Doctrine of Consent, Abatement of Will & Registration and Revocation of wills

Importance of the consent

Under Sunni Islamic law the power of the testator is limited in two ways: firstly, he or she cannot bequest more than 1/3 of the totally property unless the other heirs consent to the bequest or there are no legal heirs at all or the only legal heir is the spouse who gets his/her legal share and the residue can be bequeathed and secondly, the testator cannot make a bequest in favour of a legal heir under traditional Sunni Muslim law. Here consent must be given at the time of the operation of the Will, that is, after the death of the testator.There are two exceptions to the one-third rule:

1. When the testator does not have any heir. In such cases, if the restriction of permissible one-third is applied, then the beneficiary is the Government who will take the property by doctrine of Escheat, while the primary purpose of applying the bequeathable permissibility to the extent of one-third is to protect the rights of the heirs, and not that of the Government. An heirless person can thus make a bequest of the total property.
2. Where the heirs themselves consent to the bequest in excess of one-third. As the chief objective is to safeguard the interests of theirs, the excess bequest can be validated by consent.

Under Shia Law, the bequest in favour of an heir is valid without consent of other heirs provided it does not exceed the bequeathable one-third limit. If it is in excess of the one-third, then the consent of those heirs is necessary whose share is likely to be affected by the bequest. The consenting heirs must be majors, sane and not insolvent in law to be considered as valid consent. The consent given by the heirs may be expressed or implied. It may be oral or in writing. It can also be implied from conduct. Mere silence or inaction would not be taken as consent even if heirs were present at the time of the proceedings for effecting the names in the Will. Where a will is executed in writing and is attested by the testator's heirs it is sufficient proof of their consenting to the act of the testator. Where the testator makes a bequest in favour

of an heir and on his death, the other heirs help the legatee in effecting a mutation in name or allow the heir to take exclusive possession of the property it is proof of the heirs' consent.

Under Shia Law, the consent of heirs whose shares are adversely affected can be given before or after the death of the testator and under Sunni Law, it must be given after the testator's death. But once the consent is give, it cannot be rescinded subsequently and the heirs are bound by it. Similarly, consent cannot be given after an heir has previously repudiated it.
The legacy in favour of an heir can be validated by obtaining the consent of one or some of the heirs or even all of them collectively. Where all the heirs give their consent the legacy is valid to the extent of the shares of all. Where only one or some of them give their consent the legacy would be valid only to the extent of the heirs' shares. In the case of *Gulam Mohammed v Gulam Hussain*, the Privy Council held that a bequest in favour of heirs without the consent of other heirs is invalid.

Abatement of legacies

A Muslim testator can make a will of only one-third of his property without the consent of his or her heirs. If the bequest is in excess, and the heirs refuse to give their consent, the totality of the will does not become operative or invalid but abates rateably and is valid to the extent of one-third of the property, as has been stated in the *Hedaya*. In *Damodar Kashinath Rasane v Shahzadi* , the Bombay High Court stated that a Muslim cannot bequeath more than one-third of his property whether in favour of an heir or a stranger.

The rule of Abatement is different in Sunni Law and in Shia Law.

I) In Sunni Law, the general rule is that a bequest in excess of the one-third of the estate of the deceased would take effect with respect to one-third with the excess going by inheritance. Where there are more than one legatees and the property given to them exceeds one-third, the shares of

each of the legatees would be reduced proportionally. This is called the „**Rule of Rateable Proportion'.**

The following principles are applied:

a. The property disposed of by will, must first abate equally and rateably.
b. The proportionate part of each bequest which is for a secular purpose must be allotted to it
c. The proportionate parts so abated of bequests for pious purposes must be aggregated and the aggregate distributed so that the priority will be given to the extent of the full bequest. In such cases the following rules are applied:

The Quranic rules will be given first preference. The Quranic heirs will have precedence over other bequests for pious purposes.

- The property will be applied for certain works which are necessary.
- The property will be applied for voluntary purposes.

There is an exception to the above rule. Where the legator has left only his or her spouse, and apart from the spouse there is no other heir, the above rule of only making one third of the property may become inapplicable. In such cases, the spouse shall take the whole property. The rule of bequeathable third shall have no application if no heir has survived the legator.

If a Muslim bequest more than one-third of the property and the heirs does not consent to the same, the shares are reduced proportionately to bring it down to one-third. Bequests for pious purposes have no precedence over secular purposes, and are decreased proportionately. Bequests for pious purposes are classified into three categories:

I. Bequest for *faraiz,* that is, purposes expressly ordained in the Koran viz. *hajj*, *zakat* and expiation for prayers missed by a Muslim.
II. Bequest for *waji-bait*, that is, purposes not expressly ordained in the Koran, but which are proper such as charity given for breaking rozas.
III. Bequest for *nawafali*, that is, purposes-deemed pious by the testator, viz. bequest for constructing a mosque, inn for travellers or bequest to poor. The bequests of the first category take precedence over bequests of the second and the third category and bequests of the second category take precedence over those of the third.

An example under the Rule or Rateable Proportion: If a Muslim Man executes a Will giving Rs.30,000 to A and Rs. 20,000 to B. He leaves behind property that comes up to Rs.75,000 after

payment of funeral expenses. Here the bequeathable limit would be one-third, which would be Rs.25,000 while the bequest in the will at the moment is Rs.50,000. The bequest in favour of A and B will be proportionately reduced.

The ratio of the bequest will be the same but both bequests will be reduced to half, that is, the bequest due to A would become Rs. 15,000 and that of B would be Rs.10,000. The sum total would then by Rs.25,000 which would make it valid.

II) Under Shia Law, the principle of rate able abatement is not applicable and the bequests made prior in date take priority over those later in date. But if the bequest is made by the same will, the latter bequest would be a revocation of an earlier bequest. This is called the **Rule of Chronological Priority**. The legatee whose name appears first in the Will is to be given his or her share, followed by the second legatee and then the third and so on. The moment the bequeathable one-third is exhausted full effect has been given to the Will. Any other legatee whose name follows after the one-third of the assets has been distributed will not receive anything. The rule of chronological priority is not applicable in cases where under one legacy two or more persons have been an exact one-third of the total assets. In such cases, the legatee whose name appears last gets the one-third given to him under the Will, and the legatees whose names appear prior to him will not get anything.

For example, A testator dies behind leaving assets worth Rs.1,20,000. He leaves a will under which he leaves Rs.20,000 to A, Rs. 30,000 to B and Rs. 40,000 to C. As the total assets of the testator are to the tune of Rs.1,20,000, the bequeathable one-third of that amount would be Rs. 40,000.

Following the rule of Chronological Priority, as A's name appears first, he will be given Rs. 20,000. The rest of the Rs.20,000 of the one-third will be given to B. C will not get anything as the one-third (Rs. 40,000) is exhausted.

Registration and revocation of wills

REGISTRATION OF WILLS

Though it is not necessary to register a will, but the Law recognizes a Registered will when the execution of a will is disputed and when there is an unregistered will. The provisions relating to registration of the will have been given in s Registration Act. The testator, after his death, or any

person claiming as executor or otherwise under a will, may present it to any Registrar or Sub Registrar for registration. No time limit has been prescribed for registering the will and a will may be presented for registration at any time. A will presented for registration by the testator may be registered in the same manner as any other document.

A will presented for registration by any other person entitled to present it shall be registered, if the egistering officer is satisfied:

a. that the will or authority was executed by the testator;
b. that the testator is dead; and
c. that the person presenting the will is entitled to present the same.

The registration of will is not the proof of the testamentary capacity of the testator as the Registrar is not required to make an enquiry about the capacity of the testator except in case the testator appears to him to be a minor or an idiot or lunatic.

CODICIL

Codicil means an instrument made in relation to a will and explaining, altering or adding to its dispositions and shall be deemed to form part of the will. The codicil is generally made to make slight changes in the will, which has already been executed. A codicil cannot alter a will more than what is necessary to carry out the testator's intention as evidenced by the will and the codicil.

Executor of the will (*Al-wasi Al- mukhtar*)

The executor or *al-wasi* of the will is the manager of the estate appointed by the testator. The executor has to carry out the wishes of the testator according to Islamic law and to watch the interests of the children and of the estate. The authority of the executor should be specified. Hanafi law states that the executor should be trustworthy and truthful; Shia Law states that the executor must be just. The Hanafi law considers the appointment of a non-Muslim executor to be valid. The testator may appoint more than one executor, male or female. The testator should state if each executor can act independently of the other executors. If one starts acting as an executor, one will be regarded as having accepted the appointment, both in Islamic and in English law.

REVOCATION OF WILL BY A MUSLIM

The basic feature of a will is its revocability. The testator may revoke his will at any time before his or her death either expressly or impliedly. The express revocation may be either oral or in writing. A will may be expressly revoked by tearing it off or by burning it. This revocation is possible till the testator breathes hislast which is *Marzul Maut* (end at the death bed). Similarly a testator is lawfully empowered to make a subsequent will of the same property and the previous will would be revoked. The will can be revoked impliedly by testator transferring or destroying completely altering the subject matter of the will or by giving the same property to someone else by another will. Where the testator has disposed of the bequeathed property by way of 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.

Therefore under Islamic Law, the following conditions can stand as revocation:

a) sale of the bequeathed property

b) gifting the property

c) when the property is materially changed or altered by way of addition and the property cannot be delivered Mere denial by the testator as to the validity of a bequest will not be sufficient to revoke the will.

A similar declaration will not amount to revocation either. Under Islamic Law, a bequest to a person is revoked by a bequest in a subsequent will of the same property to another. But a subsequent bequest, though it be of the same property to another person in the same will does not operate as revocation of the prior request and the property will be divided between the two legatees in equal shares, as per the Hedaya. Another important aspect of Revocation is intention of the legator. It is important to show that a legato has intended to alter the will and the alteration in the deed, is a result of an altered intention in the interest of justice and good conscience.