that there was no ascertainable law in the matter of succession for communities other than Hindus and Muslims. This vacuum came to be noticed as a result of the decision of the Privy Council to the effect that a Hindu renouncing his religion and becoming a convert to Christianity could still choose to be governed by Hindu law in matters of succession[71]. It was to fill this gap that the Indian Succession Act of 1865 was enacted. It provided inter alia for intestate succession of the Christians of India (and also of Parsis). It may be pertinent to note at this juncture that the Travancore Christian Succession Act, 1916 and Cochin Christian Succession Act, 1921 were enacted when the Indian Succession Act, 1865 was in operation. In other words, these Acts consolidated the position in the context of the 1865 Act as applied to Christians in Travancore and Cochin.

The Indian Succession Act 1865 was repealed and the Indian Succession Act, 1925 was enacted, consolidating various other enactments in the matter of testate and testamentary succession. This Act was not to be applied to the Christians in the whole of India. It contained many a provision signifying its restrictive and cautious application. This Act does not contain an "extend clause". Further, Section 3 empowered the State Government to exempt any race, sect or tribe or any part of such race, sect or tribe from the operation of the Act, by way of a notification. Again, by Section 29 (2), existing law (law for the time being in force) was saved. So far as its application to the Christians in Travancore and Cochin, it may be noted that these were Princely States over which the British had no sovereignty or law-making authority. Thus neither did the Act apply directly to the Christians in these Princely States nor was it

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[70] *Cheriyan Achanpillai* vs. *Cheriyathu Kuruvilla*, 23 TLR 84.
[71] *Abraham* vs. *Abraham*, (1863) 9 MIA 199.

specifically made applicable to them. In fact by virtue of Section 29 (2) it could be argued that the Indian Succession Act did not apply to the Christians in the Travancore and Cochin areas. The above conclusion was reinforced by the decisions of the Travancore-Cochin High Court[72] and the Madras High Court[73] as discussed below.

When India became independent in 1947, the Travancore and Cochin States continued to be Princely States. These States became part of the Indian Union when the respective Maharajas signed the instruments of Accession in 1949, making them Part B State of Travancore-Cochin. Thereafter, Parliament enacted the Part B States (Laws) Act, 1951. Section 3 of the Act provided for extending the enactments mentioned in the Schedule thereto, to the Part B States. And Section 6, provided that any law in force in these States corresponding to any of the Acts extended to Part B States, would stand repealed. It was in this context, the question whether the Travancore Christian Succession Act stood repealed was raised. The Travancore-Cochin High Court where it was raised for the first time[74] held in 1956 that the Travancore Christian Succession Act was not repealed and it was the law applicable to Christians. Again the same question came up for decision in the Madras High Court in 1974[75], wherein it was held that the Travancore Christian Succession Act stood repealed. But a Division Bench of the Madras High Court held otherwise[76] in 1977. Thus, it could be said that the position of law settled by the decisions of the Full Bench of the Travancore-Cochin High Court was also to the effect that the Indian Succession Act, 1925 was not applicable to the Travancore-Cochin Christians. The decision of the Hon'ble Supreme Court in Mary Roy must be viewed in the light of the above position.

It may be appropriate here to examine the constitutional, procedural and jurisdictional issues involved in *Mary Roy* case[77]. The petition in Mary Roy

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[72] Supra note. 60.
[73] Supra note. 61.
[74] Supra note. 60.
[75] Solomon vs. Muthiah, (1974) 1 MLJ 53.
[76] Supra note. 61.
[77] Supra note. 57.

was filed under Article 32 of the Constitution of India. Article 32 is a fundamental right to enforce a fundamental right or to avert a threat to a fundamental right. That being so, Article 32 cannot be pressed into service for determining the validity of an enactment, unless that enactment infringes the fundamental rights. This has been the consistent view of the Supreme Court[78]. The Hon'ble Supreme Court reiterated its view in *Khyerbari Tea Co.* case[79], thus:

> "In dealing with a petition under Article 32, this Court naturally confines the petitioners to the provisions of the impugned Act by which their fundamental rights are either affected or threatened."

A petition under Article 32 is thus maintainable only if it causes restriction on the enjoyment of fundamental rights. If a right is not a fundamental right conferred by Part III of the Constitution, it is outside the purview of Article 32 for enforcement. In such cases, the petitioner may not invoke Article 32. It is open to the petitioner to approach the High Court under Article 226 of the Constitution.

Therefore, the mere declaratory judgment of the Supreme Court in *Mary Roy* was passed ignoring the procedural and jurisdictional limitations of the Court. This was contrary to the practice of the Court. The only course open to the Court was to examine the validity of the Travancore Act on the touchstone of the Constitution, and the impact of its judgments would then naturally have been prospective.

That apart, the Supreme Court had not looked into the constitutional provisions relating to existing law and its continued applicability after the commencement of the Constitution. Article 372 (1) declares:

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[78] The Supreme Court in Chiranjit Lal vs. Union of India, AIR 1951 SC 41 at paras 44-45, observed: "Article 32 is not directly concerned with the determination of constitutional validity of particular legislative enactments. What it aims at is the enforcing of fundamental rights guaranteed by the Constitution, no matter whether the necessity for enforcement arises out of an action of the executive or of the legislature... the sole object of the article is the enforcement of fundamental rights guaranteed by the Constitution.... A proceeding under this article cannot really have any affinity to what is known as a declaratory suit". Also see Lakshmanappa vs. Union of India, AIR 1955 SC 3; Ram Chandra Palai vs. State of Orissa, AIR 1956 SC 298.

> "... all the law in force in the territory of India immediately before the commencement of the Constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority."

And the President of India was given the power to make such adaptation or modification of the law in force so as to bring them in conformity with the provisions of the Constitution. This could be done before the first day of November 1957 as is provided under Article 372-A of the Constitution. Further Article 13 (1) provides that all laws in force in the territory of India immediately before the commencement of the Constitution, insofar as they are inconsistent with the provisions of Part III of the Constitution, shall to the extent of such inconsistency, be void. Obviously these provisions relating to the law in force have been enacted to make the law in tune with the principles if International Law and Public Law, though the people change their allegiance, their relation to their ancient sovereign is dissolved, their relation to each other, and their rights of property remain undisturbed.

Also it is a general rule of public law, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country continue in force until abrogated or changed by the new sovereign. When such is the position in International Law and the Constitution of India has contemplated the situation and provided for meeting such a contingency by Articles 372 and 13, the failure of the Hon'ble Supreme Court is not adverting to the constitutional provisions in deciding the case on hand was unfortunate.

Laws with regard to touchy issues like succession etc. should reflect customs and practices for their acceptance and sustenance. In this sense the Travancore Act was a well-balanced legislation inasmuch as its Sections 24, 28 and 29 were explicitly made inapplicable to certain sections of Christians living in certain Taluks. Indeed, the Indian Succession Act, 1925 also contains safety valves in its Sections 3 and 29(2) to make it relevant in the society. It is

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[79] Khyerbari Tea Co. Ltd. Vs. State of Assam, AIR 1964 SC 925.

obvious that it was with a view to make it workable in the society that these provisions were included.

Now by the judgment in Mary Roy the Indian Succession Act, 1925 in toto is made applicable to the Travancore area on the ground that it is expressly mentioned in the Schedule to Part B States (Laws) Act, 1951. While doing so, the Court repudiated the strong argument that if the Act is wholly applicable its Section 29(2) saving the existing laws (including the Travancore Act) should also be applicable. Going by the precedents of the Supreme Court itself[80], Section 29(2) should have been held applicable, thereby saving the Travancore Christian Succession Act, 1916. It could therefore be argued that, what the Supreme Court did was not interpretation in the true sense of the word, but a policy choice, which is the realm of the Legislature or the Executive. In short the reasoning and the decision of the Court cannot be sustained on any ground. Had the Court examined the issue in the constitutional context retrospective operation of the decision would have been avoided. On the other hand, if Section 29(2) of the Act was to be given effect, Travancore Act would have been saved. In both cases the present difficulties could have been avoided.

The decision however had a positive impact on the community. Christians in Kerala, by and large, welcome the decision of the Supreme Court with certain reservations. Now the majority of Christians do not seem to be opposed to giving equal share to women in the matter of intestate succession.

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[80] In fact this has been the view of the Supreme Court as it observed in *State of Punjab* vs. *Mohar Singh Pratap Singh*, AIR 1955 SC 84 at page 88 "Whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation of the same subject the court would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. *The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities, but whether it manifests an intention to destroy them.* We cannot therefore subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material."

As the problems are still alive, it has become necessary to look for some solutions, in the constitutional context. As "intestacy and succession" is a subject included in the Concurrent List (Entry 5 of List III of the Seventh Schedule) of the Constitution, the State Legislature is competent under Article 246, to exercise its legislative power and it can perhaps enact a validating Act, whereby the transactions arising out of testamentary and intestate succession in accordance with the provisions of the Travancore and Cochin Acts, made by Christians, from April 1, 1951 to February 24, 1986, could be validated. This view finds support in the decision of the Supreme Court in Hari Singh[81], wherein the Court held that the Legislature has power to validate actions under an earlier Act and that the Legislature is competent to enact a legislation with full retrospective operation. Such a course of action would not be an affront on the judicial power. This is so, because there is distinction between legislative and judicial functions.

Yet another option for the State Legislature is to enact a State Amendments to the Indian Succession Act, 1925. Whether it is a validating Act or a State Amendment, it must receive the assent of the President of India, for its validity, as it provided under Article 254 (2) of the Constitution. If the President assents to a State law which has been reserved for his assent (under Article 200), the State law will prevail over an earlier law of the Union, notwithstanding its repugnancy to the Union Law, if both the laws deal with a concurrent subject. The result of obtaining the assent of the President to a State Act is that it would prevail in that State and it will have overriding effect on the provisions of the Central Act. Therefore, there may not be any legal infirmity for such a course of action.

The State Government has yet another option open to it. It can issue a notification exercising its powers conferred under section 3 of the Indian Succession Act, 1925 to serve the purpose. At any rate it is only just and proper that either the State Government/ State Legislature or Parliament should resort

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[81] *Hari Singh* vs. *Military Estate Officer*, (1972) 2 SCC 239.

to appropriate legislation to solve the problems created by the decision of the Supreme Court in Mary Roy.

5.4. RESUME

The Christians in India are governed by the Indian Succession Act 1925 with regard to the matters of succession. But the Travancore Christian Succession Act and the Cochin Christian Succession Act, being the law for the time being in force, in the respective localities are saved by section 29 of the Indian Succession Act. As per sections 15 and 16 of the Indian Succession Act, 1925, by marriage a woman acquires the domicile of her husband if she had not the same domicile before and a wife's domicile during marriage follows the domicile of her husband. In section 20 it is clearly stated that no person shall, by marriage, acquire any interest in the property of the person whom he or she marries or becomes incapable of doing ant act in respect of his or her own property which he or she could have done if unmarried. The provisions regarding the rights of a widow to inherit the property of her intestate husband is contained in section 33 of the Indian Succession Act. As per the relevant section, if the intestate has left the widow and lineal descendants, 1/3 of his property shall belong to his widow and the remaining 2/3 shall go to his lineal descendants. If the intestate has left his widow and has no lineal descendants but has left persons who are of kindred to him 1/2 of his property shall belong to his widow and the other half to his kindred. If he has left none but his widow, the whole property shall belong to his widow. Under the Indian Succession Act, 1925 there is no discrimination between sons and daughters with regard to the distribution of the intestate father's property. The intestate's property (after deducting the widow's share) is shared equally among his children. In case the intestate has no lineal descendants and if father is dead, his mather and sisters also are entitled to inherit his property as per section 44 of the Act.

In the area of Travancore State, the Travancore Succession Act, 1916 governs the majority of the Christians in the State but this law is not applicable to the

Christians in Neyyathinkara who follows the Marumakkathayam law. The Act is also not applicable in its entirety to certain Latin Catholic Christians and protestant Christians living in Trivandrum and Quilon Districts. Similarly, the Cochin Christian Succession Act, 1921 is applicable to the Christians in the former Cochin state except in the case of the Tamil Christians in Chittoor who follow the Hindu law and the Anglo-Indian and the Parrangi Communities. In other parts of the State of Kerala, the Indian Succession Act, 1925 is made applicable. In fact, there is no substantial difference between the provisions of the Travancore and Cochin Succession Acts. In both these enactments the status of women is inferior to that of men. There is evident and unjustifiable discrimination against women. This feature has in effect, degraded these enactments as the most outdated pieces of legislation, which needs thorough and drastic changes. Mere modification is not sufficient but a fundamental change is called for. First, let us take the case of a widow. The Travancore Act recognizes the widow as one of the heirs of her husband with a share equal to that of a son if there is a son or the lineal descendants of a son left by intestate, and equal to that of a daughter, when there are only daughters (section 16). She gets 1/2 of the estate when there are no lineal descendants of the intestate, who leaves only his father, mother, paternal grandfather or the lineal descendants of his father or paternal grandfather (section 17). If there are none of these kindred left by the intestate, the widow gets the whole of the estate (section 18). The widow's rights in the estate of her husband obtained under sections 16 and 17 (not under section 18) are only a life interest, terminable by death or remarriage (section 24). In the absence of father or lineal descendants the mother of the intestate is also entitled to a share equal to that of a brother. The most controversial feature of the Travancore and Cochin Christian Succession Acts relates to the rights of a daughter to the property of her intestate parents. Under section 28 of the Travancore Act the sons and their lineal descendants shall be entitled to have the whole of the intestate's property subject to the claim of the daughter for "Streedhanam"[82] fixed at one-fourth of the value of the share of a

[82] According to section 5 of the Travancore Christian Succession Act "Streedhanam means

son or Rs 5000/- whichever is less. Any Streedhanam promised but not paid shall be a charge upon the intestate property. The Cochin Act gives the daughter a share along with the sons, subject to the limitation that her share shall be one-third in value of that of a son [section 20(b)]. It is high time for the Christians of Travancore and Cochin to see that immediate and necessary legislations are undertaken to provide equal shares to daughters along with sons in the property of their intestate parents. In fact it is for the Indian Christians to take initiative to make a move in this direction and to see that their personal law is amended in such a way as to meet the needs of the present day.

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and includes any money or ornaments, or, in lieu of money or ornaments any property, movable or immovable, given or promised to be given to a female or, on her behalf, or her husband or to his parent or guardian by her father or mother, or, after the death of either or both of them by anyone who claims under such father or mother, in satisfaction of her claim against the estate of the father or mother." According to section 3 of the Cochin Christian Succession Act "Streedhanam means any property given to a woman, or in trust for her to her husband, his parent, or guardian, in connection with her marriage, and in fulfillment of a term of the marriage treaty in that behalf."