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‘WILL’ UNDER MUSLIM LAW: SAFEGUARDING THE RIGHT OF LEGAL HEIR

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ABSTRACT

Will is a testamentary document referred to as the ‘Wasiyat’, under the Muslim Law. A Will or a Wasiyat is a document that facilitates the transfer of property to the legal heirs after the death of an individual. It also gives the satisfaction to each person preparing a will, that their existing property would be transferred to right hands in the future, executed as per their choice. Will or Wasiyat is executed by the legator in the favor of a legatee, which comes into effect after the legator has passed away. However, Muslim Law lays down restrictions upon individuals wherein no person is allowed to create a will transferring the whole of his property. The reason behind this is to ensure that the law works in line with the words of Prophet, as well as ensures the share of all legal heirs. The present research paper at hand, lays emphasis on the topic discussing Will under the Muslim Law. The researcher has attempted to discuss and understand this vast topic in a more systematic manner in order to interpret the laws that are being followed in accordance with the words of Prophet Mohammed. The research paper focuses on the meaning and aspects of the testamentary document, the working, the rules and regulations imposed upon the testator while the transfer of will takes places. The paper is an attempt to clear ambiguities which might be there in the readers’ mind as well as clarify the rules laid down under Muslim Law, with respect to the present topic at hand.

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INTRODUCTION

Every individual has substantive concern with respect to his property, during their own lifetime as well as once they pass away, and would want to ensure that the property is being transferred over in the right hands. A person can make sure that his property is transferred and to whom, it will be transferred by Will after death. Will is a legal instrument which allows the person to transfer his property according to his own decision. India is a land of culture and religion. Every custom is being treated equally under the eyes of law. Hindus and Muslims have different customs when it comes to descending one's property. Whereas the "The Indian Succession Act of 1925, which consolidates the laws of intestate (with some exceptions) and testamentary succession, supersedes the previous Acts and extends in India to all the wills and codicils of Hindus, Buddhists, Sikhs and Jains. Mohammedans are not regulated by the Indian Succession Act, 1925, and they can dispose of their property under personal laws"²

"A Will/Wasiyat is a legal document by which a person, the testator exemplifies his wishes to disperse their property at death and calls one or more individuals, the executor, to administer the property before it is eventually distributed. Although sometimes it was believed that a 'will' was historically restricted to real property while 'testament' only covers personal property provisions, historical records reveal that the terms were used on an interchangeable basis."³ Therefore, both personal and real property apply validly in the word 'will'.

Upon the death of a person, his/her property is transferred to the legal heirs on the basis of the testamentary will thus executed. However, it is very likely and possible to happen, that a person passes away without the execution of a will (testament). Under such scenario, the rule of "Intestate Succession" is applied to carry forward with the distribution of property among the heirs.

With regards to Wills by Muslims, there is no codified statute formulated to govern the same. The Quran is indeed God's relevance which was made at various times to the Prophet Muhammad. "The Quran includes references to Shari'a law, in addition to being a holy text for Muslims. Any adult Muslim, with a sound mind, can do a will under Muslim rule. A minor or an unstable person is not able to do a will."⁴ While under the Muslim Law, the majority of an individual is at the age

² Shiva, *Concept of Will under Muslim Law*, LEGAL SERVICES INDIA, (Feb.23,2021, 7:15pm), http://www.legalserviceindia.com/articles/will_hindu.htm.

³ 3 AQIL AHMAD, *MOHAMMEDAN LAW*, 487 (23rd ed., Central Law Agency, 2020).

⁴ M. HIDDAYATULLAH, *MULLA PRINCIPLE OF MOHAMMEDAN LAW*, 203 (19th ed., Lexis Nexis, 1990).

of 15, but in India Section 3 of the Indian Majority Act of 1875⁵ overrides this law, stating that "minority" ends at the age of 18, the minority ends at the age of 21, if the guardian was appointed by the court for the minor. Therefore, in the case of Mohammedans, minorities for the purpose of will, gifts, benefits, etc., do not end at 15 years, but at 18 years. The law of Muslim restricts the strength of legacies to 1/3 of net assets. In this case, two-thirds must be divided according to intestacy law, except if there are no heirs who are unfavorable to the legates. Thus, when there are heirs, a Muslim can legacies validly only one third of his net assets. On payment of funeral expenses, his debts and so on, the net assets are established. This rule is based on the Prophet's tradition and The Indian courts have since early years enforced the rule⁶.

The present research paper has been mainly researched upon in a doctrinal and analytical method. The researcher focused on collecting abstract information from various sources and consolidating them in a systematic manner. The reason why this method was opted by the researcher was, because the aim is to understand the laws and the prevalent structure that has been into force with regard to Wills under the Muslim, in order to safeguard the rights of the legal heirs. Keeping this in mind, the researcher has gone through various sources of books, journals, law reports, articles, web references, E-journals, E-library, in order to collect all relevant information pertaining to the research paper from secondary sources. In conclusion, doctrinal research method through secondary data analysis and archived study was undertaken for this research paper.

This research project primarily aims to explain the concept of will under Muslim law. The aim behind conducting this research is to understand various aspects of will under Muslim law as it is a vast topic and includes any rules which are being followed in society from many years which were once laid by Prophet Mohammed. The main motive of undertaking this research project, is to conduct an in-depth research in order to gain clarity on the topic. For the same purpose the researcher through the medium of this research paper aims at answering some questions by the end of the paper, which are:-

1. What is the meaning and concept of Will under Muslim Law?
2. What are the restrictions imposed upon the testator under Muslim Law?
3. How are disputes related to will under Muslim Law resolved?

⁵ INDIA MAJORITY ACT 1875, § 3.

⁶Sabur Bibi v. Ismail Shaikh, (1924) ILR 51 CAL 124.

The research questions are aligned with the research objectives as the questions are related to understanding the meaning and concept of Will under Muslim Law, which in turn serves to the objective of understanding the context thoroughly.

1. Essentials of a valid will

A will is called an *al-wasiyya* in Islamic words. The will plays its role only after the death of the Testator. In the words of Ameer Ali⁷, “*a will from the Musselman point of view is a divine its exercise is regulated by the Quran*”

There are generally two types of will that are executed, which is, Oral form and Written form. If we analyze the characteristics of these wills, an Oral Will it is not mandatory to have a specific set of witnesses in order to prove the validity of the will. However, there are a certain parameter that are required to be met in order to execute the will:

- Legator must have a proper intention to make the will.
- Terms laid down in the will must be proved beyond reasonable doubt.

In case of a written will, it must be noted that two witnesses are required at the time of declaration of will in order to prove the validity of the will. The will must be executed after clearance of all debts which is also known as ‘zakh’. Clearance of debt and funeral expenses is an obligatory step and must be performed at all costs irrespective of the fact whether or not it was mentioned in the Will.

The essentials for a valid will are as follows: -

- **Capacity/Competence of Testator** – In accordance to the rules of Muslim Law, the Testor is required to qualify all the basic parameters, which are age of majority and soundness of mind.
- **Competence of Legatee** – Any person who has the basic right to inherit and hold property can be called as a legatee. The Legatee can belong from Muslim caste, or even from a non-muslim caste, as long as he/she is not hostile towards the Islam religion in particular In situation, wherein a person has renounced his religion as Islam, he is not in a position to be termed as a competent legatee. “A person who renounces Islam cannot be a competent

⁷1 AMEER ALI, MOHAMMADEN LAW, 438 (9th ed., Central Law Agency, 2007).

legatee. An institution is also a valid legatee. In the general sense, the institution should not be hostile towards Islam and not promote anti-Islamic activities. A will in favour of a Hindu temple or a society that propagates another religion will not be a valid will. However an institution engaged in promoting education and self-reliance is a valid one as long as it is not against Islam".⁸

- **Subject Matter** – A Muslim is allowed to inherit any kinds of property, whether it is movable or not, whether it is corporeal or incorporeal, it should be mandatorily be in existence and transferable to the testator at the time of the execution of the will. Hence, it is important to make note here that, at the time when the will is being prepared it is not important that the property is transferrable, but, at the time of the execution of the will after the death of the Legator, the property must be in a state to be transferrable
- **Testamentary Capacity** – “The testamentary capacity of a Muslim is cut down by two principal limitations :
 - a. as to quantum where he cannot bequeath more than one-third of his net estate
 - b. as to the legatees where he cannot bequeath to his own heirs.”⁹

When the above given conditions are fulfilled, it can be said that the given will is a valid will. Any will be obtained without fulfillment of the given criteria would be considered as invalid.

2. Aspects of will under Muslim law

2.1 Who can make a will?

The competence of the legator is the foremost prerequisite in order to constitute a true Will. A legator is considered capable of forming a will if he has the following characteristics mentioned.

- **He must be a Muslim.**

Under Islamic law, a will produced only by a Muslim is regarded as a valid will. At the moment of execution of the Will, if a legator is Muslim, then only the Will is regulated by the Muslim law. And according to the provisions of the Indian Succession Act, 1925, and

⁸Badrul Islam Ali Khan vs. Ali Begum, AIR 1935 LAH 251.

⁹4 ASAF A. A. FYZEE, OUTLINES OF MUHAMMADAN LAW 378 (5th ed., Oxford, 1974).

not by the Muslim Personal Rule, in a matter where Muslim married under the Special Marriage Act, 1954.

- **He must be of a sound mind.**

The legator must be stable while the Will is being made. he must be capable to consider his acts and the possible repercussions of what he does not only for the specific period of time when the Will is made, but also to continue the same until his death.

- **He must have attained the age of majority.**

The age of majority is defined under the Indian Majority Act as 18 years in the ordinary case and 21 years if the person is under the control of the Courts of Wards. Any will be executed by a minor is deemed invalid.

- **Free consent by legator**

The free consent of the testator/legator is an obligatory step to be fulfilled when executing a Will. Any will would be considered as null and void if it found to be enforced under coercion by a legatee, excessive control or fraud, and the legatee shall not be entitled to receive any assets under that Will.

2.2 Who can be a legatee?

There is one more important requirement of a legitimate Will besides the competence of the legator, which is the competence of the legatee. The following are the attributes of a legatee who is willing to take a legator-executed Will.

- **He must be an existing person.**

A legatee is competent to accept a will on condition that he must alive at the time of the legator 's death. This is because a will only come into force after the legator 's death and not before the legator makes it. Caste, creed, sex is not essential when it comes to passing on property through will.

- **Unborn child (in womb)**

An infant in the womb of a mother is considered as a living person and is, thus, under two conditions, a qualified legatee under Islamic law. one, at the time of the declaration of the

Will, he must be in life in the womb of the mother. Secondly, within six months of the date of Will 's execution under Sunni rule, and within 10 months under Shia law, the child must be born alive.

- **Murdered of the legator**

As per Sunni Rule, a legacy to a person who, whether intentionally or unintentionally, caused the testator 's death is invalid. “Under Hanafi Rule, if the heirs have given their permission, a will in respect of a person who has caused the testator 's death may be validated.”¹⁰ It is invalid, according to Shia law, if it is caused deliberately and not if it is caused unintentionally.

- **Free consent of legatee**

It is necessary to take the legatee 's consent to know whether he wants to approve the Will or not before transferring legal title to the legatee under a Will. It is possible to express or imply approval.

2.3 Limitation of a testator

“If a Muslim desire to make a Wasiyat of his land, in that case he is permitted to do so only to the extent of one-third of the bequeathable land. This extent of one-third is measured after the expenses of his debts and funeral etc.”¹¹

“Any bequest beyond the one-third cap will not take effect until the legator 's heirs give their consent to it. In the event that the heirs do not give their permission, only one-third of the bequest will be legitimate and the remaining two-thirds will be passed by intestate succession.”¹²

In addition, the second limitation falls into effect only if the legatee is one of the legator 's heirs. The agreement of the other legitimate heirs of the legator is a dominant factor in the creation of a valid Will, whether the property bequeathed is one-third or less. “The explanation for this rule is that a legator can make a legacy for one of the legal heirs to give him more priority, which among the other heirs can result in a feeling of envy and

¹⁰ YAWAR QAZELBASH, PRINCIPLES OF MUSLIM LAW, 233 (5th ed., Central Law Publications 2005).

¹¹ *Id.*

¹² 3 PROF. RAKESH KR. SINGH, LAW OF WILL, 214 (6th ed., Central Law Agency, 2016).

enmity. Shia law does not differentiate between an heir or a non-heir, on the other hand. A bequest may be made in favour of someone before one-third of the property is considered as legitimate. It can therefore be inferred that, compared to Sunni law, Shia law offers enough powers to establish a will.”¹³

2.4 Construction and revocation of will

In general, a will must be interpreted in accordance with the rules laid down under Islamic law and the language and purpose of the legator must be thoroughly investigated. A Will is a document that a person creates during his lifetime and takes effect after his death. Therefore, a will must be interpreted after his death to fulfil the legator 's intentions. The wording cannot be explicit at some times and the legator 's intent is unclear. It is left to the discretion of the heirs in such situations to illustrate this Will in whatever way they choose.

Muslim law gives a legator a liberated right to exercise that he may at any time revoke the Will or any part of the Will executed by him. An express revocation may be performed verbally or in writing. Any act performed by the legator contrary to the legacy may revoke the Will. In other words, an act that results in the dissolution of the bequests subject-matter is treated as an implied revocation of the Will.¹⁴

CONCLUSION AND RECOMMENDATIONS

A will executed by a Muslim must specifically be framed and incorporated as per the rules laid down in the Muhammadan Law, keeping in mind the social scenario and the terminology, the usage of words as well as language that is approved of in the most basic sense as per the prevailing condition of the society at large. In case there arises any sort of ambiguities in the Testament, the Court should permit as well as lay reliance upon the intention of the testator, giving considerable importance to the opinion of the legal heirs as well alongside.

A Testamentary document like the Will vests rights and powers of property upon the legatee in the form of gratuity, which however comes into play only after the death of the Legator. It would be practical to say that this gives the legator the right to correct the mechanism of law of succession

¹³ Dr. Anand Kumar Tripathi, *Concept of will under Muslim law: a study*, 4(3) IJLJ, 70, 76 (2017), <http://ijlljs.in/wp-content/uploads/2017/08/Will.pdf>.

¹⁴Mehak Thappar, *Concept of Wasiyat under Muslim law*, THE LAWSISTO (Feb.23, 2021, 7:20 P.M) <https://lawsisto.com/legalnewsread/NTQxMA==/Concept-of-Wasiyat-Will-under-Muslim-Law>.

to a certain extent. Muslim Law in the most systematic manner, profounds this interest of transfer of property. If the researcher were to put it into words, it would be pertinent to say that the Law allows the Will to be executed in favor of any person, while at the same time it ensures that a proper ratio of balance is being maintained during all its stages so as to ensure the functioning of law of inheritance and devolution of property under a will.