

## **Paper- Muslim Law**

### **Concept of will under Muslim Law**

A Will or Testament or Wasiyat has been defined as “an instrument by which a person makes disposition of his property to take effect after his death.”

Tyabji defines Will as “conferment of right of property in a specific thing or in a profit or advantage or in a gratuity to take effect on the death of the testator.”

The distinguishing feature of a Will is that it becomes effective after the death of the testator and it is revocable.

Unlike any other disposition (e.g. sale or gift), the testator exercises full control over the property bequeathed till he is alive: the legatee or beneficiary under the Will cannot interfere in any manner whatsoever in the legator's power of enjoyment of the property including its disposal or transfer (in that case the Will becomes revoked).

#### **Object and Significance of Wills**

The object of Wills according to the tradition of the Prophet is to provide for the maintenance of members of family and other relatives where they cannot be properly provided for by the law of inheritance.

At the same time the prophet has declared that the power should not be exercised to the injury of the lawful heirs.

A bequest in favour of an heir would be an injury to the other heirs as it would reduce their shares and would consequently induce a breach of the ties of kindred.

Thus the policy of the Muslim law is to permit a man to give away the whole of his property by gift inter vivos, but to prevent him, except for one third of his estate, from interfering by Will with the course of the devolution of property according to the laws of inheritance.

A Will offers to the testator the means of correcting to a certain extent the law of succession, and enabling some of those relatives who are excluded from inheritance to obtain a share in his property, and recognizing the services rendered to him by a stranger.

### **Formality of a Will**

As a general rule, no formality is required for making a Will.

No writing is necessary to make a Will valid, and no particular form, even verbal declaration is necessary so long as the intention of the testator is sufficiently ascertained.

Where the Will is reduced to writing it is called a 'Wasiyatnama.' If it is in writing it need not be signed. It does not require attestation and if it is attested there is no need to get it registered.

Instructions of the testator written on a plain paper, or in the form of a letter, that in clear cut terms provide for distribution of his property after his death would constitute a valid Will.

In case, a Will is oral, the intention of the testator should be sufficiently ascertained. In comparison to a Will in writing which is easier to prove, the burden to prove an oral Will is heavy.

### ***Requisites of a Valid Will***

- The testator (legator) must be competent to make the Will.
- The legatee (testatrix) must be competent to take the legacy or bequest.
- The subject (property) of bequest must be a valid one.
- The bequest must be within the limits imposed on the testamentary power of a Muslim.

### ***Testator and his Competence (Who can make Will)***

Every major Muslim (above 18 years) of sound mind can make a Will.

The age of majority is governed by the Indian Majority Act, 1875, under which, a person attains majority on completion of 18 years (or on completion of 21 years, if he is under supervision of Courts of Wards).

Thus, the testator must be of 18 or 21 years, as the case may be, at the time of execution of the Will.

At the time of execution of a Will (i.e. when it is being made), the testator must be of sound mind.

Under Muslim law, the legator must have a perfectly 'disposing mind' i.e. the legator must be capable of knowing fully the legal consequences of his activities not only for a brief period when the declaration was made, but much after that.

A Will that is executed in apprehension of death is valid, but under the Shia law, if a person executes any Will after attempting to commit suicide, the Will is void.

A minor is incompetent to make a Will (such a Will is void) but a Will made by minor may subsequently be validated by his ratification on attaining majority.

A Will procured by undue influence, coercion or fraud is not valid, and the court takes great care in admitting the Will of a pardanashin lady. Thus, a Will must be executed by a legator with his free consent.

The legator must be a Muslim “at the time of making or execution of the Will.” A Will operates only after the death of the legator; before his death, it is simply a mere declaration on the basis of which the legatee may get the property in future.

If a Will has been executed by a Muslim who ceases to be a Muslim at the time of his death, the Will is valid under Muslim law.

Also, the Will is governed by the rules of that school of Muslim law to which the legator belonged at the time of execution of the Will. For example, if the legator was a Shia Muslim at the time when he wrote the Will, only Shia law of Will is made applicable.

### ***Legatee and his Competence (To whom Will can be made)***

Any person capable of holding property (Muslim, non-Muslim, insane, minor, a child in its mother's womb, etc.) may be the legatee under a Will. Thus, sex, age, creed or religion is no bar to the taking of a bequest.

Legatee (including a child in its mother's womb) must be in existence at the time of making of the Will. Thus, a bequest to a person unborn person is void.

A bequest may be validly made for the benefit of ‘juristic person’ or an institution (but it should not be an institution that promotes a religion other than the Muslim religion viz. Hindu temple, Christian church etc.).

A bequest for the benefit of a religious or charitable object is valid. It is unlawful to make a bequest to benefit an object opposed to Islam e.g. to an idol in Hindu temple, because idol worship is opposed to Islam.

No one can be made the beneficial owner of shares against his will. Therefore, the title to the subject of bequest can only be completed with the express or implied consent of the legatee after the death of the testator. The legatee has the right to disclaim.

A person who has caused the death of the legator cannot be a competent legatee. A Will operates only after the death of a legator, therefore, a greedy and impatient legatee may cause the legator's death to get properties immediately. However, it is also immaterial whether the legatee knew about him being a beneficiary under the Will or not.

### ***Subject Matter of Will (Bequeathable Property) and its Validity***

The testator must be the owner of the property to be disposed by will; the property must be capable of being transferred; and, the property must be in existence at the time of testator's death, it is not necessary that it should be in existence at the time of making of Will.

Any kind of property, movable or immovable, corporeal or incorporeal, may be the subject-matter of a Will.

In order to be a valid bequest the grant in the bequeathed property must be complete or absolute. A bequest has to be unconditional. If any condition is attached, say the legatee shall not alienate the subject of legacy, the condition is void and the bequest is effective without condition.

Likewise, a bequest in futuro is void, and so does a contingent bequest.

However, an alternative bequest of property (i.e. to one or failing him to the other person) is valid. Thus, when the testator willed that his son if existing at the time of his death will take the bequest, if not in existence his son's son will, and failing both it will go to a charity, was held valid

Creating of 'life estate' is not permissible under Sunni law; the bequest of a life estate in favour of a person would operate as if it is an absolute grant.

Under Shia law , however, the bequest of a life estate in favour of one and a vested remainder to another after his death is valid.

### ***Testamentary Power and its Limits (Bequeathable one-Third)***

A Muslim does not possess an unlimited power of making disposition by Will.

There are two-fold restrictions on the power of a Muslim to dispose of his property by Will, which are in respect of the person in whose favour the bequest is made, and as to the extent to which he can dispose of his property.

This is obvious, because the object behind this restriction is to protect the interests of the testator's heirs.

No Muslim can make a bequest of more than one-third of his net assets after payment of funeral charges and debts. If the bequeathed property exceeds one-third, the consent of other heirs is essential (Sunni and Shia laws).

A bequest of entire property to one heir to the exclusion of other heirs is void.

Where the heirs refuse to give their consent, the bequest would be valid only to the extent of one-third of the property and the rest of the two-thirds would go by intestate succession.

In respect of bequest of one-third to an heir, the consent of other heirs is required in Sunni law, but not in Shia law. In case of a non-heir (stranger) the consent of heirs is not required in both.

The above rule of bequeathable one-third will not apply to a case where the testator has no heir. The right of Government to take the estate of an heirless person will not, in any way, restrict the right of a person to make a disposition of his property as he likes. Thus Government is no heir to an heirless person.

A bequest made for pious purposes is valid to the extent or one-third of the property, both under Sunni as well as Shia law.

The '1/3rd limit' rule will not apply if a Muslim marries under the Special Marriage Act, 1954, because then he has all the powers of a testator under the Indian Succession Act, 1925.

### ***Consent of Heirs***

Consent by heirs under Sunni law, shall be given only after death of the testator, while in Shia it may be before or after the death of the testator.

Consent must be definitive, whether express or implied by positive conduct, and mere silence on the part of an heir will not amount to implied consent.

The attestation of the Will by the heirs and acquiescence in the legatee taking possession of the property has been held to be sufficient consent.

In cases where only some of the heirs give their consent the shares of those consenting will be bound, and the legacy in excess is payable out

of the consenting heir's share. The consent of heirs who are insolvent has been held effective in validating a bequest.

Consent once given cannot be later rescinded. Similarly, consent cannot be given after an heir has previously repudiated it.

### ***Bequest to Heirs and Non-heirs***

Where the testator makes a bequest to heir as well as non-heir by the same legacy, in absence of the consent of heirs, the legacy will not be invalid in its entirety but will take effect with respect to non heirs. The rule is that as far as possible, the Will, will be given the maximum effect that it is capable of.

### ***Revocation of Will***

Muslim law confers on a testator unfettered right to revoke his will. A Muslim testator may revoke, during his life-time, any Will made by him expressly or impliedly.

Thus, if he sells, makes gift of the subject of bequest or deals with the same in any other manner like constructing a house on the piece of land bequeathed earlier, would implied revocation.

For example, where the testator gives land to his friend under a Will but a year later gifts the same to his daughter, the bequest in favour of the friend is automatically revoked.

Where a testator makes a Will, and by a subsequent Will gives the same property to someone else, the prior bequest is revoked. But a subsequent bequest (though of the same property) to another person in the same Will does not operate as a revocation of prior bequest, and the property will be divided between the two legatees in equal shares.



It is not necessary that for revoking an earlier will, another will must be made. A Will can be revoked by a simple and clear declaration to that effect or by a formal deed of cancellation or revocation of Will.

### ***Death of Legatee before Operation of Will (Lapse of Legacy)***

Under Sunni law where before the Will can operate, the legatee dies, the bequest will lapse and the property bequeathed would remain with the testator and on his death will go to his heirs in absence of any other disposition by him.

Under Shia law, the legacy will lapse only if the legatee dies without leaving an heir or if the testator, after the death of the legatee, revokes the Will. However, if the testator even after the death of the legatee does not revoke the Will, on the date of operation of the Will, the benefit under it will pass to the heirs of the legatee.

### ***Rateable Abatement***

Where a bequest of more than one-third of property is made to two or more persons and the heirs do not give their consent, the shares are reduced proportionately to bring it down to one-third, or in other words, the bequest abates rateably. The above rule applies in Sunni law only.