GOVERNMENT OF INDIA

LAW COMMISSION OF INDIA

Proposal for omission of Section 213 from the Indian Succession Act, 1925.

Report No. 209

JULY 2008

LAW COMMISSION OF INDIA
(REPORT NO. 209)

Proposal for omission of Section 213 from the Indian Succession Act, 1925.

Presented to Dr. H. R. Bhardwaj, Union Minister for Law and Justice, Ministry of Law and Justice, Government of India by Dr. Justice AR. Lakshmanan, Chairman, Law Commission of India, on the 30th day of July, 2008.

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Dear Dr. Bhardwaj ji,

Sub: Proposal for omission of Section 213 from the Indian Succession Act, 1925.

I have great pleasure in submitting herewith the 209th Report of the Law Commission of India on the above subject.

The Indian Succession (Amendment) Act, 2002 (26 of 2002) amended sections 32 (*devolution of such property*) and 213 (*right as executor or legatee when established*) of the Indian Succession Act, 1925. Explanation to section 32 was omitted relieving thereby a Christian widow of the bar to succeed distributive share of her husband's estate even if there was a valid contract made to that effect before her marriage. The words "or Indian Christians" after the word "Muhammadans" in sub-section (2) of section 213 were inserted. The opening portion of the said sub-section (2) now reads thus:

> "(2) This section shall not apply in the case of wills made by Muhammadans or Indian Christians and shall only apply – ……."

The result is that the provision of sub-section (1) of section 213 which necessitates grant of probate of the will or letters of administration with the will or with a copy of an authenticated copy of the will annexed, by a Court of competent jurisdiction in order to establish the right as executor or legatee is now not applicable to the wills made not only by Muhammadans but also by Indian Christians. But this provision continues to apply -

(i) in the case of wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of the classes specified in clauses (a) and (b) of section 57, i.e., wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the 1st day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay and all such wills and codicils made outside those territories and limits so far as they relate to immovable property situate within those territories or limits; and

(ii) in the case of wills made by any Parsi dying after the commencement of the Indian Succession (Amendment) Act, 1962, where such wills are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay and where such wills are made outside those limits, insofar as they relate to immovable property situate within those limits.

The exemption in respect of the wills made by Muslims under the parent Act was due to the Muslim Personal Law. The stipulation imposed under the unamended section 213 of the Act in respect of wills made by any Indian Christian, Hindu, Buddhist, Sikh or Jaina was the legacy of the colonial rule, which was extended to Parsis in 1962. The discrimination against the wills executed by the Indian Christians has now been removed by the 2002 Amendment on an All-India basis.

There is discrimination in respect of wills made by Hindus, Buddhists, Sikhs, Jainas or Parsis, where such wills are made within the territories of the ordinary original civil jurisdiction of the High Courts of Judicature at Calcutta, Madras and Bombay and where such wills are made outside those territories insofar as they relate to immovable properties situate within those territories. There is no rationale in insisting upon the obtaining of probate or letters of

administration in respect of wills executed by Hindus, Buddhists, Sikhs, Jainas and Parsis in respect of the property situate outside those limits. Since there is no uniformity in the application of section 213 insofar as it relates to the Muslims and Christians on the one hand and Hindus, Buddhists, Sikhs, Jainas and Parsis on the other, the Commission has resolved to recommend for the repeal of section 213 altogether from the statute and remove the disuniformity/discrimination and attain uniformity. There does not appear to be any earthy reason to ignore the claim to equality of the major section of the people of India, the Hindus etc. Article 15 of the Constitution of India states that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

The Commission places on record the able assistance rendered by Mr. Justice S.A. Kader, former Judge, High Court of Madras and Senior Advocate, Supreme Court of India, now at Chennai, in preparing this Report.

With kind regards,

Yours sincerely,

(AR. Lakshmanan)

Dr. H.R. Bhardwaj,
Union Minister for Law and Justice,
Government of India,
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LAW COMMISSION OF INDIA

Proposal for omission of Section 213 from the Indian Succession Act, 1925.

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1. INTRODUCTION

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> 'The Indian Succession (Amendment) Act 2002 which received the assent of the President on the 27th May 2002 and published in the Gazette of India on 22.11.2002 has amended section 32 and section 213(2) of the parent Act which ran as follows:
>
> > **"**32. Devolution of such property.- The property of an intestate devolves upon the wife or husband, or upon those who are the kindred of the deceased, in the order and according to the rules hereinafter contained in the Chapter.
> >
> > Explanation.- A widow is not entitled to the provision hereby made for her if, by a valid contract made before her marriage, she has been excluded from her distributive share of her husband's estate."

[This section does not apply to Hindus, Buddhists, Sikhs, Jainas and Parsis. It applies to only Indian Christians.]

Section 213:

"213. Right as executor or legatee when established. - (1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed.

(2) This Section shall not apply in the case of wills made by Muhammadans, and shall only apply-

(i) in the case of wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of classes specified in clauses (a) and (b) of section 57, and

(ii) in the case of wills made by any Parsi dying after the commencement of the Indian Succession (Amendment) Act, 1962 (16 of 1962), where such wills are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras, and Bombay, and where such wills are made outside those limits, in

so far as they relate to immovable property situate within those limits."

2. The Statement of Objects and Reasons for the Amendment Act 26 of 2002 are as follows:-

"The Indian Succession Act 1925 was aimed at consolidating the Indian law relating to testamentary and intestate succession. Section 32 of this Act recognizes the Christian widow as one of the heirs to succeed the property of her deceased husband dying intestate. However, the Explanation to the said section provides that the widow would not be entitled to succeed such distributive share if there is a valid contract made before her marriage to that effect. The Kerala Women's Commission and some Non-Governmental Organizations have pointed out that this provision of the Act excluding a Christian widow from her distributive share on the basis of the contract is discriminatory and they have suggested that she should be entitled to succeed her distributive share notwithstanding any contract to the contrary.

Section 213 of this Act requires that no person claiming a right as executor or legatee of a will can establish such right in any court of justice under the will unless he has been granted a probate or Letters of

Administration with the will or a copy of the authenticated copy of the will annexed, by a court of competent jurisdiction. No such probate or Letters of Administration is required for a Mohammedan to establish rights under the will nor there is any requirement in the case of other communities on an All India basis. The Law Commission of India, the Kerala Women's Commission, Members of Parliament belonging to Christian community and various other individuals and organizations have pointed out and represented to the Government that this provision is discriminatory and should not apply to Christians alone.

The matter has been examined by the Government and it has been decided to-

(a) delete the Explanation to Section 32; and
(b) make Section 213 inapplicable to Indian Christians by amending the Indian Succession Act, 1925.

The Bill seeks to achieve the above objects."

3. Section 2 of the Indian Succession (Amendment) Act 2002 deletes the Explanation to section 32 of the parent Act thereby relieving the Christian widow of the bar to succeed distributive share of her husband's estate even if there was a

valid contract made to that effect before marriage. This is indeed a welcome amendment which has done away with the discrimination against Christian widows.

4. Section 3 of the Amendment Act 2002 has inserted the words "or Indian Christians" after the word "Muhammadans" in Section 213(2) of the Principal Act, which now reads thus:-

> "This Section shall not apply in the case of Wills made by Muhammadans or Indian Christians and shall only apply –
> ……
> ii. ……."

5. The result is the provisions of Section 213(1) which necessitates the grant of probate of the Will or Letters of Administration with the Will or with a copy of the authenticated copy of the Will annexed by a court of competent jurisdiction in order to establish the right as executor or legatee is not now applicable to the Wills made not only by Mohammedans but also by Indian Christians. But the aforesaid provision continues to apply-

> I. In the case of Wills made by any Hindu, Buddhist, Sikh or Jaina where such Wills are of the classes specified in clauses (a) and (b) of Section 57, i.e., Wills and Codicils made by any Hindu, Buddhist, Sikh or Jaina

on or after the 1st day of September 1870 within the Territories which at the said date were subject to the Lieutenant Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay and all such Wills and Codicils made outside those Territories and limits so far as relates to immovable property situate within those Territories or limits;

II. In the case of Wills made by any Parsi dying after the commencement of the Indian Succession (Amendment) Act, 1962, where such Wills are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay and where such Wills are made outside those limits, insofar as they relate to immovable property situate within those limits.

6. The exemption in respect of Wills made by Muslims under the parent Act was due to the Muslim Personal Law. The stipulation imposed in section 213(1) of the Act in respect of Wills made by any Indian Christian, Hindu, Buddhist, Sikh or Jaina was the legacy of Colonial Rule which has been extended to Parsis in 1962. The discrimination against the Wills executed by the Indian Christians has now been removed by the present Amendment on an All India basis. In Kerala, this discrimination against Indian Christians has already been done away with by the Kerala Act 1 of 1997 with effect from

14.3.1997. The discrimination in respect of Wills made by Hindus, Buddhists, Sikhs, Jainas or Parsis continues in a limited form, i.e., where the Will is made within the Territories of the ordinary original civil jurisdiction of the High Courts of Judicature at Calcutta, Madras and Bombay and where such Wills are made outside those Territories so far as they relate to immovable property situate within those Territories. This discrimination is liable to be struck down under Article 15 of the Constitution which prohibits discrimination on grounds of religion, race, caste or place of birth. Will the Parliament look into this anomaly and repeal Section 213(1) and (2) altogether?'

1.2 On the above article, a note was published by the Law Weekly, Madras, 2003 (2) page 57 (JS), which is also reproduced hereunder:-

'The litigant public in our land, why for the matter of that, even our legal fraternity is greatly obliged to Mr. S.A. Kader, former Judge of our High Court for his piece, "*The Indian Succession (Amendment) Act 26 of 2002 – Why this discrimination against Hindus, Buddhists, Sikhs, Jainas and Parsis*?" which we have carried at pages 35 J.S. to 37 J.S. (in Part 4 of this Volume) in our Journal Section.

We had ourselves noticed that the 2002 November part of AIR carried the text of the Amending Act, Act 26 of 2002 at page 120 of journal part.

We were wondering what to make of this amendment made 77 years after the enactment of Indian Succession Act, 1925, assented to by the then Governor General in Council on 30th September 1925, itself a Consolidating Act whose forerunner was the Act of 1865.

Our inability to get down to business which we can only attribute to our lacking in facilities has been exposed by the young gentleman that Mr. Kader who is only 76 years young is by his commitment to legal research. That he quoted from Thomas Gray in his retirement speech from his seat on the Bench of our Court on 4.11.1988 may be only one incident.

Parliament had passed the Bill placed before it in the year 2001 itself and the Rashtrapathy gave his assent to the same on 27.5.2002, but the Law or Legislative department of the Union Cabinet could get the enactment printed in the Official Gazette of India only on 22.11.2002.

Mr. Kader has been able to locate the Statement of Objects and Reasons for the Amending Bill/Act. The selective approach made by Parliament to go to the help of only those who open their mouths and make a full throated noise is clearly brought out on a mere look at the Objects and Reasons for this measure.

Mr. Kader's conclusion that the provisions of the Indian Succession Act, 1925, as now remain, are clearly discriminatory and require to be struck down by the High Court (s) is the only obvious one.

.. ..

On 22.2.2001, a Bench of the Supreme Court of India (Rajendra Babu and Lahoti, JJ.) delivered judgment in W.P.(C) No.137 of 1997 and connected cases. The same is reported in AIR 2001 SC 1151 and 2001-4-SCC-325.

The claim made by the petitioners in the said case, in the main, was that just as Muslims and Parsis have been exempted from the operation of section 213, Indian (?) Christians of this country should also enjoy the same exception and that it should be so declared.

Though the prayer came to be rejected by the Bench, it is found that the Indian Parliament lost no time in conceding the request and obliging a significant section of our country's citizens, namely, Christians.

What is sauce for the goose is (or at least, must be!) sauce for the gander too.

There does not appear to be any earthy reason why Parliament or the concerned Ministry of the Union Cabinet

came to ignore the claim to equality of the major section of the people of India, the Hindus and enable them to be freed from the shackles.

.. ..

If in regard only to properties in Chennai, Mumbai or Kolkata or in the event of the testator having executed the testament while within these cities, is a probate made requisite by this provision leaving aside the entire country does not this provision appear an anachronism?

More so, when a distinct and not a small percentage of the population will be affected by this Rule.

Here we can also take note of Section 3 of the Act of 1925 and Section 332 of its predecessor Act 10 of 1865 has made provision for the State Government to exempt by notification, the operation of, among others, Sections 212, 213, and 215 to 369, the members of any race etc. to whom the State Government considers it impossible or inexpedient to apply such provision. One can even apply the maxim *'cessante ratione legis cessat ipsa lex.'* (-Broom) Can't we!

We leave it to the Mega Association of lawyers in our State, the Madras High Court Advocates Association and its office bearers to take up the issue with the T.N. Government to

make a notification under Section 3 of Act 39 of 1925 and relieve a large section of our people.'

2. DISUNIFORMITY

2.1 A perusal of the above article and the note published by the Law Weekly, Madras would clearly demonstrate and reveal the discrimination against Hindus, Buddhists, Sikhs, Jainas and Parsis in the matter of obtaining probate of a will or letters of administration with respect to the wills executed by Hindus, Buddhists, Sikhs, Jainas and Parsis within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay and where such wills are made outside those limits, in so far as they relate to immovable properties situate within those limits, that the learned author pleaded for the removal.

2.2 Hardship is experienced by litigants in obtaining probate or letters of administration paying high duty. While obtaining of probate or letters of administration is not insisted upon in respect of wills executed by Muslims and Christians anywhere in India in respect of properties situated anywhere in India and wills executed by Hindus, Buddhists, Sikhs, Jainas and Parsis outside the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay in respect of properties situated outside those limits, there is no rationale in insisting upon obtaining of probate or letters of administration in respect of wills executed by Hindus,

Buddhists, Sikhs, Jainas and Parsis within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where such wills are made outside those limits insofar as they relate to immovable property situate within those limits.

2.3 Article 15 of the Constitution reads as follows:

> **"Art. 15.** (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
>
> (2) No citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-
>
> (a) access to shops, public restaurants, hotels and places of public entertainment; or
>
> (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
>
> (3) Nothing in this article shall prevent the State from making any special provision for women and children.
>
> (4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward

classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30."

2.4 The above Article prohibits discrimination on grounds of religion, race, caste, sex or place of birth.

2.5 The constitutional validity of section 118 of the Indian Succession Act was challenged before the High Court of Kerala in *Preman v. Union of India*, AIR 1999 Kerala 93. It was argued that the said provision was anomalous and anachronistic being violative of Articles 14, 15, 25 and 26 of the Constitution of India and, therefore, the said section was liable to be struck down as unconstitutional. The case was decided by the Division Bench headed by Hon'ble Dr. Justice AR. Lakshmanan (as he then was). The High Court held:

"*In the instant case, Section 118 of the Act regarding religious bequests of all testators, viz. of Hindus, Muhammadans, Parsis, Jaina, etc., are not subjected to this procedure and the bequests by Christians alone is singled out. Therefore, we hold that Section 118 of the Indian Succession Act regarding religious and charitable bequests is discriminatory and violative of Articles 14 and 15 of the Constitution of India and it is necessary that all testators who are similarly situated should be subjected to the same procedure. As the law stands today, a Christian cannot make a bequest for religious or charitable purposes without satisfying the conditions and procedures prescribed by Section 118 of the Act. Such a burden, procedural burden and substantive law burden is not falling upon Hindu, Muhammadan, Jaina or Parsi testators. ...*

we declare that Secton 118 of the Indian Succession Act: (a) discriminates against a Christian vis-à-vis non-Christian; (b) discriminates against testamentary disposition by a Christian vis-à-vis non-testamentary disposition; (c) discriminates against religious and charitable use of property vis-à-vis all other uses including not so desirable purposes; (d) discriminates against a Christian who has a nephew, niece or nearest relative vis-à-vis a Christian who has no relative at all; and (e) discriminates against a Christian who dies within 12 months of execution of the will, of which he has no control.

We, therefore, declare that Section 118 of the Indian Succession Act is anomalous and anachronistic being violative

of Articles 14, 15, 25 and 26 of the Constitution of India. Section 118 of the Indian Succession Act is, therefore, struck down as unconstitutional."

2.6 This matter was taken to the Supreme Court through a writ petition and heard by its Bench comprising Hon'ble Chief Justice of India V.N. Khare, Hon'ble Justice S.B. Sinha and Hon'ble Dr. Justice AR. Lakshmanan in *John Vallamattom v. Union of India*, AIR 2003 SC 2902. The Supreme Court allowed the writ petition for the elaborate reasons recorded in the judgments and also declared Section 118 of the Indian Succession Act as unconstitutional being violative of Articles 14, 15, 25 and 26 of the Constitution of India.

2.7 Hon'ble Dr. Justice AR. Lakshmanan delivered a separate judgment agreeing with the other two Judges. In his concurring judgment, he has elaborately dealt with discriminatory treatment meted out to the members of the Christian community under the Indian Succession Act, 1925 by which they are practically prevented from bequeathing property for religious and charitable purposes. In conclusion, he observed:

"*The Indian Succession Act though is claimed to be a universal law of testamentary disposition, but in effect, crucial sections apply only to Christians. There is no acceptable answer from the other side as to why S. 118 of the Act is made applicable to Christians alone and not to others. ...*

The Indian Succession Act came into effect on 30th September, 1925. As per S. 4, Part II of the Act shall not apply if the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina. Section 20 of Part III of the Act is not applicable to any marriage contracted before the first day of January, 1866; and is not applicable and is deemed never to have applied to any marriage, one or both of the parties to which professed at the time of marriage the Hindu, Muhammadan, Buddhist, Sikh or Jain religion. As per S. 23 of Part IV of the Act, that part shall not apply to any Will made or intestacy occurring before the first day of January, 1866 or to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh, Jain or Parsi. Likewise, as per S. 29 of Part V of the Act, that shall not apply to any intestacy occurring before the first day of January, 1866 or to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina. By Act 51 of 1991, Parsis were also excluded from the application of S. 118 of the Act. Thus, it is seen that the procedure prescribed has been made applicable to Christians alone. There is also no acceptable answer from the respondent as to why it regulates only religious and charitable bequests and that too, bequests of Christians alone. The whole case, in my view, is based upon undue, harsh and special burden on Christian testators alone. A substantive restriction is imposed based on uncertain events over which the testator has no control. I, therefore, have no hesitation to hold that S. 118 of the Act regarding religious and charitable bequests of all testators who are similar should

be subjected to the same procedure. As the law stands today, a Christian cannot make a bequest for religious or charitable purposes without satisfying the conditions and procedures prescribed by S. 118 of the Act. Such a burden, procedural burden and substantive law burden is not falling upon Hindu, Muhammadan, Jain or Parsi testators. ...

The very same question was raised before the Kerala High Court. ...

It is pertinent to notice that the judgment of the Kerala High Court was not appealed against by the respondent herein, namely, the Union of India. Even after the judgment of the Kerala High Court dated 16.10.1998, the Parliament did not remove the discrimination. Under such circumstances, this Court, in my opinion, in exercise of its jurisdiction and to remedy violation of fundamental rights, are bound to declare the impugned provision as invalid and being violative of Arts. 14, 15, 25 and 26 of the Constitution. For the foregoing reasons, I am respectfully in agreement with My Lord Hon'ble the Chief Justice of India that S. 118 of the Act is unconstitutional and is liable to be struck down as unconstitutional. ...

In the result, the writ petition is allowed."

2.8 Sub-section (2) of section 213 of the Indian Succession Act was amended by the Indian Succession (Amendment) Act, 2002 introducing the words "or Indian Christians" after the word "Muhammadans". The result is that the provision of sub-section (1) of section 213 which necessitates grant of probate of the will or letters of administration with the will or with a copy of an authenticated copy of the will annexed, by a Court of competent jurisdiction in order to establish the right as executor or legatee is now not applicable to the wills made not only by Muhammadans but also by Indian Christians. But this provision continues to apply-

(1) in the case of wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of the classes specified in clauses (a) and (b) of section 57, that is, wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the 1st day of September, 1870, within the territories which on the said date were subject to the Lieutenant Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Madras and Bombay and all such wills and codicils made outside those territories and limits so far as they relate to immovable property situate within those territories or limits; and

(2) in the case of wills made by Parsis dying after the commencement of the Indian Succession (Amendment) Act, 1962, where such wills are made within the local

limits of the ordinary original civil jurisdiction of the High Courts of Calcutta, Madras and Bombay and where such wills are made outside those limits, insofar as they relate to immovable property situate within those limits.

3. RECOMMENDATION

3.1 It is thus seen that there is discrimination and no uniformity in respect of wills made by Hindus, Buddhists, Sikhs, Jainas or Parsis, where the will is made within the territories of the ordinary original civil jurisdiction of the High Courts of Judicature at Calcutta, Madras and Bombay and where such wills are made outside those territories, insofar as they relate to immovable properties situate within those territories. Therefore, section 213 of the Indian Succession Act, 1925 is liable to be struck down as being violative of Article 15 of the Constitution of India. Hence, the Commission proposes repeal of section 213 altogether from the statute.

3.2 We recommend accordingly.

(Dr. Justice AR. Lakshmanan)
Chairman

(Dr. Brahm A. Agrawal)
Member-Secretary

Dated: July 30, 2008.