Essentials of a Valid Will

Introduction

On the other hand, in case of a written will, there should be two witnesses to the declaration of the will. If the testator fails to mention the quantity or amount of bequeathed property, regard may be given to the number or quantity owned by the testator at the time of death. The will is executed after payment of debts and funeral expenses. The majority view is that debts to Allah such as *zakh* and obligatory expiation should be paid whether mentioned in the will or not. However, there is difference of opinion on this matter amongst the Muslim jurists.For a will to be valid, the following conditions are to be satisfied.

1. Capacity/Competence of Testator;
2. Competence of Legatee;
3. Subject Matter:
4. Testamentary Capacity.

1. Capacity of Testator:-

According to Muslim Law, a testator or legator has to fulfil the following conditions: age of majority, validity of gifts made by guardians, validity of a person who has attempted suicide and soundness of mind. According to Muslim Law, the age of Majority is 15 years, but it is not applicable to the wills in India. It may be noted that under Shia law, age of majority is not a condition precedent for making a will. Tyabji states that *"the Shiite Law of wills must be deemed to be unaffected by the Majority Act which defines the age of majority as 18 or 21 and only questions related to marriage, divorce, adoption, and religious usages are exempt from this".* A Shiite who is ten years old is thus exempt from the Act and has discretion and is competent to create a will. It has however been held that this view cannot be accepted. There is no expression provision in the Act which excludes the operation of law for Shia Mulsims.
The Shafi School of Sunni Law has prescribed certain conditions:

a. A person who is capable of duties can make a valid will
b. A person who is under inhibition on account of insanity cannot make a will
c. A person who is not on his senses cannot make a will

d. A will made by a child is also not valid. However there is a difference in opinion among Muslim Law Scholars. However, under Muslim law, a will cannot be made by the guardian on behalf of the minor or insane person and it will be treated as void. A will made by a person when he was a minor but after attaining majority he ratified the same will be treated as valid.

Under Shia Law, a will made after the testator who was injured by his own actions or tried to commit suicide, such a will is declared as invalid. In *Mazhar Hussain v Bodha Bibi*6 it was held that a will of suicide is valid when made in contemplation of taking poison but before poison was actually taken, onus of proving that the will was written afterwards rests on party impugning with. Tyabji says that *"a will made by a testator whose mind is unsound does not become valid by his subsequently becoming of sound mind. A will made by a person while of sound mind becomes invalid if the testator subsequentlybecomes permanently of unsound mind."*

2. **Competence of Legatee:-**

Any person having capacity to hold the property can be a legatee. The Legatee may be a Muslim or a Non-Muslim who is not hostile towards Islam, man or woman, a major or a minor or even a child in the womb provided the child is born within 6 months of the death of the testator. A person who renounces Islam cannot be a competent 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.Where a legatee under a will is responsible for the murder or causing death to the testator, the will made in his or her favour will be invalid under Sunni Law. It is irrespective whether the murder was cause accidentally or intentionally. It is also immaterial if he knew about being a beneficiary in the will. Under Shia Law, the legatee will be incompetent to receive the benefits if the murder was caused only intentionally. The time of making the will is of no consequence. The legatee must be capable of owning the bequest. Any bequest made in favour of any legal heir already entitled to a share is invalid under traditional Sunni Muslim law unless consent has been given by other legal heirs. An acknowledgement of debt in favour of a legal heir is valid. Acceptance or rejection of a bequest by the legatee is only relevant after the death of the testator and not before. Generally speaking once a legatee has accepted or rejected a bequest he cannot change his mind

subsequently.Where the testator has bequeathed the property jointly to several certain or ascertained persons, the bequeathed property will be divided equally amongst the legatees. Under Hanafi law the legatees who have survived the testator will take the property.
The whole of a bequest made to several legatees collectively of whom one or more predeceases the testator is taken by the surviving legatees, Where the testator has directed that legatee will be entitled to take only a definite part of the bequest, the legatee will be entitled to inherit such portion of the property.

3. Subject matter:-

A Muslim can bequeath any property movable or immovable, corporeal or incorporeal, which must be in existence and transferable at the time of testator's death. Therefore it is not necessary that the subject matter of the will must exist at the time of making the will but it must exist when the will becomes operative that is at the time of the death of the testator.

4. Testamentary Capacity:-

A Muslim cannot dispose of by will more than one-third of the net assets after allowing for the debts and funeral expenses of the testator (under both Hanafi Law and Shia Law). The remaining 2/3 share should be made available for distribution amongst the heirs. Even for bequeathing the 1/3rd share, the Muslim has to obtain the consent of the other heirs. Thus, 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.