Q-1 Explain the rule that "No muslim can bedueath more than one-third of the Reside of this estate after Payment of debts and other changes." In what circumstances the will can be Revoked under Muslim Law?

Definition

A will is defined as the local declaration of the intention of a testator with respect his property which he desires to be curried into effect after his death. It is usually drafted by the person who wants to make disposition of his property. Having hardly any knowledge of law and being his own composition at which he may never have been too good. he is likely to leave loopholes.

The word used in Muslim Law to denote a will is it. This word has a meanings besides a will. It also signifies a moral exhortation Ameer Ali says A sill from the Mussalman point of view is a divine institution, since its exercise is regulated by the Quran... At the same time the Prophet declared that the power should not be exercised to the injury of the lawful heirs" Sir Thomas Strange's remarks in this respect are useful to note. He says:

Originally the chief of which first prevailed in making wills was to expiate for the sins committed, by making pious disposition through wills, and the proportion is commonly the ratio of the decide with which the property has been acquired or of the sensuality and corruption to which it has been devoted.

C. CONDITIONS FOR A VALID WILL

Under Muslim Law, the following conditions are necessary for valid testamentary of the property. These conditions are. however, not applied in the case of a Ashari Shiite Muslim.

(i) Will can he made only of one third of the property

Under Islamic law, wills are declared to be lawful in the Can and the traditions

and all our doctor moreover, have concurred to this opinion. In Pre-Islamic times on an almost unlimited power of disposing of his property. An expectant heir was not having any right over the property of his/her parents. Under the islamic law a Muslim can post of his property in favour of stranger only to the extent of one third of his total property and in this way Islam has recognised the rights of the heirs in the property of her parents. A bequest to any amount accessing the end of the testator's property is not valid. In proof of this the following tradition is good as delivered by Abee Vekass:

In the year of the conquest of Mecca, being taken to extremely ii that my life was despaired of the Prophet of God came to pay me a right of correlation. I told him is by the leasing of God, having a great estate, but no heirs. except one daughter, I wished to know if I might dispose of it All by Will.

He replied. No And when I severally interrogated might curve TWO THIRDS or ONE HALF: he also replied in the negative but when I Asked might leave a THIRD, he answered 'yes. you may leave it THIRD of your property by will: but a third part, to be disposed of by will, is a great portion and it is better you should leave your heirs rich, than in a state of poverty, which might oblige them to beg of others'.

The Muslim Law guarantees 1/2 right of inheritance to the newly entitled heir. The property is to be divided in this those whose rights were prior in time, taking twice as much as those who had just acquired them, Let. the customary heir took 2/3 und the Islamic heir 1/3.

The nucleus of the law of wilts by common consent. to be found in a transition of the Prophet, reported by **Bhukari**. In **Abdul Manan Khan v Mirtuza Khan**, the Patna High Court said that any Muslim having a sound mind and not a minor make a valid will to dispose of the property. As regards a deed of will, no formality or a particular form is necessary for the purpose of creating a valid will. An unequivocal expression by the testator serves the purpose However, the legatee must be competent to take the legacy or bequest. Saksena in his book entitled "Muslim Law says that appears the rule of one third was taken from Roman law. It is, therefore, clear that a Muslim cannot dispose of more than the bequeathable third. Under Islamic law, a man is not allowed to dispose of his whole property. At the maximum he can dispose of only one third of his estate and that only after payment of funeral expenses and debts. The two third of his estate must go to his heirs as an intestacy.

(ii) Bequest to Heir-Its legality

A will for the benefit of any of the testator's heir is invalid The heirs cannot object the decision of the legator. They cannot veto it either when the will is made or when it becomes opearative.

If a man makes a bequest in favour of a part of his heirs it is not valid, because of a traditional saying of the Prophet, 'God has allotted to every heir his particular rights'; 'and also, because a will in favour of a part of the heirs is an injury to the rest, and, therefore, if it were deemed legal, would induce a breach of the ties of kindred. Besides, it is said in the traditions, a bequest to particular heir is unjust."

(iii) Testamentary disposition of more than one third of the property- its consequences

Where the testator has disposed of more than one third of the property by way of will the will is not void. It is only invalid. Such a will can be legalised after obtaining the consent of the heirs. The heirs are fully competent to give their consent for such transaction. The heirs may give their consent expressly or impliedly. They may give their consent without raising any argument. Under Hanafi law the consent of the heirs has to be obtained after the lagator's death.

Shia Law. – There is not much difference between Shia and sunni shools on the points duscussed above. Under Shia law, a testator can dispose of more than one third of the property. The heirs are fully competent to give their consent during their lifetime and it need not be obtained either during the lifetime of the legator or after his death.

It is necessory on the part of the testator to obtain the consent of the heirs in the following cases:-

(i) he may lawfully bequeath legacies to any of his heirs, payable out of the bequeathable one third;

(ii) it is necessary on the part of the testator to obtain the consent of heirs if the disposition of property has become necessary on account of the perfomance of certain religious duties.

A will made for non-religious purposes will not be valid. The will cannot be validated by obtaining the consent of heirs. A Muslim is not permitted to make a will for the construction of Jewish synagogues or Christian churches. Similarly, he is not allowed to make a will for translating the Taurit or Injeel.

F. REVOCATION OF WILL

Under Islamic law a bequest may be revoked. The will can he revoked only by the legator. The heirs of the will cannot revoke a valid will either in his lifetime or after his death. The bequest may be revoked either expressly or by implication The express revocation may be either oral or in writing. Where the testator has disposed of the bequeathed property by way of alienation it will be presumed that testator has revoked the bequest. A subsequent sale or gift of the property bequeathed may also amount to revocation.

Where the testator has materially changed the bequeathed property by way of addition etc. and the property cannot be delivered without the addition, the bequest will be treated as revoked.

A mere denial by the testator of the validity of a bequest will not be sufficient for revoking the will. Similarly, it the testator makes a declaration that he has not bequeathed the property it will not amount to revocation.

Under Islamic law, a bequest to a person is revoked by a bequest in a subsequent will the same property to another. But a subsequent bequest, though it he of the sane property, to another person in the same will does not operate as a revocation of the price bequest, and the property will be divided between the two legatees in equal shares.

Justice **M.C. Chagla** of Bombay High Court has said that much should depend in the legator's intention. On the other hand, Mulla has criticised the opinion expressed by Mr. Justice Chagla in the above case. Mulla maintained that the view taken by Mr. Justies Chagla is not according to original texts. Thir Mahmood" says that the criticism as sound. He says in Muslim Law intention that of the parties is very important ant therefore, the mere alteration

by legator in the property, which he has bequeathed. does not mean that he has revoked his will.

Q-2 Difine "will" under muslim law who can make it? when can a will be Revoked under muslim law.

Introduction

The Law of Wills is the most difficult and complicated of all other branches of law. The reasons are manifold. Law of inheritance may differ. Wills remain the same. If a man is the absolute owner of property. he has a right to depart from the line of succession applicable to him. In doing so, however, from times immemorial one difficulty has always been felt in interpreting it. Mostly it is drafted by persons who have little knowledge of law and often have little command over the language. It is difficult for one to express precisely what one feels and means, and when it is for another at express one's intention the difficulty is enhanced . Anyone can draft a will-say a sainik, clerk, arzinavis. It is not necessary to consult a solicitor.

Will is a special mode of transfer of property. It comes into effect on the death of its maker, it is a most complicated mode too. Law differs from country to country and community to community.

Definition

A will is defined as the local declaration of the intention of a testator with respect his property which he desires to be curried into effect after his death. It is usually drafted by the person who wants to make disposition of his property. Having hardly any knowledge of law and being his own composition at which he may never have been too good. he is likely to leave loopholes.

The word used in Muslim Law to denote a will is t. This word has a meanings besides a will. It also signifies a moral exhortation Ameer Ali says A sill from the Mussalman point of view is a divine institution, since its exercise is regulated by the Quran... At the same time the Prophet declared

that the power should not be exercised to the injury of the lawful heirs" Sir Thomas Strange's remarks in this respect are useful to note. He says:

Originally the chief of which first prevailed in making wills was to expiate for the sins committed, by making pious disposition through wills, and the proportion is commonly the ratio of the decide with which the property has been acquired or of the sensuality and corruption to which it has been devoted.

It may be noted here that under Shia law, age of majority is not a condition precedent for making a will. Tyabji says that the Shiite law of wills must be deemed to be unaffected by the Indian Majority Act and and a Shiite who is ten years old and has discretion must be considered competent to make a will. It is submitted here that the opinion expressed by Tyabji cannot be accepted. There is no express provision in the Act under which Shia Muslims are excluded from the operation of Muslim Law of wills. It is, therefore, submitted that a shia Muslim like other persons will be governed by Indian Majority Act.

Shafii school of *sunni* law has prescribed certain conditions which are as follows:-

(i) a person who is capable of duties can make a valid will;

(ii) a person who is under inhibition on account of imbecility; an insane person cannot make a will;

(iii) a person who is not in his sense cannot make a will;

(iv) a will made by a child is also not valid. There is a difference of opinion amongst various doctors of Muslim Law on this point. According to

one authority a will made by a child will be valid if the child is having discernment, at the time of the making of the will.

(ii) **will made by a guardian**

Under Muslim Law a will cannot be made by the guardian. A guardian cannot make will on behalf of a minor or an insane person. A will made by the guardian on behalf of the minor or insane will be treated as void.

(III)Validity of a will made by the person who has attempted suicide

Under *Shia* law, a will made after the testator who was injured by his own deeds or who administered poison for committing suicide will be invalid. A Shia Muslim can validly make a will and later on commit suicide.

(IV) **Soundness of mind**

Tyabji says that a will made by a testator whose mind is unsound does not become valid by his subsequently becoming of sound mind.

F. REVOCATION OF WILL

Under Islamic law a bequest may be revoked. The will can he revoked only by the legator. The heirs of the will cannot revoke a valid will either in his lifetime or after his death. The bequest may be revoked either expressly or by implication The express revocation may be either oral or in writing. Where the testator has disposed of the bequeathed property by way of alienation it will be presumed that testator has revoked the bequest. A subsequent sale or gift of the property bequeathed may also amount to revocation.

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Q-3 दान (Hiba) को परिभाषित करें इसके अवयशक तत्वों का वर्णन करें । दान के प्रति संहरण से सम्बंधित विधि का वर्णन करें ।

Definition

It is not easy to give a precise and concise definition of gift. Generally, English term gift and the Islamic term "hiba" are used in the same sense and they carry the same meaning It has been however, maintained that this assumption is not true. The English term it is much wider than hips. For the validity of a *hiba*. following conditions must be fulfilled:-

(i) there must be disposition of property:

(ii) the disposition must be gratutious;

(iii) It must effect an immediate transfer of the corpus of a property by one person;

(iv) the transfer must be unconditional;

(v) the property must be in existence and should be specified.

A gratutious disposition of property which does not satisfy the above requirements may be treated as gift under the English law and may also be valid under Muslim Law but it may, however, not come within the category of *hiba.*

for understanding the term ‘gift’ properly it is necessary to know the concept of ‘property’ because both these terms are related to each other. Salmond says that the term ‘property’ possesses a singular variety of different applications having different applications having different degrees of generality. In its widest sense. property includes all person’s legal rights.

REVOCATION OF GIFT

Under Muslim Law a can be revoked. A gift may be revoked by the donor (but not by his heirs after his death) at any time before the gifted property has been delivered to the donee. Tahir Mohmood says that the above statement is not correct. He maintains firstly, ‘ it suffers from a contradiction in terms since if there is no gift the question of its revocation is irrelevant. What can be revoked (or retracted) In this case is actually the declaration (ijab) of the gift(Which is not result into a gift). He further says that in such a case the cout should, if necessary, confirm that the declaration of the gift was revoked. and not that the girl Was revoked. Second, in several cases delivery of possession is not necessary at all: but not in all those cases is a gift revocable only for the reason that possession has not been delivered.’ Is is pointed out here that the statement made by ***Tahir MahMood*** is not correct As soon as the donor had made the declaration, a gift shall come into existence. The delivery of possession is one of the necessory requirements for The validity of a gift. it can be said that a gift mainly consist of two elements-- declaration und delivery of possession These two elements are co-related One cannot exist without the other. It is there the which is revoked and not the declaration He has again not cited the cases where delivery of possession is not necessary.

It is necessary for the donor to my reason for the revocation of gift. The donor may revoke that gift even if he has purported to wane his right of revocation Where the donor has accepted nothing in return for the waiver, he will not be at library to revoke the theft The right of revocation of a gift is purely personal. The heirs of the donor shall have no right of revocation. This rule will not be applied in the case of a void gift. There are certain gifts which cannot be revoked. The list is not uniform. It differs from school to school. Sunni and shia schools are also not uniform on this point.

Broadly speaking, the revocation of gift can be classified into following two categories:--

(i) Revocation of gifts before the delivery of possession; and

(ii) Revocation of gifts after the delivery of possession.

Revocation of gifts before the delivery of possession

Delivery of possession is the necessary condition for the validity of a gift. A donor is A donor is fully competent to withdraw his offer of gift it delivery of possession was not made For the revocation of such its under of the court is necessary. Prior to the delivery of possession, the donee hardly acquires any right in the property. In such cases the revocation hardly arises.

Revocation of gifts after the delivery of passion

Where the donor has delivered the property to the done, he cannot ordinarily withdraw his offer of gift. In such cases it is necessary on the part of the donor to file a suit in the court of law for revoking the gift In such cases, the revocation can be made with the consent of donee.

It has been said in Hedaya that the death of one the parties, or if the donee should die, his property shifts to his heirs, and becomes the same as if it had shifted during his life time and if the donor should die, his heirs are strangers with respect to the contract, since they made no tender of the thing given. Wilson has also said the same thing. According to him, a gift once validly made must be rescinded by a civil court on the application of the donor, unless the right of revocation is barred on account of the death of the donor or donee. Tyabji has also expressed the esame opinion. He says the

revocation of a gift is completed either by an order of the court cancelling the gift. or by the donee consenting thereto.

Q-4

Meaning of Waqf

The word "Waqf "has its origin in the Arabic verb The legal meaning of waqua." The legal meaning of 'waqf' to ***Abu Hanifa*** is the appropriation of a particular article (corpus) in such a manner as subjects it to the rules of divine property. The immediate consequence of dedication is that the waqif (dedicator of property) will cease to have any right over the property which he has dedicated and the Almighty will become the owner of the property. Abu Hanifa was also of the opinion that a gif 1s free to dedicate his property in our and the which may be derived from that property will be applied for the benefit of mankind. He said that *waaf* signifies the appropriation of any particular thing (corpus) in such a way that (a) the appropriator's right in it shall continue, and (b) the advantage of it go to charitable object. or it is the detention of a specific thing (corpus) in the ownership of the *waqif* or appropriator, and (b) the devoting or appropriating of its profits or truth charity, on the poor, or other good objects in the manner of an ariyat or commodate loan. From the definition mentioned above, it is clear that under the Hanafi school *waqif* 's right of ownership continues even after dedicating the property and he was free to dispose it of according to his will.

The principles propounded by **Malik** are very important.*Habs fi sabil Allah* is given an important place and according to this doctrine both movable and immovable property can be given in *waqf.* According to Hanafi doctrine waqf can be made only of immovable property. Hilal in his book entitled Kitab

ahkan-al-waqf says that a Muslim cannot make a sadaqa of animals, merchandise and garments. A Muslim can validly make a gift of mules, weapons, horses and etc.

On the Basis of the definition given by Abu Yusuf, the following charactenstics are necessary for a valid waqf:

(a) Religious or pious motive. A merely secular motive, would render the dedication a gift or trust, but not a waqf. The ownership will rest in the God.

(b) Permanent nature-Waqf is permanent endowment. a pious gift dedicated which is not permanent, may be a Sadaqa but cannot come under the category of waqf. The dedicator will have no right in the property.

(c) Utilisation of usufruct-The ultimate benefit of the waqf should go to the mankind.

Definition of Waqf given by jurists

Islamic law jurists have defined the term want in their own way. There is no identity of opinion amongst different jurists in this point. **Mr. Justice Ameer Ali** in his book entitled **Mohammadan Law'** says that way literally means detention, stopping or tying up. In **Macnaghten's Mohammadan Law,** *waqf* is defined to religious or useful. or what we should call, generally charitable purposes.

Under such circumstances, a complete definition cannot be given until and unless the three important ingredients are not included:

(i) the motive of dedication must be religious, a merely secular motive would render the dedication a gift or a trust, but not a waqf,

(ii)it is a permanent endowment ; a pious gift, which is not of permanent foundation, may be a sadaqa, but cannot in law be termed as waqf,

(iii) the usufruct is to be utilised for the good of mankind.

CREATION OF WAQF BY NON-MUSLIMS

Section 3(1) of the Waqf Act, 1995, defines waqf as follows:

'Waqf means the permanent dedication by a person professing Islam of any movable or immovable property for any purpose recognised by the Muslim law as pious, religious or charitable and includes:

(i) a waqf by user;

(ii) granted (including mashru-ul- khidmat)for any purpose recognised by the Muslim law as pious, religious or charitable; and

(iii) a *wakf-alal-aulad* to the eextent to which the property is dedicated for rany purpose recognised by Muslim lawa as pious, religious or charitable and '*waqif'* means any person making such dedication.

it is clear from the definition that any person making dedication of any movable or immovable property must be a person professing Islam and that the dedication must be for any purpose recognised by the Muslim law as pious, relitgious or charitable.

Ameer ali in his book entitled Mohammadan Law says that according to the classical jurists of Islam, even non- Muslims could make waqfs. A similar view has been expressed by Mulla in his book entitled 'Principles of Mohammadan law.

There are various judicial decisions where a waqf created by non-Muslims was held as valid. In Fazlur Rahman v. Anath Bundhe, a contract for valuable consideration was in question and a Hindu agreed to set aside property for the benefit of Muslims. It was held that such a constract was illegal because Muslim law of waqf does not contemplate a waqf for the mosque being made by non- Muslims. It was, howerer, maintained that non-Muslim can also make a waqf provided that the purpose of the waqf is neither repugnant to Islam nor opposed to the settler's own creed.

The Nagpr High Court also followed the observations of Ameer Ali. In *Moti shah* v. *Abdul Gaffar*, it was observed that all persons who are competent to make a valid gift are also competent to constitute a valid waqf. The law only requires that the object for which dedication is made should be lawful according to the creed of the dedicator as well as the Islamic doctrines.