WILL UNDER MUSLIM LAW

Shikta Jain, Gitam School of Law, Visakhapatnam, India

ABSTRACT

The paper will revolve around the concept of Will under Muslim law. A Will differs from the other property disposition modes as it only takes effect after the testator's death. The paper covers the purpose of will under Islam, the concept of Will, its nature and how it can be created, and the essential element required for a valid Will. Also, the paper highlights the construction and revocation of Wills under Muslim law.

Introduction

A Will is an instrument through which the property owner makes a deposition that will take effect after his death. The study seeks to analyse the purpose of Wills under Islam. It also highlights the concept of Will and the various essentials for a valid Will.

A Muslim person must write a Will to ensure that the estate is in the right hands, as this would impact future generations. Also, people need to be made aware of the benefits of a Will and essential knowledge regarding the Will. The main objective of writing a will is to provide maintenance and support to the dependents of the concerned person. According to Muslim law, the power of making the will should not be misused to injure the legal heirs or hamper their rights. Therefore the paper seeks to make people aware of the creation of Will and its related concepts.

The study is conducted by referring to various books, cases, and various internet sites.

I. Wills

Wills, also known as wasiyat, is a legal declaration of the testator's intention concerning property distribution after death. The person who makes the Will is known as the 'testator' or 'Legator.' The person on whose favour the Will is made is known as the 'legatee.' It is

considered one of the essential Islamic documents as it affects the individual's estate. After the death of a Muslim, the heir has specific duties, one among them is the execution of the Will.

In the landmark case of *Abdul Manan Khan v Mirtuza Khan*[1], it was held that no formality is required for making a Will. It can be oral, a verbal promise is enough to constitute a Will but to prove it is challenging. It can be in writing; it is optional to get it signed, and proving it becomes effortless. Also, it does not need to be attested, and if attested no need for registration. All that it requires is that there must be a clear intention to make it. Instructions of the testator written on plain paper or in the form of a letter that, in clear-cut terms, provides for the distribution of his property after his death would constitute a valid Will.[2]

II. Essentials of a valid Will:

1. The testator must be competent to make the Will.
2. The Legatee must be competent to take the legacy or bequest.
3. The subject of inheritance must be a valid one.
4. The bequest must be within limits imposed on the testamentary power of a Muslim.

Capacity of the Testator

Every Muslim who is of sound mind and has attained majority can dispose of their property under a Will.[3] A legacy made by a person of unsound mind and subsequently cured of insanity still is invalid. Also, if a person makes a Will and later becomes unsound, the Will is considered invalid, provided the insanity is permanent.

After completing the age of fifteen, a person becomes a major under Muslim law till 1875. Thus a person of fifteen years was competent to make a will. The Indian Majority Act 1875 declared 18 as the age of majority. However, in some cases, the age of the majority is 21 for making Will.

In instances where the man who was a Muslim while making the Will, ceases to be a Muslim after the Will is made, then the Will is considered valid under Shia law, Will made by a person who later commits suicide by any means will be regarded as unsound, and the Will made by

[1] Abdul Manan Khan v. Mirtuza Khan, A.I.R 1991 Pat 154.
[2] Abdul Hameed v Mohammad Yoonus, A.I.R 1940 Mad 153.
[3] Dr. Poonam Pradhan Saxena, Family law Lectures (3rd edn, Lexis Nexis).

him stands void. But under the Sunni law, such Will is valid. In *Mazhar Hussain v Bodha Bibi,*[4] it was held that a will of suicide is valid when made in contemplation of taking poison, but before the poison was taken, the onus of proving that the Will was written afterward rests on the party impugning it.

Capacity of the Legatee

A Muslim can make a bequest to anyone competent to hold the property. A non -Muslim can also be a beneficiary under the Will, but he should not be against Islam. A person who renounces Islam and embraces another religion is not competent to the Will. Still, a person born in another religion is qualified, provided he is not hostile towards Islam.

A bequest may be validly made for the institution's benefit, provided that such an institution is not hostile towards Islam or promotes anti-Islam activities. A will favouring Hindu temples or society propagating Christian religion will not be valid. However, an institution promoting education and self-reliance is valid as long as it is not against Islam.[5]

The Legatee must exist when making the Will, so the bequest made to an unborn child is invalid in Islam. A child in his mother's womb is treated as in existence if born within six months of making a Will under Sunni law and within ten months under Shia law.

A person who has caused the death of the Legator, irrespective of whether the murder was caused accidentally or intentionally, is not considered a competent Legatee under Sunni law. But under Sunni law, the Legatee is considered incompetent only if such murder was caused deliberately.

Where the testator has bequeathed the property jointly to several specific or ascertained persons, the bequeathed property will be divided equally amongst the legatees.

Subject matter

Any time of property can constitute the subject matter of the Will that must be in existence and transferable at the time of the testator’s death. However, the property doesn't need to exist when making the Will. To be a valid bequest, the property should be absolute and unconditional. A legacy to take effect on a particular contingency that may or may not happen is void. At the

[4] Mazhar Hussain v Bodha Bibi (1898) 21 All. 91.
[5] Badrul Islam Ali Khan .v Ali Begum AIR 1935 Lah 251.

same time, an alternative bequest of property is valid where if the primary beneficiary is incompetent, an alternative name is provided in the Will.

Testamentary capacity

The testamentary capacity of the Muslim Will is limited. There are twofold restrictions on the power of the Muslim testator to dispose of the property by Will. The objective behind the provision is to protect the interest of the testator's heir. The restrictions are:

1. **Restriction concerning legatees.**

Here consent plays a vital role while bequeathing the property. Consent of the heir shall be given only after the death of the Testator under Sunni law, but under Shia law, consent can be given even before the testator's death. Consent of heir means the consent of those persons who are heirs of the testator at the time of death and not the would-be or presumptive heir. Such consent must be accessible and definitive. It must be either implied or expressed. The consent, once given, cannot be rescinded. In the case of an heir where some of the heirs give consent, the legacy would be valid only to the extent of the consenting heir. Under Shia law, legacy can be given to the extent of one-third of the testator's property, and the heir's consent is not necessary. Still, the Will is invalid if it exceeds one-third of the property without consent. Under Sunni law, even to the extent of one-third, consent of the heir is necessary. In the case of *Gulam Mohammed v Gulam Hussain*[6], the Privy Council held that a bequest in favour of heirs without the consent of other heirs is invalid. The primary purpose is that the testator may bequest to any of the heirs he favors, which may result in jealousy among other heirs. Where the whole estate is bequeathed to one heir and all other heirs are excluded from the inheritance, a such bequest is void.[7]

2. **Restriction concerning the extent of property that can be bequeathed.**

If a Muslim wants to make a will, he is only allowed to the extent of one-third of the bequeathed property after the funeral charges and debt payment. Any bequest of more than one-third will only be valid if other heirs consented. If the heir refuses to agree, the bequest will be right up to one-third, and the rest two-thirds will be transferred according to intestate succession. The

[6] Gulam Mohammed v Gulam Hussain A.I.R 1932 PC 81
[7] Husaini Begum v. Mohammad Mehdi, (1927) 49 All 547

one-third rule will not be applicable if the testator has no heir.

III. Purpose of Will

Muslims living in non-Islamic countries who wish to distribute their legacy according to the Islamic law of succession should write a valid Will because the absence of it will result in the distribution of a person's estate in a non-Islamic manner. The Will is a legal document that states what happens to your property after your death. It ensures that your estate is in the hands of the people you want. Writing a Will also avoids legal disputes between your heirs. It also provides a faster and less expensive way to settle the property. One can also express their wish for funeral arrangements through Will. It makes it easier for the family to arrange and sort everything. The effect of a Will last for generations, so one has to be cautious while writing a Will.

IV. Registration and Revocation of Will

Though it is not necessary to register a Will, it is easier to prove it in a court of law if it is registered. Section 40 and 41 of the Indian Registration Act provides the procedure for registering a Will. After his death or any person claiming the benefit, the testator may present it to any registrar or sub-registrar. There is no time limit for registering the Will.

A Muslim man can revoke his Will at any time before his death, expressly or impliedly. After withdrawing the Will, the testator can make a new Will with the same property. If the testator has disposed of the bequeathed property by alienation, it will be presumed that the testator has revoked the bequest. A subsequent sale or gift of the property may also amount to revocation.

V. Death of legatee before operation of Will

Under Sunni law, if the legatee dies before the operation of the Will, the property after the testator's death will go to his heir in the absence of any disposition by him.

Under Shia law, if the testator does not revoke the Will after the death of the legatee, the property will go to his heirs of the legatee.

VI. Conclusion

It can be said that the law of Will under Muslim law is quite complex. Since no signature or attestation is required, there is doubt about the authenticity of the Will. The law of Will in

Muslim allows one-third of property to be bequeathed, and if the property to bequest is more than one-third, the consent of other heirs is required. In the modern era, it is pretty clear that no heir is willing to consent to give more than one-third of property as it would decrease their share. It is a need of the hour that Muslim law about Wills should be codified, and such laws should be made which are in the interest of the testator so that he can bequest his hard-earned property to anyone he likes.

Bibliography

List of cases:

Abdul Manan Khan v. Mirtuza Khan, A.I.R 1991 Pat 154.

Abdul Hameed v Mohammad Yoonus, A.I.R 1940 Mad 153.

Mazhar Hussain v Bodha Bibi (1898) 21 All. 91.

Badrul Islam Ali Khan .v Ali Begum AIR 1935 Lah 251

Gulam Mohammed v Gulam Hussain A.I.R 1932 PC 81

Husaini Begum v. Mohammad Mehdi, (1927) 49 All 547

Books:

Dr. Poonam Pradhan Saxena, Family law Lectures (3rd edn, Lexis Nexis).