Mohammed Osman Shaheed's

Treatise on

MUSLIM LAW OF WILLS

Foreword By

JUSTICE BILAL NAZKI

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Justice Bilal Nazki

Foreword

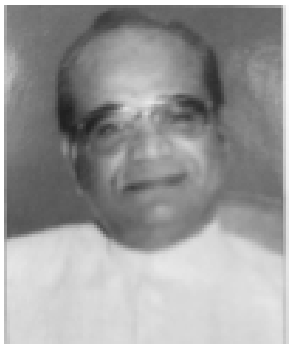
Law relating to wills is a complicated law and when it comes to Islamic Law, it becomes even more complicated. It is appropriate that a treatise is now prepared by Mr. Osman Shaheed, Advocate-Additional Public Prosecutor, High Court whose scholarship on Muslim Law is well known. He has already done a commendable job by writing two books on other facets of Islamic Law.

This book is a result of hard work, research, and keen interest. The author has tried to make the book interesting, informative and the book is written in such a fashion that it will be easily understood. I am sure, this effort of Mr. Osman Shaheed will go a long way in assisting the students of law, academicians, lawyers and Judges.

Dated : 18.4.2007

Justice Bilal Nazki

Preface



Without blessings of Almighty, without appreciation of the Members of the Bench and bar, without co-operation of my colleagues namely *Md. Moid Ahmed Quadri*, *Md. Shafeeq* and *Yaser Mamoon* this book would not have seen the light of the day. I am thankful to Almighty and to them who extended their helping hand in achieving my goal.

The readers who have read law of gift, law relating to legitimate expectation have encouraged me to pen down this Book on "Muslim law of will". It has always been my endeavour to pick and choose various subjects of Muslim Law so as to make it easy for the readers to understand the Muslim Law easily.

Muslim Law has been misunderstood rather than understood. I don't find fault with anyone except with those who are well conversant with the law but failed to explain it in simple language.

This is my another humble attempt to explain the Muslim Law of Will, with a hope that this will receive the same warm response, from the members of the Bench and bar and from others in general.

I am immensely grateful to His lordships Justice Sri *Bilal Nazki* who spent some of his most precious time to writ foreword of this book.

Last but not the least, I owe my thank to my wife Smt. *Masarath Jehan* and my son *Md. Adnan Shaheed* Advocate my daughter-in-law *Nilofar Afshan* for their valuable assistance.

I am also thankful to the publishers M/s. *Haseen Ahmad* and *Waseem Ahmad*.

Mohammed Osman Shaheed

Author

TREATISE ON MUSLIM LAW OF WILLS

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TREATISE ON MUSLIM LAW OF WILLS

INTRODUCTION

The concept of will is found in every system of law, and system of transfer of legacy by will was prevailing among the Arabs even before the advent of Islam.

Under English law and Hindu law a testator is entitled to bequeath his whole of the property but the Muslim law restricts such transfer of legacy to an extent of 1/3rd of it only.

The Muslim law of will has got its divine origin, that is the reason why it is stated by Mr. M. Sautayra that "a will from the Musalmaan's point of view is a divine institution since its exercise is regulated by Quran".

In Hidaya it is stated that wills are declared to be lawful In the Quran and the tradition.

Power of bequeath is a very important device in the hands of a Muslim to transfer 1/3rd of his property without the consent of his heirs in favour of his most deserving financially weak relatives and particularly to compensate the loss of his grand child, if any, who is father less and otherwise deprived of his legitimate share because of his exclusion in view of his fathers' death who predeceased his father. The poor persons may also be helped and their financial problems can be solved if rich Muslims by following the ordain of All Mighty, transfers 1/3rd of their wealth to them.

Many of the poor students and poor girls of marriageable age do deserve such help from the rich Muslims.

It is very unfortunate that most of the Muslims have almost failed to act in accordance with the injunction of Quran containing the ordains of All Mighty and the Hadiths and they

do not bother themselves to extend their helping hands to the needy people.

It would not be wrong if it is claimed that

QURAN is the mother of many of the existing and prevailing human laws i.e men made laws. For instance following is one of the injunctions of Quran regarding the contract of debt.

> "*Believers, when you contract a debt for a fix period, put it in writing. Let a scribe write it down for you with fairness, no scribe should refuse to write as god has taught him.*"[1]

The Indian Contract Act of 1872 (is) primarily seems to be based on or in consonance with this injunction of Quran and the law relating to promissory note under Negotiable Instrument Act of 1881 also seems to be brought into existence after getting inspiration from this Quranic injunction.

Laws relating to possession, Prohibition of Land Grabbing and Criminal Trespass (which is an offence U/s 448 I.P.C.), would emerge from the canon of under mentioned Quranic injunction:

> "*Do not devour on another's property by unjust means.*"[2]

Anti Corruption laws under which bribing is declared as punitive offence is founded on the injunction of Quran which runs thus:

> "*Nor bribe the judges with it in order that you may wrongfully and knowingly usurp the possession of other men"* [3]

1. *Surah Al Baquer (2)* the Cow, Verses No.282
2. *Surah Al Baquer (2)* the Cow, Verses No.188
3. *Surah Al Baquer (2)* the Cow, Verses No.188

Drinking alcohol and gambling are considered as evils in a civilized society now and laws have been enacted to eradicate drinking and gambling (in its various forms) such as gambling Act and prohibition laws, but the Quran prohibits both the evils 1600 years ago saying,

> "*they ask you about drinking and gambling, say, there is great harm in both.*[1]

Standards of Weights and measures Act have come into force in the year 1958 under which it is unlawful to use weights and measures other than standards weights and measures. This Act is also based on injunction of Quran which runs thus,

> *"Wa Awful Kayla Wal Miszan (and use your measure and balance with due sense of justice).*"[2]

Shortening further discussion on this topic let us come to the subject under our study i.e the law of Wasiyath, which is also based on Quranic Injunction.

SOURCE OF LAW OF WASIYATH

The following verses of Quran is the basic source of law of Wasiyath.

> *It is decreed that when death approaches those of you that leave property shall bequeath it equitably to parents and kindred. This is a duty incumbent of the righteous.*[3]

> ***It is also in the Hadith (Tradition) as reported by Buqari laying down that a Muslim who possess a property should***

1. *Surah Al Baquer (2)* the Cow, Verses No. 219
2. *Surah Al Anam,* Verse 152
3. *Surah Al Baquer (2)* the cow, Verse No. 180.

not sleep even for two nights unless he has made a written will.[1]

In order to better understand the nucleus of the Islamic Law of Will the tradition of the Prophet is quoted below as reported by Bukhari

"***Sa'd Ibn Abi Waqqus said 'the messenger of God used to visit me at Mecca, in the year of the farewell pilgrimage, on account of (my) illness which had become very severe. So I said "My illness has become very severe and I have much property and there is none to inherit from me but a daughter, shall I then bequeath two third of my property as a charity?' He said 'No'. Then the prophet said Bequeath one third and one third is much, for if thou leavest any heir free from want it is better that thou leavest them in want, begging of (other) people, and thou does not spend anything seeking thereby the pleasure of Allah."***

Thus it is clear that sources of Muslim law of Will is the Quran and the Hadith. It is not a codified law.

Before the dawn of Islam a person possessing of wealth was entitled to dispose off his/her entire property according to his/her wish. Such power was unfettered and unlimited. Such person was also entitled to make a will to anyone except the persons of old age/orphan/widow, children and women.

Islam has curtailed this right. The Quran has laid down a complete scheme of partition and distribution of wealth of a Muslim. Will or Wasiyath is implicit in such scheme explaining the Law of Will.

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1. *(Manual of Hadith, Mohammed Ali, published in Lahore in 1944,* Vol No.1, Pg 334).

The provisions of Indian succession of Act of 1925 are not applicable to Muslims in India excepting the provisions relating to letters of administration *etc.*

The following extract from Hidaya, according to Faizee, is most illuminating :—

> Wills are lawful on a favourable construction. Analogy would suggest that they are unlawful, because a bequest signifies an endowment with a thing in a way; which occasions such endowment to be referred to a time when the property has become void in the proprietor (the testator) and as an endowment with reference to a future period (as if a person were to say to another, "I constitute proprietor of this article on the morrow") is unlawful. Supposing even that the donor's property in the article still continues to exist at that time. It follows that the suspension of the deed to a period when the property is null and void (as at the deceased of the party), is unlawful, a fortiori. The reasons however for a more favourable construction in this particular are two fold. First there is an indispensable necessity that men should have the power of making bequest, for man, from the definition of his hopes, is improvident and deficient in practice, but when sickness invades him he becomes alarmed and afraid of death. At that period, therefore, he stands in need of compensating for his deficiencies by means of his property and this is such a manner that if he should die of that illness, his objects namely compensation for his deficiencies and merit in a future state may be obtained, or, on the other hand, if he should recover, that he may apply the said property to his wants and as then objects are alienable by giving validity to wills, they are therefore ordained to be lawful. And to the objection, 'if the right of property in the proprietor

become extinct at his death, how can his set of endowment become valid'? It is replied, 'his right of property is accounted to endorse at that time from necessity in the same manner as hold with respect to executing the funeral rites, or discharging the debts of the deceased.

CHAPTER I
DEFINITIONS

Let us now proceed with the definition of various terms used in the law of wasiyath.

WASIYATH (WILL)

The word used in Islamic Law to denote a will is Wasiyath. Fatawa-e-alamgiri defines Al Wasiya, Wasiyath or its English equivalent word Will, thus:

"*the conferment of a right of property in a specific thing or in a profit or advantage in the manner of gratuity to take effect on the death of a testator*".

Thus wasiyath denotes a legal declaration of the intention of a testator with respect to his personal property which he desires to be carried into effect after his death. Such a gift of a personal property by a will is known as bequest or legacy. Generally the terms wasiya or wasiyath or bequest or legacy or testamentary disposition or bequeath are used synonymously with a will.

According to Hidaya, Pg 670 and 671 the term wasiyath denotes an endowment with the property or anything after death.

According to baillee, I, Pg 623, II Pg 229, to bequeath is in the language of law to confer a right of property in a specific thing or in a profit or advantage in the manner of gratuity postponed till after death of testator.

In the compendium of Islamic Laws published by All India Muslim Personal Law Board the Wasiyat is termed as Bequest under Section 382, Part IV, Chapter I, and it is defined thus:

> "*if a person transfers the ownership of his property or its usufruct or income to be effective after his death in favour of another person without consideration it is a bequest.*

As per law Lexicon reprinted edition of 1992 the word Wasiya is defined as under:

> "a percept, a command in law, a will or testament defined to be the endowment of anything or person with his property by an individual after his demise."[1]

The word wasiyath has various meanings beside a will. It also signifies a moral exhortation. Ameer Ali referring to Hidaya says that a will from a Muslim point of view is a divine institution, since its exercise is regulated by the Quran. It offers to the testator the means of correcting to a certain extent the law of succession and of enabling some of those relatives who are excluded from inheritance to obtain a share in his goods and of recognizing the services by a stranger, or the devotions to him in his last moments. At the same time the prophet has declared that power should not be exercised to the injury of lawful heirs

1. AIR 1921 LAHORE 196.

MOOSI (TESTATOR)

A Muslim who makes a will is termed in Arabic language as Moosi and in English he is termed as Testator.

WASILAHOO (LEGATEE)

The person in whose favour the will is made is termed as Wasilahoo (Legatee).

MOOSE -BEHEE

The subject matter of will is termed as moose–behee.

UNIVERSAL LEGATEE :

In default of all the other heirs/a testator is empowered to bequeath the whole of his estate to any person, who is known as 'the universal legatee'. The rule of one-third applies only where there are heirs; if no heir exists the whole property of the deceased can be willed away.[1]

CHAPTER II

PERSONS COMPETENT TO MAKE WILL AND BE A LEGATEE

After having understood the definitions of various terms of Law of Will now we shall study the competency of testator and who could be a legatee.

1. [Wilson 264, Tyabji 728, Mulla 82]

According to Bailee's digest on Mohammedan Law, perfect intellect and freedom in a testator are indispensable requisites to the validity of a bequest.[1]

The following are the necessary qualifications for a testator in order to bequeath his property, as enumerated by: Taher Mahmood in his book on Muslim Law in India Second Edition (pg 227),

AND

Ameer Ali in his celebrated work commentaries on Mohammedan Law[2], and in Bailee's digest of Mohammedan Law[3].

i. That he should be a Muslim.

ii. He should be a major.

iii. He should be of sound mind and rational.

iv. He should be the lawful owner of the property (subject matter of will).

v. A person of unsound mind or an insane and a person under the influence of alcohol or intoxication cannot make a will

The testator must be sane at the time of making the will (Bailee I pg 62). A will made by a person who is insane at the time of making the Will, it will not become valid by his subsequent recovery. Bailee I pg 727.

This condition is stipulated since a person making a will or transferring his property through a gift or will should be able to

1. (*Bailee* II 1958 Edition Pg 232). See also: *Seeta Ram Shah vs. Bibi Ayesha Khatoon,* (1987 PLJR Pg 248).
2. Pg 394 3rd edition.
3. V 1. pag 627, ediya pg 673.

understand the consequences of his act. The obligation entering into by idiots, lunatics and other person non compotes mentis is null and void but when a person afflicted by lunacy at lucid intervals and during such intervals would be valid subject to restrictions.

The cause of inhibition (which are proceedings under Muslim law by which a person is judicially declared by the court to be incompetent to deal with this property or to contract with any obligation and a person against whom such declaration is made is called as Maazur), according to Hidaya are three viz; infancy, slavery, Junoon (insanity).

Lord Coke has enumerated four different classes of persons who are deemed in law to be non compotes mentis.

The first is an idiot. The second, he, who was of good and sound memory and by visitation of God has lost it. The third is a lunatic, who sometimes is of a good and sound memory and sometimes Non Compose Mentis and fourth is Non Compotes Mentis of his own act such as drunkard.

If a person is of unsound mind or insane he can also bequeath his property at lucid intervals as stated by Ameer Ali in his book as stated supra. When the will is made at the time the testator is sane it is rendered invalid by his subsequent insanity till death, however, when the madness had not lasted over six months the bequest will not be avoided.

It is also held by Allahabad High Court that a will by a person of un-sound mind is not valid.[1]

Disposing Mind: As a general rule it may be stated that

1. (AIR 1927 ALL 340) *Ameer Ali Pg 443 and 574* (See also)

the principles of Mohammedan Law with regard to the disposing capacity of person are analogous to the principles recognized by English Law.

The will of an idiot would be void.

Mental inability arising from advanced illness, age or of like cause may destroy the testamentary power.

AGE OF MAJORITY OF TESTATOR

Even though a Muslim attains majority at the age of fifteen years under Islamic Law but age of majority in India irrespective of religion with regards to marriage, divorce, dower, gift and will is controlled by the Indian Majority Act IX of 1875. The provision of Section 3 contemplates that a person (male/female) shall be deemed to have attained majority when he/she shall have completed the age of eighteen years.

So a Muslim who wants to make a will must be of the age of eighteen years.

Before the enactment of Indian Majority Act a Muslim having completed 15 years of his age was competent to make a valid disposition of his property. But this rule of Muslim law has been superseded by the provisions of Indian Majority Act.

However if a guardian of the person and or property of a minor is appointed by a court of law under the Guardian and wards Act, such a minor will attain majority after the completion of 21 years.

In short a Muslim is minor (as far as India is concerned) till he reached to the age of 18 years. No guardian can lawfully

make a will on behalf of a minor. A will made by a guardian on behalf of an insane is also void.[1]

SHIA LAW:

The Shiites rule of 10 years to attain majority is abrogated in India. Since shia law recognizes the validity of a will by a person who has attained the age of ten years and is capable of discernment.

SHAFAII LAW

Shafaii law would recognize a will even by a minor provided the purpose is meritorious.

A will by a minor is at length dealt with in the forth coming chapter.

REGARDING TESTATOR COMMITTING SUICIDE

HANAFI LAW:

There is no express provision under Hanafi Law to effect of suicide by the testator on the validity of will. All have generally opined that under Muslim Law the will of a suicidor is held to be invalid.[2]

SHIA LAW:

Under the Shia law a person who has made an attempt to commit suicide by taking poison or otherwise is not competent to make a will and if such a will is made it is invalid.

1. *Bai Gulab vs. Thakore lal*, (1912) 36 Bom, Pg 622, 17 IC 86. *Ballie* 1,623 durul Muqtar 408 Hidaya 673.
2. (*Ameer Ali* Vol I, Pg 585)

However in the case of *Mazhar Hussian vs. Bodha Bai*,[1] a person bequeathing his property took poison soon after making his will and such bequeath was declared valid.

WILL BY AN INSOLVENT

An insolvent is competent to make a will, but debts have priority over legacies. In other cases if a Muslim is in debt to the full amount of his property the will of such a person will be invalid unless the creditors relinquish their claims.[2]

The English version of Hidaya makes a difference in the following passage. If a person is deeply involved, bequests any legacies such bequest is unlawful and of no effect, because debts have a preference to bequest and the discharge of debts is an absolute duty whereas bequest are gratuitous and voluntary and that which is most indispensable must be first considered.

TESTATOR WHO IS UNABLE TO SPEAK

If a Muslim is dumb or unable to speak due to illness or due to any physical disability he can still make a will by signs provided that the signs are made in such a manner as is commonly used to denote affirmation. In case of a person whose inability arises subsequently owing to some illness *etc.*, a will made by signs will be valid or if the testator was deprived of speech for a long time so as to make the signs habitual to him but not if the inability is recent.[3]

1. (1898) 21 ALL 91
2. *Bailee* I, Pg 627.
   Hidaya Chapter I, Pg 673
   Bailee II, Pg 232
3. *Hidaya* Pg 70
   DurulMuqtar, Pg 408
   Bailee I, Pg 652.

It makes no difference between the case of a dumb person and whose inability is supervenient.[1]

FRAUD OR UNDUE INFLUENCE

A will may be vitiated by fraud or undue influence. The testator cannot be said to have a disposing mind if subject to undue pressure practiced on him. Thus a will in order to be valid must be made with free consent. If it is made under compulsion or mistake which is invalid.[2]

WILL BY PARDANASHIN WOMAN

The courts exercise great care and circumspection in admitting a will by pardahnashin woman. It is incumbent on the propounder of will to satisfy the court that transaction was explained to the lady and that she knew what she was doing.

In the case of *Shyamlal vs. Ranbir Singh*,[3] it was held that where the testatrix is a pardanasheen lady the law presumes the exercise of undue influence and propounder of will has to explain the fairness on his part. In proving the execution of a document by pardahnasheen lady this word is not to be taken in its strict literal sense. It only means a woman who by habit or family usage does not come out in the open to conduct her affairs.

OWNERSHIP OF TESTATOR

If the property bequeathed does not belong to the testator then the bequest of the property would not be valid unless the

1. *Hidaya, Pg 707*
2. Baillie 1,627.
3. AIR (38) 51 All. 386

person to whom the property belongs gives his consent after the death of the testator. The real owner however may refuse to give the property to the legatee since he is not legally bound to consent such transfer.[1]

If the legator bequeathed his property which was encumbered by him and subsequently before his death the property becomes free from encumbrances the bequest shall be effective.[2]

If a Muslim converts himself to Christianity, Judaism or Hinduism and then make bequest such of them as would be valid, if made by a Muslim, remains in suspense, until he returns to his faith or is put to death or dies naturally or takes refuge in foreign country and such of them as are not valid, if made by Muslim, are void according to Abu Hanifa but according to his two disciples the acts of apostate are operative for present, so that whatever is valid according to the sect to which he apostatizes is valid, in him, and if the bequest be an act of piety with them but sin with us it is valid though to a sect of persons who are not particularized.

With regard to female apostate her bequest are valid so far as the bequest of the sect to which she has apostatised would be valid because she is not liable to be put to death for apostacy.[3]

WHO CAN BE LEGATEE

A legatee may be a male or a female Muslim. A married or an un-married, A legatee can be a Muslim or Non-Muslim (as

1. *Hidaya* Pg 623.
2. (Compendium of Islamic Law published by A.I.M.P.L.B., Pg 147.)
3. (Fatawa e Alamgiri Vol VI Pg 141, Bailee's digest Pg 675, Raddul Mukhtar Vol V pg 643, Hidaya Vol IV, Pg 537)

laid down in Multeka), a legatee may be a Minor or a Major, a legatee may be a sane or an insane person. A Muslim can make a will in favour of any person who is capable of holding such property.[1]

A bequest to a Non Muslim, an infidel (Kafir) or refugee is valid according to all schools. A will to an apostate is valid according to better opinion.[2] A wasiyath is lawful for any person or object actually or constructively in existence at the time of the disposition.

According to Bailee I, Pg 625 and II Pg 244, a bequest to an apostate is invalid but this disqualification would no longer valid in view of Act 21 of 1850.

A bequest can be made in favour of a religious or charitable object for such purpose which is not opposed to Islam.[3]

According to the strict letter of law the legatee must be in existence at the time of the bequest and not at the time of testator's death, but how far this is applicable is India is somewhat doubtful. The general rule of modern law is that a will becomes effective from the death of the testator. This is a view taken in a Bombay decision and recommended by Tayabji.

A bequest to a person not in existence at the time of the death of the testator is clearly void. According to **Sharaya** the legatee must be in existence at the time of bequest as it is indispensable condition and if legatee is not alive the legacy is not valid. As also stated in the Fatawa e alamgiri that there is no bequest in favour of non existing or dead.

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1. (Durrul Mukhtar 413, Hedaya 692)
2. (Minhaj, Pg 260) (Bailee I, Pg 654, The Hidaya Pg 674, *Abdul vs. Turner* ILR 9, Bom 158) according to Raddul Mukhtar Vol 5, Pg 661.
3. *Tayabji Pg 586, Fitz Gerald Pg 169.*

SHAFAII'S VIEW

The Shafaiis regard a bequest by a Muslim to a Non Muslim to be unqualifiedly unlawful.

The latest view appears to be that Mohammedan Law contains two rules regarding the existence of the legatee, That he must be in existence at the time of the making of will, either actually or presumably (*i.e.* within six months of the making of the will) and (2) that he must be alive at the time of the testator's death.

MAN-SLAYER

The rule of law is that he who kills another cannot take a legacy from the deceased. In Hanafi Law this provision of law is applied with great severity and man slayer is excluded whether the homicide is intentional or not.

The Fatimadis have adopted the Hanafi Rule.[1]

The express or implied acceptance of the legatee is necessary before the legal title in the bequest is transferred to him and the legatee has the right to disclaim. If the legatee predeceases the testator the legacy in Hanafi Law lapses but according to Shia Law if the legatee dies leaving heirs the legacy would pass to them and if there are no legal heirs the legacy would lapse.

According to Raddul Mukhtar if the death is caused by a minor or an insane person this principle is not made applicable.

According to Raddul Mukhtar this exception is made in

1. (Tayabji, Pg 682, Wilson 478-A, Fitz Gerald, Pg 170, Fatimi Law Pg 446).

favour of minor and lunatic because they are not liable for punishment. It is further stated in Raddul Mukhtar that "the prophet has declared *there is no legacy for the person slaying"* so a bequest in favour of a murderer is unlawful whether it was made before or after the mortal wound was inflicted.

According to Abu Hanifa and Mohammed such will in favour of murderer is valid if the heirs of testator assent to the bequest.

If 'A' causes simple injury to 'B' but actual murder was committed by 'C' then bequest in favour of 'A' is valid.

MALIKI DOCTRINE

Malikis are of the opinion that the testator has the power of condoning the offence committed by the legatee and if after receiving fatal blow he makes Wasiyath in favour of his assailant such will is valid.

SHIA LAW

According to Shias such act of murder must be intentional but a Wasiyath in favour of parents and children or any other ascendant and descendent of murderer is valid.

In Ithna Ashari law the more logical view is taken and only intentional homicide leads to exclusion.

MOSQUE AS LEGATEE

Fatawa-e-alamgiri provides that a will in favour of a mosque or to construct a mosque or to construct a holy shrine is lawful.

It is also stated in Raddul Mukhtar that where a bequest is made of a third in favour of Baithul Muqaddas is valid.

SHIA LAW:

Under the Shia Law a Muslim having Shia faith can make a will in the way of Almighty but he cannot bequeath more than one third of his property thus and promoting religion.

CHRISTIAN AS LEGATEE

According to Hanafi Law a Muslim can bequeath his property in favour of poor Christians but he cannot bequeath for building of a church.[1]

SHIA LAW

The shahriya says that when a Muslim has made bequest it is payable to the persons of his own religion.[2]

JOINT LEGATEES

A will can be made in favour of more than one legatee. In case of joint legatees if any one of the legatees is incapable of being so from beginning then the entire legacy will go to the remaining legatee. According to Bailee I, 642, The Hidaya 679, if the legatee becomes disqualified later on, then the other remaining legatee would be entitled to their share only, and the rest would lapse.

For example if Zaid says that his legacy would be divided

1. (Fatawa-e-Alamgiri Vol VI, Pg 148).
2. AIR 1952 Madhya Bharat, Pg 56

between Omer and Khaled and if Omer was dead Khaled would be entitled to 1/6th share only.

A bequest may be made to a special class also.[1]

MINOR LEGATEE OR LEGATEE AS AN UNBORN CHILD OR CHILD IN THE WOMB

A bequest can validly be made to a child conceived so long as it is born within six months from the date of will, here again a modern court would probably extend the rule to include a legatee born within the normal span of gestation after the death of the testator.

According to Fatawa E Alamgiri Vol VI, Pg 140, Raddul Muqtar Vol V, Pg 661, Bailee's Digest Pg 627 a bequest in favour of a child in the womb is valid, but the child must be born within six months from the date of will.

In the Nihaya it is stated that six months should be completed from the date of the death of the testator. It is also mentioned in Raddul Mukhtar that under Hanafi Law it is further classified that the child must be born alive in whose favour the will was made. But if the Child was born alive and died then the Wasiyath is valid to the extent of third of the property of testator and is divisible among the child's heirs.

According to Fatawa-e-Alamgiri, Vol VI, Pg 142, if a woman should bring forth two children one dead and the other alive, the living child takes the whole legacy, but if both be born alive and one of them die the legacy is divided into Moitees *i.e.* one for the living child and other for the heirs of dead child by way of inheritance.

1. (Bailee I, Pg 655, II Pg 247).

SHIA LAW

Under Shia Law there is no restriction as to the time when the child should be born to take the benefit of the Wasiyath.

Will in favour of adopted child ("Pisar Parwarda")

A will in favour of adopted child not being an heir even if adoption is not recognized under Muslim Law.

But an adopted child cannot claim the legacy on the basis of will which speaks that will is made in his favour as "Pisar Parwarda".

Kashmir High Court in the case of *Mohd. Ismail and another vs. Noor-ud-Din and others*,[1] had an occasion to decide a controversy on this point and held that :

> Respondent No.1 had filed a suit for declaration and possession in respect of a house situate at Samboora, Tehsil Pulwama on the ground that he and respondent No.2 were reversioners of one *Ghani Shah*, owner of the house, who was their father's brother, and were entitled to inherit the house and seek its possession after his death. The said house is said to have been purchased by appellants from respondent No.3 who claims himself to be the adopted son of *Ghani Shah* deceased. On this ground the sale deed dated 17-4-1973 is said to be void and ineffective as against the interests of respondents 1 and 2.
>
> The suit was decreed by the trial Court of *Munsiff Pulwama*. The trial Court had also held that respondent No.3 could not inherit on the basis of the alleged will also. On appeal the findings of the trial Court were confirmed by the District Judge Anantnag. Hence this second appeal.

1. AIR 1986 J&K 14

Appellants have urged that respondent No.3 was adopted son of *Ghani Shah* and in the alternative they were entitled to inherit on the basis of will. It is also urged that the trial Court had failed to strike issue in respect of jurisdiction and if that issue was framed, it could be proved that the trial Court had no jurisdiction. Reliance was placed also on the basis of will alleged to have been written by *Ghani Shah* in favour of respondent No.3. Plea of adverse possession was also set up as a defence and it is contended that the Courts below misappreciated the evidence.

So far as the question of adoption of respondent No.3 is concerned that is purely a question of fact. Two Courts on appraisal of evidence have found respondent No.3 not to be an adopted son of *Ghani Shah*. Therefore, in this second appeal that finding cannot be disturbed. Moreover it is to be pointed out that adoption as such is unknown to Muslims. However, for purposes of inheritance they may appoint an heir and appointment of heir is called as making a Pissar Parwardah. This is an incident of a custom. Therefore the custom, its existence and its being prevalent in the family of *Ghani Shah* was required to be proved. Burden of this was on respondent No.3 and the appellants. Courts below have held that they have failed to prove this issue. Therefore respondent No.3 cannot be held to be Pissar Parwardah of *Ghani Shah*. As to whether respondent No.3 could inherit any portion of the disputed property on the basis of will is a matter for consideration. The will in his favour which is sought to be relied upon by the appellants is executed in his favour as being Pissar Parwardah of *Ghani Shah*. If he is not held a Pissar Parwardah, could he fall back upon the will, which was executed in his favour as Pissar Parwardah is in fact the short point for determination.

Mr. *K.N. Raina* appearing for the respondents has invited my attention to two unreported judgments of this Court. The first is *Peer Jalal-ur-Din v. Syed Mohd. Shah,* Civil 1st Appeal No.38

of 69 decided on 15-1-1973 by a Division Bench of this Court. The other is *Muma Najar v. Nabir Najar*, Civil Second Appeal No.25 of 62 decided on 29-8-1962 by a Division Bench of this Court. In the former case it was held by the Division Bench that where a will recites that one has been adopted as a son and is held to get the property after the death of the testator, it is not a will which bequeaths a property, but is a recitation of adoption and on that basis will is made. However in the said case there was no pleading for claiming the property on the basis of will, therefore, it was held that if adoption fails, person claiming as adopted son cannot get anything on the basis of a will. The same principle is laid down in the second judgment referred to above.

From the perusal of the written statement it appears that respondent No.3's title is based on his being Pissar Parwardah of *Ghani Shah* which is said to have been evidenced by a will also and the property is said to have vested in respondent No.3 as being Pissar Parwardah. The will is casually mentioned because it has evidenced fact of adoption. Therefore, in the alternative respondent No.3 cannot claim anything on will when his main plea of being Pissar Parwardah has been repelled by the Courts below. Will is not an independent document, it is a document which recites him as Pissar Parwardah and in that capacity he is given the property after the death of the testator. If the status and capacity of respondent No.3 is not proved, he will not be entitled to get anything on the basis of will also.

Question of adverse possession is also a matter of fact. Whether one has become owner by adverse possession and whether the real owner's title is extinguished by prescription is a pure question of fact which is to be pleaded and proved. In the present case there is no such proof by which it could be held that title of respondents 1 and 2 to the property is extinguished and it has vested by prescription in respondent No.3.

So far as the plea of misappreciation of evidence by the trial Court is concerned, nothing has been pointed out in this regard. Therefore the contention of the appellant in this respect is also to be rejected.

It was contended that issue regarding valuation was not framed and the suit was decided without that issue being there. It is true that there is no issue framed by the trial Court about the valuation of the suit property. The question which remains to be seen is as to whether this suit is bad for not framing the issue on valuation. If that issue was important or its decision would go to the root of the case, then the trial Court will be said to have committed an error, but when without framing that issue finding can be arrived then defect of non-framing of issue is not at all fatal to the judgments of the Courts below.

I have examined the plaint and the written statement as also relief prayed for in the suit. Respondent No.1 has sought the declaration with consequential relief. Declaration being about his ownership and about avoidance of sale deed executed by respondent No.3 in favour of the appellants. The consequential relief would be relief of possession. Unless pleas in respect of declaration are proved, respondent No.1 would not be entitled to get a decree for possession. So the relief of possession was dependent on the relief of declaration. Declaration had two limbs; one declaration about status of the appellant No.1 being a reversioner and entitled to inherit along with respondent No.3 and the other sale deed executed by respondent No.3 in favour of the appellants being void. Since respondent No.1 was out of possession, therefore, under Section 42 his suit for simple declaration would not be maintainable unless he would ask for further relief, which in the present case would be relief of possession, because that was available to him at the time of the institution of the suit. Therefore the present suit is a suit for declaration with further relief of possession. It is not a suit of possession simpliciter. It is well

settled that in a suit for declaration where additional relief is claimed, jurisdictional value and the Court-fee value is to be the same which is to be fixed by the plaintiff not on the value of the subject-matter of property but for the relief which he claims. The jurisdictional value and value for Court – fee being the same, Court – fee is to be paid *ad valorem*. Therefore, the contention of the appellant in this regard cannot be accepted and non – framing of issue as regards valuation has not in any manner affected the jurisdiction of the trial Court and the trial Court had the jurisdiction to try the suit. Moreover this plea was not taken before the first appellate Court. The memo of appeal filed before the 1st appellate Court do not contain any such averment which is now raised in this second appeal for the first time.

For the reasons stated above, this second-appeal fails and is dismissed with costs.

HEIRS AS LEGATEE

Under the Hanafi Law a will in favour of an heir is not valid unless consented by other heirs, impliedly or expressly, after the death of the testator, but under Itna Ashari law such consent can be given at any time and consent of all the legal heirs is not required. One of them can give consent as to bind his share.

CHAPTER III
WILL BY A MINOR

At this juncture it is necessary to understand the law with regard to the will by a minor since there is divergence of opinion

on this subject so it has been separately dealt with in this chapter.

In the case of *Ghulam Mohammed v. Ghulam Husain and others*,[1] and in the case of *Valanhiyil Kunhi Avulla and others v. Eengayil Peetikayil Kunhi Avulla and others*,[2] this point is extensively dealt with as such both are reproduced below :

"One *Khadim Husain*, a Mohammedan governed by the law of the Hanafi school, died on 21st August 1901. Two days before his death he made a will in the following terms:

"I, *Shaikh Khadim Husain*, son of *Munshi Aman Ullah*, deceased, resident, jagirdar and talukdar of Ganeshpur, District Basti, declare as follows:

"I own and possess moveable and immovable property of every description (such as) houses, groves, *etc.*, in the Districts of Basti, Gorakhapur and Fyzabad, and it is in my possession and enjoyment as a proprietor without the participation of anyone else. The immovable property consists of three kinds of property: one is that which is meant for maintenance of disciples and female slaves (under a Will, dated 25th November 1866, my father, *Maulvi Shaikh Aman Ullah*, deceased gave (this property) to me alone). This property which he had, under a Will, dated 13th June 1937, got from his father for maintenance of the disciples and the female slaves as proprietor, is the panchmi share in the entire taluka of Ganeshpur. My father, having included a panchmi share in his self-acquired property to that property, conferred it on me as proprietor under the said will. Accordingly, after the death of my father, I, the executant, entered in possession and occupation thereof under the said will. The second kind of the immovable property is

1. AIR 1932 PC 81.
2. AIR 1964 Ker. 200

that which has devolved upon me from my deceased father and the other persons; the third is that which I, the executant, myself have acquired. I have two sons, *Shaikh Ghulam Husain* and *Shaikh Ghulam Muhammad* minors; three daughters, Mt. *Roshanunnissa*, Mt. *Khairunnissa* and Mt. *Mumtazunnissa*, and one wife, Mt. *Amna Bibi*, who is now alive. As there is no certainty of life, I, the executant, also think it proper to make a will in conformity with the custom of my family in order that no dispute may arise in future among my heirs. My elder son, *Ghulam Husain*, minor, shall remain in proprietary possession of the panchmi share in taluka Ganeshpur together with the panchmi property acquired by my deceased father given to me under the will, dated 5th November 1866, for maintenance of the disciples and the female slaves in accordance with the conditions laid down in the Will made by my father; and a one-fifth share acquired by me; the executant, Shaikh *Ghulam Husain* aforesaid, should, from the income thereof, maintain the disciples and the female slaves, who are alive now, or in future those who may be increased in their generations, (Paper torn). The disciples and female slaves have no proprietary right in the said property. They are entitled to food and clothing only. If any of them disobey or refuse to render service or take up service at another place, then *Shaikh Ghulam Husain* aforesaid is empowered to discontinue his maintenance. Both my sons, *Shaikh Gulam Husain* aforesaid who is born now, shall after me be the owners in possession of all the property which I have, by right of inheritance, received from my deceased father, *Maulvi Shaikh Aman Ullah*, and the other persons, and which I have myself acquired, and out of which property four-fifths share has been saved. So long as they live jointly, they shall appropriate the profits jointly, and after separation they should divide the profits of the said property half and half. Both the sons should, out of the profits of the same property, pay Rs.600/- a year to their mother Mt. *Amna Bibi*, and Rs.300/- a year to each of my daughters, namely, Mt. *Roshanunnissa*, Mt. *Khairunnissa* and Mt. *Mnmtazunnissa*, after their marriage, generation

after generation. The said *Mussammats* have no proprietary power in the property. If *Shaikh Ghulam Husain* and *Shaikh Ghulam Muhammad* fail to pay the fixed amount to the said *Mussammats*, the latter are empowered to recover their annual amount by bringing a suit. When both the brothers become separate, they should, out of the profits of the property in their respective possession, continue to make payment to my wife and daughters. Both my sons are still minors. God forbid, if I die before they attain majority, their mother, *Mussammat Amna Bibi*, shall be their guardian during their minority. After attaining majority my both sons shall themselves be the owners in possession and abide by the conditions of the will and make management. This Will shall come into force after me, the executant. As long as I am alive, no one has power to cause interference. Both the sons shall be the owners of the moveable property and the houses half and half.

In line 15 the word "milkiatan" written above the line is correct.

Hence I have executed these few presents by way of a Will in order that it may serve as evidence. Dated 19th August 1901.

Signature of *Shaikh Khadim Husain*.

(The Will executed by me is correct, in autograph)."

The principal question in this appeal is as to the construction of the will so far as regards what is referred to therein as the "panchmi" property. The appellant, the younger of the two sons of the testator, sued to establish his right, under the events which had happened since his father's death, to a moiety of this property. Respondent 1 denied his brother's right to any share at all, though it is not clear how far he claimed the property for himself. The trial Judge decided in favour of the appellant, but gave him a quarter shares only. Both parties appealed to the High Court (their appeals being numbered respectively 132 and 164 of 1925), with the

result that the suit was dismissed. These appeals were heard jointly with two other appeals in suits instituted by one of the daughters of *Khadim Husain*, but in which no appeal has been taken to His Majesty in Council, and with which therefore the Board are not concerned. The other respondents are alienees from respondent 1 and have taken no part in the proceedings.

It is not disputed that under the Hanafi law, if the effect of the will was to confer a beneficial interest in the panchmi property upon respondent 1, it was invalid unless consented to by the other heirs after the testator's death. The first question therefore is whether this was the true effect of the will. The trial Judge held that it was; the High Court, on the other hand, took the view that respondent 1 was a mere trustee with no beneficial interest in the property.

The decision no doubt concerns directly only the Will of *Khadim Husain*, but the references by the testator to the Will of his father *Amam Ullah*, and the trend of the arguments in the case, make it necessary to consider the terms of his will also, and this in turn brings in the will of *Kadir Baksh*, the grandfather of *Khadim Hussain*, under which the panchmi property originated.

The Will of *Kadir Baksh* is dated 13th June 1837. He in effect divided his estate into five shares, bequeathing one-fifth, to each of his four sons, and setting aside the remaining fifth

"for the expenses of the male and female slaves and the other dependants, *etc.*, who are at present in addition to the sons and who may survive hereafter."

This share he made over to his youngest son, *Aman Ullah*. The slaves and dependants were to remain in his control; they were to get from him their necessary expenses for food and clothing, but were not to be in possession of the land, and if they were disobedient

they were to get nothing. It is admitted by Counsel for respondent 1 that this bequest was, as, indeed the terms of the will show, confined to slaves and dependants living at the testator's death. It is also clear, their Lordships think, that they took no interest in the corpus of the share, and that the Will made no express disposition of it as such.

The Will of *Aman Ullah* followed much, the same lines. It is dated 25th September 1866. It recites the Will of *Kadir Baksh*, and after referring to the one-fifth made over to him (*Aman Ullah*) for the maintenance of the slaves and dependents, continues:

"Under the terms of the will executed by the ancestor and admitted by his heirs, two-fifths of the whole of the taluka (meaning evidently the one-fifth for the slaves and his own personal one-fifth) was settled to be my own share and property of which I am in possession and occupation by virtue of private partition."

He goes on to state that he also has four sons who are "heirs and owners of my estate and property," and that following the ways of his ancestor, he has made "a Will regarding, and division of, my estate." He then makes over to *Khadim Hussain*, his eldest son,

"the one-fifth share which my ancestor has given to me for the maintenance of the dependent slaves boys and girls, as well as one-fifth of all my self acquired villages (subject to all the conditions laid down in the Will of my ancestor, dated 13th June 1837), together with the slave boys and girls that are alive at present and that may be born hereafter."

He repeats that the slaves are to be entitled to maintenance only; that they are to have "no concern with the possession of the lands"; and that if disobedient they will forfeit their rights. The balance of his estate he divides equally among his sons. It appears

that some years before the date of this Will there had been litigation between the brothers, *Miran Baksh*, the second son of *Kadir Baksh*, suing for partition, and claiming that the panchmi share was divisible with the rest of the property left by his father. The principal *Sadar Amin* of Gorakpur, by a judgment dated 28th August 1860, held against the plaintiff's claim in respect of the panchmi villages, and gave him a decree for partition of his share only in the other property. The issues raised the question directly whether *Kadir Baksh*'s will established that the panchmi villages "solely belonged to the contesting defendant," *i.e.*, *Aman Ullah*, and their Lordships think that the decision must be regarded as having, answered this question in the affirmative. They have very little doubt that *Aman Ullah*'s Will was based upon this decision, and that he regarded himself as the owner of the panchmi villages, subject only to the obligation of maintaining the slaves.

The construction of *Kadir Baksh's* will in raised in 1898, after the death of the last of the slaves, the claimant on this second occasion being *Karamat Bibi*, a daughter of *Zahur Uddin*, the eldest son of *Kadir Baksh*. *Aman Ullah* was then dead, and *Khadim Baksh* was the principle defendant to the suit. The case went into the High Court on second appeal, the sole question for decision being the construction of the Will with reference to the panchmi share. The learned Judges, their judgment dated 8th August 1901, held that there was a gift of this share to *Aman Ullah*,"

"but a gift burdened for the time being with the necessity of making provision, suitable and lifelong for the slaves and slave girls who might survive the testator.

They thought that the assignment of the share "was as regards time unconditional," and they accordingly affirmed the dismissal of the suit which the District Judge had decreed. It will be observed

that this decision was in substantial account with that of the *Sadar Amin* in 1860.

Turning now to the Will of *Khadim Hussain*, with which the present appeal is more directly concerned, their Lordships note that it was made very shortly after the decision of the High Court above referred to, and they think that its terms must have been influenced by that decision. The testator begins by stating that he is

"in possession and enjoyment as a proprietor without the participation of anyone else,"

of immovable properties which include both the original and increased panchmi shares. He affirms that these shares were conferred upon him "as proprietor" under his father's Will and that he had been in possession and occupation of them since his father's death. He then proceeds to declare that respondent 1 "shall remain in proprietary possession of the panchmi share in taluqa Ganeshpur together the with panchmi property acquired by my deceased father given to me under his Will."

Apart from any question of a wakf has been put forward for the first time, on the argument of this appeal, and with which their Lordships will presently deal, they think that *Aman Ullah* took under the will of his father *Kadir Baksh* beneficial interest in the original panchmi share, subject to the maintenance of the slaves during their lives. The slaves clearly took no interest in the corpus of the share, or in the surplus income as the life interests dropped out, and the only reasonable construction of the will would seem to be that arrived at by the High Court in 1901, which as between the parties to that suit was clearly *res judicata*.

Whether *Khadim Husain* took a similar interest under *Aman Ullah*'s Will may be more doubtful, but reading the will as a whole in the light of the surrounding circumstances, their Lordships think

that the intention of *Aman Ullah* was to pass on to his son the same quality of interest in the now increased panchmi share as that which he himself had taken under his father's Will. The exact date of *Aman Ullah*'s death seems to be uncertain. It was probably not long after the date of his Will, and must in any event have occurred before July 1871, as is shown by the proceedings in a suit which went upto the High Court in 1872. *Khadim Husain* was therefore in possession of the villages for at least 30 years and their Lordships have no doubt that he regarded himself as the owner, subject only to the maintenance, at his discretion, of the slaves. The only persons interested to deny his proprietorship would be the other heirs of *Aman Ullah*, who seem to have taken no steps to assert a claim, and they are not parties to or in any way represented in the present litigation.

Khadim Husain's Will, in their Lordships' opinion, clearly purported to pass on to respondent 1 a proprietary interest in the panchmi property, now again increased by the addition of one-fifth of the other estate of the testator, subject to similar obligations. The learned Judges of the High Court would attach little, if any, weight to the references in the Will to "proprietorship" and "proprietary" rights. Their Lordships are unable to take this view of the expressions employed by the testator. They regard them as used in their ordinary acceptance, and as intended to make it clear that respondent 1 was to be the owner of the villages, subject to provision for the slaves. The latter were to be maintained out of the income only and were to have no proprietary interest in the property: whatever surplus income there might be and the reversionary interest in the corpus was to go to respondent 1.

Their Lordships take no exception to the view of the High Court that there was a trust for the slaves. They think that this is probably a more correct way, of looking at the bequest than to refer to it as an onerous gift: it would, they think, clearly come

within the definition of a trust under the Trusts Act 1882, by which the Will of *Khadim Husain* would be governed. But in the view their Lordships take, the learned Judges were wrong in thinking that the proprietorship conferred upon respondent 1 by the will was a bare trusteeship accompanied by no interest of a beneficial nature.

In their Lordships' opinion therefore the Will of *Khadim Husain* did purport to confer a beneficial interest in a part of his estate upon respondent 1, who was one of his heirs, and it would seem to follow that (apart from any question of consent by the appellant) the will was invalid under the Mohammedan law.

But it has been contended before the Board that the setting apart of the panchmi share under each of the three Wills, to which reference has been made, was in reality the creation of a wakf, and that so considered it must be presumed that there was a dedication of the whole interest of the testator in each case to charitable purposes, leaving nothing to which the devisee could be beneficially entitled, his position being that merely of the muttwali or manager of the charity.

No case of wakf was made by respondent 1 in his defence to the suit, nor was it suggested in his memorandum of appeal to the High Court, and there is no trace of such a contention having been raised in the judgments. No one of the three Wills purports to create a wakf nor is there in any of them anything that could be regarded as a gift of the ultimate residue to charitable purposes, and no suggestion of wakf was made in any of the previous suits. It is admitted that a trust for slaves and dependants is not within the terms of the Wakf Validating Act 6 of 1913, and it is therefore unnecessary to consider the effect of Act 32 of 1931, which purports to give retrospective effect to the Act of 1913. The argument which has been addressed to their Lordships on this

point is in reality only an attempt to reopen the controversy which was finally settled by decisions of this Board nearly 40 years ago: see *Mahomed Ahsanulla v. Amarchand*, (1890) 17 Cal. 498 = 17 IA 28 (PC); *Abdul Gafur v. Nizamudin,* (1892) 17 Bom. 1 = 19 IA 170 = 6 Sar. 238 (PC), *Abdul Fata Mahomed Ishak v. Russumoy Dhur*, (1895) 22 Cal. 619 = 22 IA 76 = 6 Sar. 572 (PC), Under these circumstances their Lordships think it sufficient to say that the contentions of respondent 1 on this part of the case must necessarily fail.

Unless therefore the appellant can be shown to have consented to the terms of his father's will it cannot be binding upon him.

At the time of *Khadim Husain*'s death both respondent 1 and the appellant were minors. The former attained his majority in 1915 and the latter in 1919. Before the trial Judge an attempt was made to prove that the appellant upon attaining majority consented to the terms of the will. It was held that his consent was not proved. The High Court makes no reference to this contention, and before their Lordships no serious attempt has been made to support it.

In the High Court however it was contended for respondent 1 that the appellant was in effect bound to the terms of the will by what was said to be a "family arrangement" embodied in a registered instrument dated 11th March 1910. The learned Judges accepted this contention and their finding has been supported before the Board; if it is correct, the appellant necessarily fails.

The document in question was executed, during the minority of the contesting parties to this appeal, by their mother on her own behalf and purporting to act as guardian of her sons. The other parties were their sisters, the three daughters of *Khadim Husain*, who disputed the validity of his will. Shortly put, the effect of this arrangement was that the mother gave up, in favour of her sons, a

claim to dower amounting to about a lakh of rupees, taking for herself only a life annuity of Rs.600/- out of the estate, while the sisters accepted perpetual annuities of Rs.400/- each charged upon specified immovable properties. Elaborate schedules of the various properties were annexed to the document the first of which, referring to the panchmi properties, was headed:

"List of property which belongs exclusively to *Shaik Ghulam Husain* (*i.e.* respondent 1) and with the income of which the slaves and slave girls will be maintained according to the conditions and restrictions laid down in the wills of the ancestors."

The learned Judges of the High Court thought that this should be read as an agreement make by the mother, acting on behalf of the younger son, with herself, acting on behalf of the elder son, that the latter should be the owner of the panchmi properties, and that it was binding upon the appellant. But quite apart from the question whether the mother could legally bind the appellant by such an agreement, their Lordships are unable to hold that this was either the intention or the effect of the document. The only object of the management was, they think, to get rid of the daughters' claims, leaving the landed estates for the sons. Apart from the heading to the schedule of the panchmi properties, there is nothing to suggest that the rights of the sons *inter se* were considered. There was, and indeed could be, no dispute between them at their then ages, and the mother was evidently upon the terms of the document acting for them both jointly. Their Lordships must accordingly hold that the appellant was, when he came of age, free to dispute the validity of *Khadim Husain*'s Will, and to claim his share according to the Mohammedan law in the panchmi properties.

The last line of respondents 1's defence was limitation : it was contended first that the deed of March 1910, should be read as having effected a transfer of the panchmi properties by the mother,

acting on behalf of the appellant, to respondent 1 and that therefore the suit fell under Article 44, Schedule 1, Limitation Act, which runs as follows :

Description of suit	Period of Limitation	Time from which period began to run
44.—By a ward who has attained majority, to set aside a transfer of property by his guardian	Three years	When the ward attains majority.

The trial Judge held that this article has no application on the ground that there was no transfer by the deed: the High Court took the opposite view. It is manifest, on the construction which their Lordships have put the deed, that the trial Judge was right.

Alternatively, it was argued that the suit was barred by 12 years' adverse possession under Article 144. Both the Courts in India have negatived this contention, and their Lordships have no doubt that they were right. Respondent 1 only attained majority in 1915, and the suit was, instituted in July 1924. Until 1915 the mother was in possession of all the immovable properties of the estate on behalf of both her sons, and it would be impossible to, hold that her possession was adverse to the appellant.

Before the Board it was for the first time suggested that the suit in reality falls under Article 123, which applies to a suit

"for a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the properties of an intestate."

The period of limitation in such a case is 12 years from the date "when the legacy or share became payable or deliverable." It is said that on the contentions of the appellant, "*Khadim Husain* must be deemed to have died intestate, and that what the appellant

is claiming is a distributive share in his estate. There is however a long series of decisions in India, dating at least from 1882, that this article only applies where the suit is brought against an executor or administrator or some person legally charged with the duty of distributing the estate: *Issur Chunder v. Juggut Chunder*, (1883) 9 Cal. 79; *Keshav Jagannath v. Narayan Sakharam*, (1890) 14 Bom. 236, *Umardaraz Ali Khan v. Wilayat Ali Khan*, (1897) 19 All. 169 = (1897) A.W.N. 34, *Khadersa Hajee Bappu v. Puthen Veettil*, (1911) 34 Mad. 511 = 6 IC 50 and see *Mahomed Riasat v. Hasin Banu*, (1893) 21 Cal. 157 = 20 IA 155 = 6 Sar. 374 (PC).

Counsel for respondent 1 drew their Lordships' attention to a decision of this Board reported as *Maung Tun Tha v. Ma Thit*, AIR 1916 PC 145 = 38 IC 809 = 44 IA 42 = 44 Cal. 379 (PC), where Article 123 was apparently applied in a suit by a Burmese-Buddhist son for his share in the paternal estate. No reference was made to the Indian case law on the subject, and the main question debated was as to whether the son was bound under the Burmese law to elect within a reasonable time after his father's death.

Their Lordships have referred to the record of this case, and they find that in the Courts of Burma no issue was raised as to limitation, and that there was no discussion as .to the article of the Act which should be applied. There had been at least one previous decision in the Lower Burma Court that Article 123 was applicable to such a case, and it seems to have been assumed on all hands that it must equally apply in the case then under consideration. After the decision in *Tun Tha v. Ma Thit*, (supra) it appears to have been considered in one case in the Bombay High Court that the Indian authorities had been overruled [*Shrinbai v. Ratanbai*, (1919) 43 Bom. 845 = 51 IC 209], but in two later cases the same High Court refused to apply Article 123 to

claims by Mohammedan heirs; see *Nurdin Najbudin v. Bu Umrao*, AIR 1921 Bom. 56 = 59 IC 780 = 45 Bom. 519. The specific question was considered by a Full Bench of the Allahabad High Court in 1928 [*Rustam Khan v. Janki*, AIR 1928 All. 467 = 111 IC 809 = 51 All. 101 (FB)] another case between Mohammedan heirs, when the same conclusion was come to as in *Nurdin Najbuddin v. Bu Umrao*, (supra) the article applicable being held to be Article 144 and not, Article 123.

Their Lordships have no doubt that it was not intended by the judgment in *Maung Tun Tha v. Ma Thit*, (supra) to overrule the decisions to which they have referred, and they think that, at all events in cases from the Indian Courts, these authorities should be followed. They are therefore of opinion that the present case does not fall within Article 123, and that the appellant's suit was not barred by limitation.

It only remains to consider whether the trial Judge was right in holding that the appellant was entitled to recover a quarter share only, and not a half, of the panchmi property, and it is to be noted that upon this point the learned Judges of the High Court were in agreement with him.

The appellant's share in his father's estate under the Mohammedan law would be one-quarter only, but he contends that the widow and daughters having surrendered their rights in exchange for annuities which were charged upon the whole estate, he was entitled to share equally with his brother in all the residue.

The view taken by the Indian Court was that the allocation of the panchmi property to respondent 1 was an integral term of the arrangement under which the surrenders were made, and that if the appellant refused to be bound by this allocation he could claim no benefit from the surrenders.

In their Lordships' opinion, this view is based upon a misinterpretation of the deed of March 1910. They think that the rights of the widow and daughters being in effect bought out by payments from the general estate, their interests enured for the benefit of the other heirs, irrespective of their rights *inter se*, and that the whole, subject to the annuities so charged and the debts (which were considerable) became divisible equally between the two sons. If the annuities and the debts had been made payable out of respondent I's share only, all in consideration of this the panchmi property had been allotted to him, the position would have been different but this was not the effect of the deed.

Their Lordships are therefore of opinion that the appellant is entitled to share equally with respondent 1 in the panchmi properties, and that a decree should have been entered in his favour for possession of a moiety thereof. This would of course, be without prejudice to the rights of any persons claiming as slaves or disciples under the will of *Khadim Husain*. They are not parties to the present litigation, and such rights as they may be entitled to assert are not affected by it.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decrees of the High Court in Appeal Nos.132 and 164 of 1925 should be set aside, and that in lieu thereof a decree should be made in favour of the appellant for the shares in the several panchmi Villages claimed by him in his plaint. Respondent 1 must pay the costs of the appellant in the High Court and before this Board, but, having regard to the order for costs made by the trial Judge, and to the fact that the appellant had raised issues on which he failed, their Lordships think that justice will be met by ordering respondent 1 to pay only half of the appellant's costs in the Court of first instance.

A Division Bench of the Kerala High Court in the case of *Valanhiyil Kunhi Avulla and others v. Eengayil Peetikayil Kunhi Avulla and others*,[1] laid down the law on a similar point thus :

"The appellants are defendants 1 to 3 in a suit for partition.

The plaint properties belonged to *Mammad* who died on October 27, 1956. Defendants 1 to 3 and plaintiffs 1 and 2 are his children. On June 18, 1956, a deed of partition Ext.B22, had been executed among *Mammad* and his children. Certain disputes "regarding properties that stood in the name of the 1st defendant and his exertions for acquisitions in the name of Mammad" were settled by that deed and properties divided among defendants 1 to 3 and plaintiffs 1 and 2 with immediate effect. It was agreed therein that properties not included in the deed belonged absolutely to the persons in whose name they stood and that no other party would have any claim thereto. Clauses 6 and 7 of that deed (translated in English) recite as follows:

"6..... It is resolved that properties not included herein but found in the name of any of us belong to such persons separately and that the others, among us shall not advance any claim thereto contrary to the document (of title).....

7..... As more properties than what parties Nos.5 and 6 may get as their fair shares under the Shariat in the acquisitions of the 1st party have been allocated to them under Schedule B in the name of parties 5 and 6 and Schedule C in the name of the 5th party separately, it is resolved that if any properties be found in the name of the 1st party not included herein those properties can be claimed only by parties 2 to 4 as per the Shariat, that party No.2 has no objection thereto, and that parties Nos.5 and 6 shall not claim those properties....."

1. AIR 1964 KERALA 200

Party No.1 in Ext. B22 was *Mammad*, parties Nos. 2 to 4 are present defendants 1 to 3 and parties Nos.5 and 6 are plaintiffs 1 and 2 respectively.

The Court below has found items 1 to 3 and 8 of plaint A schedule and 1/8 share in item No.1 of plaint B schedule to have belonged to *Mammad* at the time of his death. They are admittedly not included in, and therefore within the ambit of clauses 6 and 7 of Ext. B22. Defendants 1 to 3 claim those properties absolutely under the above clauses, while the plaintiffs challenge the clauses as void and claim shares as on intestacy of *Mammad*. The Court below accepted the plaintiffs' case and decreed partition of 3/7 shares in *Mammad*'s properties to them, with profits from date of suit. Hence this appeal.

The plaintiffs have filed a cross-objection claiming item No.6 of plaint A schedule also to have belonged to *Mammad* at the time of his death and therefore partible in this suit. The Court below has repelled that claim as not been proved. Here too counsel could not point out any reliable evidence in that regard. The cross-objection must therefore fail.

The main controversy between the parties is about the effect of clause 7 of Ext. B22. Shri *Muttikrishna Menon* contended the disposition therein to be testamentary in nature and being in favour of some of the heirs not consented to by the other heirs after the death of the testator void under the Mohammedan Law. That contention seems to us correct. Unlike the case of Hindu coparceners, no son can claim any interest in the properties of a. Muslim in his life time, and the reference in the aforesaid clause to rights under the Shariat can only be to right of succession on *Mammad*'s death. In paragraph 117 of the Principles of Mohammedan Law by Mulla, the learned author observes:

"A bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator." *Ghulam Mohammad v. Ghulam Hussain*, 59 Ind App 74 : AIR 1932 PC 81:

There is no case that the plaintiffs, who are two of the heirs of *Mammad*, have, subsequent to *Mammad*'s death, assented to the disposition under clause 7 of Ext. B22, which must therefore fall under the Mohammedan law.

The learned Advocate-General, on the other hand, contended that the said disposition was not testamentary, because,

(1) the instrument is not styled a will, but only a Bhagapathram (partition deed);

(2) the instrument has been registered only in Book No.1 whereas a will is always registered in Book No.3;

(3) there is no power of revocation reserved in the instrument; and

(4) the other clauses in the instrument being admittedly non-testamentary, clause 7 should also be construed likewise.

In our view, none of these points has any merit. Neither the name of the document nor the fact of its registration in a particular book of the Registry Office is of any importance in construing the nature and effect of the provisions thereon. In *Thakur Ishri Singh v. Baldeo Singh*, 11 Ind App 135 (PC) an instrument that was named a deed of assignment was nevertheless construed to be a Will; and in *Krishna Rao v. Sundara Siva Rao*, 58 Ind App 148 = AIR 1931 PC 109, the mere fact that a document was registered in a wrong book was held insufficient to outweigh the effect of its terms as a Will.

If a particular provision in an instrument is testamentary in its expression, the fact that it has not been expressed to be revocable

is no consequence. "The principal test to be applied is" observed *Asutosh Mookerjee,* J., in *Sagar Chandra Mandal v. Dwarka Nath Mandal,* 14 Cal WN 174 "whether the disposition made takes effect during the lifetime of the executant of the deed or whether it takes effect after his decease.....Where the disposition is expressly stated to take effect after his demise it is a will."

Revocability is a characteristic of every testament and not its condition. In *Vynior*'s case, (1610) 8 Co. Rep 80a (82a) Lord *Coke* observed :

"If I make my testament and last Will irrevocable, yet I may revoke it, for my act or my words cannot alter the judgment of the law to make that irrevocable which of its nature is revocable".

and in *Walker v. Gaskill,* 1914 P 192 Sir *Samuel Evans* cited Williams on Executors to state unequivocally and without any limitation:

"It is also a peculiar property in a will..... that by its nature it is in all cases a revocable instrument, even should it in terms be made irrevocable."

The legal effect of a particular clause in a document depends mainly on its own terms and not on the other clauses in a deed. The following passage in Jarman on Wills (8th Edn..p 39) is instructive,

"... in the case of *Deo d. Cross v. Cross,* (1846) 8 QB 714, where an instrument in the firm of a power of attorney was given by a person abroad, whereby he appointed his mother to receive the rent of his lands for her own use until he might return to England; or in the event of the death, he thereby assigned, and delivered to her the sole claim to his lands', but her occupancy was to cease on his return: this instrument was properly executed as a

will, and was held to be a good will of the lands in question. The Court was clear that there was no objection to one part of an instrument operating in *praesenti* as a deed, and another in futuro as a will".

The dispositions in the other clauses of Ext.B22 made operative from the time of its execution may be gifts *inter vivos*; but that provided in clause 7 thereof in regard to *Mammad*'s properties to take effect on the death of *Mammad* can be testamentary only.

It was then contended that under Ext.B22 the plaintiffs have relinquished or agreed to relinguish their rights to share in *Mammad*'s properties on his death, and *Latafat Husain v. Hidayat Husain*, AIR 1936 All 573, was cited to show that in the circumstances the plaintiffs are estopped from claiming them when succession opened. The passage relied on runs thus:

There is nothing to prevent an heir from not sharing in the property which is devolved on him or from so acting as to estop himself from claiming it.

The question of estoppel is really a question arising under the Contract Act and the Evidence Act and is not a question strictly arising under the Mohammedan Law. In *Mahomed Hasmat Ali v. Kaniz Fatim*, 13 All LJ 110 = AIR 1915 All 486 (I), a Bench of this Court held that there was nothing illegal in a person, for good consideration contracting not to claim the estate, in the event of his becoming entitled to inherit on the decease of a living person; and further held that the provisions of Section 6 T.P. Act did not in any way create a bar against the legality of such a contract.... Obviously, Section 6, T.P. Act can in terms apply to such a relinquishment. If relinquishment is in the nature of a gift or of a contingent right then of course it said be void under Section 6; but if it is merely an agreement or contract for not claiming a

contingent right of inheritance when succession opens in future then the case would not be governed by the provisions of Section 6 at all.

The contract made by an heir for consideration not to claim a certain property cannot be said to be in any way illegal or forbidden by any Law.

With all respect, we cannot agree with the Act observations. Section 23 of the Contract enacts that every agreement of which the object or consideration is unlawful is void and also that the object or consideration of an agreement is unlawful if it is of such a nature that if carried out it would defeat the provisions of any law. Section 6 of the Transfer of Property Act profits a transfer of

"the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature."

The ruling itself says that if the relinquishment be a transfer in present it would be within the inhibition of Section 6(a), Transfer of Property Act; but draws a distinction that if it be an agreement not to claim in future it would be valid. We apprehend that such an agreement, if permitted, would render Section 6(a) of the Transfer of Property Act futile and must therefore be strictly within the mischief of Section 23 of the Contract Act.

In *Abdul Gafoor v. Abdul Razack*, AIR 1959 Mad 131, the above dictum has been expressly dissented with the observation:

"With all respect, we are unable to agree with the learned Judges who decided ILR 58 All 834 = AIR 1936 All 573, that a distinction can be made between a case of actual relinquishment of the chance of inheritance and contract to relinquish it in future. In *Lakshmi Karayana Jagannadha Raju v. Lakshmi Narasimha*, ILR

39 Mad 554 = AIR 1916 Mad 579, it has been held that a contract for sale of expectancies is void in India under the provisions of Section 6 of the Transfer of Property Act and Section 23 of the Indian Contract Act. *Tyabji*, J., observed at p.559 (of ILR Mad) = (at p.581 of AIR):

'When property is conveyed in future there is said to be a transfer of property no less than when it is conveyed in the present; (Section 5 of the Transfer of Property Act); and the Legislature has provided that the chance of an heir-apparent cannot be the subject of conveyance in present or in future. An agreement, therefore to convey in future such a chance cannot be considered a valid contract because it is an agreement to transfer that which the law says is incapable of transfer. The 'object' of such an agreement is of such a nature that if permitted, it would defeat the provisions of Section 6(a) of the Transfer of Property Act and Section 23 of the Indian Contract Act... It would be defeating the provisions of the Act to hold that though such hopes or expectations cannot be transferred in present or future, a person may bind himself to bring about the same results by giving to the agreement the form of a promise to transfer not the expectations but the fruits of the expectations, by saying that what he has purported to do may be described in a different language from that which the Legislature has chosen to apply to it for the purpose of condemning it.'

This decision has been approved by their Lordships of the Privy Council in *Annada Mohan Roy v. Gour Mohan Mullick*, ILR 50 Cal 929 = AIR 1923 PC 189. 'In view of the above decisions we hold that the release cannot be supported on the ground of its being a mere contract not to claim a share when succession opens."

We agree with the Madras High Court in the above reasoning and hold that the plaintiffs are not bound by any relinquishment of

or agreement to relinquish their share in the inheritance implied in clause (7) of Ext.B-22.

The learned Advocate-General urged that Ext.B-22 is a 'Family arrangement" and therefore the relinquishment made therein as part of such arrangement is binding on the plaintiffs who are parties thereto. A family arrangement is defined "an arrangement between the members of the same family intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or preserving family properties or the peace and security of the family by avoiding litigation or by saving its honour".

(Halsbury's Laws of England, 3rd Edition, Vol. 17, page 215). The dispute referred to in Ext. B-22 is one between the 1st defendant and *Mammad* only in regard to properties standing in the name of either. Their disputes had been adjusted finally in Ext. B-22 and some properties that were in the name of the 1st defendant conceded to be *Mammad*'s and made the subject of division in Ext. B-22 along with some other properties of *Mammad*. Neither in the deed nor in the evidence is any other dispute referred to. Plaintiffs were therefore right in submitting that as regards them Ext. B-22 was a deed of gift of the properties specified in its Schedules B and C and not a family arrangement. It is notorious that a testament is invariably designed to avoid a scramble among the heirs', but nobody ever said that all testaments are family arrangements. The test of a family arrangement is the give and take involved in the transaction. Evidence is that under Ext. B-22 the plaintiffs had nothing to give, nor to give up, but only to take. They cannot then be said to have been parties to a family arrangement."

A testamentary disposition of property through a will by a minor is subject to much controversial and divergent views among the Hanafis, Shias and the Malikis Schools.

HANAFI VIEW

According to Hanafi school of thought a minor who has not attained the age of puberty is not competent to make a will.

MULTEKA declares that "the validity of a Wassiyat requires several conditions one of them being that the testator should be adult"

According to *Fatwa e Alamgiri*,

"A bequest by a minor under puberty whether he be adolescent at the verge of puberty or not, is not legal".

According to *Raddul Mukhtar*,

"The Wasiyat of a minor is not valid except with respect to the provision for his funeral on the authority of Hazrath Omer (THE ALLAH BE PLEASED WITH HIM).

According to *Hidaya*,

"Bequest by an infant is not valid. The reasons being that a will is a voluntary act concerning which an infant has no capacity of forming a proper judgment, Secondly, the declaration of an infant is not of a binding nature.

With regard to the tradition of Hazrath Omer the term SABI must be understood to mean a person just arrived at the age of maturity and Omer confirmed a will of Sabi.

If an infant should make a will and die after he had attained majority the will is not valid as it was made when the testator was incapable of making such will.

Even if a minor declares that "it is my will that a third of my estate be considered a legacy in favour of so and so, the will is still invalid, because an infant being unqualified is not competent to make a will that shall be deemed valid immediately, or that can be rendered so by being suspended to a future period.[1]

But according to Hanafi Doctrine a Wasiyat by a minor becomes effective ab-initio upon his confirming or ratifying the same after attaining majority.[2] In *Abdul Mannan Khan vs. Murtuza Khan*,[3] Patna High Court held that any Mohammedan having a sound mind and not a minor may make a valid will to dispose off the property. (judgement enclosed here with)

SHIA LAW

The Shia Law declares that perfect intellect and freedom are indispensable to make a will

SHAFAII & MALIKI VIEWS

The Shafaiis and Malikis generally agree with Shias. According to Shafaii school of thought an infant may validly make a will if he is morally in a condition to understand the nature of his act.[4]

The Malikis also do not consider minority itself a disability. But some of the Malikis scholars are of view that such dispositions by a minor should be regarded as valid as they are pious, and others do not agree with this view.

1. (Raddul Mukhtar-Vol-V, Pg 645).
2. (BAILLIE 1,627. Hidaya page 673.
3. (AIR 91 PATNA Pg 155)
4. (M.Sautayra's book on will page 319)

CHAPTER IV

FORM OF WILL

Having understood the important components of will we shall discuss now as to how the will is to be made and whether a particular form of will is necessary to validate the transfer of property in favour of a legatee under a will.

The Rules of Muslim law relating to will does not make it mandatory to reduce a will or make a declaration of will in a particular form. No writing is required to make a will.[1] Gujarat High Court has also stated that where a Muslim makes an oral will it is valid.

For Example: If a sick person requests another to pay back his loan this would amount to will (Wasiyat), as mentioned in Khazanatul Mufteen[2]

It is thus clear that no formality is required to make a will as a general rule.

In the case of *Mohammed Altaf vs. Ahmed Bux*,[3] it was held that "By the Muslim Law no writing is necessary to make a will valid and no particular form, even verbal declaration is necessary as long as the intention of the testator is sufficiently ascertained."

In *Mazhar Hussain vs. Bodha Bibi* referred supra,[4] the Privy Council. Further held that "a letter written by a testator shortly

1. AIR 1933 Oudh 99, 142 IC 42. AIR 1928 Nagpur 275, 108 IC 435, 8 IC 38, 15 CWN (P.C) 328, ILR 3 ALLAHBAD 266 (PC), AIR 36 ALLAHBAD 600, 164 IC 515.
2. (Fatawa-e-Alamgiri, Pg 64, Vol 9, Kitabul Wasiyat).
3. 25 W.R. 121 P.C.
4. 21 All 91 (PC)

before his death and containing directions as to the disposition of his property constituted a valid will".

Of course under Muslim Law an oral will is perfectly valid but at the same time one who rests his title on oral will is bound to allege and prove with utmost precision the words (of will) on which he relies with every circumstance of time and place.

The Allahabad High Court speaking through its Division Bench in the case of *Izhar Fatima vs. Ansar Fatima Bibi*,[1] considered oral will and ruled that when a case of oral will has been setup by any of the parties then it would be the paramount duty of the person founding his claim on the oral will to prove the extract words used by the testator. The Court must make certain that it knows what the speaker said and must from the circumstances and from the statement be able to infer for itself that testamentary effect was intended in addition to being satisfied of the contents of the direction given.[2]

This judgement was considered by P.C. in the case of *Venkat Rao vs. Nam Deo*,[3] judgment is extracted below :

> In the following case no doubt the parties are Hindus but the issue involved in the facts of the case was as to whether disposition of property by an oral will was valid. So the PC was elaborately interpreted "oral will". The principle of law laid down in this case was subsequently followed in other subsequent decisions rendered by other High Courts.
>
> "The only question in this case is as to the genuineness of a nuncupative will or oral disposition of his property alleged to

1. AIR 1939 All. 348.
2. *Babu Beer Pratap & Maharaja Rajendra Pratap* (1867) 12 MIA, Pg 128
3. AIR 1931 PC 285.

have been made by *Vishram Patil*, a malguzar or land owner of *Lonsaoli* in the Wardha District of the Central Provinces, who died on the morning of Tuesday, 23rd December 1919, aged 70, leaving two widows, but no children. The will is alleged to have been made on the evening before he died, and again, by way of confirmation, on the following morning shortly before his death. No probate was necessary, but *Namdeo*, the principal beneficiary, having obtained mutation of names in his favour as regards the deceased's lands, with the consent of the widows, who took widow's estate in the absence of a will, two of the next reversioners or presumptive heirs the deceased, who would have been entitled to succeed on the determination of the widows' estate, deeming that the order for mutation cast could upon their title, instituted the present suit, under Section 42, Specific Relief Act, for a declaration that the deceased had died intestate, against *Namdeo*, the principal beneficiary under the alleged will, joining as defendants 2 and 3 the two widows, who supported him, and as defendant 4, his father, *Govind Rao*, the remaining reversioner, who was unwilling to be joined as a plaintiff.

The suit came by transfer before the Additional District Judge of Wardha, and the case made in the plaint was that *Vishram* died of typhoid fever, and was unconscious, and had lost all control of his functions for several days before his death. The written statement of *Namdeo*, defendant 1, after setting out at some length that he had been brought up by the deceased and his wives as their own child and treated as heir, set out the defendants' case as to the alleged will in the following terms:

"11. *Vishram* got fever on 16th December 1919. It was an ordinary fever and *Vishram Patil* could not in any sense then be said to be bedridden. When the fever did not subside for a week he feared that the illness might take a more serious turn, and in view of his old age, *Vishram Patil* orally declared on 22nd December

1919, at 8 p.m. (in the night) that, if he were to expire in that illness, defendant 1 would be the owner of all his moveable and immovable property after his death. The testator declared his last will in words to the following effect in the presence of several persons including his relations and his two wives: 'I brought up *Namdeo* from his childhood as my son. He will be the owner of my estate after my death. He will, according to my wishes, gift to the Deosthan the Dorli fields that I intended to gift, and he will provide for my ladies. I am sure of this'. *Vishram Patil* was quite conscious and in his senses when he made this testamentary disposition of his property. He was in full possession of his mental powers and quite in his senses the whole night. He ordered a feast to the Brahmins and relatives to be arranged on the 24th and caused letters of invitation to be written partly by this defendant and partly by plaintiff. 2. Some of the letters intended for persons living at a distance were dispatched on 22nd December 1919, at night, and others were kept over for being sent the next day."

"12. Early in the morning of the 23rd (Tuesday) he sent for the father of this defendant and asked him to look to arrangements for the contemplated feast. In the meantime he felt inclination to answer the call of nature, and insisted on being taken down the cot for that purpose. While he was answering the call he felt giddy and extremely exhausted. He felt that his end was drawing near and he expressed his fears that he would not survive to see the feast during which he thought of executing some writing embodying his last wishes in regard to the disposition of his property, but he enjoined on all those present to help in giving effect to the wishes already expressed by him orally on the previous night. He was at this time fully conscious. His strength then began to fail him, and he lapsed into a languid state. He died at 8 a.m. on 23rd December 1919. Under these circumstances a formal writing and the contemplated feast could not be held."

The widows' written statement alleged that on the night preceding his death *Vishram*:

"Unequivocally declared that his estate should devolve on defendant 1, *Namdeo*, and he said that he felt no doubt that defendant 1, would gift the fields at Mauza Dorli to the Murlidhar Deosthan founded by him (as a religious endowment) and that defendant 1 would look after defendants 2 and 3. The same wish was repeated about the early morning of the day on which he died."

The sole issue: "Did *Vishram* make an oral bequest to defendant 1, as alleged by the latter?" threw the onus on defendant 1, and put him in the same position as if he had been propounding the will for probate.

The defence examined 50 witnesses in support of their case. The trial began in March 1924, and during that month 30 witnesses were examined, but nearly all their evidence was directed to mere probabilities, and none of them spoke to the actual making of the alleged oral wills. The evidence of the remaining 20 witnesses was taken after the Long Vacation before another Judge, but the only witnesses who spoke to the making of the will were *Namdeo* himself, his father *Govind Rao*, the surviving widow and six other witnesses, only four of whom spoke to the alleged will on Tuesday morning.

The plaintiffs gave evidence themselves and called 11 other witnesses, but the impression formed by the Additional District Judge about all of them was that they were not a reliable batch, and it must be taken that they have failed to prove that the deceased was unconscious for some days before his death.

The Additional District Judge devoted two-thirds of his lengthy judgment recording what were really unnecessary findings on

all the points as to which the parties were at issue with reference to the exact relations which had existed between *Vishram* and his wives and defendant 1, *Namdeo*, from childhood onwards, and only then approached what he rightly said was the real question in the case, the making of the oral wills. After examining the evidence of the defence on this question he observed that witnesses 34 and 38 for the defence were the two witnesses who were not connected with either party, and that it would be difficult to say that they were enough to prove the defence unless the surrounding circumstances corroborated them materially.

He then proceeded to deal with this question and arrived at the conclusion that it was improbable the deceased would have made the wills set up by the defendants. He accordingly found the issue against them and decreed the plaintiffs' suit.

The learned Judicial Commissioners, before whom the case came on appeal, were dissatisfied with the way in which the Additional District Judge had dealt with the case. They rightly criticized the theory – it was nothing more – that in 1917, after *Vishram* had constructed a temple at great cost in front of his house his feelings towards *Namdeo*, defendant 1, whom he had hitherto regarded as his heir, underwent a complete change, and he ceased to care about him, and thought only of the temple, and that consequently it was very improbable that he would have made a will in *Namdeo*'s favour. They also criticized his examination of the evidence on the ground that he had made no reference to the corroborative effect of the proof of *Vishram's* previous conduct, though it was found that upto 1917 at least he had manifested an intention of making *Namdeo* "his general trustee to whom some property should be given."

This was really to fall into the opposite error. The will was, no doubt, one which *Vishram* might well have made and would

have been a very proper will to make. That this was also the opinion of the neighbourhood may be gathered from the fact that 50 witnesses came forward in support of the defendant's case, as against the "unreliable batch" of thirteen who gave evidence for the plaintiffs. Still, the only question is: Is the will proved to have been made? and the very propriety of the contents does not make it any the less necessary for the Court to be on its guard, and to scrutinize closely the evidence of execution, because experience shows that witnesses are sometimes tempted to come forward and depose that the will which ought to have been made actually was made.

There is unfortunately, no satisfactory medical evidence as to the nature or course of *Vishram*'s illness. What is common ground is that on the evening of Monday, 22nd December, the day before he died, invitations, some of them written by one of the plaintiffs and some by defendant 1, were prepared and sent out to certain Brahmins and castemen to a repast (the translation calls it dinner) at 10 a.m. on Wednesday morning. It is proved by the plaintiffs and by the surviving widow that *Vishram* had great faith in the religious efficacy of feeding Brahmins, and the widow says that it was usual to have resort to this practice in cases of illness in the family. The fact that *Vishram* was ill was therefore very naturally mentioned in most of the invitations to indicate the object of the gathering. There was no mention of any will, and the invitations in themselves had no more to do with a will than if the recipients had been asked to come and join in prayers for *Vishram*'s recovery. The story that *Vishram* intended to make a written will on that occasion rests therefore wholly on the oral evidence of the defendants, and is not corroborated by the fact that the invitations were prepared and partly sent out. If on Monday evening *Vishram* decided to make a will there is no reason why he should not then and there have made a written will, and it was further open to him to send for the Sub-Registrar, admit execution, and get it registered

so as to put the will beyond all question. It is not part of the defendants' case that he was afraid of obstruction from the reversioners, which might have made him put off making his will until the gathering on Wednesday. It cannot therefore be said that the defendants' explanation of the fact that no written will is forthcoming is at all convincing.

In the absence of a written will the defendants are constrained to rely on an alleged oral will, and their case is that the declaration of the deceased's testamentary wishes of the Monday evening when he announced his intention of making a written will on the following Wednesday was itself a valid oral will, and that, in any case, the repetition of these wishes by the deceased on the Tuesday morning when he knew that he would not live till Wednesday, constituted such a will. The question therefore is : have the defendants shown that this is a true story and not an attempt to set up a false case of a will which the deceased very possibly would have made if he had not become unconscious and died before realizing the seriousness of his condition? The onus of establishing an oral will is always a very heavy one, and in this connexion their Lordships may refer to the ruling of this Board for the guidance of Courts in India in dealing with oral wills in *Baboo Beer Pertab Sahee v. Maharajah Rajinder Pertab Sahee,* (1867-69) 12 MIA.1 = 9 WR 15 = 2 Sutt 114 = 2 Sar. 348, at p. 28, that they must be proved with the utmost precision, and with every circumstance of time and place.

As regards the alleged oral will of the Monday evening, it is in their Lordships' opinion quite clear that the defendants have failed to prove that such a will was made. A declaration such as is alleged to have been made by the deceased on that occasion of testamentary intentions to which effect was to be given by a written will cannot be regarded as an oral will. It cannot, in such a case, be inferred that there was the necessary *animus testandi*, or intention

that the oral declaration should itself operate as a testamentary disposition of the declarant's property.

The defendants must therefore rely on their alternative case, that on Tuesday morning, shortly before he died *Vishram*, feeling that he would not survive to make a written will on the Wednesday, made a fresh declaration of his testamentary wishes with the intention of making an oral will. That case again rests entirely on the oral evidence of the defence witnesses who speak to it.

Before dealing with this evidence it is necessary to refer to what is said by the defendants to have happened in the interval between the making of the two alleged wills. The writing of the invitations, it is said, took till 10 o'clock on Monday night, when *Govind Rao* retired to rest in his own house in the same compound, leaving the two wives and *Namdeo* in charge of Vishram. At 11 O' clock a party of six persons from other villages is said to have arrived to inquire about his health. They found him lying in his cot, but he sat up and spoke to them, and told them that he was going to make a will at the gathering on Wednesday and they remained with him and kept him awake till 1 a.m. on Tuesday. Their Lordships cannot but regard with grave suspicion the evidence as to this visit which was, no doubt, intended to corroborate the evidence as to what had already taken place and to rebut the plaintiffs' evidence that at this time *Vishram* was unconscious. The witnesses all say that when they started on Monday they did not know that *Vishram* was seriously ill and their whole story is so unsatisfactory as to suggest that they are not witnesses of truth. It is said that *Gopal Rao*, who had married *Vishram*'s niece and lived 10 miles away had heard on Saturday that *Vishram* was ill, but not that the illness was serious. He decided on Monday to go and see *Vishram* and left his village for that purpose with another friend at 3 p.m. They stopped at Mhasala at 5.30 p.m.,

and met there *Gopal Wogh*, who invited them to share his evening meal, and said he would go with them. The meal was over at 8.30 p.m., but they did not leave till 10, by which time the party had come to include three more persons, *Gopal Wogh's* manager, one Ithoba, who has not been called, and another witness who had no connexion with the deceased and whose only reason for going was that Ithoba had asked him. The Additional District Judge was struck by the disconnected manner in which the evidence as to this part of the case was presented, and viewing it as a whole their Lordships do not think it can be regarded as corroborating the defendants' case.

To come now to the crucial part of the case, the alleged oral will on Tuesday morning, the allegation in Para, 11 of defendant's 1 written statement, which has been set out above, states that early on Tuesday morning *Vishram* sent for *Govind Rao*, and asked him to see to arrangements for the contemplated feast:

"In the meantime (sic) he felt an inclination to answer the call of nature, and insisted on being taken off the cot for that purpose. While he was answering the call he felt giddy and extremely exhausted. He felt that his end was drawing near, and expressed his fears that he would not live"

to execute the will on Wednesday, but he enjoined all present to give effect to the wishes already expressed by him orally on the previous night. His strength began to fail him and he lapsed into a languid state. He died at 8 a.m.

The evidence of the three defendants and four other witnesses is to the same effect, and the only question is, can it be accepted as proving the alleged oral will? The allegations in the written statement fail to specify the precise time at which the will was made, which turns out to be a point of some importance. *Govind*

Rao says he was sent for an hour before sunrise to discuss the arrangements for Wednesday, which seems a strangely early hour for such a purpose. *Namdeo*, on the other hand, says they slept till red of dawn and the widow says that *Govind Rao* was not sent for until after the sun was up, which, so far north of the Equator, on one of the shortest days in the year, must have been well after 6 o'clock. There is also evidence that before the oral declaration was made witnesses were sent for, which of course would take some time.

Now the defendants had put into the box at an early stage of the case as their seventeenth witness, one *Chintaman Joshi*, the Brahmin family priest, who was called to speak of *Namdeo*'s relations with *Vishram*, and particularly to the prominent part taken by *Namdeo* in *Vishram*' ceremonies. He was cross-examined as to this evidence, but was not shaken. It was then elicited from him that he had been away from the village, and returned on the Monday evening. He stated that he was called on Tuesday at daybreak, as *Vishram*'s condition was very bad, to come and administer the last rites to him. He found *Vishram* unconscious and administered the last rites to him whilst in that condition, and then left. *Vishram*, he stated, died between 6.30 and 7 a.m. No questions were asked the witness in re-examination about this part of his evidence, and it would seem to have been thought best to ignore it, as no reference to him is found in the evidence as to the oral wills which was all taken subsequently. There is no suggestion against this witness, and their Lordships feel no doubt that he was speaking the truth to the best of his recollection. Making every allowance for unintentional errors due to the lapse of time, their Lordships are of opinion that this evidence throws grave doubt on the testamentary capacity of *Vishram* at the time the will is alleged to have been made, and on the whole story of what happened on Tuesday morning, which, indeed, appears to be none too probable in itself.

Further, in the case of disputed wills, it is always material to see when the alleged will was first put forward, and their Lordships therefore attach considerable importance to the omission of any mention of a will in favour of *Namdeo* in the report of the patwari or village officer to the revenue authorities as to the mutation of names with reference to *Vishram*'s lands which was made on the 31st December, eight days after his death.

To

The Revenue Inspector, Circle Salod.

10. (The undersigned patwari) bags to report as follows:

"*Vishramji*, son of *Shiwaji Patil* of *Lonsaoli*, a five annas four pies co-sharer of malguzari share, Khel (A), eight annas, of Mauza *Lonsaoli*, died on 23rd December 1919. His heirs are his wives *Sayatrabai*, eight annas and *Baijabai* eight annas of *Lonsaoli*. Report submitted for information for mutation of the above share in the names of the heirs in place of the deceased. Dated 31st December 1919."

"Signature of *Manik Rao Vithoba*, Patwari,

Circle. No.48, *Lonsaoli*, Tahsil Wardha."

It can scarcely be questioned that if the patwari knew of a will under which *Namdeo* became *Vishram*'s heir it was his duty in the ordinary course to mention it in his report as to the persons in whose favour mutation of names should be made. The defendants' case is that the patwari knew about it from the first but was directed by the Assistant Inspector not to mention the oral will in his report. The defendants have not called the patwari, not, as mistakenly stated by the appellate Court, because he died before the trial, but because the defendants allege

he had been won over by the other side. Instead they called as their fortieth witness the Assistant Land Record Superintendent who did not say that he had told the patwari not to mention the will in his report. He professed to recollect a conversation in which the Patwari consulted him as to the mutation and having told him preferably to mutate in the name of the widows, as there was no writing. This seems rather a lame story, because it was his own duty to take action on the report, and it does not account for the fact that the will was not mentioned in the report. There is, in fact, no satisfactory evidence that the oral will was publicly put forward until *Namdeo* applied for registration in his own name on some unspecified date in January, that is to say, very late in the day.

Their Lordships have not failed to give full consideration to the fact that the widows have been supporting a case which involves the loss of their own widow's estate, but they cannot agree with the appellate Court that the attitude of the widows would almost prove the will by itself. It may wall be that the deceased and his wives who had brought *Namdeo* up as their own child desired him to succeed, and that the surviving widow, as stated by the appellate Court, is anxious even now to give effect to her husband's wishes if she can, by adopting defendant 1, but the duty of the Court is to see whether the oral will set up is proved to have been made. The Additional District Judge was not satisfied with the oral evidence in support of it. For the reasons already given their Lordships, after a careful consideration of the case, have reached the same conclusion. In their Lordships' opinion the appeal must be allowed, the decree of the appellate Court reversed, and the decree of the Additional District Court restored, and they will humbly advise His Majesty accordingly. The defendants must pay the appellants' costs here and in the appellate Court.

If the will is in writing it need not be signed and if signed it need not be attested.[1]

Mulla in his book, Principles of Mohammedan Law states that so long as the intention of the testator is reasonably clear, the testament takes full effect.

Even a gesture, if the intention is sufficiently manifest, is enough. The Fatawa-e-Alamgiri says "A sick man makes a bequest and being unable to speak from weakness gives a nod with his head and it is known that he comprehends what it is about if his meaning be understood and he dies without regaining the power of speech, the bequest is lawful.[2]

The above principle is based on a decision rendered by Imam Hasan and Imam Hussain (Grand children of Prophet MPUBH) who jointly upheld the will by gesture of a lady by name Umama who was the grand daughter of Prophet (MPBUH).[3]

So if the testator is dumb he may make a will by gestures provided that the signs are made in such a manner as is commonly used to denote affirmation. In a case of a person whose inability arises subsequently owing to some illness *etc.*, a will made by sign will be valid only if the testator was deprived of speech for a long time so as to make the signs habitual to him but not if the inability is recent.[4]

It is also mentioned in Hidaya 707 that it makes no difference between the case of a dumb person and of one whose inability is supervenient.

1. *Aulia Bibi vs. Allauddin* 1906 (28) ALL 715; *In re Aba Sattar* 1905 (7) Bom L.R. 558.
2. Bailee I, Pg 652.
3. (Da a im at Islam of Cadi Numan)
4. Hedaya 70, Darrul Mukhtar 408, *Bailee 1652*.

Answering a question regarding form of will and its formalities Madhya Bharath High Court in the case of *Ramjilal vs. Ahmed Ali*,[1] considered this aspect of Muslim Law of Will and ruled that under Mohammedan law no formalities are needed and no attestation is required to make a will. Even unattested will can be acted upon admitted and proved.

Madras High Court had also an occasion to answer such question in the case of *Abdul Hameed vs. Md. Younus*,[2]. A full text of judgment is reproduced below so that even a layman may understand the Law of Wasiath.

> "Hajee Sir Ismail Sait, a member of the Cutchi Memon community and a resident of Bangalore, died on 24th April,1934 in the Tuberculosis Sanitorium at Arogyavaram Chittoor District. He was survived by a widow, five sons (the appellant and respondents 1 to 4) and a daughter (respondent5). He had sixteen grandchildren, who are respondents 6 to 21. He left a will dated 19th March 1934, and the present appeal arises out of an application which was made by the executor for the grant of probate. By his will the testator provided for the education of his grandsons. For some of them he made special provisions with regard to their education and maintenance. While he was in the Sanitorium he decided to fix the allowance which his sons and daughter were to receive under his will and he directed his solicitors, Messrs. Moresby and Thomas, Madras to draw up a codicil to give effect to his intentions in this respect. The instructions to draft the codicil were embodied in a letter dated 5th April 1934 and signed on the testator's behalf by respondent 1. Messrs. Moresby and Thomas prepared a draft and sent it to him on 6th April. Two of the testator's grandchildren had been at school at Aligarh. One died while at school and the other was consequently withdrawn

1. AIR 1952 MB 56
2. AIR 1940 Mad. 153

from the school. On 13th April 1934 the testator directed respondent1 and his agent D.L.Narasappa to write to Messrs. Moresby and Thomas in these terms:

I beg to acknowledge the receipt of your letter of the sixth instant with the draft codicil. I am grieved to inform you that since the receipt of this codicil my grandson, Abdul Sammad, suddenly died at Aligarh University. I have withdrawn my other grandson from school and have decided to cancel the allowances provided for school fees. I have therefore wired you as under : 'Your letter, sixth; since my grandson Abdul Sammad died have therefore decided omit also school fees – Don't delay –Ismail', which I beg to confirm.

Respondent 1 who applied for probate of the will also asked that the telegram referred to in this letter and the letter should be read as parts of the will and admitted to probate. The learned Judge who heard the application, (Wadsworth J.) granted probate of the will, but refused to admit to probate the telegram and the letter. The appeal concerns the question whether this decision is right. The refusal of the learned Judge to admit these documents to probate was based on the opinion which he formed that they were only intended to provide material for the preparation of a draft codicil which the testator was to settle later.

Although according to the oral evidence the testator was in clear mind until two days before he died, he was undoubtedly seriously ill when he instructed respondent 1 and his agent to write to Messrs. Moresby and Thomas on 13th April 1934, and from the documentary evidence it is quite evident that soon afterwards he became too ill to attend to his affairs. On 14th April, Messrs. Moresby and Thomas wrote to him acknowledging receipt of his telegram instructing them to omit from the will the provisions made for school fees but asked for further instructions in order to clear up

a doubt which they felt with regard to the extent of the instructions. By cl.14(a) of the will the testator provided for the maintenance and education of the five sons of respondent 2, including provision for the pursuit of studies in England or America. In cl.(b) he made a similar provision for the education of any sons who might subsequently be born to the second respondent, and in cl.(f) he made provision for the education and maintenance of Sulaiman, the son of the appellant. Sulaiman was then reading for the bar in England. In their letter asking for further instructions Messrs. Moresby and Thomas referred to the fact that Sulaiman was in England and observed that probably the testator did not wish to make any alteration in the clause relating to him but they would be glad to know by return whether he wished them to strike out from will cls.14(a) and 14(b). In addition to writing this letter Messrs. Moresby and Thomas sent him a telegram asking for instructions. The telegram and the letter were not replied to and it is obvious that this was because the testator was too ill to give instructions. On 12th April Messrs. Moresby and Thomas submitted a bill of costs to the testator and on 21st April the first respondent wrote to them stating that his father was not well enough to through their letter in consequence of which it had not been placed before him.

The testator being a Cutchi Memon the provisions of the Mohammedan law with regard to wills apply. That a Cutchi Memon is governed by the Mohammedan law in this respect was held in 43 Bom 641, and the contesting respondents have not disputed the correctness of the decision. It is also accepted, as it must be, having been accepted by the Judicial Committee, that by the Mohammedan law no writing is required to make a will valid and no particular form even of verbal declaration is necessary as long as the intention of the testator is sufficiently ascertained: *see* 25 WR 121. The appellant says that the telegram and the letter which he asks to be admitted to probate embody a definite decision by the testator that the provisions which he had made in his will

with regard to school fees should be cancelled. If that is the position there can be no doubt that the telegram and the letter should be admitted to probate. The contesting respondents however say that the learned Judge was correct in treating the telegram and the letter as being material for the preparation of a draft and that the testator left open the definite position until the draft had been submitted to him. The case reported in 43 Bom 641 has direct bearing on this appeal. In that case a Cutchi Memon wrote to his brother-in-law, Bhai Abdullabhai, as follows:

In the will which you will get made tomorrow and give me, be kind not to forget (to add) my 'mukhatyari' so long as I am alive and after me .....wife's 'mukhatyari.' Whatever costs may be incurred I will pay you. Written by your servant, Mahomed Hassam Haji.

On the other side of this document were the words "Bhai Abdullabhai", the name of the brother-in-law. "Mukhatyari" means absolute ownership or full power. The document was unattested. The intention was that the brother-in-law should instruct a solicitor to draw up a will embodying the intentions of the deceased. It was held that the document was in the nature of instructions to his legal adviser with regard to the disposition of his property and that under Mohammedan law the document operated as a valid will which might be admitted to probate. The deceased died before the will was drawn up. Marten J. cited with approval the following statement from Mayne's Hindu Law. Edn. 8, page 588:

So, a paper drawn up in accordance with the instructions of the testator, and assented to by him, will be a good will, though not signed. And if a paper contains the testamentary wishes of the deceased, its form is immaterial.

He also referred to the case in 25 W R 121. In that case

the Privy Council held that a document which was a power of attorney containing an expression of what was to be done with property after the death of the donor of the power operated as a will. In 21 All 91 the Privy Council held that a letter operated as a will. The letter contained this statement:

You should not have the property given to (my) grandmother and paternal uncle's wife, but you should give the whole to my three sisters, who are my paternal uncle's daughters. You should see that they all get an equal share, and in the same .....as stated by me in Para 3.

The letter was addressed to the writer's agent. Now what is the position here? The testator having decided to make certain alterations in his will and after having received the draft codicil instructed his solicitors to amend it by inserting a provision canceling the directions he had given in his will with regard to the school fees of his grandchildren. He wrote : "I... have decided to cancel the allowances provided for school fees" and sent a telegram also couched in language legally clear. The testator had made up his .... What was to be done and he gave definite instructions to this end. The fact that the solicitors were not certain whether the instructions affected the grandson who was studying for the Bar in England did not alter the nature of the instructions. In these circumstances the letter and the telegram cannot be regarded as being instructions to the solicitors to submit a draft the provisions of which were to be deemed to be merely tentative. The learned Judge formed the opinion that the letter and the telegram were instructions merely for the preparation of a draft codicil which the testator would settle after perusal, but there is no evidence to be found in support of this. I can see no difference in principle between this case and the case in 43 Bom 641 and I accept the judgment in that case as correctly deciding the question under discussion.

For the reasons indicated I consider that the appeal should be allowed and the telegram and the letter admitted to probate. It is not necessary to inquire what will be the effect of admitting these documents to probate. That question will be decided if and when it arises in proper proceedings. The costs of all the parties who have appeared before us will be paid out of the estate, but not on the advocate and client basis.

Kunhi Raman, J :—I agreed with my Lord."

The A.P. High Court in the case of *Vazeer Bi vs. Putli Begum*,[1] has also taken a similar view and relying upon the authoritative pronouncement of Madras High Court in the case of *Vazeer Bi* (supra), held that :—

"The unsuccessful defendants are the appellants. The Respondent, daughter of late Shaik Mahboob, laid the suit for partition of the plaint schedule properties on the ground that her father died intestate. In the suit the appellants propounded the will, Ex.B1 dated June 15,1956, under which the testator had given 1/3rd share to the second appellant. The trial court in the first instance accepted that the will is valid and passed a preliminary decree. On appeal, it was confirmed. In Second Appeal No.570/77, this court by judgment dated Feb. 6, 1979, allowed the appeal and set aside the decree, in so far as it purports to uphold the validity of Ex.B.1 and the second defendant's claim of 1/3rd share in item No.1 of the plaint schedule properties and remanded for fresh disposal in accordance with law after giving opportunity to the parties.

After remand, the appellate court held that the will is not valid and binding. It also held that the will does not contain a provision for 1/3rd share in the house to the second defendant.

1. AIR 1986 AP 159.

Accordingly, in the first instance it granted a preliminary decree declaring that the plaintiff is entitled to 1/2 share, that the first defendant is entitled to 1/8th share and that the second defendant is entitled to 3/8th share. The second defendant is not a legal heir, as per law. Then I.A. 14/80 was filed for amendment of the decree and consequently it amended the decree declaring that the respondent is entitled to 7/8th share and the first appellant is entitled to 1/8th share and the second defendant/2nd appellant is not entitled to any share in the suit properties, Assailing the correctness of the appellate decree, the present second appeal has been filed.

In this appeal, Sri Aziz Ahmed Khan, learned counsel for the appellants contended that the view of the lower appellate Court that the will, Ex, Bl is not legal as per 'Mohammedan Law', is not correct. He contends that the will recites several persons to be the heirs. It also declares the assets and liabilities. It also provides the proportion in which the property is to be received by each party and finally it is stated that the heirs are entitled to the properties after the testator's lifetime. There is no express provision under the Mohammedan Law to recite in the will that right to revocation is reserved. The lower court proceeded on an erroneous assumption that the testator conferred rights in praesenti and the absence of right to revocation of the will constitutes invalidity. This view is against the provisions of Chap. IX of 'Principles of Mohammedan Law' by Mulla. He read out various provisions thereunder.

Sri Syed Shah Mohammad Quadri, learned counsel for the respondent, on the other hand, contends that the Document is primarily to be read whether it is a will or a conveyance. Once it is construed that it is a will, then the provisions contained in Mohammedan Law in Chap. IX would apply. The recovation is implicit under the Mohammedan Law also, since the testator has got

a right till the date of his death to revoke the will and write another will or even orally declare his will declaring his intention to be a will. In this case the fact that he divided the properties during his lifetime and gave them by metes and bounds in species, it is only a conveyance and not a will. The fact that he did not preserve the right, though not expressly, but by conveying the property itself, indicates that he did not reserve his right to revoke. That is the emphasis laid by the lower court in the absence of the recital in the document. Therefore, the view of the lower court is perfectly legal in holding that the will is not valid and it does not warrant interference in this second appeal.

Upon the respective contentions, the question that arises for consideration is whether Ex.B.I is a will and whether it is valid according to law. Though while remanding the matter to the lower court, this court set aside the legality of the execution of the will as such, the appellate court did not go into the execution of the will, but proceeded on the basis that it is a will and then considered whether it is valid. I am not for a moment doubting the correctness of the finding, but as a fact, I have mentioned. Both the counsel also did not argue that it is not a will. Therefore, I proceed on the premise that it is a will, and then to test whether it is valid. Chap. IX of the Principles of Mohammedan Law, by Mulla, 16th Edn. deals with wills and S.115 says that subject to the limitation provided in this chapter, every Mohammedan of sound mind and not a minor may dispose of his property by will. Section 116 says that a will may be made either verbally or in writing. It is, thereby clear that no writing is required to make a valid will and no particular form is necessary. Even a verbal declaration is a will so long as the intention of the testator is sufficiently ascertained.

In *Abdul Hameed v. Mohammad Yoonus*, AIR 1940 Mad 153, a Division Bench of the Madras High Court was considering

whether a letter written by the testator would be a will. The Division Bench has held that under Mohammedan Law, no writing is required to make a will valid and no particular form of verbal declaration is necessary as long as the intention of the testator is sufficiently ascertained. Hence, where the testator having decided to make certain alterations in his will and after having received the draft codicil instructed by a letter and wire, his solicitors to amend it by inserting a provision cancelling the directions he had given in his will with regard to the school fees of his grandchildren. The letter of instructions and the wire form part of the will and can be admitted to probate.

7. Under Section 128, a bequest may be revoked either expressly or by implication. Under Section 129 it is stated that a bequest may be revoked by an act which occasions an addition to the subject of the bequest, or an extinction of the proprietary right of the testator. Under Section 118, a Mohammedan is prohibited to dispose of by a will of not more than a third of the surplus of his estate after payment of funeral expenses and debts. For excess thereof, the consent of the heirs thereto after his demise mandatory. Under Section 117 a bequest to an heir is not valid unless the other heirs consent to it after the demise of the testator. From a consideration of the above relevant sections, it is clear that the intention of the testator must be clear and explicit and form is immaterial and inconsequential. Revocation also is an inferential fact from proved facts and circumstances in a given case. No express mention of revocation of the will is mandatory. The bequest must be one third of his estate after meeting the specified expenses and a bequest to an heir is invalid.

8. In view of the above consideration, the necessary conclusion is that under Mohammedan Law, no form is required and a writing by way of a testamentary disposition by a Mohammedan is valid and binding on the persons claiming to his estate."

Gujarat High Court has also considered a question regarding scope of oral will. A full text of this judgment (AIR 1984 Guj. 126), given below to understand the law :—

"This appeal involves point about an oral gift made by a *Mahomedan* and also an oral will. Some of the donees and legatees are actual heirs under the Mahomedan law, while the one, *i.e.*, the plaintiff, who has filed the suit, is not.

The suit property belonged to one *Shah Mohmed Noor Mohmed*. He had four sons – (1) *Ibrahim* (appellant No.1), (2) *Usman* (appellant No.2), (3) *Noor Mohmed* (respondent No.1's father), who died during the life-time of *Shah Mohmed* and (4) *Ismail*. He had also one daughter named *Kulsumbibi* (appellant No.3).

Plaintiff *Noor Ahmed Noor Mohmed* filed Civil Suit No.3615 of 1973 on the ground that his grand-father *Shah Mohmed* had made an oral gift of some properties. Which are mentioned in Schedule 'A' to the plaint, in favour of the three appellants and respondent No.1 (plaintiff). This oral gift is alleged to have been made on 1-4-1953. It was also his case that before going to pilgrimage to Mecca, his grand-father also made an oral will in favour of all the four pertaining to the remaining immovable properties. The trial Court did not believe the case of the plaintiff about oral will pertaining to properties mentioned in Schedule 'B' and hence, for that much, the Plaintiff (respondent No.1) has filed cross-objections.

Defendants Nos.1 and 3 by their written statement Ex.95, firstly contended that the suit is time-barred, and also that deceased Shah Mohamed was in possession, use, occupation, enjoyment and management of all the properties during his lifetime and that the alleged gift-deed was not acted upon or given effect to. These

defendants, therefore, denied the fact of the gift, but contended in the alternative that if there was one, the same was not legal and valid. Defendant No.2 in his written statement Ex.86 did not dispute the factum of gift, and specifically stated that the deceased had made an oral gift of the properties as mentioned in the plaint. It was, however, stated that the gift was not legal and had no effect. It was also contended that he got separate possession of some of the properties. Other defendants merely contested the suit by saying, that they were the *bona fide* purchasers for value without notice.

After hearing the parties, the learned trial Judge negatived the case of the defendants that the suit was time-barred, and decreed the suit of the plaintiff so far as the properties allegedly gifted by deceased *Shah Mohmed* were concerned. The learned trial Judge did not believe the case of the plaintiff that deceased *Shah Mohmed* had made any will and also disallowed the claim of the plaintiff so far as Behrampura property was concerned. It was decreed that the plaintiff had one-fourth share in the properties described in Schedule 'A' to the plaint, except the property situated in Behrampur Ward bearing survey No.13, Final Plot No.173. It was declared and decided that the plaintiff had no share in the properties mentioned in Schedule 'B' to the plaint, which, according to the plaintiff, were bequeathed by the will. It was decreed that sale deed dated 17-4-1969 in favour of defendant Nos.5, 6 and 7, sale deed dated 11-11-1968 in favour of defendants numbers 8 to 10, and sale deed, dated 9-7-1970 in favour of defendants Nos.11, 12 and 13 are not binding on the plaintiff and his aforesaid share. It was further ordered that the charge created by the consent decree in Civil Suit No.1275 of 1966 in favour of defendants Nos.16 and 17 and attachment and sale of any of the properties in Survey Nos.2928, 2929, 2930 and 2931 to 2933 of Kalupur Ward No.3 are not binding on the plaintiff's 1/4th share in the said properties.

Before proceeding further, it would be worth-while to refer to this dispute to bring out the facts very clearly. It was the contention of the plaintiff in the plaint that the plaintiff is not concerned with the registered partnership firm which does business in the name and style of *Ibrahim Noor* and Co., and that defendants Nos.1, 2 and one *Abdulrashid Kamalbhai*, who is the son of defendant No.3, were carrying on business in the said name and style. The said firm of Ibrahim & Co., had borrowed huge amounts of money from defendants Nos.16 and 17, who filed Summary Suit No.1275 of 1966 in the City Civil Court at Ahmedabad and a consent decree dated 1-8-1966 for Rs.90,000/- with interest was passed therein against the said firm and its partners. A charge was created on some of the gifted properties. Thereafter, defendants Nos.16 and 17 filed Darkhast No.34 of 1968 for recovery of an amount of Rs.1,06,831.06 paise by the sale of the said properties. The plaintiff, therefore, sought a declaration that the plaintiff's one-fourth share in the said property is not affected by the said charge.

It should be noted that there is further development that during the appellate stage Civil Application No.924 of 1981 was filed by *Laxmandas Chanchaldas* (now respondent in the appeal) stating that original defendants Nos.16 and 17 *Modi Hiralal Manilal* and *Hiralal Manilal Halwawala* respectively, had filled Civil Suit No.1275 of 1966 in the City Civil Court for recovery of the money advanced by them against the appellants and respondent No.1 (plaintiff). Execution proceedings were taken after the decree passed in Suit number 3615 of 1973 is subject to the rights of aforesaid defendants Nos.16 and 17. It was his case that the decree passed in Civil Suit No.1275 of 1966 was assigned by said defendants Nos.16 and 17 by a Deed of Assignment dated 3-8-73 in his favour. It is also the case of this *Laxmandas* that in the auction sale held in the aforesaid Darkhast, being Darkhast No.34 of 1968, he had purchased the undivided share

of present appellants Nos.1 and 2 of the property shown in Paragraph 2 of that civil application. Then it is the case of this *Laxmandas* that he had purchased one-fourth share of present appellant No.3 by sale deed is registered with the Sub-Registrar of Assurance on the same duty, *i.e.*, on 30-3-1979. Therefore, he (*Laxmandas*) had 3/4th share in the said properly mentioned in Para 2 of that civil application. It is, therefore, that by the civil application *Laxmandas* requested to join him as defendant in the suit and respondent in the appeal. This request was granted by the court. This further development after this respondent *Laxmandas* was impleaded as a party has resulted into civil application filed by respondent No.1 to which we shall refer at an appropriate stage. The trial Court further declared that the attachment and sale in Darkhast Civil Court filed by defendant No.19 (*i.e.*, firm of *Kanaiyalal Mohanlal*) was not binding on plaintiffs one-fourth share in survey Nos.3068 to 3073 of Kalupur Ward No.3, Ahmedabad. The trial Court also appointed the Commissioner for taking Accounts to sever plaintiff's one-fourth share in the properties and a preliminary decree was passed to that effect. It should be noted that after respondent *Laxmandas* came on record, original plaintiff (present respondent No.1) filed Civil Application No.3780 of 1982 requesting the Court to grant injunction against said *Laxmandas* injunction against said *Laxmandas* restraining him from alienating transferring by sale, mortgage, gift, lease or in any other manner the suit properties bearing Survey Nos.2926, 2929, 2930, 2931, 2932 (part) 2933, 2934, 2935, 2936 and 2937 till the final decree is made. This is also being heard. Against the aforesaid preliminary decree passed by the learned trial Judge, the appellants have filed this appeal.

Mr. *P.V. Nanvati*, learned Advocate for the appellants, submitted that in fact, the gift is not believable. In the alternative he submitted that if at all the oral gift is considered to be a fact, then

the gift is not in accordance with the provisions of the Mahomedan Law and, therefore, the same is illegal.

So far as the factum of gift is concerned, the learned trial Judge had discussed that aspect very elaborately in his judgment from Paragraph 31 on wards. The first aspect considered is that defendant No.2 in his written statement Ex.86, admitted that it was true that deceased *Shah Mohmed* had made an oral gift of the properties stated in the plaint, and also stated that the properties were transferred in the names of donees in the City Survey Records. Then, on record there is application Ex.319 Dated 18-4-1953 made by deceased *Shah Mohmed* to the City Survey Officer, Ahmedabad. In that application he had categorically stated that such a gift was made and requested that the names of the donees be entered on record. This clearly shows that the donor himself accepted the oral gift having been made by him. Further, on 20-4-1953 deceased *Shah Mohmed* also made a statement before the officer concerned regarding his having made such a gift. That statement was considered by the learned trial Judge to be a statement made by deceased *Shah Mohmed* against his own interest. Then there is also Ex.409, which is a joint statement dated 20-4-1953 made by defendants Nos.1, 2, 3 and 24 (*i.e.*, present appellants, and respondent No.2), *Bai Fatma* as a guardian of the plaintiff) before the Officer concerned regarding the said gift. In this statement clear reference is made regarding the oral gift dated 1-4-1953. Then it was stated that this oral gift was made according to Muslim Law regarding the properties stated therein in their favour and so, their names be entered as owners in place of the deceased regarding the said properties. That statement has been reproduced by the learned trial Judge in Paragraph 33 of his judgment. Therein there is mentioned in Gujarati (vernacular omitted) on the strength of this, Mr. *Nanavati* has advanced a ground about the initially of the gift to which we shall immediately refer.

The first ground advanced by Mr. *Nanavati* is that this gift is not valid according to Mahomedan Law. According to him, formalities required under the Mahomedan Law for a valid gift are that the transfer of the properly should be made immediately and without any exchange, by one person to another, and accepted by or on behalf of the latter. It was his contention that because the plaintiff was a minor, the gift should be accepted on his behalf by somebody, and it seems that respondent No.2 *Bai Fatma* accepted the gift. Therefore, it is submitted that as per Section 156 of the Mahmodean Law by Mulla, gift to a minor by a person other than his father or guardian may be completed by delivery of possession to the father or guardian. According to Mahomedan Law, it is an accepted position, which has not been denied by Mr. *C.P. Vyas*, learned Advocate for respondent No.1 – plaintiff also, that mother is not a guardian if grandfather is there. Therefore, according to Mr. *Nanavati*, if the mother has accepted the gift on behalf of the minor, then that is not proper acceptance and, therefore, the gift is invalid. It is the submission of Mr. *Nanavati* that mother is not a legal guardian and therefore, possession given to her, when one of the said guardians is alive is in-effective.

This ground of attack of Mr. *Nanavati* in regard to the gift is not valid in our view even according to law. It is a fact that deceased *Shah Mohmed* was the guardian of the plaintiff when he was a minor. Now, he himself was making a gift and, Muslim Law does not say that any person who is entitled to be a guardian (mother here) cannot be a guardian in presence of a donor who is legal guardian and cannot take the gift. To the argument advanced by Mr. *Nanavati*, there is a clear answer in *Valia Peedikakkandi Katheessa Umma v. Pathakkalan Narayaneth Kunhamu*, AIR 1964 SC 275, rendered by *Hidayatullah*, J. (as he then was). In order to appreciate the principles of law propounded, it will be worthwhile to consider some salient features of that case. One *Mammotty* was married to *Seinaba* and he made a gift of his

properties including immovable property to *Seinaba*. This *Mammotty* who was the husband of *Seinaba* died issueless. At the time of the gift, *Seinaba* was 15 years and 9 months old. Therefore, she was a minor. *Mammotty* was ill for a long time and was in hospital and he was discharged uncured a month before the execution of the gift deed and remained in his mother-in-law's house afterwards. A contention was raised whether the gift was valid, because the donor was the husband who was her legal guardian and mother of *Seinaba* had accepted the gift. The Supreme Court, in Para 7 of the judgment, specifically observed that possession was not delivered to *Seinaba* but to her mother, and she accepted the gift on behalf of *Seinaba*. The Supreme Court further observed that *Mammotty* could have made a declaration of gift and taken possession on behalf of his wife who had attained puberty and had lived with him. For after the celebration of marriage a husband can receive a gift in respect of minor wife even observed that *Seinaba's* mother was also not a guardian of the property of *Seinaba*. Mahomedan Law makes a distinction between guardian of the person, guardian of the property and guardian for the purpose of marriage in case of minor females. Considering these, facts, the Supreme Court observed :

"Where a husband, a Hanafi, makes a gift of properties, including immoveable property, by a registered deed, to his minor wife who had attained puberty and discretion, and the gift is accepted on her behalf by her mother in whose house the husband and wife were residing, when the minor's father and father's father are not alive and there is no executor of the one or the other, such a gift must be accepted as valid and complete, although the deed is handed over to the minor's mother and possession of the property is not given to a guardian specifically appointed for the purpose by the civil Court."

Specific observations made by the Supreme Court further would clearly show that the intention of law is to make a gift valid and

legal as far as possible so as to give full justice to the desire of the donor. The Supreme Court observed that there can be no question that there was a complete intention to divest ownership, on the part of the husband the donor, and to transfer the property to the donee. In the instant case also, on facts, it can be very clearly said that deceased *Shah Mohmed* had a complete intention to divest ownership and to transfer the property to all the four donees. In that case the Supreme Court further observed that if the husband had handed over the deed (it was a written gift deed) to his wife, the gift would have been complete under the Mahomedan Law and it is impossible to hold that by handing over the deed to his mother-in-law, in whose charge his wife was, the husband did not complete the gift. In Paragraph 15, after considering various judgments, the Supreme Court considered that those cases are distinguishable from those cases in which there is no guardian of the property to accept the gift and the minor is within the care either of the mother or of other near relative or even a stranger, and in such cases the benefit to the minor and the completion of the gift for his benefit is the sole consideration. Same principle would be applicable in the instant case. Donor *Shah Mohmed* was the only guardian. There was no other guardian of the property or person of the minor and mother was the only other person who could look after the interest of the minor and, therefore, acceptance of gift by mother of the minor would not be illegal or invalid, in view of the principles propounded by the Supreme Court in the aforesaid case. Therefore, this ground has no basis.

12. Then it is submitted that this transfer should be of a property on which there is no encumbrance. It is submitted that when a gift is made, actual possession should be available to the donee, and if the property cannot be directly handed-over, then it would not be a proper gift. It should be noted that these grounds are advanced by three of the donees, because if the gift is considered to be invalid, only plaintiff-respondent No.1 would be

losing his rights while all the three appellants under the Mahomedan Law would be entitled to retain the property as heirs to the exclusion of the plaintiff and, therefore, strenuous attempts are made on behalf of the appellants to show that the gift in invalid.

Section 145 of the Mahomedan Law by Mulla, 18th Edition, mentions that a gift may be made by a mortgagor of his equity of redemption. However, there is a conflict of opinion whether a gift of an equity of redemption, where the mortgagee is in possession of the mortgaged property at the date of the gift, is valid, and the Bombay High Court has held that such a gift is not valid. Some other High Courts have held that such a gift is valid. But that judgment of the Bombay High Court in *Ismail v. Ramji*, (1989) ILR 23 Bom. 682, is binding on this Court.

Then we wanted to know from Mr. *Nanavati* as to whether there is any evidence to show that there is any evidence to show that there is any encumbrance or equity of redemption and the mortgagee was in possession of the mortgaged property on the date of the gift. He first relied on Ex.409 to which we have made reference earlier wherein it is mentioned (Vernacular omitted) and submitted that this statement shows existence of encumbrances. It should be noted that most of the properties were tenanted and it is not disputed that under Mahomedan Law gift of tenanted properties is valid. As under Mahmodean Law there should be delivery of such possession as the nature of the property is susceptible (Section 150 of Mulla's Book) and constructive possession is permissible. Except tenants, there is no other aspect to connect ("Gujarati word omitted") Ex.409. But in order to support his argument. Mr. *Nanavati* submitted Civil Application No.602 of 1983, to permit to produce rent-note dated 25-9-1942 executed in favour of *Amratlal Mohanlal, Jagubhai Bhogilal* and *Sumanchandra Bhogilal* by deceased *Shah Mohmed Noor Mohmed*

and others and requested this Court to order that the same may be received in evidence and exhibited. By this it is attempted by Mr. *Nanavati* to show that there was some property which was mortgaged with possession (Gujarati word omitted) and the mortgagors continued to remain in possession of that property as tenants and, therefore, it can be said that the mortgagee was in possession. Now, in the civil application it has been stated that this document was produced in the trial Court by *Kantilal Gordhandas Patel* Ex.302. Evidence of this *Kantilal* was recorded on 24-2-1977. He merely produced some four documents by list Ex.303, and they are already exhibited at Exs.448 to 451. This rent-note does not figure in that list, *i.e.*, it was not produced during the deposition of this witness, who was examined on behalf of defendants Nos.1 and 3. At the time of arguments, as we are told at the Bar, with an affidavit this rent-note was produced on 9-8-1977. As this was produced after the evidence was over and arguments were going on, probably the learned trial Judge did not consider it. It, however, seems, as argued by Mr. *Vyas*, that this rent-note is of year 1942, and the transaction of gift is said to have taken place on 1-4-1953. It could not be shown whether at the time when the gift was made, deceased *Shah Mohmed* had already redeemed the mortgage. At any rate, we are not inclined to grant this civil application because it is for the production of a document at a very late stage and creating scope for the second round of evidence on the strength of this civil application. Therefore, the reliance of Mr. *Nanavati* on the law laid down by the Bombay High Court about gift of equity of redemption, where the mortgagee is in possession of the mortgaged property at the date of the gift is invalid, would not be of any avail to him.

Then the last ground of attack of Mr. *Nanavati* is that the suit is time-barred. Now, the learned trial Judge has discussed this aspect in Paragraph 97 of his judgment, that the plaintiff was born on 10-9-1948, about which there is no dispute, and the plaintiff

became major on 10-9-1969. The application to sure *informa pauperis* was filed by the plaintiff on 13-9-1972. It has been specifically observed by the learned trial Judge that 10-9-1972 was a Sunday, and 11-9-1972 and 12-9-1972 were holidays and, therefore, this suit was filed within the period of limitation. No exception can be taken this finding. Therefore, this ground also would not be available to Mr. *Nanvati*.

One more argument was advanced by Mr. *Nanavati* suppose the gift is considered to be valid, then after the gift a partnership was formed and hence the suit should have been filed for dissolution of partnership and accounts. Because the suit is filed for partition and accounts and not for dissolution of partnership if partnership is formed, it would not lie. Now, merely because some reference has been made to M/s. *Shah Mohmed Noor Mohmed*, a ground has been advanced that that was a partnership firm doing business. Now it is clear that so far as that firm is concerned, it was merely collecting rent and not doing any business. In fact, no such contention was raised in the written statement of any of the contesting defendants not his point was raised so as to make out a triable issue. Still, however, in repeated Paragraphs 82 and 83 of the judgment, the learned trial Judge has considered that formation of so-called partnership of *Shah Mohmed Noor Mohmed* cannot be said to be a partnership firm so as to attract the provisions of the Indian Partnership Act, because there was no business being carried out by the firm so as to make it a partnership firm and, therefore, there was no agreement to share profits of the business carried on by all or any of them acting for all. It was merely collecting rent of properties which were gifted away. Then it is observed that the relationship constituted between the parties is that of co-owners only and not of partners. We fully concur with this finding of the learned trial Judge and, therefore, we do not find any substance in this appeal and the same to be dismissed.

Then comes the question of cross-objections pertaining to will. In order to support that argument, Mr. *C.P. Vyas* relied on plaint Ex.327, which is original plaint of Civil Suit No.1594 of 1969, filed by all the appellants as well as respondent No.1 (plaintiff) who, at that time, is shown as 'major'. That suit pertained to property bearing City Survey No.3085 and Municipal Census No.1626/1/2, situated in Chudi Ole, Pankore Naka, Kalupur Ward No.3, Ahmedabad. That property is not the subject-matter, of gift. But therein it has been mentioned that the said property was of ownership of deceased *Shah Mohmed Noor Mohmed*, and all the four plaintiffs (of that suit) are the heirs of deceased of Mr. *Vyas*, that it, according to Mahmodean Law, the plaintiff (present respondent No.1) could not be the heir, how would be an heir to the property which was the subject-matter of that suit, unless there was a will. It probably seems that there was some mistake in drafting of the plaint, which might have been done without considering the provisions of law or at that time parties must not have been minded to fight tooth and nail as they are doing now. But merely because a mistake has been made, it would not take out the legal position that the plaintiff is not an heir under the Mahomedan law. The endeavour of Mr. *Vyas* is to show tat the said property might have come by will and, therefore, name of present plaintiff has been mentioned as an heir in that suit. This is too much to guess from such an averment. It is an admitted position under Mahomedan Law that an oral will is permissible (Section 116 of Mulla's book) and hence reliance is on an alleged oral will.

In order to support his argument further, Mr. *Vyas* submitted that in the deposition pointed attention of *Ibrahimbhai Shah Mohmed* (appellant No.1) Ex.292, was drawn in Para 151 pertaining to survey No.3085, which was the subject-matter of Civil Suit No.1594 of 1969, and he specifically stated that he was not knowing when the suit was filed, that present plaintiff (respondent

No.1) being a son of deceased, had no right in the properties of his (witness') father. In Para 152 of his deposition it is his case that in that plaint plaintiffs are shown as heirs of *Shah Mohmed*, but denied that it was so stated because present respondent No.1 (plaintiff) was an heir pursuant to the will, and stated that the Advocate of the plaintiffs in the said suit had stated through oversight (about all plaintiffs there being heirs). This can be said to be a proper explanation.

Then Mr. *Vyas* relied on partition agreement Ex.305 dated 12-2-1968. It should be noted that the suit to which we have referred earlier was filed on 25-7-1969, and this Ex.305 is prior to that. That refers to various properties about which claim has been made by the plaintiff as properties bequeathed to all the four donees. It also refers to properties bearing Survey Nos.3083, 3084 and 3085. These properties are not mentioned in the gift deed. Averment is made in Paragraph 1 of the agreement that these properties belonged to deceased *Shah Mohmed* and that he had gifted those properties by oral gift. Now, as considered earlier, these properties are not the subject-matter of oral gift, because only the properties for which oral gift was made are in Schedule 'A'. As those three properties are included in the agreement Ex.305, it is argued that it should be considered that the appellants the properties as properties gifted away; but should be considered that these properties formed the subject-matter of the bequest.

Then reliance is placed on sale-deed Ex.312 dated 1-9-1967, which is even earlier than Ex.305 (partition agreement). In paragraph 5 of Ex.312 clear mention is made that *Noor Mohmed Shah Mohmed* had a son named *Noor Ahmed* and his mother *Bai Fatma* is also alive, but according to law, this *Noor Mohmed* died during the lifetime of his father (*i.e.*, *Shah Mohmed*) and, therefore, he has no share in the property and as such his son or widow also

has no share in the property, meaning thereby, by heirship. It is, therefore, submitted that if on 1-9-1967 parties knew that the plaintiff had no share and still in the subsequent two documents if they mention that the plaintiff has some share in the property which would not be the subject-matter of the gift, then the Court should consider that the plaintiff got right in this property on the strength of the will. It is too much to accept the argument of Mr. *Vyas* merely on this stray circumstance. In order to prove a will or al least show semblance of a will, parties must lead evidence before the Court in such a way that the circumstances would clearly establish that will has been proved satisfactorily. Now, as we find a specific statement before the Mutation Officer so far as the properties gifted are concerned, there is no specific statement so far as the will is concerned. Except these stray statements, there is no documentary evidence specifically mentioning about any oral will. The trial Court rightly appreciated that no witness in this case except the plaintiff and his mother deposed that deceased *Shah Mohmed* had made any will. The trial Court rightly observed that the evidence of the plaintiff and his mother does not inspire confidence because that is interested evidence. If there would have been an oral will, then after the death of *Shah Mohmed,* some attempts would have been made to get mutation entries made so far as those properties are concerned. As nothing is done in that behalf, the trial Court rightly negatived the case of the plaintiff so far as the oral will is concerned. In view of this the cross-objections filed by the plaintiff deserve to be dismissed with costs.

Then remains Civil Application No.3780 of 1982 for injunction against respondent *Laxmandas Chanchaldas*. It has been contended by Mr. *P.V. Nanavati* for the appellants and Mr. *P.G. Desai* for respondent *Laxmandas,* that the request of plaintiff-request No.1 to get injunction against him is not justified because whatever transactions have taken place in future would be subject to right,

> title and interest of plaintiff-respondent No.1 and, therefore, this Court should not grant injunction. A very serious argument about the valuable right of a party to dispose of his undivided share in the property in any way he chooses was advanced and it was stated that a right of a person to deal with his undivided share would remain uncontrolled and whatever transaction would be made by a co-owner vis-à-vis his undivided share would be subject to right of a person who has also a share in the property. So far as principle of law about the undivided share of co-owner is concerned, no objection can be raised about it. The Court is, however, seized of the matter pertaining to the property. Pending the litigation, the property was transferred and, therefore, this respondent *Laxmandas* had to come on record. The matter is still to go back to the trial Court for final decree. If during that period property would change hands with any other persons, would it not be necessary either for the plaintiff or somebody else to bring all parties on record, meaning thereby, delaying further proceedings for brining them on record, having their say, *etc.*, and thus delaying the passing of final decree? The Court should always lean towards seeing that there is no multiplicity of proceedings and also that the proceedings should go on as far as possible so smooth that the decision can be arrived at between the parties who are on record as early as possible. If injunction is not granted, then probably the result would be as mentioned by us about and, therefore, it is in fitness of things that Civil Application No.3780 of 1982 should be allowed and the relief prayed for therein is granted."

It is to be noted that every declaration of testamentary intention will not amount to a will. Privy Council in the case of *Venkat Rao vs Namdeo* (supra) further ruled that a declaration of a deceased of his testamentary wishes on the occasion of his announcing his intention of giving effect to them by a written will cannot be regarded as an oral will.

The mere fact that the document is called Tamlik Nama (Assignment) will not prevent it from operating as will if it possess the substantial characteristics of a will as held in the cases of *Syeda Kusum vs Shaista Bibi*,[1] and *Ishri Singh vs. Baldeo*[2].

In the under mentioned cases also, oral will was also as well accepted as valid without insisting upon any disposition in writing, attestation, a particular form.[3]

SHAFAII'S VIEW

Shafaiis do not make a difference between the case of a dumb person and of one whose inability is supervenient.

CHAPTER V

MOOSE BEHEE (Subject matter of Will)

In view of the above discussion it is necessary for us to study now as to what property can be bequeathed.

Every type of property moveable or immovable, corporeal or incorporeal or right, including corpus and usufruct which is capable of being transferred may be the subject matter of Wasiyat, provided that the subject matter is in existence at the time of testator's death as his property.[4]

1. (1875) 7. NWP, Pg 313
2. (1884) 11, I.A., 135 = ILR 10 Calcutta 792 (PC)
3. *Aminuddowlah vs Roshan Ali* (1851)5 MIA 199; *Musamma Tameez Begum vs Farhat Hussain* (1871) NWP 55; *Maung Lu vs Maungee* PC 171 C 868.
4. (Tayabjee page 675, mullah 122)

The general rule of Mohammedan Law regarding subject of will is that the property bequeathed should be owned by the testator and should answer the description as contained in the will and the will would take affect only after the death of the testator.

So the validity of the will is subject to condition that the property, subject matter of will, should be possessed by the testator at the time of his death and should be capable of being transferred.[1]

Provided further that the usufruct of property or right may be separately bequeathed for a limited period or for the life time of the legatee. As to these different facets of property in Islamic Jurisprudence a discussion is at length made below.

According to Bailee, I, 623, II, 233 Corpus of the property including usufruct may be bequeathed. A testator can make a bequest of the substance of any property which can be lawfully possessed or of its usufruct or profit.

A muslim may retain the corpus and make bequest of limited rights dealing with the usufruct or profit. The intention whether the testator has made a bequest for corpus or usufruct may be collected from the terms and conditions of the bequest.[2]

According to Baillie I, 241,665 and 666: The Hidaya 692-695, Right of rent, income, profit, produce use or occupancy of a house, the fruits of a garden by which corpus is not consumed are usufruct of the property. A testator without bequeathing the

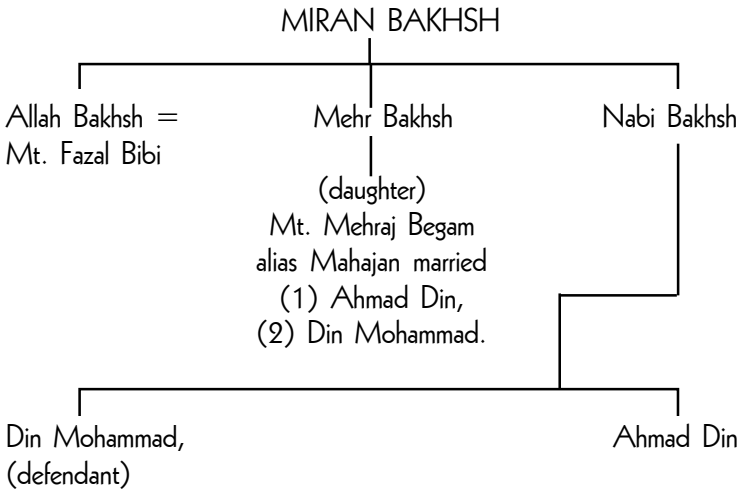
1. Hidaya, Bailee II, Chapter 11, Pg 679, Faizee 2nd Edition Pg 307, Tayabjee IV Edition Pg 691
2. Bailee I, 665, 666

corpus may make a bequest of limited rights pertaining to usufruct or profit only. But the usufruct must be in existence at the time of death of testator. In all such cases the intention of the testator should be gathered from the terms of the will.

A bequest of corpus may be made in favour of "a" and of the usufruct in favour of "b". It is permitted. *(AIR 1937 LAHORE 669, Mehraj Begum vs Din Mohammed)*

Note: The said judgement is reproduced below to let the readers understand this principle.

"The parties to this litigation are husband and wife. They are Qureshis of Lahore, and their relationship with *Allah Bakhsh*, whose property is in dispute will appear from the following pedigree table:



Mt. *Mehraj Begam* was first married to *Ahmad Din*, son of *Nabi Bakhsh*. On *Ahmad Din*'s death she married his brother *Din*

Mohammad, who has another wife living, from whom he has children. Mt. *Mehraj Begum* and *Din Mohammad* appear to have fallen out with each other lately. The property in dispute is a house which originally belonged to *Allah Bakhsh* who died childless on 23rd May 1918. It is alleged by the plaintiff that one day before his death, *i.e.* on 22nd May 1918, *Allah Bakshsh* executed a will (Ex. P.1) which was attested by eight witnesses, including his wife Mt. *Fazal Bibi*, his two brothers *Mehr Bakhsh* and *Nabi Bakhsh*, and his niece Mt. *Mehraj Begam*, plaintiff. The plaintiff averred that under this will Mt. *Fazal Bibi* lived in the house in dispute for her lifetime, and on her death, in 1925, the plaintiff became the absolute owner thereof. She remained in possession till April 1933 when her husband, the defendant, unlawfully dispossessed her of the lower storey of the house. Accordingly she brought this action for recovery of possession of this part of the house. The defendant *Din Mohammad* denied the plaintiff's claim to any part of the house in suit. He did not admit the execution of the will by *Allah Bakhsh*, and in the alternative pleaded that *Allah Bakhsh* was not of disposing mind at the time, and that the will was invalid under Mohammedan law. He also alleged that *Allah Bakhsh*, in his lifetime had orally gifted the house in dispute to him and he was in possession in his own right.

The trial Judge held that the alleged oral gift by *Allah Bakhsh* to the defendant has not been proved, that he, while in possession of his senses, had executed the will Ex. P.1 on 22nd May 1918, that though the will was of the entire property of the deceased, it had been validated by consent of the other heirs, *Mehr Bakhsh* and *Nabi Bakhsh*, given after the testator's death. He accordingly granted the plaintiff a decree for possession of the portion of the house, of which she had been dispossessed by the defendant a short time before the suit. On appeal the learned Additional District Judge upheld the finding of the Subordinate Judge that the

will had been executed by *Allah Bakhsh*, but he did not come to any definite finding as to whether the testator had a disposing mind at the time. He also found that though the will was in excess of the legal one-third and therefore invalid under Mohammedan law, but this defect had been cured by the consent of the other heirs of the deceased. He interpreted the will as bequeathing the house in dispute to Mt. *Fazal Bibi* absolutely, with a condition that she will have no power to alienate it, and after her death to Mt. *Mehraj Begam*. He held that as under the Mohammedan law of the Hanafi School, by which the parties were governed, such a condition and the gift over are void, the legal effect of the bequest was that Mt. *Fazal Bibi* took the house as absolute owner and the plaintiff got nothing at all. On this finding, he accepted the defendant's appeal and dismissed Mt. *Mehraj Begam*'s suit leaving the parties to bear their own costs.

The plaintiff has come in second appeal and it has been contended on her behalf that the will has been misinterpreted by the learned Additional District Judge and in any case the view of the Mohammedan law taken by him is incorrect in the light of the recent pronouncement of the Privy Council on the point in *Amjad Khan v. Ashraf Khan*, AIR 1929 PC 149 = 116 IC 405 = 4 Luck 305 = 56 IA 213 (PC) at p. 307. It has also been urged that the learned Judge should have held, in agreement with the Subordinate Judge, that the testator was of disposing mind at the time of the execution of the will. On the last point, I have no doubt that the contention of the appellant is correct. As already stated, both Courts have concurrently found that the will was executed by *Allah Bakhsh*, and this finding has not been challenged before me by the respondent's Counsel, as indeed it could not be, in view of convincing evidence on the record. This evidence also establishes that the deceased, though ill at the time, was in possession of his senses. The will was executed in 1918, and of the eight attesting witnesses all except Basso have since died. Basso gave

evidence at the trial and clearly stated that the will was written at the instance of *Allah Baksh* and was thumb-marked by him. The scribe *Devi Das* has also appeared as a witness and deposed that the testator was in possession of his senses at the time and that the will was attested by *Mehr Bakhsh* and *Nabi Bakhsh*, brothers of the deceased, and Mt. *Fazal Bibi*, his wife. The plaintiff is also one of the attesting witnesses and she too has sworn to the above facts. There is also on the record a group photograph, taken on the day on which the will was executed, and this shows that the deceased was able to sit up and was not unconscious as is alleged by the defendant. There is no rebuttal evidence worth the name produced by the defendant. In my opinion this evidence is quite sufficient to prove the due execution of the will by *Allah Bakhsh* while he was of disposing mind.

The real question in the case is one of construction of the will, clause (7) of which contains the disposition relating to the immoveable properties owned by the testator, which consisted of a house in Koocha Kababian and a shop inside Mochi Gate, Lahore. Reading this clause as a whole, and not laying too much stress on a word here or a word there, I have no doubt that the bequest by the testator of these properties to his wife, Mt. *Fazal Bibi*, was not a transfer of the corpus with an inconsistent restrictive condition and a gift over to the plaintiff. On the other hand, it seems clear that the dominant intention of the testator was to give her the 'usufruct' of the properties for a limited period and confer the ownership of the house on the plaintiff, and that of the shop on his two brothers, *Nabi Bakhsh* and *Mehr Bakhsh*. Though in one place it is stated that Mt. *Fazal Bibi* will be the malik of these two properties, it is laid down in clear terms that "She will occupy the house for her residence for her life or so long as she remained of good character" and as regards the shop, all that she became entitled to was merely to realize the rent and bring it to her own use. It is also provided that under no circumstances

was she to alienate any of these properties and it appears that she was not given the power even to sub-let the properties. On her death, the shop was to become the absolute property of *Nabi Bakhsh* and *Mehr Bakhsh*, brothers of the testator, and on her becoming unchaste or on her death (as the case might be) the house was to be the property of his niece, Mt. *Mehraj Begum*, plaintiff, who, it was stated in the will, had been living with him and whom he had brought up. Now whatever may be the correct legal position under Mahomedan law of the Hanafi School with regard to bequests of a life-estate with a vested remainder, it is beyond doubt that it is permissible to make a bequest of the thing itself in favour of one person and of its produce or use to another. In the Hedaya, Vol. 4, Chap. 5, p.692, it is laid down that:

If a person bequeath.... the use of his house, either for a definite or indefinite period, such bequest is valid, because as an endowment with usufruct, either gratuitous or for an equivalent, is valid during life, it is consequently so after death.

Similarly in Baillie's digest, Vol. 1, p.668, it is stated:

If a person should bequeath.... this mansion to such a one, and its occupancy to such another .... each legatee would have what was mentioned for him, without any difference of opinion, whether the bequests are connected together or separate.

I hold, therefore, that the bequest of the house in dispute to Mt. *Fazal Bibi* was not of an absolute estate with a gift over to the plaintiff, as held by the learned Additional District Judge, but that in reality the 'occupancy' or 'use' of the house had been given to Mt. *Fazal Bibi* for a limited period and its corpus to the plaintiff, and that on the death of the former the usufruct and the corpus both vested in the latter. In this view of the case, it is not

necessary for the purposes of this case to discuss whether the bequest of a life-estate is or is not valid under Mohammedan law. It may be stated that it is not easy to reconcile the various cases on the point, and the latest decision of the Privy Council in *Amjad Khan v. Ashraf Khan*, AIR 1929 PC 149 = 116 IC 405 = 4 Luck 305 = 56 IA 213 (PC) cannot be said to have set the matter at rest, as has been explained by *Mirza,* J., of the Bombay High Court in *Rasool Bibi v. Yusuf Ajam*, AIR 1933 Bom. 324 – 148 IC 82 = 57 737 = 35 Bom LR 643 at p. 757 and in the dissenting opinions on appeal by *Beaumont*, C.J. and *Rangnekar*, J. (p. 777 and p. 784 *et seq*). The defendant's learned Counsel concedes that his client has no lawful title to the house under the will. It is admitted that even on the interpretation put on the will by the Additional District Judge, Mt. *Fazal Bibi* took an absolute estate and the defendant is not her heir. He relied merely on the weakness of the plaintiff's title. But as has been held above, the plaintiff is the rightful owner of the house and there is no doubt that she was wrongfully dispossessed of the lower storey by *Din Mohammad* in April 1933. I accept the appeal, set aside the judgment and decree of the learned Additional District Judge and restore that of the Court of first instance, decreeing the plaintiff's suit with costs throughout."

In such cases the legatee of the usufruct is exclusively entitled to the use during his term.[1]

In order to give effect to a will it is necessary that the subject matter of a will must be in existence at the time when it is made. The reason being that a will takes effect after testator's death and not earlier.[2]

1. Bailee I, Pg 66, The Hidaya Pg 694
2. Bailee I, 624, 665, 666, Bailee I, 236

WASIYAT-BIL MANAFE AND WASIYAT-BIL-AYN

A usufructuary bequest (Wasiyat-Bil Manafe) is governed by the same general principles as applied to a will of a corpus (Wasiyat-bil-ayn).

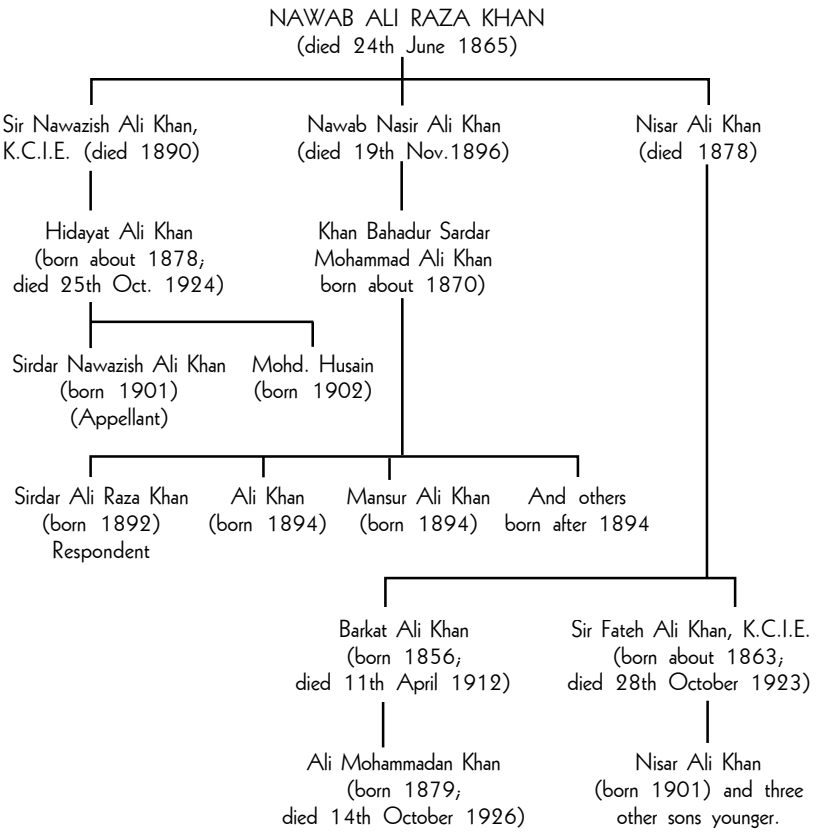
A usufructuary will (though not that of the corpus) can be lawfully made for a fix duration, eg-the life time of the legatee, and the usufruct of the same property can be lawfully bequeathed as a life interest in favour of several person to take it one after another. How a usufructuary will was taken into consideration by way of explaining it and exploring the right of testator to make such a will *i.e.*, Wasiyat-Bil-Ayn and three celebrated judgments of Privy Council, Calcutta and Allahabad High Courts are reproduced below :

Nawazish Ali Khan v. Ali Raza Khan, AIR (35) 1948 PC 134

These are consolidated appeals from a judgment and decree of the Chief Court of Oudh, dated 12-1-1943, (Reported in ('43) 30 AIR 1943 Oudh 243 - Ed.) which modified a decree of the said Court in its original civil jurisdiction, dated 30-10-1937. *Sardar Nawazish Ali Khan* will be referred to hereinafter as "the appellant" and *Sardar Ali Raza Khan* as "the respondent."

The family to which the parties belong are Shia Mohammedans of the Ashna Ashari Sect governed by the Imamia Law.

The litigation which led up to these appeals arose out of the wills of *Nawab Sir Nawazish Ali Khan* and *Nawab Nasir Ali Khan*, who were related to the parties to these appeals as shown in the pedigree following:



The estates, the title to which is contested in these appeals, are first an estate in Oudh (hereinafter called "the Oudh estate)" known as the Nawabganj Aliabad estate in the Bahraich District which was granted to *Nawab Ali Raza Khan*, and was shown as No.151 in List I of the lists in the Schedule to the Oudh Estates Act, 1869, and No.39 in List V, so that under Section 8 of that Act the intestate succession was regulated by the rule of primogeniture and in accordance with the scheme laid down in Section 22 of the Act. Secondly, an estate in the Punjab called the Rakh Juliana estate (hereinafter called "the Juliana estate")

which was granted by the Government of India to *Sir Nawazish Ali Khan*.

Both these estates were owned by *Sir Nawazish Ali Khan*. He transferred the Juliana estate to his brother *Nasir Ali Khan* in his lifetime. By his will dated 14-2-1882, he bequeathed the Oudh estate to his said brother under the power conferred by Section 11, Oudh Estates Act, 1869, which enabled him to make such a bequest, notwithstanding that under his family law he could only bequeath one-third of his property.

At the date of his death in 1890 *Sir Nawazish Ali Khan* had a son *Hidayat Ali Khan*, who would have succeeded to the Oudh estate under the Act of 1869, if *Sir Nawazish Ali Khan* had died intestate. This is relevant in connexion with the descent of the Oudh estate.

On 15-7-1896, *Nasir Ali Khan* executed two Wills, one disposing of the Oudh estate, and the other of the Juliana estate and another estate in the Punjab. It is common ground that the heirs assented to the Wills.

These Wills are in substantially the same form. It will be sufficient to quote the material provisions of the Will with regard to the Oudh estate:

"Now, under Section 11 of Act 1 of 1869, I, by means of this will, do hereby appoint *Nawab Fateh Ali Khan* son of my late brother *Nawab Nisar Ali Khan*, my executor and successor of all this Taluqdari estate with all the rights and interest aforesaid and do hereby authorize the executor that whatever Taluqdari powers over the above-mentioned ilaqa and over all the properties moveable and immoveable I the said declarant have, my devisee, to wit, *Nawab Fateh Ali Khan* after my lifetime shall have like myself the very same powers including the power of possession and

enjoyment as owner provided he be alive. Similarly after the lifetime of the devisee *Nawab Fateh Ali Khan* my son *Nawab Mohammad Ali Khan* shall, if alive, be his successor. He shall also have the very same powers as have been bestowed on *Nawab Fateh Ali Khan* by means of this deed of Will. After the lifetime of my son *Nawab Mohammad Ali Khan*, *Nawab Hidayat Ali Khan* son of the late *Sir Nawab Haji Nawazish Ali Khan Saheb* shall be his successor provided he be alive. After all these three successors the fit amongst the descendants of the successors shall succeed. The last devisee shall have power to nominate as his successor any one whom he might consider fit from amongst the descendants of each of the three successors and if the last devisee die without nominating a successor the male descendants of each of the three successors shall have power to appoint as successor whomsoever they consider fit and superior amongst themselves. The line of successors shall continue according to this very rule. In the event of disagreement the Government shall have power to appoint as successor anyone amongst the descendants of each of the three successors whom it considers the fittest. And if anyone amongst our family claims maintenance contrary to the wishes of the Taluqdars, to wit, my successors, he shall in no way be entitled as of right to get maintenance. The successors shall have power to give or not maintenance in the event of good conduct and obedience."

On the death of *Nawab Nasir Ali Khan* on 19-11-1896 (before the birth of the appellant), *Sir Fateh Ali Khan* entered into possession of both properties. On his death on 28-10-1923, his son *Nisar Ali Khan* took possession thereof. *Hidayat Ali Khan* died in 1924. On 9-12-1925, *Mohammad Ali Khan* (who will be referred to hereinafter as "*Mohammad*") instituted a suit claiming both the properties. This litigation was eventually taken in appeal to the Privy Council in *Nisar Ali Khan v. Mahomed Ali Khan*, ('32) 59 I.A. 268 = 19 A.I.R. 1932 P.C. 172 = 7 Luck. 324 = 137 I.C. 539 (P.C.), where it was decided that *Fateh Ali*

Khan and *Mohammad* took life estates under the Wills. The Privy Council refused to consider what would happen after Mohammad's death.

As a result of this litigation *Mohammad* got possession of the Oudh estate and the Juliana estate.

By a document dated 30-6-1934, *Mohammad*, after reciting the Wills of *Nasir Ali Khan*, declared as follows:

"Whereas according to the decision of the Privy Council, I the declarant, also in accordance with the said Will, have been in possession of the property left by the late *Nawab Nasir Ali Khan* and on account of the death of the late *Sirdar Hidayat Ali Khan Saheb* son of the late *Haji Sir Nawazish Ali Khan* I, the declarant, in accordance with the will am the last legatee and am in every manner, subject to the said Will, entitled and competent to nominate successor; whereas I the declarant have reached my full age and consider it proper and necessary to abide by the said Will executed by the late *Nawab Nasir Ali Khan* in order to remove future domestic disputes. I the declarant, therefore, in my unimpaired five senses, without repugnance and force, nominate as successor *Nawabzada Nawazish Ali Khan* son of late *Sardar Hidayat Ali Khan*, for this reason that although, by the grace of God each of the three legatees mentioned in the Will dated 15-7-1896, has male issues still, among all of them the said *Nawabzada Nawazish Ali Khan* is in every way, fit to be preferred for succession ..... The said *Nawabzada Nawazish Ali Khan* shall also be bound to continue to pay to the descendants to the family of *Nawab Nasir Ali Khan* and *Nawab Nawazish Ali Khan*, deceased subject to (their) obedience, maintenance at the scale mentioned in Section 25, Act 1 [I] of 1869.

Therefore I have with my own Will and consent executed this document appointing successor according to the provision of

Schedule 1, Article 7, Stamp Act by way of (appointment in execution of a power) so that it may serve as an authority and be of use when needed. Dated 30-6-1934 - The scribe of the deed is *Syed Hidayat Husain Vakil, Said Wara Bahraich*."

Mohammad died on 3-2-1935, and on his death the appellant obtained possession of both estates.

On 25-9-1935, the respondent instituted in the Chief Court of Oudh against the appellant the suit out of which these appeals arise. By his plaint the respondent claimed a decree for possession of the Oudh estate, the Juliana estate and other estates with which this appeal is not concerned, and consequential relief.

The questions which were argued on this appeal were:

"(1) Is it competent for a Shia Mahomedan governed by Imamia law by Will to leave property to a person for his life and after his death to such members of a class as such person may appoint? Or, to state the question in more general terms, does Shia law recognise powers of appointment of a character with which English law is familiar?

(2) If the answer to the first question is in the affirmative can such power be exercised in favour of a person not born in the lifetime of the testator though born before the power is exercised?

(3) Is the document executed by *Mohammad* on 30-6-1934, a Will? If so does it comprise property of which *Mohammad* was absolute owner?

(4) What relief, if any, is the respondent (plaintiff in the action) entitled to?"

A question was raised, but not seriously pressed, upon the construction of the Wills of *Nasir Ali Khan*. It was suggested that

the power to appoint a successor was given to the last of the three named tenants for life, namely *Hidayat Ali Khan*. Their Lordships feel no doubt that the Courts in India were right in holding that the power was given to the last survivor of the three life tenants, and in the events which happened the power, if validly created, was vested in *Mohammad*.

Both the Courts in India held that the power of appointment given by the Wills of *Nasir Ali Khan* was valid according to Shia law, but that its purported exercise in favour of the appellant, who was not born in the lifetime of the testator, was invalid under the personal law so far as the Juliana estate was concerned, but valid so far as the Oudh estate was concerned under the Oudh Estates Acts. Both Courts held that the document of 30-6-1934, executed by *Mohammad* was a Will. The trial Judge held that it gave to the appellant one third of the Juliana estate to which *Mohammad* was entitled as heir at law of *Nasir Ali Khan*. The Chief Court in appeal held that the Will was not intended to affect, and did not affect, property of which the testator *Mohammad* was the absolute owner. With regard to the relief claimed in the suit the trial Judge dismissed the suit of the respondent on the ground that it was a suit in ejectment and the respondent had not proved his title to the whole of the property claimed. In appeal the Chief Court varied the decree of the lower Court by giving the respondent a decree for possession of one-fifth of the Juliana estate, the proportion of the estate to which he was entitled as one of the heirs of *Mohammad*.

The first question arising in this appeal, as to the validity of the power of appointment conferred by the Wills of *Nasir Ali Khan*, is one of general importance in Islamic law. Both the Courts in India based their opinion that such a power is valid under Muslim law on the decision of the Privy Council in *Bai Motivahoo v. Bai Mamoobai*, ('97) 24 I.A. 93 = 21 Bom. 709 = 7

Sar. 140 (P.C.). In that case the Board upheld a power of appointment conferred by the Will of a Hindu holding that the question for consideration was whether there was anything against public convenience, anything generally mischievous or anything against the general principles of Hindu law, in allowing such a power. Applying a similar test in the present case the Courts in India held that a power of appointment can be conferred under Muslim law. Their Lordships are not satisfied that this is the correct test to apply in a case relating to the Will of a Muslim. The origin of testamentary capacity in the case of Muslims is quite different from that in the case of Hindus. The Hindu texts make no reference to Wills and this is natural since the normal state of Hindu society in ancient times was the joint family, and on the death of a member the property in which he had an interest passed by survivorship to the other members of the family. It was only after partition, and the acquisition of self-acquired property, became common that the necessity to make Wills arose, and testamentary power amongst Hindus has been based on long usage and judicial decision: see *Jatindra Mohan Tagore v. Ganendra Mohan Tagore*, 9 Beng. L.R. 377 = 3 Sar. 82 (P.C.) = ('72) I.A. Sup Vol.47 at p.67. On the other hand Wills have been recognised under Muslim law from the earliest times. "Wills are declared to be lawful in the Quran and the traditions, and all our doctors, moreover, have concurred in this opinion" (*Hamilton*'s Hedaya, Vol.4, p.468). It would however appear that the Prophet was not in favour of unlimited testamentary power. It is recorded in the Hedaya (vol.4, p.468) that he said to a follower when asked his opinion, "You may leave a 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"; and at page 472 of the same volume there is a saying attributed to the Prophet, "God has allotted to every heir his particular right". Their Lordships have not been referred to, and are not aware of any work on

Mahomedan law, or any judicial decision in support of the view that powers of appointment, so special a feature in English law, are recognised in Muslim law. The matter seems never to have been discussed. In such circumstances, and at this date, to add to the testamentary capacity of Muslims the right to create powers of appointment might seem to encroach on the sphere of the Legislature.

Their Lordships however would be very reluctant to differ from the Courts in India solely on the ground of lack of precedent, and they propose therefore to consider the question whether the grant of such a power of appointment as was contained in the Wills of *Nasir Ali Khan* conflicts with the general principles of Muslim law.

The Chief Court in appeal took the view that under the Wills of *Nasir Ali Khan* the estate vested after his death in the three successive tenants for life; that on the exercise of the power of appointment it would pass immediately to the appointee; that there was no period during which the estate would be in abeyance; and that the rights of the heirs of the testator were not affected or prejudiced. In their Lordships opinion this view of the matter introduces into Muslim law legal terms and conceptions of ownership familiar enough in English law, but wholly alien to Muslim law. In general, Muslim law draws no distinction between real and personal property, and their Lordships know of no authoritative work on Muslim law, whether the Hedaya or Baillie or more modern works, and no decision of this Board which affirms that Muslim law recognizes the splitting up of ownership of land into estates, distinguished in point of quality like legal and equitable estates, or in point of duration like estates in fee simple, in tail, for life, or in remainder. What Muslim law does recognise and insist upon, is the distinction between the corpus of the property itself (ayn) and the usufruct in the property (manafi). Over the corpus of property the law recognizes

only absolute dominion, heritable and unrestricted in point of time; and where a gift of the corpus seeks to impose a condition inconsistent with such absolute dominion the condition is rejected as repugnant; but interests limited in point of time can be created in the usufruct of the property and the dominion over the corpus takes effect subject to any such limited interests.

"If a person bequeath the service of his slave, or the use of his house, either for a definite or an indefinite period, such bequest is valid; because as an endowment with usufruct, either gratuitous or for an equivalent, is valid during life, it is consequently so after death; and also, because men have occasion to make bequests of this nature as well as bequests of actual property. So likewise, if a person bequeath the wages of his slave, or the rent of his house, for a definite or indefinite term, it is valid, for the same reason. In both cases, moreover, it is necessary to consign over the house or the slave, to the legatee, provided they do not exceed the third of the property, in order that he may enjoy the wages or service of the slave, or the rent or use of the house during the term prescribed, and afterwards restore it to the heirs." (Hedaya, Vol.4, p.527, Chap.5, entitled "Of Usufructuary Will.")

This distinction runs all through the Muslim law of gifts - gifts of the corpus (hiba), gifts of the usufruct (ariyat) and usufructuary bequests. No doubt where the use of a house is given to a man for his life he may, not inaptly, be termed a tenant for life, and the owner of the house, waiting to enjoy it until the termination of the limited interest, may be said, not inaccurately, to possess a vested remainder. But though the same terms may be used in English and Muslim law, to describe much the same things, the two systems of law are based on quite different conceptions of ownerships. English law recognizes ownership of land limited in duration; Muslim law admits only ownership unlimited in duration, but recognizes interests of limited duration in the use of property.

20. There is a full discussion of the law on this subject in the judgment of *Sir Wazir Hasan* in the case of *Amjad Khan v. Ashraf Khan,* ('25) 12 A.I.R. 1925 Oudh 568 = 28 O.C. 265 = 87 I.C. 445. That case challenged the doctrine accepted by Hanafi lawyers that a gift to "A" for life conferred an absolute interest on "A"; a doctrine based on a saying of the Prophet (Hedaya, Bk. III, p.309):

"An amree or life grant is lawful to the grantee during his life and descends to his heirs. The meaning of amree is a gift of a house (for example) during the life of the donee, on condition of its being returned upon his death. An amree is nothing but a gift and a condition and the condition is invalid: but a gift is not rendered null by involving an invalid condition."

Sir Wazir Hasan in his judgment examined the appropriate tests and all the relevant decisions of the Privy Council. He pointed out the distinction in Muslim law between the corpus and the usufruct, between the thing itself and the use of the thing. On the construction of the deed which was in question in the case before him, he came to the conclusion that the donor intended to confer upon his wife not the corpus, but a life interest only, that such life interest could take effect as a gift of the use of the property and not as part of the property itself, and that there was nothing in Muslim law which compelled him to hold that the intended gift of a life estate conferred an absolute interest on the donee. This case was taken in appeal to the Privy Council and is reported in *Amjad Khan v. Ashraf Khan,* ('29) 56 I.A. 213 = 4 Luck. 305 = 16 A.I.R. 1929 P.C. 149 = 116 I.C. 405 (P.C.). The Board agreed with *Sir Wazir Hasan* on the construction of the deed in question that only a life interest was intended, and held that if the wife took only a life interest it came to an end on her death and the appellant who was her heir took nothing, and if the life interest was bad the wife took no interest at all and the

appellant was in no better case. There is also a discussion of the basis upon which a life interest under Hanafi law can be supported in the 3rd edition of *Tyabji*'s Muhammadan Law at pp.487 et seq: That book as the work of an author still living, cannot be cited as an authority, but their Lordships have derived assistance from the discussion.

Limited interests have long been recognised under Shia Law. The object of "*Habs*" is "the empowering of a person to receive the profit or usufruct of a thing with a reservation of the owner's right of property in it ... I have bestowed on thee this mansion ... for thy life or my life or for a fixed period" is binding by seizing on the part of the donee. (Bail: II 226). See also *Banoo Begum v. Mir Abed Ali,* ('08) 32 Bom. 172 at p.179. Their Lordships think that there is no difference between the several Schools of Muslim law in their fundamental conception of property and ownership. A limited interest takes effect out of the usufruct under any of the schools. Their Lordships feel no doubt that in dealing with a gift under Muslim law, the first duty of the Court is to construe the gift. If it is a gift of the corpus, then any condition which derogates from absolute dominion over the subject of the gift Will be rejected as repugnant; but if upon construction the gift is held to be one of a limited interest the gift can take effect out of the usufruct, leaving the ownership of the corpus unaffected except to the extent to which its enjoyment is postponed for the duration of the limited interest.

It remains to construe the Wills of *Nasir Ali Khan* and to apply to them the rules of Muslim Law. On the death of the first life-tenant his son and heir claimed that the gift to his father was of the corpus, relying on the use of the word "owner" (malik), and that all subsequent limitations were repugnant and void. This argument failed in all the Courts, and it was held that the will created three successive life interests. As the Will contained no

gift of the corpus, that descended to the heirs of the testator subject to the interests of the life tenant in the usufruct. On the death of the surviving tenant for life, two alternative constructions of the Wills have been suggested. First, that the person to take under the power of appointment was to take absolutely. Secondly that the sentence in the Wills "The line of successors shall continue according to this very rule" means that the person to take under the power was to take for life and to possess a power of appointing a successor similar to that given to the survivor of the three tenants for life named in the Wills and that this arrangement was to continue forever. If this be the meaning of the Wills, the power if valid would operate on the usufruct, but the question would arise whether under Shia law as administered in India and in the light of public policy it is competent for a testator to provide in perpetuity for a succession of tenants for life not born in his lifetime taking under successive powers of appointment. Their Lordships do not find it necessary to decide this question, because they are satisfied that the first suggested construction of the wills is the right one, and that the person nominated under the power was to take an absolute interest. The words of the sentence quoted above are vague and not capable, their Lordships think, of bearing the extended meaning sought to be attributed to them. They appear to be words of emphasis and repetition merely. The testator is saying that the line of succession which he has laid down, namely to three successive tenants for life and then to the successor appointed under the power, is the line which is to continue from his death. If the successor is to take absolutely the power operates upon the corpus, and in their Lordships' view is clearly inconsistent with principles of Muslim law. It would interfere with the Muslim law of succession, and would involve that the heirs took the corpus of the property for a term, not merely of limited, but of uncertain, duration. The Chief Court found some support for its view that the power of appointment was valid in analogies drawn from wakfs. In their Lordships' opinion no such

analogy exists in a case like the present which is not founded on trust. In wakfs the property is vested either notionally in Almighty God, or in the wakif or his heirs, and all beneficial interests take effect out of the usufruct.

For the above reasons their Lordships hold that, the power of appointment contained in the Wills of *Nasir Ali Khan* is invalid under Muslim law.

The next question for consideration is as to the nature and effect of the document of 30th June 1934 executed by *Mohammad*, which both Courts in India held to be a Will. No doubt in point of form it might be a will. But it is to be noticed that it purports only to exercise the power conferred by the Wills of *Nasir Ali Khan* and to dispose of the property subject to the power. It contains no appointment of an executor, no gift of any property belonging to the testator, and no suggestion of revocability; it was stamped under an article of the Stamp Act relating to appointments made by any writing not being a Will and it is called a deed at the end of the document. In all the circumstances their Lordships think that the document was a deed and not a will. But if it a Will, their Lordships agree with the lower appellate Court that the document did not pass property which *Mohammad* took as heir of his father. It was one thing to choose the appellant, who was the senior male member of the senior branch of the family to succeed to the leadership of the family and to the family estates, but quite another thing to decide that the appellant was better suited than *Mohammad*'s own children to inherit *Mohammad*'s own property. There is nothing to show that *Mohammad* ever considered that question.

This dispose of the appeal of the appellant relating to the Juliana estate which belongs to the heirs of *Mohammad* under his personal law.

The cross-appeal of the respondent relates to the Oudh estate. The Courts in India were of opinion that apart from Muslim law, a power of appointment can be created under the wide power of disposition conferred by Section 11, Oudh Estates Act, 1869, which applies to all Taluqudaris, Hindu as well as Muslim. As against this view the respondent points out that neither the Act of 1869 nor the amending Act of 1910 mentions powers of appointment, and that Sections 78 and 79, Succession Act, 1855, which relate to powers of appointment, are not included amongst the section incorporated in the Act of 1869. Their Lordships do not find it necessary to decide this question because they are satisfied for the reasons now to be stated that if a power of appointment can be created under the Oudh Estates Act, the power sought to be conferred by the wills of *Nasir Ali Khan* does not fall within the Acts. The position is as follows.

Estates in List V descend on intestacy under the law of primogeniture in accordance with the scheme laid down in Section 22 of the Act of 1869. Under Section 11 of the Act the holder of such an estate might however dispose of the estate, either in his lifetime or by Will.

The estate in the hands of a person taking it by such a disposition only remained under the Act (so as to be capable of being dealt with or pass under the Act and not under the personal law) if the transferee was a person who would have succeeded according to the provisions of the Act, if the transferor had died intestate. This was provided for by Sections 14 and 15 of the Act of 1869, which were (so far as material) as follows:

"14. If any Taluqdar or Grantee or his heirs or legatee hereafter transfer or bequeath the whole or any portion of his estate to another Taluqdar or Grantee or to such a younger son as is referred to in Section 13, Clause 2, or to a person who would have

succeeded according to the provisions of this Act to the estate or to a portion thereof if the transferor or testator had died without having made the transfer and intestate, the transferee or legatee and his heirs and legatees shall have the same rights and powers in regard to the property, to which he or they may have become entitled under or by virtue of such transfer or bequest, and shall hold the same subject to the same conditions and to the same rules of succession as the transferor or testator.

"15. If any Taluqdar or Grantee or his heirs or legatee shall hereafter transfer or bequeath to any person not being a Taluqdar or Grantee the whole or any portion of his estate, and such person would not have succeeded according to the provisions of this Act to the estate or to a portion thereof if the transferor or testator had died without having made the transfer and intestate, the transfer of and succession to the property so transferred or bequeathed shall be regulated by the rules which would govern the transfer of, and succession to, such property if the transferee or legatee had bought the same from a person not being a Taluqdar or Grantee."

It was held by the Judicial Commissioners of Oudh in *Raijagatpal Singh v. Thakurain Balraj Kuar,* (1900) 3 O.C. 120, that any person mentioned in Section 22 as a possible heir might be said to be "a person who would have succeeded according to the provisions of the Act of the estate." On this construction of the Act, *Nasir Ali Khan* would have had power to dispose of the estate under Section 11 of the Act. But it was decided by the Privy Council in *Thakurain Balraj Kuar v. Rai*, ('04) 31 I.A. 132 = 26 All. 393 = 7 O.C. 248 = 8 Sar. 639 (P.C.), that on the true construction of Section 14 of the Act of 1869, the expression "a person who would have succeeded according to the provisions of the Act" is equivalent to "the person or one of the persons to whom the estate would have descended according to the

provisions of the special clause of Section 22 applicable to the particular case;" and does not include any person mentioned in Section 22 as a possible heir in a line of succession not applicable to the particular case.

It was admitted in the Chief Court on appeal and before the Board that, as a result of this decision, the Oudh estate was taken out of the Oudh Estates Act, 1869, by the will of *Sir Nawazish Ali Khan*. He gave the estate by Will to *Nasir Ali Khan. Nasir Ali Khan* was the brother of *Sir Nawazish Ali Khan* and *Sir Nawazish Ali Khan* left a son surviving him. Accordingly *Nasir Ali Khan* was not the person to whom the estate would have descended, if the testator had died intestate.

The position when the amending Act was passed was that under the will of *Nasir Ali Khan* there were three successive tenants for life with a purported power of appointment in the survivor which was invalid under the personal law, and subject thereto the estate was vested in *Mohammad* as the heir of *Nasir Ali Khan*. Then came the amending Act which by Section 7 substituted a new section for Section 14 of the Act of 1869, the effect of which was to restore the law to the state in which it was supposed to have been before the decision of the Judicial Committee in *Thakurain Balraj Kuar v. Rai,* ('04) 31 I.A. 132 = 26 All. 393 = 7 O.C. 248 = 8 Sar. 639 (P.C.). By Section 21, Section 7 was made retrospective, but with this important reservation:

"nothing contained in the said section shall affect suits pending at the commencement of this Act, or shall be deemed to vest in or confer upon any person any right or title to any estate or any portion thereof, or any interest therein which is at the commencement of this Act vested in any other person, who would have been entitled to retain the same if this Act had not been

passed, and the right of title of such other person shall not be affected by anything contained in the said section."

Assuming that the effect of the retrospective operation of Section 7 of the Act of 1910 was to bring the Oudh estate again within the purview of the Act of 1869, so that the estate would descend according to the rule of primogeniture and not under the personal law, it is clear that to impose upon the interest of *Mohammad* a valid power of appointment the exercise of which would deprive him of his estate and which might be exercised by himself or others as future events might determine, would vest in other persons a right and title to the estate vested in him at the commencement of the Act of 1910. Their Lordships therefore are of opinion that the power of appointment contained in the Oudh Will of *Nasir Ali Khan* was inoperative in relation to the Oudh estate.

As the power of appointment was invalid and ineffective as to both the Juliana estate and the Oudh estate, it is unnecessary to consider whether it could be exercised in favour of a person not born in the lifetime of the creator of the power.

The question then arises as to what relief the respondent is entitled. With regard to the Juliana estate the respondent claimed the whole estate for himself, relying on a custom which he failed to prove. Their Lordships agree with the Courts in India that it would be wrong to grant to the respondent an order for possession on behalf of himself and his co-heirs. The suit was neither framed nor fought as a representative suit. The Chief Court, as already noted, granted the respondent a decree for possession of one fifth of the estate, a decree which their Lordships think would be difficult to enforce, and which ought not to be enforced, because, as appears from the judgment of the Chief Court, the respondent has sold his share in the Juliana estate. Their Lordships, however, think that the

position can be dealt with by a declaratory order under Section 42, Specific Relief Act.

With regard to the Oudh estate the respondent contended before the Board that it passed under the Oudh Estates Act, 1869 to himself as the eldest son of his father under the rule of primogeniture established by the Act. It appears that in the appeal to the Chief Court the respondent contended that the estate passed under the personal law and not under the Act, the argument being directed against the view which had prevailed in the trial Court that under the Act though not under the personal law, the power of appointment could be exercised in favour of a person unborn in the lifetime of the testator. Before this Board the appellant contended that the Oudh estate did not pass under the Act, but the argument advanced on his behalf failed to satisfy their Lordships that this was the effect of Sections 7 and 21. The question is of interest to the appellant only as bearing on the proper form of order and their Lordships do not feel called upon to express a considered opinion as to the construction of the Act which would affect other parties. Their Lordships think that as between the parties to this appeal the respondent has shown his right to possession of the Oudh estate and an order can be made accordingly for possession of that estate, but such order Will be without prejudice to any claim the heirs of *Mohammad* under the personal law other than the respondent may choose to make.

Their Lordships therefore will humbly advise His Majesty that the appeal of the appellant be dismissed, that the cross-appeal of the respondent so far as it relates to the Oudh estate be allowed and that the decree passed by the Chief Court in appeal on 12th January 1943 be set aside and that the decree passed by the said Court on its original side dated 30th October 1937 also be set aside. That there be a declaration that the power of appointment given by the two wills of *Nasir Ali Khan* to *Mohammad*

as the survivor of the successors appointed by those wills was invalid both in respect of the Juliana estate and in respect of the Oudh estate; and that the Juliana estate descended on the death of *Mohammad* to his heirs according to his personal law. That in respect of the Oudh estate there be an order that the appellant deliver up possession to the respondent, but that such order be without prejudice to any claim which the heirs of *Mohammad* under this personal law other than the respondent may choose to make to the Oudh estate.

With regard to the costs the appellant has failed in his appeal, and the respondent has succeeded substantially in his cross-appeal. Under the decree of the Chief Court, parties were given proportionate costs throughout. The respondent as plaintiff claimed to be entitled to the whole of both estates, and according to the learned trial Judge the respondent wasted much time in producing a large number of witnesses whose evidence was not referred to in the course of the argument, and which has not been included in the record before their Lordships' Board. It is clear that the respondent largely increased the costs of the trial by raising a question on which he failed. Their Lordships think that, as the case leaves this Board, an order for proportionate costs would be difficult to work out. On the whole they think a fair order as to costs will be that the appellant *Sardar Nawazish Ali Khan* pay his own costs throughout and that he pay the respondent *Sardar Ali Raza Khan* half his costs throughout.

The claim to *mesne profits* raised by the respondent in his plaint was not dealt with by the Courts in India, since, in the view they took of the case, that matter did not arise. The claim will be referred back to the trial Court for disposal according to law.

Anarali Tarafdar v. Omar Ali and others,
A.I.R. (38) 1951 CALCUTTA 7 (C.N. 4.)

The property in suit originally belonged to one *Meher Ali Tarafdar*. Before his death he had executed a Will on 15-10-1911. Although *Meherali* died in November following, probate was not obtained by his widow, *Gour Bibi* until 27-6-1935. By the Will *Meherali* purported to create a life interest in favour of his widow *Gour Bibi* and after the determination of that life estate the property was to descend to all his legal heirs under the Mahomedan law. After having obtained probate *Gour Bibi* as executrix obtained permission from the Probate Court for sale of one of the properties which had been bequeathed by *Meher Ali*. After having obtained permission, *Gour Bibi* sold this particular plot to *Wahed Hossain*. The interest of *Wahed Hossain* was sold on 15-5-1940 in execution of a money decree obtained against him. The plaintiff *Omar Ali* was the purchaser and it is stated that he had obtained possession on 25-6-1941, through Court but as he could not get actual possession the present suit was started in March 1944, for declaration of title and for delivery of possession.

Meher Ali had three sons and one daughter. Defendants 1 to 5 are the heirs of *Belat Ali*, one of the sons of *Meher Ali* Defendant 6 is the widow of another son *Asmat Ali*. Another son, *Entaz* is dead as also his son *Usuf*. It is not possible to ascertain from the present record as to who the heirs of *Usuf* were but it appears that the parties had proceeded on the basis that *Usuf*'s interest had vested in some or other of the defendants. *Arifannesa*, the only daughter of *Meher Ali*, had not been made a party.

The defence in the man was that the will being of the entire property left by *Meher Ali* and the disposition being in favour

of one or more of the heirs of the testator the will did not convey any title and the executrix had no right to deal with the property. There were other allegations that the kobala executed by *Gour Bibi* in favour of *Wahed Hassin* had not been acted upon and that the latter had never possessed the suit land. Both the Courts below have decreed the plaintiff's suit. The present appeal is on behalf of defendant 2 alone, one of the sons of *Belat Ali.*

Under the Mahomedan law, a Mahomedan cannot by will dispose of more than one-third of his estate unless such bequest in excess of the legal third is consented to by the heirs after the death of the testator.

On behalf of the plaintiff, it is alleged in the first place that this provision in the Mahomedan law is not attracted on the facts of the present case as only a life estate was created in favour of the widow and after such life estate the property was to descend according to the Mahomedan law. No doubt creation of a life estate is not repugnant to Mahomedan law *Achiraddin Ahmed v. Sakina Bewa,* 50 C.W.N. 59 = A.I.R (33) 1946 Cal. 288. But the interposition of a life estate of a certain estate under a testamentary bequest must be deemed to be a testamentary disposition of the entire property to the exclusion of the legal heirs. *Mt. Amrit Bibi v. Mustafa Hussain,* 46 ALL. 28 = A.I.R. (11) 1924 A.L.L.20. It is therefore, to be proved that the heirs had consented to such a bequest.

On behalf of the plaintiff, it is contended that the sale in favour of *Wahed Hussain* was by *Gour Bibi* after having obtained permission from the Probate Court in her capacity as executrix to the estate of *Mehar Ali.* Under Section 211, Succession Act 1925 the executor to the estate of a deceased Mahomedan is his legal representative for all purposes and all the property of the

deceased vests in him as such. This provision must be read along with the limitations which are imposed under the Mahomedan law on the rights of a testator to dispose of his properties. Reference may in this connection be made to the following passage in Mulla's Mahomedan law, Edn. 13, p 31:

"But since a Mohammedan cannot dispose of by Will of more than one-third of what remains of his property after payment of his funeral expenses and debt and since the remaining two third must go to his heirs as on intestacy unless the heirs consent to the legacy exceeding the bequeathable third, the executor when he has realized the estate is a bare trustee for the heirs as to two thirds and an active trustee as to one-third for the purpose of the Will, and of these trusts one is created by the Act and the probate irrespective of the Will, the other by the Will established by the probate."

For this proposition the authority relied upon is *Kurratulain Bahadur v. Nawab Nuzhat-Ud-Dowla,* 32 I.A 244 at p.257 =33 Cal. 116 P.C. The Judicial Committee further observed:

"There are thus two trusts for different sets of persons of different properties and based upon different titles. And this state of things does not arise from any accidental conflict of laws such as gave rise to a somewhat similar complication in the case of *Concha v. Concha,* (1886) 11 A.C. 541= 56 L.J. Ch. 257, but by the deliberate action of the Legislature. In giving effect to a system of so peculiar a nature as that described, their Lordships think it necessary to proceed with the great caution".

The actual decision in the case was that the provisions of the Probate and Administration Act (V [5] 1881) did not create an estoppel. In the case of a Mohammedan whose testamentary power was limited only to one third of the estate, the two-thirds

claimed adversely to the Will by the heirs could not be affected by the terms of the Will or by the effect of the probate.

Bearing in mind these observations of the Judicial Committee we have next to consider the effect of the provisions now contained in Section 307, Succession Act. It is unquestionable that the estate of a Mohammedan testator vests in the executor from the date of the testator's death and the former has the power to alienate the estate for the purposes of administering it and he has all the powers of an executor under the provisions contained in that section.

This, however, is to be read subject to the provisions contained in the Mohammedan Law limiting the powers of disposition of the Mohammedan testator. If the testator himself was incapable of bequeathing any share in the property in excess of one-third of the entire estate, the executor to the estate so left by the testator would not have rights larger than what the testator himself had at the time of his death. The powers of the executor cannot, in my view, be extended over the entire estate without being limited by the provisions contained in the Mohammedan Law which restrict the power of testamentary disposition by a Mohammedan. The sale by the executrix after having obtained permission of the District Judge would not therefore in any way clothe the purchaser with rights which the executrix herself had not.

Reference may also at this stage be made to another set of circumstances. Even if under the Will the entire property had vested in the wife as the holder of a life estate the wife in this case was dealing with the property to meet a portion of her own debts. She cannot in any view be regarded as having rights in excess of what could have been driven to her under the testamentary disposition. The acts by the executor or the beneficiaries, the holder of the life estate, cannot therefore be supported even with reference to the provisions of Section 307, Succession Act.

The only way therefore that the transfer by *Gour Bibi* in favour of *Wahed* may be supported is on proof that heirs of *Meher Ali* had consented to the testamentary disposition of a life estate in favour of *Gour Bibi*.

As indicated already bequests in excess of the legal third can be effectual only if the heirs consent thereto. Such consent is to be by the heirs as at the time of the testator's death and not at the time of the execution of the Will (Baille 625). The consent to be effective is to be given after the death of the testator *(Khajurinnessa v. Raoson,* 3 I.A. 291 = (2) Cal. 184 P.C.

While discussing as to how the consent by the heirs as at the time of the death of the testator may be proved reference may be made to the observations in *Sharifa Bibi v. Ghulam Mahomed,* 16 Mad. 43 at p. 47 = (3) M. L. J. 14. Consent having been given before the death of the testator and the same not having been revoked it holds good even after his death. Whether the heirs have consented to bequests in excess of the legal third may be signified by the conduct of the parties. *Daulatram Khushalchand v. Abdul Kayum,* 26 Bom. 497 = (4) Bom. L.R. 132, *Mahomed Hussain v. Aishabai,* 36 Bom. L.R. 1155 = AIR (22) 1935 Bom. 84. Consent is also presumed from passive acquiescence by the heirs, *Satyendra Nath v. Narendra Nath*, 39 C.L.J. 279 = A.I.R. (11) 1924 Cal. 806. Where the testator left a registered will long silence by the heirs was held to raise a presumption of consent by the heirs *Faquir Mohammad v. Hasan Khan*, 16 Luck. 93 at p. 99 = A.I.R. (28) 1941 Oudh 25.

It has further been held that if proof be available of consent having been given by some of the heirs the share of such consenting heirs would be bound by such consent. *A.E. Salayjes v. Fatima Bibi*, 1 Rang. 60 = A.I.R. (9) 1922 P.C. 391.

The learned Subordinate Judge has not approached the case from the proper standpoint. At one place he states that:

"It was not suggested by the defendants that *Meher Ali* executed the Will without the consent of his heirs. In fact there is no evidence bearing on the question."

The point of time when consent must be shown to have been given was not properly appreciated. He proceeds further to assume that *Maher Ali* must have disposed of his entire property by the Will and that with the consent of all his heirs. Reference is in this connection made to the conduct of *Gour Bibi* and the eldest son of *Maher Ali viz*: *Velayet Ali* and of the second son *Entaj Ali*. It is then stated that as the other heirs of Maher Ali have not appeared in this suit consent by them may be presumed. Mere absence from the present suit is not sufficient under the law to presume consent by such heirs. From passive acquiescence consent may be presumed as indicated already but whether there has been a passive acquiescence by some or more of the heirs of *Maher Ali* has not been properly considered by the lower appellate Court. There is no consideration of the question whether the other heirs had at any previous stage given their consent to the bequest in excess of the legal third.

In this view the judgment and decree of the Court of Appeal below are set aside and the case remitted to the Court of the learned Subordinate Judge for rehearing according to Law keeping in view the principles governing a bequest in excess of the legal third. All the points which were available to the parties during the hearing of the appeal in the lower Appellate Court will be considered by the Court during the rehearing. Costs of this hearing will abide the result.

Siddiq Ahmad and another v. Vilayat Ahmad and others, AIR (39) 1952 Allahabad 1 (C.N. 1.)

One *Hakim Ali* was the owner of two annas eight pies share out of sixteen annas in village *Kasmandi Kalan*, *Pargana* and *Tehsil Malihabad*, in the district of Lucknow. He had four sons *Wajid Ali, Faqir Mohammad, Nazar Mohammad* and *Saiyid Ahmad*. *Wajid Ali* died in his father's lifetime. He left a son *Wajid Ali*, alias *Kallan*. Under the Mohammedan Law *Wahid Ali*, his father having predeceased *Hakim Ali*, was not an heir of *Hakiin Ali*. *Hakim Ali* on 17th May 1903, executed a will in favour of his three surviving sons *Faqir Mohammad, Nazar Mohamad* and *Saiyid Ahmad* and his grandson, *Wahid Ali*. It is the interpretation of this will with which we are mainly concerned.

Hakim Ali died on 18th September 1909. His three sons and his grandson *Wahid Ali* alias *Kallan* survived him. The property, that is, the two annas and eight pies share, was mutated in the name of his three sons and his grandson *Wahid Ali* on the basis of inheritance. On 11th April 1928, *Wahid Ali* gifted his entire share which was eight pies in the village aforementioned, to *Kulsumunnissa*, wife of *Faqir Mohammed*, that is to his aunt. She got mutation in her favour and in 1937 the property was partitioned through the revenue Court and a separate chitthi was prepared in favour of *Kulsumunnissa* of this eight pies share. This partition was affirmed on 30th July 1939. *Wahid Ali* died on 5th October 1940. *Wilayat Ahmad*, one of the five sons of *Nazar Mohammad* claimed a one-seventh share in these eight pies and filed the suit on the allegation that defendants 1 and 2, who were sons of *Kulsumunnissa*, *Kulsumunnissa* having died in 1941, were in wrongful possession of the property in suit.

The suit was contested by defendants 1 and 2, *Siddiq Ahmad* and *Mushtaq Ahmad* sons of *Kulsumunnissa*, on various grounds.

The suit was, however decreed with half the costs in favour of the plaintiff for joint possession of plaintiff's one-fifteenth's share of 16 Biswansis 13 Kachwansis and 611/16 Anwansisshare of patti *Kulsumunnissa*. The learned *Munsif* held that the plaintiff's share was not one seventh but one-fifteenth, that *Wahid Ali* got merely a life estate under the will and on the death of *Wahid Ali* the property reverted to the three sons of *Hakim Ali* and the gift executed by *Wahid Ali* in favour of *Kulsumunnissa* was, therefore, of no legal validity after *Kulsumunnissa*'s death.

This judgment was upheld by the Additional Civil Judge of Lucknow who dismissed the appeal filed by the defendants, the plaintiff having submitted to the decree.

On second appeal to this Court a learned Single Judge held that on a true interpretation of the will the testator intended to give to *Wahid Ali* for his lifetime merely the usufruct of the one-fourth share and he had no intention to give the corpus of the property to *Wahid Ali*. That the will was, therefore, valid and, on the dead of *Wahid Ali,* the property vested in the three sons of *Hakim Ali*, and if they were dead, in their legal representatives. Second plea that had been raised before the learned Single Judge that the suit was barred by Section 233(k), Land Revenue Act was decided against the defendants. The appeal was dismissed but the learned Single Judge gave leave to the defendants to file an appear under Section 12(2), Oudh Courts Act.

Learned Counsel for the respondents has raised a preliminary objection that the learned Single Judge should no have granted leave under Section 12(2), Oudh Courts Act. He has relied on several decisions of the Oudh Chief Court that a mere question of the interpretation of a document is no ground for giving leave. The cases cited are *Dayanat Ullah v. Atia Khanam*, 1940 Oudh W.N. 193, *Uman Shankar v. Ashraf Husain*, 1943 Oudh W.

N. 372, *Brij Bhukhan v. Bhagwan Datt*, 1943 Oudh W. N. 404 and *Beni Madho v Harihar Prasad*, 1946 Oudh W. N. 331. Learned Counsel has urged that this view has been consistently followed by the Chief Court ever since it foundation in 1925. It is not necessary for us to examine these cases in detail as in our view this case does not depend on a mere question of interpretation of the document on the language used in the dead but raises a much larger question, whether a document, whatever the language, must be interpreted in the manner suggested by learned Counsel for the respondents and whether that was the law intended to be laid down by their Lordships of the Judicial Committee in *Nawazish Ali Khan*'s case, (75 Ind. App. 62). We are, therefore of the opinion that the leave was correctly granted. The learned Single Judge when granting lean observed: "The appeal involves principles of interpretation with respect to the will in suit," and the case to our minds raises a question of some importance which is likely to arise in other case of transfers by Muslim parties.

We may, however, point out that the words "the case is a fit one for appeal" in Section 12(2), Oudh Courts Act cannot be interpreted to mean the same thing as the words "the case is a fit one for appeal" in Section 110, Civil P.C. Sections 109 and 110 Civil P.C. provide for three types of appeals (1) Cases in which valuation is above Rs.10,000/- and the High Court has not affirmed the decree of the trial Court. There is a right of appeal in that case; (2) Cases in which the valuation is over Rs.10,000/- but the High Court has affirmed the decree of the lower Court. In such a case the appellant has to make out that the case involves a substantial question of law; and (3) Cases which have been certified as fit one for appeal to the Privy Council. In a series of cases their Lordships have pointed out that in this third group of cases it was not enough to establish that there was a substantial question of law involved. (See *Banarasi Parshad v. Kashi Krishna*

Narain, 28 Ind. App. 11 and *Radha Krishn Das v. Rai Krishn Chand,* 28 Ind. App 82, where their Lordships said:

"It is noticed in the judgment of this Board, in the case to which their Lordships have just referred, that there was a prevailing impression in the High Court that the mere existence of a substantial question of law was sufficient to give the Court jurisdiction to give leave to appeal to her Majesty in Council. Lord *Hobhouse* says: Their Lordships have found on previous occasions that the existence of a point of law has been supposed to give a right of a appeal in the ordinary course of procedure under the Code." That is mistake."

In *Radhakrishna Ayyar v. Swaminatha Ayyar,* 48 Ind App. 31 at p. 33 after having dealt with the first two classes of cases their Lordships observed:

"This does not cover the whole grounds of appeal because it is plain that there may be certain cases in which it is impossible to define in money value the exact character of the dispute; there are questions, as for example, those relating to religious rights and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money".

It could not be said that under Section 12(2), Oudh Courts Act existence of a substantial question of law was not enough to justify a learned Single Judge in granting leave. The learned Single Judge deciding the case was the proper person to judge whether the case was such that it needed further consideration by a Bench. The grounds on which leave should be granted in such cases was considered in *Kalyan Das v. Brij Keshore,* A.I.R. (28) 1941 ALL 9 by *Braund J.,* who held that there were at any

rate, four classes of cases in which such leave should be granted. First a case in which a question of general importance has arisen and in which it is manifestly in the public interest that a more authoritative decision should be given or a case in which the matter involved is of unusual private importance by reason of the magnitude of the material issues involved or for some other reason. Secondly, cases in which the question decided is of a very frequent occurrence in which authoritative decision by a bench is, therefore, desirable. Thirdly, when the case involves a point on which the existing authorities are obscure or conflicting. Fourthly a case in which the Judge feels that a view other than the view taken by him is possible and it is, therefore, just to the parties that a further appeal should be allowed. These are matters which are eminently suited for the decision by the Judge himself who had decided the case and should not be subject to review by the Bench after the appeal is filed. In some cases no doubly the Privy Council have considered the questions whether leave was rightly granted but leave to appeal to the Privy Council cannot be placed in the same class as leave by Single Judge of a Court to a Bench of the same Court. Special leave could be granted by their Lordships of the Judicial Committee when leave had been refused by the High Court, but no such power is given to a Bench under the Oudh Courts Act when a learned Single Judge has refused to grant leave under Section 12(2) of that Act. If the learned Single Judge has refused to grant leave the, order is final. There appears to be no reason why the order granting leave should be open to challenge. If the Bench agrees with the decision it can dismiss the appeal on the merits. It does not appear to us to be proper that the Bench should, allow the order granting leave to be questioned before it. We were told that there is a practice in Lucknow of giving leave without notice to the other side. This practice should cease and if leave is granted by a learned Single Judge after hearing the parties there is no reason why such an order should be allowed to be questioned before the

Bench hearing the appeal under Section 12. Oudh Courts Act. As we have already said in the view that we have taken that the certificate was rightly granted it is not necessary to pursue this matter further.

The main point for decision in this case is the question of interpretation of the will of *Hakim Ali* dated 17th May 1903. The learned Single Judge has quoted in extenso a translation of the document. Though learned Counsel has read out to us the will in the original, he correctness of the translation is not disputed. The will starts by providing that the executants was making a will in respect of his entire property to the effect that after his death three sons with powers of transfer and his grandson without power of transfer shall become the owners in possession of his entire aforesaid property as well as other moveable and immoveable properties. He then gives to his widow, *Najmunnissa*, eight bighas odd of land as owner in possession without power of transfer and provides that after the death of the widow all the four beneficiaries and their representatives shall become the owners in possession thereof in equal share. It is then provided that *Wahid Ali* alias *Kallan* shall have no right to transfer his property and his male issue shall generation after generation have the right to make a transfer in respect of the property and if *Wahid Ali* alias *Kallan* has no issue then his three sons and their representatives shall become the owners in possession after the death of *Wahid Ali*.

These are the only provisions that are really relevant and it would appear from the same that all the four beneficiaries, that is, the three sons and grandson, were included in the same dispositive clause with merely this difference that *Wahid Ali* was not given the right to transfer. He was described as malik wakabiz like the three sons. If *Wahid Ali* had a son then also it was made clear that son was to get the property with full right of transfer,

but if he had no male issue it was only in that case that the property was to revert to the sons of the testator.

We find it extremely difficult to interpret this document as a document by which the corpus of the property was not transferred and it was merely the usufruct that was dealt with. The Muslim law makes a clear distinction between property and its usufruct and it is well settled now that life estate with vested remainders in not recognized under the Mahomedan Law and such an estate, if attempted to be created whether by will or by gift, is invalid. Authorities are all one way that when a Mahomedan has make a gift and has stipulated for a condition that is fasid or invalid, the gift is valid and the condition is void. See *Abdul Gafur v. Nizamuddin, 19 Ind. App. 170 and Babu Lal v. Ghanshiam Das*, 44 ALL. 633. The fact that a life estate with a vested remainder ii not recognised by Mahomedan Law is not seriously disputed but what is urged is that on a correct interpretation of the document it should be held that the testator intended to give to *Wahid Ali* merely the usufruct in the eight pies share and not the corpus with restriction against alienation. It is urged in the alternative, on behalf of the plaintiff, that where a Mahomedan has purported to create a life estate a gift for life should be construed as an interest for life in the usufruct. Reliance is placed for this argument on the observations made in Mulla's Mahomedan Law, Edn 13, p. 151, which are as follows:

"In recent case *Nawazish Ali Khan's* case, (75 Ind. App.62) the Privy Council observed that there was no such thing as life estate or vested remainder in Mahomedan Law as understood in English Law, but a gift for life would be construed as an interest for life in the usufruct.

Before we deal with this point, however, we may dispose of another point.

[F-9]

Learned Counsel for the respondents has urged in the alternative that though it may not be possible to create a life estate by a gift, such an estate can be created by a will. Reliance is placed on two decisions of the Oudh Chief Court *Naziruddin v Khairat Ali*, A.I.R. (25) 1938 Oudh 51 by *Ziaul Hasan* and *Hamilton* JJ., and *Fakir Mohammad v. Hasan Khan,* A.I.R. (28) 1941 Oudh 25 by *Bennett J.* In *Naziruddin*'s case learned Counsel for the defendant respondent had urged that the Condition that the legatee should remain in possession of the property for her lifetime only was void under the Mohammedan Law and that, therefore, the bequest was absolute. Mr. *Justice Ziaul Husan* held that under the Mohammedan Law a condition repugnant to the grant is invalid, applies to gifts only and not to wills. In support of the proposition he quoted the following passage from *Hedaya*:

"If a person made a will of the services of his slave or of the right of residence in his house for a definite period or for ever in favour of another, such a will is valid, as the giving of the proprietorship of the usufruct either for consideration or without it in the lifetime of the testator is valid, and similarly it will be valid after his death."

It will appear from the quotation that the author of the *Hedaya* had made no distinction about giving the proprietor ship of the usufruct either in the lifetime of the testator or after his death. A similar quotation from Baillie's Digest of Mohammedan Law made it also clear that a grant of the usufruct limited in duration whether in the lifetime of the testator or after his death was valid. With great respect to the learned Judge the passage from *Hedaya* and from Baillie quoted by him make no distinction between a give and a will. In *Fakir Mohammad Khan*'s case *Bennet* J., held that a creation of a life interest under a will is valid. It does not appear that he made a distinction between a will and a gift.

The point however, appears to us to have been set at rest by certain decisions of their Lordships of the Judicial Committee. Before we come to the latest decision on the point in *Niwazis Ali Khan v. Ali Raza Khan* 75 Ind. App. 62, it would be more convenient to deal with the earlier case of *Amjad Khan v. Ashraf Khan*, 56 Ind. App. 213, especially as there has been a certain amount of misapprehension in some of the reported decisions as to what their Lordships had actually decided. The case was decided by a bench of the Judicial Commissioner's Court Lucknow, of which Sir *Wazir Hasan* was a member. It has been assumed in some cases that their Lordships of the Judicial Committee approved of the decision of the Judicial Commissioner's Court. A careful examination of the decision, however, makes it clear that their Lordships after having carefully considered the document agreed with Mr. *Wazir Hasan*, as he then was, that the deed read as a whole and giving effect to all the terms thereof affords clear proof that the donor intended to make and did make a gift to his wife of a life interest only in the entire property comprised in the deed together with a power of alienation in respect of one-third of the property. Their Lordships of the Judicial Committee, however, did not express any opinion on the question whether a transfer of a life estate could be make by means of a gift as in their view the plaintiff who had claimed the property as the legal representative of *Srimati Waziran* in whose favour the life estate was created could not clam the property if the estate was valid as on her death the life estate came to an end, and if the life estate was invalid then *Srimati Waziran* having no right the plaintiff as her legal representative could not claim the property. This decision cannot, therefore, be said to have recognized the validity of a life estate under the Mohammedan Law, nor could it be said that the observations make by Mr. *Wazir Hasan* Judicial Commissioner, except as regards the interpretation of the deed, was approved of by their Lordships of the Judicial Committee.

In *Nawazish Ali Khan's* (75 Ind. App. 62), the point arose under the Shia Law whether it was competent for a *Shia Mohammedan* by his will to have property for a person for his life and after his death to such members of the class as such person may appoint. Dealing with the question whether the Muslim Law recognizes the power of appointment given under a will to a person to whom an estate had been granted for life after the death of the testator their Lordships said:

"In general Muslim Law draws no distinction between real and personal property, and their Lordships know of no authoritative work on Muslim Law, whether the *Hedaya* or Baillie or more modern works, and no decision of this Board which affirms that Muslim law recognizes the splitting up of ownership of land into estates, distinguished in point of quality like legal and equitable estates, or in point of duration like estates in fee simple, in tail, for life, or in remainder. What Muslim Law does recognize and insist on, is the distinction between the corpus of the property itself (ayn) and the usufruct in the property (manafi). Over the corpus of property the law recognizes only absolute dominion, hirable and unrestricted in point of time, and where a gift of the corpus seeks to impose a condition inconsistent with such absolute dominion the condition is rejected as repugnant; but interests limited in point of time can be created in the usufruct of the property and the dominion over the corpus takes effect subject to any such limited interest."

Their Lordships laid down for the guidance of the Courts that in dealing with a gift under Muslim Law, the first duty of the Court is to construe the gift. If it is a gift of the corpus, then any condition which derogates from absolute dominion over the subject of the gift will be rejected as repugnant; but if on construction the gift is held to be one of a limited interest the gift can take effect out of the usufruct, leaving the ownerships of the corpus

unaffected except to the extent to which its enjoyment is postponed for the duration of the limited interest.

From the said decision, it mush now be deemed to be finally settled that creation of a life estate or of an estate of limited duration is not possible under the Mohammedan Law. Such an estate not being known to that system of law cannot be created whether by a gift or by a will. The question, however, remains whether when a testator has executed a document whether a will or a gift, in which he has put absolute restriction as a transfer of the usufruct and not as a transfer of the corpus of the property. It does not appear that their Lordships intended to lay down that the language of the document should be disregarded and wherever a life estate has been created it must be deemed to be a transfer of the usufruct. If this were so, their Lordships would not have said that it was for the Courts to construe the deed and pointed out in *Amjad Khan*'s case (56 Ind. App. 213) that the intention of the donor is to be ascertained by reading the terms of the deed as a whole and giving to them the natural meaning of the language used. Learned Counsel has urged that we have to put ourselves in the arm chair of the testator and to make every effort to give effect to his intentions rather than interpret the will in such a manner as to invalidate its provision. This no doubt is true, but at the same time no Court has a right to make out a new will for a testator if the old will make by him is not capable of an interpretation which would validate it. It must be read as a whole and the language used in the document must be given its natural meaning. The mere fact that a life estate in the corpus is not recognized under the Mohammedan Law would not justify the Courts in holding that it was a life estate in the usufruct that was intended to be created when the document read as a whole and give in the natural meaning to the language used is not capable of that interpretation.

Where a person has been given a property for life with an absolute restraint on the power of alienation and with no right of succession in favour of his legal representatives and with directions that on his death the property shall come into the possession of his own heirs or their legal representative, there is very little difference in fact between such a transfer and a transfer of the usufruct in the property for the lifetime of the transferee, though Mohammedan Law has made a clear distinction between a transfer of the usufruct and a transfer of the property. Where, however, as in this case, not only has the property been given to the legatee for his lifetime, like the three other legatees to whom the property was given absolutely, but the property was to go to the legatee's male issues absolutely, if the document was to be interpreted as transferring to *Wahid Ali* the mere right to enjoy the usufruct then the property would immediately vest in the three sons of *Hakim Ali* with this limitation that in his lifetime. *Wahid Ali* would enjoy the property and the provision in the will that the property should go absolutely to the son of *Wahid Ali*, if any on his death would become invalid. There can be no doubt after the death of his eldest son *Wajid Ali* and knowing that *Wajid Ali*'s descendants would not inherit his property under the Mohammedan Law, *Kakim Ali* executed the will to benefit his grandson and his male descendants who would otherwise have not got any share in his property. It is said that *Wahid Ali* was mentally weak and at one time an attempt was make to have a guardian appointed for him under the Lunacy Act. It may be that on that account the testator deprived him of the power of transfer but the dominant intention of the testator to help *Wahid Ali* and his male descendants would be partially nullified by interpreting the will as a gift of the usufruct to *Wahid Ali* for his lifetime. We have no right to make out a new will for the testators and when it is clear that he wanted to give the property to *Wahid Ali* and his sons a forced construction cannot be placed on the document and it cannot be said that the

testator did not intend to give the corpus to *Wahid Ali* and his sons but only the usufruct to *Wahid Ali* for his life. Reading the document as a whole and keeping in mind its various provisions we are of the opinion that the deed cannot be interpreted as a mere transfer of the usufruct. It was intended to be a bequest of the corpus with certain limitation and the limitations being invalid *Wahid Ali* became the absolute owner of the property.

One small point was mentioned to us that though under the Mohammedan Law *Hakim Ali* could not make a will as regards the whole of his property and the will could operate only as regards one third this defect was cured by the consent given by the heirs to *Hakim Ali*. Learned Counsel for the appellants pointed out that mutation of names was not on the basis of the will but on the basis of inheritance. The importance of this point might arise in this way that *Wahid Ali* having got possession of the property in 1909 and having transferred it to *Kulsumunniss* in 1915 it had to be seriously considered whether the suit filed in 1944 was within time. As we are dismissing the appeal (suit?) on another point and as this point was not raised in any of the Courts, it is not necessary for us to consider it. In the view that we have taken it is also not necessary for us to discuss the question whether Section 233(k) of the Land Revenue Act barred the plaintiff's claim.

The result, therefore, is that this appeal is allowed, the decrees of the learned Single Judge and the lower appellate Court are set aside, the decree of the trial Court is modified and the plaintiff's suit is dismissed in its entirety with costs in all the Courts.

How a will can be made in respect of property (Ayn) in favour of one person and its usufruct in favour of another person and how far it is legally acceptable in accordance with the principles of Muslim law of will was also discussed by Lahore Court in the case of *Miraj Begum* referred (supra).

The thing bequeathed should be such property whose use or the use of whose usufruct or income is lawful in Shariaa (Compendium of Islamic Law published by AIMPLB, Pg 147).

A usufructuary will to precede that of the corpus, several such wills to become operative one after another and reservation by the legator (for himself) of the usufruct in the property bequeathed all other distinct form conditional or contingent wills and they are perfectly valid and legal and enforceable.

BEQUEST OF REMAINDER AND USUFRUCT

'A' bequests the rent of his house to one of his sons for life and after his death to a charitable society for the benefit of the poor. The other son does not consent to the legacy. The bequest to the son being void for want of consent of the other son the subsequent bequest to the charitable society is also void.[1]

'A' bequeathed whole of his property to his widow for life and thereafter to his children. The bequest to his widow is invalid unless the other heirs consent to it.[2]

The property bequeathed need not be in existence at the time of will. According to *Bailee II, Pg 229-230, 263, 623 and Vol II Pg 233, 238, 241, 624, 665, 666 and The Hidaya Pg 692*

1. *Fatima Bibi vs. Arif Isma Ijee* (1881) 9 C.L.R, Pg 66.
2. *Amar Ali vs. Omer Ali* (1951) 55 C.W.N. 33, 51 AC 7

to 695. But it should be in existence at the time of testator's death.[1]

It is open to a testator to make bequest of the substance of any property which can be lawfully possessed or of its usufruct or profit.

Where the bequest of the corpus is made it cannot be the subject of any conditions. It is necessary that the will of the corpus should relate to a property which is in existence at the time of the testator's death. It is however not necessary that it should also exist at the time of the will. The reason is that a will take effect from the moment of the testator's death and not earlier.

According to Hidaya[2] and Bailee[3] it is open to a testator to make a bequest of limited rights dealing only with the usufruct of the property without bequeathing the corpus.

The bequest of usufruct of some property which is in existence at the time of testator's death is valid. If the bequest is indefinite as to the terms, or is forever, the legatee will be entitled to get it till his death.[4]

The effect of the bequest of the future usufruct is to give the legatee only the right to take the profits in the same way as a person, in whose favour a Waqf has been made.

The Privy Council in the cases of *Humeeda v. Budloom*,[5] held that a life estate does not seems to be acknowledge by Mohammedan Law, as the same is not consistent with Mohammedan

1. Tayabji 675, Mulla 123.
2. Pg 692 to 695.
3. II Pg 241.
4. *Bailee I, Pg 663, The Hedaya Pg 692*
5. 1872, 17 weekly reporter 525

usage and there ought to be very unusually a transaction, this principle was followed by Karnataka High Court in the case of *Huchu Sab v. Sahajabai.*[1]

In the case of *Nizamuddin v. Abdul Gaffour*,[2] which was an appeal in the case of from ILR 13, Bom pg 264, the Privy Council held that life rents is a kind of estate which does not appear to be known to Mohammedan Law. This ratio was also followed in the case of *Sulema Qadir v. Dorab Ali.*[3]

As a result of the principles laid down by the Privy Council in the above cases the High Courts of Allahabad Bombay, Rangoon, have held that a gift or bequest of interest for life was a gift of the corpus with a repugnant condition the case about an oomree seemed to the courts to lead to this condition, it was therefore held that the condition was void and the donee legatee took it as an absolute owner.[4]

If A bequests a life interest to an heir B and thereafter the remainder to C (a non-heir), the bequest to C will fail if the life estate to be is invalid for want of consent of other heirs.[5]

In the below mentioned cases where in the Privy Council has delivered two important decisions thereby not only made the position cleared but also settled the law.[6]

1. 1983, 1 Karnataka Law Journal 170.
2. I.L.R 17 Bom.
3. I.L.R 8 Calcutta 1. (P.C)
4. *Abdullah v. Mahmood,* 1905, 7 Bom L.R 306; *Abdul Kareem v. Abdul Qayum,* ILR 28 Allah bad ILR 342; *Babu Lal v. Ghanshyam Das,* AIR 1922 Allahabad 205; ILR 44 Allah bad 633; 70 IC 84; AIR 1935 Rangoon 318; 158 IC 848; *Shafi khan v. Lalijaan,* 11 IC 702
5. *Ameena Khatoon v. Siddiqur Rahman,* Pakistan Law Decisions, 1960 Dhaka 647.
6. *Amjad Khan v. Ashraf Khan,* AIR1929 PC 149 at pp.151, 152: I.L.R 4 Luck. 305 : 116 I.C .405.

The facts of the cases are briefly as follows :

The husband made a gift of his property to his wife subject to the following conditions :

(i) She would remain in possession during her lifetime;

(ii) she would be entitled to alienate one-third of the property [but not the remaining two-third];

(iii) the entire property would revert to some named collaterals of the donor after her death. The wife remained in possession during her lifetime without alienating any part of the property. After her death, the collaterals of the donor and the brother of the wife who was her heir both claimed to be entitled to possession of the property. The contention of the wife's brother was that this was a case of a hiba with inconsistents condition and as such condition were void, it operated as an absolute gift to her.

Two questions arose for decision

(1) If the donor intended that only a life-interest should be given to the wife, was it enlarged into an absolute estate on the ground that the condition restricting it to the lifetime was void?

(2) Would the gift of a life-interest be valid under Mohammedan Law?

On the first point, their Lordship decided on a construction of the terms of the deed, that as the intention to grant only a life-interest.

As a result of this decision the High Courts of Oudh, Nagpur and Calcutta, took the view in the cases of:

1. *Nizamuddin v. Khairat Ali*, AIR 1938 Oudh 51 at pp. 53, 54: I.L.R. 13 Luck, 713: 172 I.C 384; *Fakir Mohd. v. Hasan Khan*, A.I.R 1941 Oudh 25:190 IC. 132 : I.L.R 16 Luck, 93: *Mohd Siddiq v. Risaldar*, A.I.R 1926 Oudh 360 at p. 361 : I.L.R 2 uck. 216 :95 I.C.220.

2. *Subhanbi v. Abdul Hafiz*, AIR 1936 Nag.113 at p.115:161 I.C. 719 (dissenting from *Abdul Rahman v. Abdul Hafiz*, AIR 1929 Nag.313 : 113 I.C.35).

3. *Baisaroobai v. Haseen Somj*, A.I.R 1936 Bom 330 at p.336 (F.B) : 165. IC 34: *Rasool Bibi v. Usuf Ajam*, AIR 1993 Bom. 324 at P.330 : ILR 57 Bom.737:148 I.C 82.

4. *Abdul Khalid v. Bipin Bihari*, AIR 1936 Calcutta pg.465, 1946 Calcutta 288 that grands of life-interests are valid both by way of gift or by will but there would not be inlarged into absolute ownership.

In the case of *Nawazish Ali Khan v. Raza Khan*,[1] the position was further made clear by Privy Council in this case. Though the same terms may be used in English and Muslim Law to describe much the same things, the two systems of law are based on two different conceptions of ownership. While English law recognizes ownership of the land, limited in duration, the Mohammedan law on the other hand recognizes ownership unlimited in duration. Both the laws recognizes

1. AIR 48 PC 134

interests of limited duration in the use of the property. Thus where the use of the house is given to any person for his life he may not be termed as a tenant for life and the owner of the house, waiting to enjoy it until the termination of the limited interest may be said, not in accurately, to possess a vested remainder if the gift is found to be one of a limited interest the gift can take effect out of the usufruct leaving the corpus unaffected except to the extent to which its enjoyment is postponed to the duration of the limited interest.

The parties in this case were Shia Muslims and they were governed by the rules of Shia laws. But their lord ships pointed out that there is no difference between the several schools on this point and a limited interest takes effect under any of these schools.

As a result it has been settled that (i) a bequest of limited interests in the usufruct may be validly made by Muslims following any of the schools of Islam and (ii) that a corpus cannot be bequeathed for a limited period and life estates as understood in English law (ownerships of the corpus for a limited period) cannot be created by a will, therefore life estate under Hanafi Law or Shia Law means an interest in the usufruct.

The ratio laid by the Privy Council in the above cases was followed by Allahabad High Court in the case of Siddiq Ahmed which has been discussed earlier.

VESTED REMAINDER:

The use of this term means and is construed, as likely to cause the same confusion when considered with reference to cases under Mohammedan Law. For example if a person makes

a gift to A, for his life time having delivered possession to him and to B after the death of A, the position under the English and Mohammedan Laws may be considered as to legal rights of A and B as under:

> Under the English law the interest of A would be a " life estate" during his lifetime (*i.e.*, he would be the owner during that period) while the interest of B would be a "vested remainder". It would be transferable and also heritable. Even if B dies in the lifetime of A, his interest would not be lost and would survive to his heirs.

Under Mohammedan Law two questions will arise:

(1) Is the gift to B at all valid?

(2) If the gift to B is valid will the interest be a vested remainder (*i.e.*, will it be transferable and heritable even if B dies during lifetime of B.

The first question would in each case be one of construction of the deed. If the corpus may be deemed to have vested in A, then the gift to B would be invalid. If, however, it is construed to be only a life-interest in the usufruct for A, it would not be enlarged into absolute estate and the corpus would vest in B.

On the second point, the question as to vested remainders has not been decided. It was observed by the Privy Council in a case that such an interest as vested remainder did not seem to be recognized by Mohammedan Law. It has been held in some cases on the authority of this case that the remainder man B can get his rights only if he survives the life tenant A (but not otherwise).

CONTINGENT REMAINDER

A Muslim cannot create a contingent remainder.[1]

In the case of *Siddiq Ahmed v. Wilayat Ahmed*,[2] the Allahabad High Court in its land mark judgement held that the Muslim Law makes a clear distinction between property and its usufruct and it is well settled that life estate with vested remainders is not recognized under the Mohammedan Law and such an estate if attempted to be created whether by will or gift is invalid.

Authorities are all in one way that when a Mohammedan has made a gift and has stipulated for a condition that is Fasid or invalid, as held in the case of *Abdul Gafoor vs. Nizamuddin*,[3] and *in the case of Babulal vs Ghansham Das*.[4]

Referring to the above decisions the Allahabad High Court further discussed the law on this subject holding that creation of life estate or of an estate of limited duration is not valid and possible under the Mohammedan Law.

Such an estate not being known to that system of law cannot be created whether by a gift or by a will. Where a person has given his property for life, with an absolute restraint on the power of alienation and with no right of succession in favour of his legal representatives and with directions that on his death the property shall come into possession of his own heirs or their legal representatives, there is very little difference infact between such a transfer and a transfer of the usufruct in

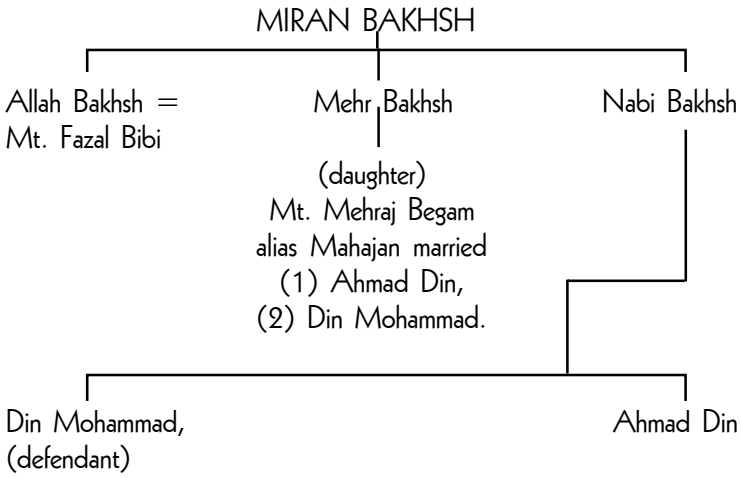
1. AIR 46 Bom 122.
2. AIR 1952 All. Pg I
3. 19 IA Pg 170.
4. ILR 44 All.

the property for the lifetime of the legatee though Mohammedan Law has made a clear distinction between a transfer of the usufruct and transfer of property. Where, however, not only has the property been given to the legatee for his lifetime like the three other legatees to whom the property was given absolutely, but the property was to go to the legatee's male issues absolutely. The deed cannot be intercepted as a mere transfer of the usufruct.

SEPARATE WILL REGARDING CORPUS AND USUFRUCT

In Hedaya on page 694 and Bailee on page 663 it is stated that:

> "The Corpus of the property and its usufruct may be treated as separate properties for the purpose of will. The will which is in question, of course, be one of the interpretation of the terms of a will for ascertaining of the terms of a will for ascertaining as to what was the subject of will. It is permissible to make a bequest of the thing itself in favour of one person and of its produce or use to another. How a will can be made in respect of a property (Ayn) in favour of one person and its usufruct in favour of another person and how far it is legally acceptable and in accordance with the principles of Islamic Law of Will was discussed by the Lahore High Court in the case of *Mehraj Begum vs. Din Mohammed,* AIR 1937 Lahore 669. The facts of the case and the ratio laid down in this case are extracted below:
>
> The parties to this litigation are husband and wife. They are Qureshis of Lahore, and their relationship with *Allah Bakhsh*, whose property is in dispute will appear from the following pedigree table:



Mt. *Mehraj Begam* was first married to *Ahmad Din*, son of *Nabi Bakhsh*. On *Ahmad Din*'s death she married his brother *Din Mohammad*, who has another wife living, from whom he has children. Mt. *Mehraj Begum* and *Din Mohammad* appear to have fallen out with each other lately. The property in dispute is a house which originally belonged to *Allah Bakhsh* who died childless on 23rd May 1918. It is alleged by the plaintiff that one day before his death, *i.e.* on 22nd May 1918, *Allah Bakshs*h executed a will (Ex.P.1) which was attested by eight witnesses, including his wife Mt. *Fazal Bibi*, his two brothers *Mehr Bakhsh* and *Nabi Bakhsh*, and his niece Mt. *Mehraj Begam*, plaintiff. The plaintiff averred that under this will Mt. *Fazal Bibi* lived in the house in dispute for her lifetime, and on her death, in 1925, the plaintiff became the absolute owner thereof. She remained in possession till April 1933 when her husband, the defendant, unlawfully dispossessed her of the lower storey of the house. Accordingly she brought this action for recovery of possession of this part of the house. The defendant *Din Mohammad* denied the plaintiff's claim to any part of the house in suit. He did not admit the execution of the will by *Allah Bakhsh*, and in the

alternative pleaded that *Allah Bakhsh* was not of disposing mind at the time, and that the will was invalid under Mohammedan law. He also alleged that *Allah Bakhsh*, in his lifetime had orally gifted the house in dispute to him and he was in possession in his own right.

The trial Judge held that the alleged oral gift by *Allah Bakhsh* to the defendant has not been proved, that he, while in possession of his senses, had executed the will Ex. P.1 on 22nd May 1918, that though the will was of the entire property of the deceased, it had been validated by consent of the other heirs, *Mehr Bakhsh* and *Nabi Bakhsh*, given after the testator's death. He accordingly granted the plaintiff a decree for possession of the portion of the house, of which she had been dispossessed by the defendant a short time before the suit. On appeal the learned Additional District Judge upheld the finding of the Subordinate Judge that the will had been executed by *Allah Bakhsh*, but he did not come to any definite finding as to whether the testator had a disposing mind at the time. He also found that though the will was in excess of the legal one-third and therefore invalid under Mohammedan law, but this defect had been cured by the consent of the other heirs of the deceased. He interpreted the will as bequeathing the house in dispute to Mt. *Fazal Bibi* absolutely, with a condition that she will have no power to alienate it, and after her death to Mt. *Mehraj Begam*. He held that as under the Mohammedan law of the Hanafi School, by which the parties were governed, such a condition and the gift over are void, the legal effect of the bequest was that Mt. *Fazal Bibi* took the house as absolute owner and the plaintiff got nothing at all. On this finding, he accepted the defendant's appeal and dismissed Mt. *Mehraj Begam*'s suit leaving the parties to bear their own costs.

The plaintiff has come in second appeal and it has been contended on her behalf that the will has been misinterpreted by the

learned Additional District Judge and in any case the view of the Mohammedan law taken by him is incorrect in the light of the recent pronouncement of the Privy Council on the point in *Amjad Khan v. Ashraf Khan*, AIR 1929 PC 149 = 116 IC 405 = 4 Luck 305 = 56 IA 213 (PC) at p. 307. It has also been urged that the learned Judge should have held, in agreement with the Subordinate Judge, that the testator was of disposing mind at the time of the execution of the will. On the last point, I have no doubt that the contention of the appellant is correct. As already stated, both Courts have concurrently found that the will was executed by *Allah Bakhsh*, and this finding has not been challenged before me by the respondent's Counsel, as indeed it could not be, in view of convincing evidence on the record. This evidence also establishes that the deceased, though ill at the time, was in possession of his senses. The will was executed in 1918, and of the eight attesting witnesses all except Basso have since died. Basso gave evidence at the trial and clearly stated that the will was written at the instance of *Allah Baksh* and was thumb-marked by him. The scribe *Devi Das* has also appeared as a witness and deposed that the testator was in possession of his senses at the time and that the will was attested by *Mehr Bakhsh* and *Nabi Bakhsh*, brothers of the deceased, and Mt. *Fazal Bibi*, his wife. The plaintiff is also one of the attesting witnesses and she too has sworn to the above facts. There is also on the record a group photograph, taken on the day on which the will was executed, and this shows that the deceased was able to sit up and was not unconscious as is alleged by the defendant. There is no rebuttal evidence worth the name produced by the defendant. In my opinion this evidence is quite sufficient to prove the due execution of the will by *Allah Bakhsh* while he was of disposing mind.

The real question in the case is one of construction of the will, clause (7) of which contains the disposition relating to the

immoveable properties owned by the testator, which consisted of a house in Koocha Kababian and a shop inside Mochi Gate, Lahore. Reading this clause as a whole, and not laying too much stress on a word here or a word there, I have no doubt that the bequest by the testator of these properties to his wife, Mt. *Fazal Bibi*, was not a transfer of the corpus with an inconsistent restrictive condition and a gift over to the plaintiff. On the other hand, it seems clear that the dominant intention of the testator was to give her the 'usufruct' of the properties for a limited period and confer the ownership of the house on the plaintiff, and that of the shop on his two brothers, *Nabi Bakhsh* and *Mehr Bakhsh*. Though in one place it is stated that Mt. *Fazal Bibi* will be the malik of these two properties, it is laid down in clear terms that "She will occupy the house for her residence for her life or so long as she remained of good character" and as regards the shop, all that she became entitled to was merely to realize the rent and bring it to her own use. It is also provided that under no circumstances was she to alienate any of these properties and it appears that she was not given the power even to sub-let the properties. On her death, the shop was to become the absolute property of *Nabi Bakhsh* and *Mehr Bakhsh*, brothers of the testator, and on her becoming unchaste or on her death (as the case might be) the house was to be the property of his niece, Mt. *Mehraj Begum*, plaintiff, who, it was stated in the will, had been living with him and whom he had brought up. Now whatever may be the correct legal position under Mahomedan law of the Hanafi School with regard to bequests of a life-estate with a vested remainder, it is beyond doubt that it is permissible to make a bequest of the thing itself in favour of one person and of its produce or use to another. In the Hedaya, Vol. 4, Chap. 5, p. 692, it is laid down that:

If a person bequeath.... the use of his house, either for a definite or indefinite period, such bequest is valid, because as an

endowment with usufruct, either gratuitous or for an equivalent, is valid during life, it is consequently so after death.

Similarly in Baillie's digest, Vol. 1, p.668, it is stated:

If a person should bequeath.... this mansion to such a one, and its occupancy to such another .... each legatee would have what was mentioned for him, without any difference of opinion, whether the bequests are connected together or separate.

I hold, therefore, that the bequest of the house in dispute to Mt. *Fazal Bibi* was not of an absolute estate with a gift over to the plaintiff, as held by the learned Additional District Judge, but that in reality the 'occupancy' or 'use' of the house had been given to Mt. *Fazal Bibi* for a limited period and its corpus to the plaintiff, and that on the death of the former the usufruct and the corpus both vested in the latter. In this view of the case, it is not necessary for the purposes of this case to discuss whether the bequest of a life-estate is or is not valid under Mohammedan law. It may be stated that it is not easy to reconcile the various cases on the point, and the latest decision of the Privy Council in *Amjad Khan v. Ashraf Khan*, AIR 1929 PC 149 = 116 IC 405 = 4 Luck 305 = 56 IA 213 (PC) cannot be said to have set the matter at rest, as has been explained by *Mirza,* J., of the Bombay High Court in *Rasool Bibi v. Yusuf Ajam*, AIR 1933 Bom. 324 – 148 IC 82 = 57 737 = 35 Bom LR 643 at p. 757 and in the dissenting opinions on appeal by *Beaumont*, C.J. and *Rangnekar*, J. (p. 777 and p. 784 *et seq*). The defendant's learned Counsel concedes that his client has no lawful title to the house under the will. It is admitted that even on the interpretation put on the will by the Additional District Judge, Mt. *Fazal Bibi* took an absolute estate and the defendant is not her heir. He relied merely on the weakness of the plaintiff's title. But as has been held above, the plaintiff is the rightful owner of the

> house and there is no doubt that she was wrongfully dispossessed of the lower storey by *Din Mohammad* in April 1933. I accept the appeal, set aside the judgment and decree of the learned Additional District Judge and restore that of the Court of first instance, decreeing the plaintiff's suit with costs throughout.

In the light of the above judgment it is clear that the legatees of the usufruct will be exclusively entitled to the use during his term.

According to Hidaya Pg 679, Faizi 2nd edition page 307 and Taher Mahmood on Muslim Law of India Page 223,

> "If a person who is poor bequeaths to another the third of this property and afterwards becomes rich, the legatee is in that case entitled to a third of his estate whatever the amount, the law is also the same in case the testator being rich at the time of making the will should afterwards become poor, and again acquire wealth."

Another instance given by Wilson in his celebrated work "Wilson's Mohammedan Law" page 312 is extracted below:

> "Likewise if a person bequeathed "a fourth of my goats" to Z, and it happened either he had no goats or that such as he had were destroyed before his death, the bequest would be null and void. However, if he should afterwards acquire goats, so as to be able to leave some at his death. One fourth of them would go as a legacy to Z."

FUTURE PROPERTY

There cannot be a bequest of future property e.g. the fruits of a palm tree in the coming year *Bailee, Pg 516,* But both Allahabad and Madras High Courts are of the view that an

assignment of an insurance policy is valid under Section 38(7) of the Insurance Act of 1935 even if made with condition that if shall be inoperative or that the specified contingency during the life of the property holder. *AIR 1939 ALL pg 744*, the judgment is reproduced below:

Sadiq Ali and others v. Zahida Begam, AIR 1939 Allahabad 744

This is a defendants' appeal arising out of a suit brought against them by the plaintiff-respondent to recover Rs.10,000/- for her dower and interest thereon. The plaintiff is the widow of *Khan Bahadur Tasadduq Hussain*. The defendants are his other heirs. It was not contested that her dower was Rs.10,000/-. The defendants contended that it had been paid up by the assignment of three assurance policies of Rs.6000/- each by the plaintiff's husband before his death. The learned civil Judge found against the defendants and decreed the suit. It is not denied by the plaintiff that three assurance policies of Rs.6000/- each were assigned to her by her husband, *K.B. Tasadduq Husain*, before his death. The defendants' case was that this assignment was made to her in lieu of her dower, while the plaintiff contended that the assignment was made on account of love and affection and not in lieu of her dower. It has been contended on behalf of the appellants that the dower was paid up by this assignment; and if it was not, the assignment amounted to a gift which was invalid, and they were entitled to their share in the money which was realized by the plaintiff under the assignment. The appellants produced three witnesses, two of whom are defendants themselves. *Zahir Alam* and *Zafar Alam* are both the sons of *K.B. Tasadduq Husain. Zafar Alam* has stated:

Plaintiff is my step-mother. *K.B. Tasadduq Hussain* assigned three policies of value of Rs.18,000/- plus bonus to my step-

mother and one policy of Rs.6000/- with bonus to my younger brother, *Inamul Hasain* ..... My father told me that *Begam Saheba* and her relations had been pressing him very much to make provision for the youngsters and that *Begam Saheba* should get her mahar, which was Rs.10,000. Father told me that he told *Begam Saheba* and her relations that he had no ready cash to pay her or to make provision for the youngsters. He told me that he told *Begam Saheba* that he was going to insure himself and then assign the policies to *Begam Saheba* to meet his liabilities to her and the provision for the children. He said that the money which would come from the policies out of that Rs.10,000/- would go for dower of *Begam Saheba* and Rs.10,000/- would be for the education and maintenance of the children, as he was receiving threatening letters from the revolutionaries and he had no cash.

Zahir Alam has deposed: *Khan Bahadur* one day sent for me and my brother at Hapur, while he was sitting near his father. He then said that his wife's, my step-mother's relations were insisting that provision be made for the children and dower. He said as he had no money in cash, he wanted to make arrangements for this by life insurance ..... Excepting what I have said above, my father said nothing else in particular.

On comparing these two statements it will be found that there is some conflict in them. Both these witnesses have admitted that there was no talk about the payment of dower before this. *Zafar Alam* has stated:

Father never mentioned to me about the dower except on the occasion I referred to, *viz.*, early October 1930, or what provision would be made for the dower.

Zahir Alam also has stated:

No reason was told us by father why the other relations were wishing upon provision for dower. This was the first occasion when talk about dower took place with us.

It has not been explained what necessity arose for making this provision for payment of the dower and why the dower was demanded suddenly for the first time by the plaintiff. It is admitted by *Zahir Alam* that the relations between the father and the plaintiff were cordial. There is intrinsic evidence in the endorsement of assignment itself, which shows that the assignment was not made and could not have been made in lieu of dower. The endorsement is:

I, *Tasadduq Hussain*, in consideration of natural love and affection do hereby assign the benefit of all moneys to become payable under this .....

If this assignment was made in lieu of her dower, it should have been so stated in the endorsement. On the other hand, the proviso to this endorsement clearly says that the assignment was not to take effect in case the wife died during the lifetime of her husband. The plaintiff's heirs would have been entitled to the dower on her death. If this assignment were made in lieu of dower, there was no reason to deprive the plaintiff's heirs of her dower in case she died before her husband. Under this proviso her heirs would not have got any benefit under the assignment. This fact leaves no room for doubt that the assignment was not made in lieu of dower.

It has been further contended by learned Counsel for the appellants that this assignment amounted to a gift, and it was invalid under the Mohammedan Law. The validity of the assignment has been attacked on two grounds, namely that it was a gift *in futuro* and a contingent gift. It is essential for the validity of a gift

that there should be: (1) a declaration of the gift by the donor, (2) an acceptance of the gift, express or implied, by or on behalf of the donee, and (3) delivery of possession of the subject of the gift by the donor to the donee. If these conditions are complied with, the gift is complete. In this case there is a declaration by the donor in the shape of the assignment. The assignee has stated on oath that the policies were handed over to her and she accepted them. The gift was therefore complete as soon as these conditions were complied with. The mere fact that the money was to be realized in future is not enough to make it a gift *in futuro*. Otherwise gifts of actionable claims would not be possible. It is not disputed that valid gifts can be made of actionable claims.

In the present case what was gifted was the right to receive the money under the policies. In *Ahmaduddin v. Ilahi Baksh*, (1912) 34 All 465 = 14 IC 587 = 9 ALJ 555, a gift was made of the right to receive a specified share of the offerings which might be made at a particular shrine. It was contended that a gift of the right to receive offerings was not valid, inasmuch as the thing gifted was not in existence and a gift of future things was void. It was observed:

The deed of 11th January 1900 purports to transfer to *Ilahi Baksh* the right of *Maksudunnisa* to receive a specified share in the offerings made by pilgrims at a certain shrine in the town of Amroha. It is contended before us that such a gift is invalid under the Mahomedan Law, because it is a gift of a thing not in existence at the time and incapable of that actual seisin which the Mohammedan law requires in order to make a gift valid. We think that the thing gifted in this case must be regarded as being the right of the donor to receive a fixed share in the offerings after they have been made, and this is an enforceable right in the sense that it is enforceable in law as against other co-sharers in the same.

These observations apply fully to the present case. Whether the gift is complete and *in prasenti* or not depends on the question whether the donor has divested himself of the property and conferred it on the donee. In the present case the assignor completely divested himself of all his rights and conferred full ownership on the plaintiff as soon as he made the assignment. In *Sadik Husain Khan v. Hashim Ali Khan*, (1916) 3 AIR PC 27 = 36 IC 104 = 43 IA 212 = 19 OC 192 = 38 All 627 (PC), it was observed by their Lordships of the Privy Council:

In *Chaudhri Mehdi Hasan v. Mahammad Hasan*, 33 IA 68 = 9 OC 196 (PC) = (1906) 28 All 439 at p.449 it is laid down by this Board that, according to Mohammedan Law, holder of property may in his lifetime give away the whole or part of it if he complies with certain forms, but that it is incumbent on those who seek to set up such a transaction to prove that those forms have been complied with, and this will be so whether the gift be made with or without consideration. If the latter, then unless it be accompanied by delivery of the thing given, so far as it is capable of delivery, it will be invalid. If the former, delivery of possession is not necessary, but actual payment of the consideration must be proved, and the *bona fide* intention of the donor to divest himself *in prasenti* of the property and to confer it upon the donee must also be proved.

Section 38(1), (2) and (5), Insurance Act, (No.4 of 1938) enacts:

(1) A transfer or assignment of a policy of life insurance, whether with or without consideration, may be made only by an endorsement upon the policy itself or by a separate instrument, signed in either case by the transferor or by the assignor or his duly authorized agent and attested by at least one witness, specifically setting forth the fact of transfer or assignment.

(2) The transfer or assignment shall be complete and effectual upon the execution of such endorsement or instrument duly attested but shall not be operative as against an insurer and shall not confer upon the transferee or assignee, or his legal representative, any right to sue for the amount of such policy or the moneys secured thereby until a notice in writing of the transfer or assignment has been delivered to the insurer at his principal place of business in British India by or an behalf of the transferor or transferee.

(5) From the date of the receipt of the notice referred to in sub-section (2) the insurer shall recognize the transferee or assignee named in the notice as the only person entitled to benefit under the policy, and such person shall be subject to all liabilities and equities to which the transferor or assignor was subject at the date of the transfer or assignment and may institute any proceedings in relation to the policy without obtaining the consent of the transferor or assignor or making him a party to such proceedings.

These provisions have been duly complied with. The assignment therefore became complete and effectual as soon as the required endorsement duly attested was made. The assignment, even if it amounted to a gift, was a gift *in prasenti* and not *in futuro*. It has also been contended by learned Counsel that the gift was contingent and therefore void under the Mahomedan law. If this assignment is to be regarded as a gift, as is contended by learned Counsel for the appellants, the defect of contingency is validated by the provisions of sub-section (7) of Section 38, Insurance Act, which lays down:

Notwithstanding any law or customs having the force of law to the contrary, an assignment in favour of a person made with the condition that it shall be inoperative or that the interest shall pass to some other person on the happening of a specified event during the

life of the policy-holder and an assignment in favour of the survivor or survivors of a number of persons shall be valid.

The words "any law or custom" are wide enough to cover the Mohammedan law in the present case. The gift therefore is not invalid on account of the proviso that in the event of my said wife predeceasing me, this assignment shall become null and void, as if it had not been made.

We therefore hold that the assignment was valid. There is no force in the appeal. It is therefore ordered that the appeal be dismissed with costs.

LIFE ESTATE AND CONTINGENT INTEREST

Life estates and contingent interest of English law are not known to Mohammedan law. The corpus of thing must be given under the will. But the 'use' or the fruit or produce of a thing may be bequeathed to a person for life or for a specified period. The ownership of the thing may vest in another living person. If the ownership is not specifically disposed off, it will belong to the testator's heirs, subject to the right of the usufructuary.

The legatee of the 'use' of a house is only entitled to reside in it and not to let it. The legatee of the 'produce' of a house is only entitled to let it and not to reside in it.

In the case of *Nawazish Ali Khan vs. Raza Ali Khan*,[1] the Privy Council ruled that the usufruct may be given to one person and corpus to another.

1. *Nawazish Ali Khan vs. Ali Raza Khan,* AIR 1948 PC 134: (1948) 75 IA 62, *Mehraj Begum vs. Din Mohammed,* AIR 1937 LAHORE 669, T. Mahmood Muslim Law of India 2nd Edition Pg 230.

Where as, when bequest is made for life, the gift will be construed as a gift with a condition and the condition is void, with the result that the legatee will take it absolutely as held in the case of *Nizamuddin*[1].

A leading case on this point which was decided by Bombay High Court *Ashrafalli Cassamalli v. Mahomedalli Rajaballi and others*, AIR 1947 BOM 122 is reproduced below:

> *Facts: ADMINISTRATION SUIT*. The estate to be administered belonged to one *Cassamally Jairajbhai*, a *Khoja Mahmodan* (testator), who died on 8-6-1938, leaving a will dated 15-10-1934. He left behind him a large family and vast estate. He was a much married man. By his first pre-deceased wife *Rahmatbai*, he had one son, *Hassanalli* (Defendant 6) and two daughters, *Shirinbai* and *Aminabai*. His second predeceased wife, *Khirubai*, gave him a son *Ashrafalli* (plaintiff) and a daughter *Noorbanubai*. By his third wife *Khurshid Khanum* (Defendant 5), he had four sons *Sultanalli, Amiralli, Roshanalli* and *Naziralli* (Defendants 7, 8, 9 and 10). He also left his mother *Rehmatbai* (Defendant 12). *Mahomedalli* and others (Defendants 1 to 4) were executors of the will.
>
> The testator left vast estate, which included a bungalow known as "Gulshanabad" at Peddar Road in Bombay, another property known as "Qassin Manzil", on the same road, a third one bearing the name of "*Rehmet Manor*" at Warden Road, situated in a large compound on which the testator built three houses, "Bit-ul-Hava", "Bait-ul-Sirur", and "Bait-ul-Saddah". There also were two buildings on the Gowalia Tank Road, known as "Khalakdina Terrace" and "Khalakdina Terrace Annex."

1. Mulla S. 164 citing *Nizamuddin vs Abdul Gafur* 13 Bom 264: 17 Bom 1 (PC), *Mohammed Ibrahim v Abdul Latif* 37 Bom 447, *Mohammed Shah vs Official Trustee* 36 Cal 431: See also *Abdul Karim vs Abdul Qayyum* 28 All 342.

By his will the testator made several dispositions of his properties. Clauses 5 and 6 of the will ran as follows:

I give to my wife *Khoorshid Khanum* absolutely free of all duty: (a) All my household furniture pictures china silver and plate and all other my household chattels and all my personal estate. (b) my property known as Khaluckdina Terrace Bombay aforesaid. 6. I give and bequeath all the residue of my estate unto my Trustees absolutely upon the following trusts:—(a) Upon trust to pay or provide for my debts, funeral and testamentary expenses and the said legacies and any duty payable on any legacies bequeathed free of duty and subject thereto upon trust as to my personal estate for my said wife absolutely. (b) As to my property the said Goolshanabad Peddar Road upon trust to permit my said wife to reside there during her life subject to the maintenance by her in a good state of repair to the payment by her of all rates and taxes upon the said property and the maintenance by her of a proper insurance against fire on the said property and also subject to my said wife continuing to take a very keen interest in the various charities mentioned by me hereafter. (c) Subject to the said life interest as to my property the said Goolshanabad and as from the date of my death as to my property known as Rehemet Manor, Warden Road, Bombay, aforesaid upon trust during the lifetime of my said six sons *Hasan Ali, Ashraf Ali, Sultan Ali*, *Ameer Ali, Roshan Ali* and *Nazir Ali* out of the income thereof. (1) to maintain the said properties in a good state of repair and to keep the said properties insured against fire to their full values and to pay the rates and taxes thereon. (2) Subject thereto to pay the sum of Rs.250 (rupees two hundred and fifty) per month equally between the two schools at Kera and Bharaput founded by my father; the sum of Rs.100 (rupees one hundred) per month to the Jairazbhoy Peerbhoy Benevolent Fund, the sum of Rs.50 (rupees fifty) per month to *Rehemetbai*'s Khoja Girls Orphanage for teaching the Koran, the sum of Rs.100 (rupees one hundred) per month to the Working Muslim Mission and Literary Trust and I declare

that in the event of the income from the said properties being insufficient to provide for the payments set out in clause 5(c)(2) the same shall be reduced proportionately and I declare that the receipt of the Secretary or Treasurer for the time being of the said charities shall be sufficient discharge for my trustees. (3) Subject thereto upon trust to pay the balance of the income from the said properties to my said six sons and the survivor or survivors of them in equal shares absolutely. (d) From and after the death of the survivor of my said six sons my trustees shall hold the said properties Rehemet Manor and Goolshanabad upon trust for the male heirs of my said six sons *per stirpes* absolutely. (e) As to the rest and residue of my immoveable estate my trustees shall stand possessed thereof upon trust for my said six sons in equal shares provided always that in the even of any of my said six sons predeceasing me the shares which would have gone to his father had he survived me shall be divided between his male heirs.

Doubts having arisen as to the construction of the above clauses of the will, the plaintiff filed a suit on 21-7-1941, to administer the estate of the testator, to determine the shares taken by the heirs, and to recover possession of the share allotted to the plaintiff.

JUDGMENT :—This is a suit for the administration of the estate of one *Cassim Ali Jairazbhoy*. He died on 8-6-1938, leaving behind him his widow (defendant 5) and six sons (the plaintiff, Defendants 6, 7, 8, 9 and 10). Defendant 11 is his grandson by his son, Defendant 6. Defendant 12 is his mother. Defendants 1 to 4 are the executors of his will dated 15-10-1934. Counsel have informed me that the various matters in dispute in suit between the parties have been settled, and the decision of the Court is only sought on the question of the construction of Clause 6 in the will of the deceased.

The will left by the deceased is a very short document. By Clause 1 he appoints Defendants 1 to 4 his executors and trustees. Clause 2 is an interpretation clause as to what the expression "trustee" signifies. Clause 3 contains several pecuniary legacies given by the deceased. By Clause 4 he makes two specific bequests of two of his properties to one of his sons. By Clause 5 he makes a bequest of all his household furniture, pictures, china, silver and plate and all other household chattels and personal estate to his wife and also of one of his immoveable properties. Then we come to Clause 6 which has created difficulties and which has called for construction at the hands of the Court. The testator prefaces this clause by stating that he is giving and bequeathing all the residue of his estate unto his trustees absolutely upon the trusts which he enumerates. The first trust is to pay the funeral debts and testamentary expenses and the legacies which he has already provided and the duty thereon and subject to that, the whole of his personal estate is given to his wife absolutely. Then by Clause 6(b) he makes a trust of his house, "Goolshanabad" at Peddar Road and he gives the right of residence in hat house to his wife. Then by Clause 6(c) he deals with his property known as "Rehemet Manor," Warden Road. He first provides for the outgoings of the property; then he directs payment to certain schools and charitable institutions; and finally directs that the balance of the income of the properties "Goolshanabad" and "Rehemet Manor", subject to the trust already created, is to be paid to his six sons and the survivor or survivors of them in equal shares absolutely. Then by Clause 6(d) he deals with the corpus of his two properties, "Goolshanabad" and "Rehemet Manor", and directs that upon the death of the survivor of his six sons they should go to the male heirs of his six sons *per stirpes* absolutely. Then by Clause 6(e) he provides for the rest and residue of his immoveable estate and gives it to his six sons in equal shares provided that, in the event of any of his six sons predeceasing him, the share which would have gone to that son should be divided between his male heirs.

The deceased was a *Khoja Mahomedan* and it has now been established by a series of authorities of this Court that in matters of succession and inheritance a Khoja was governed by Hindu Law on the ground of custom. It is unnecessary to review all the authorities that establish this proposition, and they have been carefully and conveniently summarized in the judgment of *Chitre* J., in *Fidahusein Piramahomedali v. Bai Manghibai*, 38 Bom. LR 397. Sir *Jamshedji Kanga* for the plaintiff has, however, contended that although a Khoja, unlike a Muslim governed by strict Mahmodan law, may dispose of the whole of his property by will, when it comes to the question of the construction of that will it should be construed according to Mahomedan law and not Hindu Law. Sir *Jamshedji*'s argument is that the ordinary and natural presumption is that a Khoja being a Mahomedan is governed by Mahmedan law and in every case where it is sought to be established that the law applicable to him in any respect departs from the strict Mahomedan law it must be proved as a matter of custom; and he further urges that it never has been established as a custom that in construing the will of a Khoja Hindu law applies. The position of Khojas is very similar to that of *Cutchi Memons* and *Beaman* J., in *Advocate-General of Bombay v. Jimbabai*, 41 Bom. 181 took the view that the question whether a devise by a *Cutchi Memon* was good or bad should be determined by Mahomedan Law. *Mirza*, J., had to consider this case in *Abdulsakur v. Abubakkar*, 54 Bom. 358, which was a case of a *Cutchi Memon*'s will; and in construing that will he expressly differed from the opinion of *Beaman,* J., holding that that opinion was *obiter* and that the will of a *Cutchi Memon* should be construed according to Hindu Law. There is a more recent decision of our Court of Appeal – *Adambhai v. Allarakhia*, 37 Bom. L.R. 686. The Bench consisting of Murphy and *N.J. Wadia,* JJ. Considered both the decisions, that of *Beaman,* J., and that of *Mirza,* J., and came to the conclusion that the decision of the latter Judge was to be preferred. It is true that the cases I have just been considering are those of *Cutchi Memons*, but authorities

are not lacking with regard to Khojas. As far back as 1901, Sir *Lawrence Jenkins*, C.J., in *Sallay Mahomed v. Lady Janbai*, 3 Bom.L.R. 785, in construing the will of Sir *Tharia Topan*, a Khoja, observed (p.785): "It is conceded on all sides, and I think rightly, that the will is to construed according to Hindu Law"; and again in *Advocate-General v. Karmali Rahimbhai*, 29 Bom. 133, the same learned Chief Justice observed. (p.148):

"It is common knowledge in legal circles that Khojas continually make their wills, as though they had the testamentary capacity of a Hindu; and Counsel in this case, whose experience is of the widest have informed the Court that they do not desire any issue to be raised on the point, for all parties are at one that this will must be construed on the basis of the testator having the testamentary powers of a Hindu resident of Bombay."

Sir *Jamshedji Kanga* points out that both these decisions are based on points conceded at the bar. But it is to be remembered, as pointed out by the Privy Council in *Brij Narain v. Mangla Prasad*, 51 I.A. 129, that when an obvious plea which could have been taken is not taken by eminent Counsel at the bar, the irresistible conclusion is that that plea was not taken because it was felt to be bad. Counsel have sufficient sense of responsibility not to argue against self-evident propositions, and the Court very often does not decide such self-evident propositions but takes them for granted. Similarly, Sir *Lawrence Jenkins* in both the cases to which I have referred accepted the proposition that the will of a Khoja is to be construed accordingly to Hindu law and did not think it necessary expressly to decide the question.

Sir *Jamshedji Kanga* has also relied on a decision of *Macleod*, J., as he then was, in *Mangaldas v. Abdul Razak*, 16 Bom. L.R. 224. That case decided that the Hindu law of joint family property did not apply to *Cutchi Memons*, but at p.231, *Macled* J., has

made an observation that in a recent case he had noticed that Khojas in the matter of wills were governed by Mahomedan law unless a custom to the contrary had been proved and that no trace could be found of the proof of any such custom in the cases so far decided. With great respect to the learned Judge, I think that it was too late in the day in 1914 to doubt the proposition that the Khojas were in the matter of wills governed by Hindu Law when, as I have pointed out, Sir *Lawrence Jenkins* more than ten years ago accepted the proposition as so obvious as not to admit of any discussion or argument. I, therefore, hold that apart from the recent legislation to which I shall presently refer, it is indisputable that the Courts must construe the will of Khoja according to Hindu Law.

The next question is whether the Shariat Act (26 [XXVI] of 1937) has in any way affected the legal position so far as it relates to Khojas. Section 2 of that Act abrogates all custom and usage which is contrary to Mohammedan law in those matters which are enumerated in that section and applies to Muslims their strict Muslim personal law. The only subjects that I need refer to are intestate succession, gifts, trusts and rust properties, and wakfs. It is to be noted that testate succession is not referred to in that section. Therefore it is clear that any established custom with regard to testate succession which departs from Mahomedan law can still be enforced by Courts of law, and as I have already held that Khojas were governed by Hindu Law both in matters of testate and intestate succession, although in the case of the latter they would now be governed by Mahomedan law, as far as the former is concerned their customary law would still prevail. The question that really causes considerable difficulty is: what are the matters that are embraced by the expression 'testate succession'? Do they for instance, include the construction of trusts and wakfs, created by a will? or does Section 2, when it refers to trusts and wakfs, refer merely to trusts and wakfs *inter vivos* and excludes testamentary trusts and wakfs?

Considerable light is thrown on the proper construction of Section 2 by the following section of the Act which enables a Muslim by making a declaration to get himself governed by Mahomedan law even in those matters which are excluded by Section 2. Therefore it seems that if a Muslim made a declaration under Section 3, he would be governed in all matters by Mahomedan law and in no matter whatsoever any customary law would apply to him which departs from the law of Shariat. Now the subjects enumerated in Section 3 are adoption, wills and legacies. Mr. *Manecksha*'s contention is that the law of testate succession or of wills must include the construction not only of legacies given by the will but also the construction of trusts and even of wakfs created by the will. If that contention were sound, it is difficult to understand why in Section 3 the Legislature has used not only the expression "wills" but also "legacies". If the subject "wills" was by itself all embracing then it was tautologous to use the expression "legacies". The very use of the expression "legacies" to my mind clearly indicates that the subject "trusts and wakfs" both *inter vivos* and testamentary, having already been dealt within Section 2, the Legislature was only dealing with those subjects which were excluded from the operation of Section 2, namely, legacies and wills. "Wills" could only mean in this context testamentary power, namely, the right to will away the whole of one's property and not merely one-third as Mahomedan Law permits. It may be suggested that trusts under Mahomedan law are merely a medium through which a gift or a bequest can be made and, therefore, testamentary trusts would be included in the expression "legacies". But that argument is not tenable because in Section 2 the subject of gifts is included and, as I have already pointed out, at the same time trusts are also included. Therefore, it is clear in any case that the Legislature did not consider that the law of simple gifts and the law of gifts through the medium of a trust were the same. I further see no warrant for qualifying the expression "trusts and wakfs" used in Section 2 as *inter vivos* trusts and wakfs. Section 2 provides that in *all questions* relating to trusts

and wakfs the Muslim personal law shall apply, and I do not see why, if a question arose as to a testamentary trust or a testamentary wakf, the question should be decided otherwise than as provided in Section 2, Shariat Act. Therefore, in my opinion, although a Khoja after the passing of the Shariat Act can still will away the whole of his property, but when it comes to the question of the construction of his will to the extent he has created trusts or wakfs by his will, the validity of those trusts and wakfs must be determined by Mahomedan law and not by Hindu Law. I have considered the question of trusts and wakfs together, although I am not concerned in this case with the question of wakfs because they are both alike and cognate and the decision with regard to one must be the same as regards the other, and for the further reason that anomalies which would result from any decision to the contrary are more apparent in the case of wakfs. It would be absurd to suggest that if a Khoja creates a wakf by his will that wakf should be construed according to Hindu Law and not according to Mahomedan law.

It is clear that by Clause 6 of his will the testator has set up a trust and therefore the validity of that trust in view of my decision which I have just arrived at must be decided according to Mahomedan law. Apart from the question of revocation with which I shall deal later, the trust with regard to life interest created in "Goolshanabad" in favour of the wife and in "Rehemet Manor" in favour the six sons is not challenged. What is challenged, however, is the ultimate benefit given to the male heirs of the testator's six sons *per stirpes* absolutely upon the death of the survivor of his six sons. This, to my mind, is clearly a contingent interest. The class to benefit is the class of the male heirs of the six sons, and as a Mahomedan cannot make a gift or a bequest even through the medicum of a trust in favour of an unborn person, only those persons of the class would take who were in existence at the date of the death of the testator; but those persons do not

take a vested interest; their interest is contingent — contingent upon their being alive when the last survivor of the six sons dies. The heirs of a person can only be ascertained when he dies and, therefore, it would be impossible to say at the death of the testator when the will begins to speak who the male heirs of the six sons would be. Not only is the class which is to benefit under Clause 6(d) of the will unascertained, but even with regard to those who can ultimately take as being the heirs of the sons and being alive at the death of the testator, the gift is clearly contingent. Mr. *Manecksha* has argued that the expression "male heirs" in Clause 6(d) should be construed to mean "sons". For this purpose he relies on the language used in sub-clause (e) which, as I have stated, disposes of the residue. The testator there provides that the residue has got to go to the six sons in equal shares; but if any of the sons has predeceased him, then the share "which would have gone to his father had he survived me" shall be divided between his male heirs. Now the words "his father" is clearly a mistake for the word "him"; but Mr. *Manecksha* contends that this mistake throws a flood of light on the meaning attached by the testator to the expression "male heirs". It is not necessary to decide the question, but I agree with Mr. *Manecksha* that there is much to be said for his contention that at least in sub-clause (e) the expression "male heirs" is used in the sense of "sons". But because in that particular context the testator used that expression in that sense and wished his residue to go only to the sons of his predeceased sons, it does not follow that necessarily he wanted to make a similar disposition with regard to "Goolshanabad" and "Rebemet Manor". I do not see any reason why I should give to the expression" male heirs" any other than its ordinary natural meaning. But even assuming that the expression "male heirs" means sons and in which case Mr. *Manecksha*'s client alone being the only son of the six sons in existence at the date of the death of the testator would be capable of taking, even so the interest which he would take would not be a vested interest but a contingent interest, because

he would only take provided he survived the last survivor of the six sons. Therefore, in any view of the case, in my opinion, the ultimate disposition in sub-clause (d) is clearly contingent and therefore void under Mahomedan Law. It has not been suggested — and it cannot be suggested — that a Muslim can create a contingent remainder.

If, however, the view I have taken happens to be wrong and the disposition contained in sub-clause (d) is to be construed according to Hindu law, then there cannot be much doubt that that disposition is a valid one. In *Madhavrao Ganpatrao v. Balabhai Raghunath*, 55 I.A. 74, a Hindu conveyed property to trustees upon trust to pay the income arising therefrom to the settlor during his life and after his death, as to a one-fourth share, to the settlor's married daughter K for her sole and separate use and after her death in trust for the male heirs of K share and share alike. K survived the settlor and died leaving six sons, all of whom were alive at the date of the deed. Their Lordships of the Privy Council held that the words "male heirs" were not used as words of inheritance but that the intention was to make an independent gift to those persons who should be K's male heirs at her death, though by Hindu law there would be excluded from the class those male heirs who had not been in existence a the date of the deed. Similarly here in my opinion the words "male heirs" are not used as words of inheritance and such of the male heirs of the six sons who were in existence at the date of the death of the testator would take as an independent gift.

The next question to consider is: if the bequest contained in Clause 6(d) is void, does it fall into the residue or does not subject-matter of the bequest devolve as upon an intestacy? The contention of the Advocate-General is that the whole of Clause 6 is a residuary clause and sub-clause (d) deals with a part of that residue and sub-clause (e) finally deals with the residue of the

residue. It is, therefore, urged that if the bequest contained in sub-clause (d) is void, it cannot fall into the residue of the residue but must devolve as upon an intestacy. Now a true residuary clause can be constituted by any words that show a clear intention on the part of the testator so to constitute it, and under a residuary bequest the legatee would be entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect. Under sub-clause (e), if it is a true residuary clause, the residuary legatees are the six sons who were all alive at the date of the death of the testator. The principle which is clearly enunciated in the books seems to be that a testator deals with a particular fund and disposes of part of it and then deals with the residue of that fund, that does not constitute a true residue. What he disposes of is really a specific portion of that fund which can be arrived at by a mere arithmetical calculation. Thus if a testator gives out of a fund of Rs.1,000/- three hundred rupees to A and three hundred rupees to B and gives the residue to C, C is not a residuary legatee for in truth and in substance what is given to C is a specific bequest of four hundred rupees and, therefore, if the bequest to A or to B fails, C does not take the particular amount which was given to A or B. The question, therefore, resolves itself into this: was the testator in Clause 6 dealing with a particular fund or a particular ascertained part of the property, and whether having dealt with that particular fund or that particular part of the property under sub-clauses (a), (b), (c) and (d), did he then deal in sub-clause (e) with the residue of that particular fund or that particular part of the property? In order to arrive at a conclusion, one must carefully look at the scheme of the will. Under Clause 3 the testator gives certain pecuniary bequests. Under Clause 4 he makes specific bequests of two of his properties. Under Clause 5 he makes a specific bequest of one of his properties and gives his household furniture, *etc.*, to his wife. Finally under Clause 6 he in the first place, after providing for the payment of his debts, funeral and

testamentary expenses, gives all his personal estate to his wife absolutely. Then under sub-clauses (b), (c) and (d) he makes specific bequests of two of his properties, "Goolshanabad" and "Rehemet Manor". Having then dealt with all his personal properties, and having dealt specifically with some of his immoveable properties, he winds up by giving the rest and residue of his immoveable estate to his six sons. It is true that Clause 6 is preferred by the expression "I give and bequeath all the residue of my estate unto my trustees absolutely upon the following trusts." But that to my mind does not constitute the whole of Clause 6 as a residuary clause. All that it means is that having dealt with some of his properties in Clauses 1 to 5, he proceeds to deal in Clause 6 with the rest of his property; and, as I have said, having dealt with his personal property and two of his immoveable properties in sub-clause (a) to (d), he gives all the residue of his immoveable estate to his six sons. In my opinion, sub-clause (e) constitutes a true residuary clause. As stated by *Grant M.R.* in *Leake v. Rabinson*, (1817) 2 Mer. 363 at p.393, everything which is ill-given by the will does fall into the residue; and it must be a very peculiar case indeed, in which there can at once be a residuary clause and a partial intestacy, unless some part of the residue itself be ill-given. I do not think that in this case the residue is ill-given.

It may be suggested that there is a residuary clause as to personal estate in Clause 6(a) whereby the testator gives all his personal estate to his wife absolutely after making certain dispositions with regard to it and that there is a second residuary clause in Clause 6(e) where the testator deals withy the residue of his immoveable property. Even if the will be looked at in this way, there is nothing to prevent there being two residuary clauses in a will. In *In Re Mason; Ogden v. Manson*, (1901) 1 Ch. 619, there were two perfectly good residuary devises, the one limited to freeholds and the other limited to copyholds. It is true that in the case of every residuary clause there must be some quality of universality

to use the expression of Lord Justice *Rigby* at p.230. The test applied by Mr. *Uthwati* in *In Re Parnell; Ranks v. Holmes,* (1944) 1 Ch. 107 was p.110:

"The question here, therefore, is: Does the 'remainder' mean the residuary trust fund less the various sums, or what remains of the residuary trust funds after giving effect to the gift of those various sums?"

The learned Judge further points out that if the words of the will are rationally capable of two constructions, and one of them results in an intestacy and the other does not, one should prefer the latter construction. If, therefore, on a fair and reasonable construction of Clause 6(e) of the will, I can come to the conclusion that the testator intended his six sons to take all the devises of immoveable properties which did not take effect, I should rather lean towards that construction than a construction which would result in a partial intestacy. The rule as to construction, although perhaps in that context applicable only to personality, is stated in similar terms in Hawkins on Wills, Edn. 2 (p.57):

"If a part of a particular fund be given to one person, and the residue to another, it is a question of intention, not subject to any particular rule whether the gift of the residue is to be read as a gift of the mere balance of the fund after deducting the amount of the sum previously given out of it, ... or a gift of the entire fund subject to the gift previously made out of it."

In my opinion in this case the bequest is not merely of such of the immoveable properties as are left over after accounting for those which are specifically dealt with earlier, but it is the bequest of all the immoveable properties subject to those properties with which the testator has already dealt. I, therefore, hold that the bequest under Clause 6(d) having failed, falls into the residue.

It has been contended by the Advocate-General that there is a revocation of the bequests contained in Clause 6(c) and Clause 6(d). The question might be academic as far as Clause 6(d) is concerned because whether the bequests is void or is revoked the result would be the same, namely, it would fall into the residue. But the question has got to be considered with regard to the life interest given in "Rehemet Manor" in Clause 6(c). The first question is whether in questions of revocation the law to be applied is Hindu law or Mahomedan Law where the testator is a Khoja. In *In Re Haji Mahomed Abba,* 24 Bom. 8, Sir *Lawrence Jenkins,* C.J. granted probate of a nuncupative will to a *Cutchi Memon* holding that as far as the making of the will is concerned, a *Cutchi Memon* was governed by Mahomedan law. Then *Tyabji,* J, in *In Re Aba Satar*, 7 Bom. L.R. 558, held that an unattested will of *Cutchi Memon* was valid as the question had to be determined according to Mahomedan Law which did not require attestation. Similarly, in *Sarabai Amibai v. Mahomed Casum*, 43 Bom. 641, Marten J. as he then was, held that probate could be granted to an unattested will of a *Cutchi Memon* as *Cutchi Memons* were governed by Mahomedan law on the question of execution of wills. There is no authority of our Court as to revocation of wills; but in a recent decision of the Madras High Court, *Wadsworth*, J., has taken the view that a *Cutchi Memon* is governed by Mahomedan law not only with regard to execution of his will but also with regard to its revocation: *Mohomed Yoonus v. Abdur Sattar*, A.I.R. 1938 Mad. 616. The principle seems to be that even though in matters of construction of a will, Khoja or a *Cutchi Memon* may be governed by Hindu Law with regard to the making of the will, with regard to its form, with regard to its revocation or to the revocation of parts of it he is governed by Mahomedan law. The construction of a will only comes into question when the will begins to speak which is at the death of the testator. The making of the will or its revocation is concerned with the acts of the testator himself while he is alive; and with regard to these

acts, he is governed by his own personal law, namely, the Mahomedan law and not Hindu law which is restricted as a matter of custom to questions of inheritance and succession.

Now, under Mahomedan law, revocation can be express or implied. In this case there is no express revocation of the bequest with regard to "Rehemet Manor" contained in Clause 6(c) and Clause 6(d). But the Advocate-General contends that there is an implied revocation. The facts with regard to "Rehemet Manor" property are as follows. At the date when the will was made namely, on 15th October 1934, there was only one house on the "Rehemet Manor" property called "Rehemet Manor". The property consisted of a large piece of land but the rest of the land was not built upon. In 1936, the testator commenced constructing three bungalows on that property and they were ready in 1937. These three were named "Bait-ul-Yumn", "Bait-ul-Saddah" and "Bait-ul-Sirur". He started constructing another bungalow on the same plot of land in the middle of 1937 and it was ready by the end of that year. It was called "Bait-ul-Hana". One of these bungalows, namely, "Bait-ul-Yumn" was gifted away by the testator to his wife on 16th April 1937. Therefore when the testator died, on the "Rehemet Manor" property, besides "Rehemet Manor" there were three other houses belonging to the testator, namely, "Bait-ul-Hana", "Bait-ul-Saddah" and "Bait-ul-Sirur".

The Advocate-General relies on the statement of the law to be found in Sir *Dinshah Mulla*'s treaties on Mahomedan Law, End.12, Page 121:

"A bequest may be revoked by an act which occasions an addition to the subject of the bequest, or an extinction of the proprietary right of the testator."

Relying on this statement, the Advocate-General urges that in the case before me there is an addition to the subject of the

bequest, namely, the "Rehemet Manor" property by the construction of three new properties on it. No authority is cited by Sir *Dinshah Mulla* for his statement of the law but he relies on *Hamilton*'s Hedaya and *Baillie* on Mahomedan Law. *Hamilton*'s Hedaya, Vol.4, at p.478, has this passage:

"Upon the testator either expressly rescinding his bequest, (as if he were to say, 'I retract what I had bequeathed,') or performing any act which argues his having rescinded it, retractation is established. It is established, in the former instance, evidently; and so likewise in the latter; for as acts are demonstrative of the inclination as much as express words, they are consequently equivalent thereto."

Then at page 479:

"If, also, he perform upon it any act creating an addition to the legacy, and this addition be so connected, that the legacy cannot be separately delivered, (as where a person bequeaths the flour of wheat, and afterwards mixes it with oil, — or a piece of ground, and afterwards erects a building on it, — or undressed cotton, and afterwards dresses it, — or a piece of cloth, and afterwards lines or covers a gown with it,) – such act is a retractation of the bequest. It is otherwise with respect to plastering the wall of a bequeathed the house, or undermining the foundation of it; for these acts do not indicate a retractation of the bequest, as they affect the legacy in its *dependencies* only."

Baillie's Mahomedan Law, Part I, lays down a similar proposition at p.628:

".....every act which occasions an addition to the subject of a bequest, when it cannot be delivered without the addition, has the effect when done by the testator, of revoking it, ... so also, if

he should bequeath fried barley, and afterwards mix it with butter, or bequeath a mansion and then build within it, or cotton and use it in stuffing or quilting, or lining a garment, in all these cases also the bequest would be void."

Then at P.631:

"If one should bequeath a mansion, and then put plaster on it, or pull it down, that would not be a revocation; but if he were to bedaub it over with mud, that would be a revocation if done largely. If he should bequeath land, and sow it with vegetables, that would not be a revocation; while, if he makes a vineyard of it, or plants tress on it, the bequest is revoked."

Now there is no doubt that these ancient Muslim texts must be considered with the utmost respect. But it must also be remembered at the same time that Muslim jurisprudence is not a static jurisprudence. It is a jurisprudence which has grown and developed with the times and the quotations from Muslim texts should be so applied as to suit modern circumstances and conditions. It is also dangerous to pick out illustrations wrenched from their context and apply them literally. Illustrations merely illustrate a principle and what the Court should try and do is to deduce the principle which underlies the illustrations. To my mind both in *Hamilton*'s Hedaya and *Baillie*'s Mahomedan Law the principle is clear that in each case the Court must consider whether the acts of the testator were such from which it could be legitimately inferred that he had an intention of revoking the bequest made by him. The Advocate-General has strongly relied on the illustration contained in *Hamilton*'s Hedaya to which I have referred, namely, that the testator bequeaths a piece of ground and afterwards erects a building on it and the bequest is revoked. The Advocate-General says that we have exactly the same circumstances here. The testator erects four buildings upon what he has bequeathed and,

therefore, the bequest is revoked. This is exactly the danger which I have just indicated of literally applying the illustration without taking the trouble of finding out what principle emerges from it. If the intention of the testator was merely to bequeath a plot of land and nothing more, then undoubtedly the construction of a building thereon would result in its revocation because the testator never intended to bequeath a plot of land with a building standing on it. But in this case what the testator has bequeathed is not a plot of land but the whole of the "Rehemet Manor" property and already at the date of the will there was a building standing on that property. If the intention of the testator was to bequeath the whole property and not merely the building and the plot annexed to it, then the mere fact that he proceeds to construct four more buildings does not result in a revocation of the bequest. The testator has not bequeathed the building known as "Rehemet Manor" and the open piece of ground attached to it, but what he has bequeathed is the "Rehemet Manor" property. Every case must depend upon its own fats and there is no rule of law as such which can be applied to determine whether a bequest is revoked or not. The intention of the testator must be inferred from his acts; and, in this particular case, in my opinion, it is not established that by constructing four buildings on the "Rehemet Manor" property the testator revoked the bequest. In my opinion the statement of the law as contained in Sir *Dinshah Mulla*'s took on Mahomedan Law, with great respect to that learned author, is much too wide. It is not in every case that an addition to the subject of the bequest necessarily results in its revocation. As I have already pointed out, it is a question of the intention of the testator, and the intention has got to be ascertained from the particular facts of each case. I, therefore, hold that there was no revocation of the bequest of the "Rehemet Manor" property contained in Clause 6(c) and Clause 6(d) of the will.

With regard to the contention that the bequest was revoked by the gift of one of the bungalows to his wife by the testator, the

point has not been seriously pressed by the Advocate-General. It is clear that revocation could only be with regard to that bungalow alone and, it is common ground that the bungalow which was gifted to the wife does not form part of the subject-matter of the bequest. The final question that remains is the determination as to what passes under the bequest of the "Rehemet Manor" property. On the one hand, it is contended by Sir *Jamshedji Kanga* that what passed is merely the bungalow known as "Rehemet Manor"; on the other hand it is contended by Mr. *Manecksha* that the three other bungalows constructed on that property, namely, "Bait-ul-Hana" "Bait-ul-Sirur" and "Bait-ul-Saddah," also passed under that bequest. The rule of construction is clear and is embodied in Section 90, Succession Act:

"The description contained in a will of property, the subject of gift, shall, unless a contrary intention appears by the will, be deemed to refer to and comprise the property answering that description at the death of the testator."

The question, therefore, is which property answers the description of the "Rehemet Manor" property at the death of the testator? It is to be noted that the testator has not bequeathed merely the building known as "Rehemet Manor" but what he has bequeathed is the "Rehemet Manor" property. It is also clear that all these three bungalows are constructed on that property; and although these three bungalows are differently named, these four bungalow together still constitute the "Rehemet Manor" property. The plaintiff admits in the plaint that the four bungalows were constructed on that property. This fact is made more clear by the manner in which accounts were kept when these bungalows were being constructed. The headings of the accounts describe the bungalows as being built upon the property known as the "Rehemet Manor" property. The plaintiff has led the evidence of *Alladin Mahomed* who was the manager of the estate of the deceased; but

that evidence to my mind has not elicited any fact which is material to the determination of this question except that there was a separate entrance from Warden Road to each of these three bungalows constructed on the "Rehemet Manor" property. But that by itself would not constitute the three bungalows something different from the "Rehemet Manor" property. If all the four bungalows answer the description of the "Rehemet Manor" property at the death of the testator as I hold that they do, then the only question is: Is there any contrary intention appearing in the will which would lead me to decide that what the testator wanted to bequeath was not the whole of the "Rehemet Manor" property but only the "Rehemet Manor" bungalow with the land it stands on? Far from there being anything in the will which supports Sir *Jamshedji*'s contention, the language of the will is clear and emphatic that the testator intended to bequeath the whole of the "Rehemet Manor" property.

The facts of the case in *In Re Evans; Evans v. Powell*, (1909) 1 Ch. 784, are very similar to the facts before me. There the testator by his will made in 1901 devised to his wife for life, with remainder to his daughter. "House and effects known as Cross Villa situated in T." At the date of his will he was possessed of half an acre of ground with a house upon it, the premises being known as "Cross Villa." In 1906, upon a part of the ground, which he separated from the rest by a hedge, he erected two semi-detached dwelling-houses which he named Ashgrove Villas. He died in 1908. The Court held that under the devise the whole of the property with all the buildings thereon passed. It is to be noted that in this case he actually separated part of the ground by a hedge and on that separate ground he erected two houses to which he gave a name different to the name which the original property bore and yet the Court came to the conclusion that the whole of the property passed under the devise. *Joyce*, J., has enunciated the principle as follows (p.786):

"When ..... the description is generic, as "all my lands in the country of X,' the subject of the devise being capable of increase or diminution, all the testator's lands in the country of X at the date of his death will pass; and where there is such a particularity in the description of the subject of a gift as to shew that it was some object in existence at the date of the will that was intended to pass, it is considered that there is sufficient evidence of a contrary intention to exclude the application of the provisions of Section 24."

In the case before me the description "Rehemet Manor" property is a generic description of the property and lands owned by the testator. It is not a gift of the particular bungalow known as "Rehemet Manor". In *In Re Will's; Spencer v. Willis,* (1911) 2 Ch. 563, a testator by his will made in 1885 devised to his wife "all that my freehold house and premises situate at Oakleigh Park, Whetstone in the country of Middlesex, and known as "Ankerwyke', and in which I now reside." The testator died in 1901, an between the date of his will and his death he purchased two plots of adjoining land, one contiguous to his house and the other on the opposite side of the road, using them in connection with his house, and with another plot bought before the date of his will. The Court held that what passed under the gift was the house and premises known as "Ankerwyke" at the date of the testator's death and the devise included the plots bought subsequently to the date of the will. *Eve* J., at p.569 observed: "It comes then to be a question of fact, what was known as 'Ankerwyke' at the date of the testator's death?" and he held that the plots subsequently purchased were known as part of 'Ankerwyke.' Similarly in this case it is a question of fact as to what was known as the "Rehemet Manor" property at the date of the death of the testator. On the admissions made by the plaintiff and on the evidence of the books of account maintained by the testator himself, it is clear that what was known as 'Rehemet Manor' property at the death of the

testator was not merely the "Rehement Manor" bungalow but the "Rehemet Manor" bungalow and the other three bungalows which were erected on that property.

A Wasiyat is also lawful in favour of the following objects: as stated in Raddul Muktar Vol V pg 652.

a. To the poor generally or a particular body of them.

b. To the Holy Shrine of the Kaaba or any mosque.

c. To Almighty God or to spend in the way of God (Sabil illah)

d. For Wajuh-ul-Khair or Wajub-ul birr (good or meritorious purposes generally

e. 'To fight to the way of God' *i.e.* in the propagation of faith;

For the performance of religious ceremonies over the tombs of deceased person (Urs) celebration of Moharram.

f. For the children of one's heir, the kindred, neighbors.

g. For the emancipation of slaves;

h. For the payment of one's debts;

i. A bequest for feeding cattle is also lawful.

SHIA LAW

Under the Shia Law bequests are lawful for the following purposes—

(a) for offering prayers for the testator in perpetuity or for a limited period;

(b) for carrying the body of the deceased to Kerbala or any other holy place;

(c) for someone to perform a pilgrimage on behalf of the testator;

(d) for burning lights and putting flowers on his grave or in the shrines of the Imams;

(e) for relieving the poor Syeds of Kerbela and Najaf;

(f) for feeding the poor on particular holy festival;

(g) for reading Mursias (elegies) in the Imambaras;

(h) for offering sherbet or supplying water in the time of the Moharram and such like objects;

(i) For the performance of religious ceremonies on the testator's behalf; for example, A on the point of death may ask B to perform the prayers which he has left unperformed during his lifetime, and B accepts the Wasiyat, it is valid and he will be bound to perform the same.

SHAFEE LAW

According to shafee law a will is valid for following pious purposes:—

Faraiz:—those expressly ordained *viz*; Haj, Zakat, for prayer misses.

Wajibat :—such as sacrifice alms of FITR and charity on day of breaking fast.

Nawafil:—such as non obligatory charity to the poor, the building of mask or voluntary pilgrimage.

Secular Bequest:- in case for bequest for secular purposes priority is not observed and they are reduced rateably.[1]

CONTINGENT AND FUTURE BEQUESTS

As to future, conditional and contingent bequests the law treat them on a footing of equality with gifts and unless there is special provisions, the rules applicable are similar. But it is a settled law that a contingent bequest is void.[2]

However a bequest cannot be said to be contingent merely because it is made subject to the consent of heirs.[3]

POWER OF APPOINTMENT

A Muslim cannot bequeath a power of appointment which is a peculiar feature of English law and unknown to Mohammedan Law.[4]

WHEN WASIYAT TAKES PLACE

According to injunction of Quran, Surah Nisa, Verses 11, if a Muslim dies leaving behind him legacies, debts the ordain of Allah is that his Matruka property should be divided amongst his heirs only after the payment of funeral expenses, debts and legacies as the debts and legacies are the first charge on the estate of a deceased person before distribution takes place. The English text of Quran is extracted below. *[The entire arrangement is valid only after paying the bequest, which he has, bequest and his debts]*

1. Hidaya 676, Baillie 1,636.
2. AIR 1947 Bom 122, AIR 1930 Bom 191, ILR 54 Bom 358.
3. AIR 1928 ALLAH BAD 494 : ILR 50 ALLAH BAD 748.
4. *Sardar Nawazih Ali's* case AIR 1948 PC 134

ALTERNATIVE BEQUEST

An alternative bequest is held to be valid.[1]

In the above case a Kutchi Memon who had no son at the date of his will bequeathed the residue of his property in effect as follows:

> *"should I have a son and if such son be alive at my death my executors shall hand over the residue of my property to him, but if such a son dies in my life time leaving a son, and the latter is alive at my death, then my executors shall hand over the residue to him. But if there by no son or grand son alive at my death my executors shall apply the residue to charity."*

The testator dies without having ever had a son. It was held that this was not a gift in futuro, but it was an absolute gift in the alternative and the charity was entitled to the residue.

CHAPTER VI

LIMITATION ON TESTAMENTARY DISPOSITION

In the preceding chapter we have studied with regard to the nature of the property which can be bequeathed. In this chapter we shall deal with the power of a Muslim while

1. *Advocate General vs. Gimba Bai*, 1917, 41 Bom 181, 31 I.C. 106

transferring the property through a will and the restriction imposed thereupon by the law. In other words in this chapter we shall answer the questions as to how far a property of a Muslim can be bequeathed in favour of his heirs, non-heirs and what is the limitation on his testamentary power, and whether he has got unlimited power to transfer his property through a will in favour of his heirs and non-heirs.

BEQUEST TO HEIRS, NON HEIRS AND ITS LIMITATION

According to all the schools a bequest to any one of the heirs is invalid, unless it is consented by the other heirs. This rule of law was upheld by Calcutta High Court in its two judgments pronounced in *Bafatun vs. Velayati Khanam*,[1] and *Khajur Unnisa vs. Roshan Jehan*,[2]. A general rule in this regard is clearly laid down in the case of *Ghulam Mohammed vs. Ghulam Hussain*, thus, that a bequest in favour of an heir is not valid unless the other heirs consent to the bequest after the death of the testator.[3]

Allahabad High Court has also accepted these restrictions as valid restrictions on the power of disposition of a testator, holding that, under the Mohammedan Law no unlimited testamentary power is given to a testator.[4]

In *Salayji vs. Fatima Bibi*,[5] it was held by their Lordships that Mohammedan Law does not allow a testator to leave a legacy to any one of his heirs unless the other heirs agree.

1. (1903) IL 30 CALCUTTA Pg 683.
2. (1876) LR 3 I.A. 291
3. (1932) 59 I.A. All 93=136 I.C. Pg 454=AIR 32 PC 81.
4. AIR 1933 Allahabad 934.
5. AIR 1922 PC 391.

It was further held that the burden of proving the consent was on the party claiming under the Will. Thus there is no doubt that a bequest under Mohammedan Law to an heir even to the extent of 1/3rd cannot be upheld, unless the other heirs consent to the bequest after the death of the testator.

Following the above decision Rajasthan High Court in the case of *Furqan vs. Mumtaz*,[1] ruled that "the policy of the law is to prevent the testator from interfering by Will with the course of devolvation of the property according to law among his heirs, although he may give a specified portion as much as third to stranger. The reason is that a bequest in favour of heir would be an injury to the other heirs as it would reduce their share, and would consequently induce a breach of the ties of kindred. In this case the plaintiff respondent *Mumtaz Begum* filed a suit for possession alleging that the land in dispute was given to her by her father under a will and she was forcibly dispossessed by the defendant (Appellant) who denied the execution of the will and pleaded that he had been in possession after the death of *Mehrab Khan* (father of *Mumtaz Begum*) as his heir as being the son of his brother *Irfan Khan*, the Rajasthan High Court confirmed the well-settled principle that a bequest in favour of an heir, even to the extent of one-third was not valid under the Hanafi Law unless the other heirs consented it, expressly or impliedly after the death of his testator.

Another judgement of Kerala High Court which was reported in AIR 1964 Kerala Pg 200 is also extracted below so that the readers may understand this principle.

Who is an heir? this question will have to be answered and determined not at the time of the will but soon after the testator's death. A grandson whose father has died in the lifetime

1. AIR 1971 Raj. 497.

of the testator is a non-heir when he co exists with a son and a bequest to him not exceeding a third is valid.

In the following cases also it was held by the courts of India that a bequest to an heir is not valid unless the others heirs consent to the bequest after the death of the testator and that any single heir may consent so as to bind his own share.

(1) *Ghulam Mohammed v. Ghulam Husain,* (1932) 59 I.A. 74, 54 All. 93, 136, 136 I.C. 454; ('32) A.PC. 81, *Shek Muhammad v. Shek Imamuddin,* (1865) 2 B.H.C. 50; *Ahmad v. Bai Bibi* (1916) 41 Bom. 377, 39 I.C. 83 (Bhagdari property); *Muharram Ali v. Barkat Ali,* (931) 12 Lah. 286, 125 I.C. 886, ('30) A.L. 695; *Ghulam Mohammad v. Ghulam Husain,* (1932) 59 I.A. 74, 54, All. 93, 34 Bom L.R. 510, 136 I.C. 454, ('32) A.PC. 81; *Bafatun v. Bilaiti Khanum*, (1903) 30 Cal. 683.

(2) *Salayjee v. Fatima*, (1923) 1 Rang. 60, 63, 71 I.C. 753, ('22) A.PC. 391; *Mohammad Ata Husain v. Husain Ali,* (1944) 216 I.C. 276, ('44) A.O. 139.

SHIA LAW

According to the Shia Law a testator can leave a legatee to an heir if it does not exceed 1/3 of his share and this does not require the consent of other heirs. In short, a legacy in favour of an heir to the extent of 1/3 of the share is valid without the consent of other heirs and if it exceeds one third then the consent of other heirs is required. Such consent can be given either before or after the death of the testator.

Under the Sunni Law, ratification must always be after the death, (but) consent before death is of no value.

The voluntary consent given by the heirs during the last illness of the testator is irrevocable, because the heir is supposed to have acquired a right at that time.

When a person has no heirs he can leave his entire property to any one of his choice.

The author of the Shariya has laid down that when a testator has excluded one of his children from succession and left the property only to the others, his Wasiyat is invalid and the inheritance will be succeeded by all his heirs. The Shia law further lays down that supposing a father makes an unequal division of property among his children or other heirs to take effect after his death (a taksim-bi'l-wasiat), if it is assented to by the heirs it is lawful without question, but if no such assent is given what would be the effect? An example of such a case is given in the Jamaa ush-Shittat. A person who was going on a pilgrimage made a partition of his estate among his children in the following manner-(a) to some he gave properties in excess of their legal shares on account of the dower due of their mother; (b) to others he gave certain sums of money in excess of their shares to defray the expenses of their marriages. A question was raised by the heirs, who received smaller shares, as to the validity of the taksimnamah-bi'l-wasiat. The dictum of the Mujtahid was to the following effect—

> "The dower is a debt which is bound to be discharged before the payment of the legacies. The properties given in lieu thereof have been lawfully devised. The sums of money left to some of the children in excess of their legal shares are in the nature of legacies and must come out of one-third of the testator's estate. The remainder of the property must be divided among the children according to their legal shares. (*Jamaa ush-Shittat, comp. Baillie's Imamia Law, Pg 233).*

As under the Hanafi Law, a bequest in excess of the one-third is valid with the assent of the heirs. When there are several heirs, and one or more of them allow the excess, it is valid to the extent of his or their share in it. The assent of an heir is effective when given after the testator's death. Whether it is equally valid before his death is a question on which there are two opinion, the more common and approved of which is in favour of its being binding on the heir. When the consent is given after the testator's death it is a ratification of his act and not a gift de novo from the heir, consequently it does not possess by the legatee to complete its validity.

According to Raddul Mukhtar a bequest to a stranger or non-heir is valid to the extent of one third, but it may be validated in respect of a larger portion of the estate of the testator with the consent of the heirs after his death.

The consent of the person who is sick is subject to the same rules as his legacy.[1]

If the heir is sane, and adult, he possesses the capacity of consent. If he happens to give his consent at the time when he is suffering from illness and if he recovers from that illness his consent is valid, but if the original legatee was not the heir of the assenting heir who has died, the assent would validate the legacy to the extent of one third of his share in the inheritance of the original testator, such consent may be given either expressly or by necessary implications as held in the cases of:

Daulat Ram v. Abdul Qayyum (1902) I.L. 26 Bom, pg 497

Sharifa Bibi v. Ghulam Mohammed Dastagir Khan, (1892) I.L 16 Madras 43

1. *Raddul Mukhtar, Vol 5, Pg 644, Bailee's digest Pg 626, Fatawa e Alamgiri Vol 5, Pg 148.*

An acknowledgment of debt by an heir is valid, though a bequest in favour of an heir is invalid.

CASE LAW ON CONSENT OF HEIR

In the case of *Ali Raza vs. Nawazish Ali*,[1] the High Court of Oudh examining validity of a will as an independent document, (or) ruled that will is not an independent document, it is a document which recites him (the legatee) as Pissar Parwardah and in that capacity he is given the property after the death of the testator. If the status and capacity of the respondent is not provided he will not be entitled to get anything on the basis of will also.

A consent of heir is not valid after previous repudiation.[2]

Consent given by heirs of a Muslim testator (who were insolvent), to the will was invalid, as it was presumably given to save the property from going into hands of the receiver or that this property has been attached. In this it was also held that consenting heirs must be major and sane and solvent.[3]

In the case of *Yaseen Imam Bhai Sheikh vs. Hajera Bai and others*, the Bombay High Court was posed with a question as to whether power of testator to the extent of 1/3rd of the estate is valid and who should establish the factum of consent. Bombay High Court giving the answer ruled that Mohammedan law provides that a Mohammedan cannot by will dispose of more than 1/3rd of the surplus of his estate after payment of funeral expenses and debts. That a bequest in excess of 1/3rd cannot take effect, unless the heir consent thereto after the death of the

1. AIR 1943 OUDH 243.
2. *Mahabir Prasad v. Mustafa, AIR 1927 P.C. 174.*
3. *Imdadul v. Parbi Din,* AIR 1937 Oudh 239.

testator. It if for the person who claims under a will to establish that other heirs had consented to bequest.

In the cases of *Mohd Ala Hussain vs. Hassan Ali,*[1] and *Mohd Hussain vs. Aishabai*[2], it was held that consent of heirs may be inferred, if the will is not questioned for a long time and legatee gets benefit from it, and that consent can be inferred from the conduct of the heirs.

Consent of the heir which can validate the bequest in excess of 1/3rd may be given either before or after the death of the testator. It was further ruled by the Allahabad High Court in this case that consent once given by heir cannot be withdrawn.[3]

Lahore High Court was also of the view that a bequest in excess of 1/3rd is not valid without the consent of the heirs.[4]

A bequest is valid to the extent of one third not only to a stranger but also to heir—A bequest in excess of 1/3rd, will of course not be valid without the consent of heirs.[5]

A bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator.[6]

Bombay High Court has also ruled that a Muslim cannot bequeath more than 1/3rd of his property whether in favour of a stranger or his heirs.[7]

1. AIR 1944 Oudh 139.
2. AIR 1935 Bom. 84.
3. *Hussain Begum v. Mohd. Mehdi,* AIR 1927 All.340.
4. *Badrul Islam v. Ali Begum,* AIR 1935 Lah. 251.
5. *Mohd. Ata Hussain v. Hussain Ali,* AIR 1944 Oudh 139.
6. *Ghulam Mohammed v. Ghulam Hussain,* AIR 1932 P.C. 81.
7. *Damodar Kashinath Rasana v. Smt. Shahajad Bibi,* 1988 (2) Bom. C.R. 339.

In the case of Quadri Jehan it was ruled that a bequest cannot be said to be contingent, merely because it is made subject to the consent of the heirs.[1]

A contingent bequest is valid, as held by Bombay High Court in the case of *Abdul Shakoor v. Abu Bakkar*[2].

If a Mohammedan left no heirs, he can bequeath his entire property which will not, in that case, escheat to the Government but will go to universal legatee.[3]

If, however, any heir refuses to give his consent to a bequest his subsequent assent would not invalidate it.[4]

In determining the bequeathal, one third of the property which is subject to specific rules of devolution should not be taken into consideration.[5]

It is permissible to make a bequest of the thing itself in favour of one person and of its produce or use to another.[6]

Oudh High Court has ruled that, Consent of heirs is necessary, even when inheritance is governed by any custom.[7]

In the case of Qamar Ali it was ruled by Calcutta High Court that, Consent of other heirs would validate a will.[8]

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1. *Qadri Jahan v. Fazal Ahmad,* AIR 1938 All. 494.
2. AIR 1930 Bom. 191.
3. *Allah Baksh v. Mohd Umar,* AIR 1929 Lah. 444.
4. *Mahabir Prasad v. Mushtafa Hussain,* AIR 1937 P.C. 174.
5. *Mohd. Ziaullah v. Rafiq Mohd.,* AIR 1939 Oudh 213.
6. *Mst. Mehraj Begum v. Din Mohammed,* AIR 1951 Lah. 669.
7. *Irshad Ullah v. Mst.Fakiran,* AIR 1937 Oudh 4.
8. *Anwar Ali v. Qamar Ali,* AIR 1951 Cal. 7.

In *Abdul Manan Khan v. Murtaza Khan,*[1] the court held that, a bequest in favour of an heir is invalid unless the other heirs consent to it after the testator's death. A provision has been made in law to obtain consent of the heirs after the death of the testator; if by any reason a will, of more than 1/3 of the properties is sought to be bequeathed to an outsider, and to any extent to a heir. Such consent can be inferred from conduct. Acts of attestation of will by legatees and taking of possession by them of property bequeathed could signify such consent.

The present case clears the difference between a gift and a will. In *Kajoorunnisa v. Raushen Jehan*,[2] it was held that the policy of Mohammedan Law appears to prevent a testator from interfering with course of devolution of property according to law among his heirs. The facts of the above case were as follows:

> D, a Muslim died in 1841, and his eldest son E possessed himself of all his property by virtue of a deed of gift and will executed in the year 1839, in 1859 the widow of a younger son, as guardian of her infant daughter R, filed a suit to set aside both deed and will, and to recover the property, but after the judgement was obtained she withdrew from the suit on terms of a compromise filed therein. In 1886, R and her husband sued E, who was represented by Khjoorunnisa, to set aside both deed and will, and to recover the property, but after the judgement was obtained she withdrew from the suit on terms of a compromise filed therein. In 1886, R and her husband sued E, who was represented by Khajoorunnisa, to set aside the said compromise on the ground of minority, covered by that suit as also a share derived by her father from his predeceased brother, a share in the right of

1. AIR 91 Pat. 154
2. ILR 2 CALCUTTA 184.

her grand mother and a share of the property recovered by E under the previous decisions of the Privy Council. The compromise was set aside and therefore the parties were restored to their original positions. It was held by the Privy Council that the deed of gift by D, purporting to give E one-third of the property was without consideration and was unaccompanied by delivery of possession, and was only intended to operate after D's death. This was an evasion of Mohammedan law. The testator could not by will interfere with the devolution of property among the heirs.

The Calcutta High Court ultimately accepted the restriction imposed under Muslim law of will on the power of testator holding that that a Mohammedan cannot by Will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequest in excess of the legal third cannot take effect unless the heirs consent thereto after the death of the testator. This view is also explained by Hidaya 671 and Bailee 625.

Whether a person is an heir or not, will be determined at the time of the testator's death because a person who is an heir at the time of making the will may not remain an heir at the time of testator's death and vice versa.

For example, A, by his will bequeaths certain property to his brother. The only relatives of the testator living at the time of the will are a daughter and the brother. After the date of making the will a son is born to A. The son, the daughter and the brother all survive the testator. The bequest to the brother is valid, for though the brother was an expectant heir at the time of the will, he is not an heir at the date of the death of the testator, for he is excluded from inheritance by the son. If the brother and the daughters had been the sole surviving

relatives, the brother would have been one of the heirs, in which case the bequest to him could not have taken effect, unless the daughters assented to it.

In the case of *Jeewa vs. Yakub Ali*,[1] it was held, that if the heirs do not consent, the remaining two thirds must go to the heirs in the shares prescribed by the law. The testator cannot reduce or enlarge their shares nor can he restrict the enjoyment of their shares.

As per Hidaya Pg 671, consent once given by the heirs cannot be rescinded.

In *Daulat Ram vs. Abdul Qayyum*,[2] and in the case of *Mohammed Hussain vs. Ayesha Bai,*[3] it was ruled that the consent need not be expressed, it may be signified by conduct showing a fixed and unequivocal intention.

A testator can bequest his legacy to an heir and to a non-heir also by the same will, but the legacy to the heir is invalid unless assented to by the other heirs, but the legacy to a non-heir is valid to the extent of one third of the property as held in the case of *Mohammed vs. Auliya Bibi*,[4] and in the case of *Ghulam Jannat vs. Rahmath Deen*[5].

In the case of *Jabbar Khan vs. District Kacheri*,[6] it was held, that consent of the heirs could not be implied from mere silence on their part at the mutation proceedings.

1. (1928) 6 Rangoon 542 = 114 Indian Cases 303.
2. (1902) 26 Bom Pg 497
3. 155 I.C. Pg 334
4. (1961) I.C. Pg 947
5. 153 IC Pg 133.
6. (1956) Nagpur Pg 501

The consent necessary to give effect to the bequest, must be given after the death of the testator, for no heir is entitled to any interest in the property of the deceased in his lifetime.

The fact that an heir consenting to a bequest to a co-heir is an insolvent at the time when the consent is given is immaterial, the consent is effective all the same, as held in *Azeez Unnisa vs. Chiene*,[1] and in the case of *Imdadul Rahman vs. Phurbi Deen*,[2] in which case the decision given in *Kalicharan vs. Mohammed Jameel*,[3] was disapproved.

However if the succession is governed by custom which does not destroy the testamentary capacity of the owner the rule still applies. The bequest to an heir is invalid without the consent of those who are the other heirs according to custom as held in the case of *Irshad Ulla Khan vs. Fakheer Khan*[4].

Consent once given cannot be withdrawn nor vitiated on the ground that it was made under mistake of law.[5]

In the case of *Salayjee v. Fatima,*[6] it was held that, Entire will would be binding if all heirs agree to the bequest but if only some of them agree to it, their share would be bound by it.

In the case of *Ghulam Mohd. v. Ghulam Hussain,*[7] the Privy Council answered the question as to whether a consent given by

1. (1920) 42 ALL Pg 593 = 59 I.C. Pg 296.
2. 166 I.C. Pg 980 (37)
3. 122 I.C. Pg 762
4. 165 I.C. Pg 322 (37).
5. *Muttmuyin vs. P.L.S. Chettiyar,* AIR 1935 Rang. 318, *Hussan Begum vs. Mohd Mehdi,* A 27 All 340, *Manohar Prasad vs Mustafa,* A 27 PC 174
6. AIR 1922 P.C. 391
7. AIR 1932 P.C. 81.

a Guardian of minor is valid or not and held that if the heirs are minors at the time of testator's death, consent may be given after attaining majority, and that a consent given by their guardian is not valid.

In the case of *Ma Khatoon vs. Ma Mya,*[1] it was held that it is not necessary that consent should be expressly given. It may be given either expressly or impliedly.

Sindh High Court in the case of *Hayatuddin vs. Mst. Rahiman,*[2] considered the question as to when the consent is to be given and ruled, that it is necessary that consent to the bequest should be given after the death of the testator.

ABSENCE OF HEIRS

The limit as to the testamentary powers has been provided for the benefit of the heirs. If a Muslim left no heirs he can bequeath his whole property which will not, in that case escheat to the Government but will go to the universal legatee as held in the cases of *Mohd Ameenuddin vs. Kabeeruddin*[3], *Allah Baksh vs. Mohd Omer*[4], and *Ekan Bibi vs Ashraf Ali*[5].

SECOND RESTRICTION ON TESTAMENTARY POWER

As we have stated above that the testamentary capacity of a Muslim is limited in two ways. He does not possess unlimited power of making disposition by will. There are two-fold

1. AIR 1936 Rang. 448
2. AIR 1928 Sind. 73
3. 4 S.D.A.
4. AIR 29 LAHORE 444
5. 1 WR 152.

restrictions on the power of a Muslim to dispose off his property by will. The two-fold restrictions are in respect of the person, in whose favour the bequest is made, and as to the extent to which he can dispose off his property.

The second limb of this chapter with regard to the limitation on testamentary power of a Muslim is discussed below. The Quran expressly sanctioned the power of making testamentary disposition and regulated the formalities and conditions to which it is subjected.[1]

There are also indications in the Quran that a Mohammedan may not so dispose off his property by will, as to leave his heirs destitute.[2]

The rule of law of Wasiyath prescribed by the prophet (MPBUH) has been discussed above.

The limit of one third is not laid down in Quran. This limit derives sanction from a tradition reported by Hazrath Abee Vekaas as referred supra.

The General Rule of Muslim Law of Wills regarding limitation, as regards possession has been explained in *Ghulam Mohammed v. Ghulam Hussain.*[3] The full text of the judgement is reproduced below, so that the readers may understand this rule:

> One *Khadim Husain*, a Mahomedan governed by the law of the Hanafi school, died on 21st August 1901. Two days before his death he made a will in the following terms:

1. Quran V, Verse 75.
2. (Surah IV).
3. AIR 1932 PC 81.

"I, *Shaikh Khadim Husain*, son of *Munshi Aman Ullah*, deceased, resident, jagirdar and talukdar of Ganeshpur, District Basti, declare as follows:

"I own and possess moveable and immovable property of every description (such as) houses, groves, *etc.*, in the Districts of Basti, Gorakhapur and Fyzabad, and it is in my possession and enjoyment as a proprietor without the participation of anyone else. The immovable property consists of three kinds of property: one is that which is meant for maintenance of disciples and female slaves (under a Will, dated 25th November 1866, my father, *Maulvi Shaikh Aman Ullah*, deceased gave (this property) to me alone). This property which he had, under a Will, dated 13th June 1937, got from his father for maintenance of the disciples and the female slaves as proprietor, is the panchmi share in the entire taluka of Ganeshpur. My father, having included a panchmi share in his self-acquired property to that property, conferred it on me as proprietor under the said will. Accordingly, after the death of my father, I, the executant, entered in possession and occupation thereof under the said will. The second kind of the immovable property is that which has devolved upon me from my deceased father and the other persons; the third is that which I, the executant, myself have acquired. I have two sons, *Shaikh Ghulam Husain* and *Shaikh Ghulam Muhammad* minors; three daughters, Mt. *Roshanunnissa*, Mt. *Khairunnissa* and Mt. *Mumtazunnissa*, and one wife, Mt. *Amna Bibi*, who is now alive. As there is no certainty of life, I, the executant, also think it proper to make a will in conformity with the custom of my family in order that no dispute may arise in future among my heirs. My elder son, *Ghulam Husain*, minor, shall remain in proprietary possession of the panchmi share in taluka Ganeshpur together with the panchmi property acquired by my deceased father given to me under the will, dated 5th November 1866, for maintenance of the disciples and the female slaves in accordance with the conditions laid down in the Will made by my

father; and a one-fifth share acquired by me; the executant, *Shaikh Ghulam Husain* aforesaid, should, from the income thereof, maintain the disciples and the female slaves, who are alive now, or in future those who may be increased in their generations, (Paper torn). The disciples and female slaves have no proprietary right in the said property. They are entitled to food and clothing only. If any of them disobey or refuse to render service or take up service at another place, then *Shaikh Ghulam Husain* aforesaid is empowered to discontinue his maintenance. Both my sons, *Shaikh Gulam Husain* aforesaid who is born now, shall after me be the owners in possession of all the property which I have, by right of inheritance, received from my deceased father, *Maulvi Shaikh Aman Ullah*, and the other persons, and which I have myself acquired, and out of which property four-fifths share has been saved. So long as they live jointly, they shall appropriate the profits jointly, and after separation they should divide the profits of the said property half and half. Both the sons should, out of the profits of the same property, pay Rs.600/- a year to their mother Mt. *Amna Bibi*, and Rs.300/- a year to each of my daughters, namely, Mt. *Roshanunnissa*, Mt. *Khairunnissa* and Mt. *Mnmtazunnissa*, after their marriage, generation after generation. The said *Mussammats* have no proprietary power in the property. If *Shaikh Ghulam Husain* and *Shaikh Ghulam Muhammad* fail to pay the fixed amount to the said *Mussammats*, the latter are empowered to recover their annual amount by bringing a suit. When both the brothers become separate, they should, out of the profits of the property in their respective possession, continue to make payment to my wife and daughters. Both my sons are still minors. God forbid, if I die before they attain majority, their mother, *Mussammat Amna Bibi*, shall be their guardian during their minority. After attaining majority my both sons shall themselves be the owners in possession and abide by the conditions of the will and make management. This Will shall come into force after me, the executant. As long as I am alive, no one has power to cause interference. Both the sons

shall be the owners of the moveable property and the houses half and half.

In line 15 the word "milkiatan" written above the line is correct.

Hence I have executed these few presents by way of a Will in order that it may serve as evidence. Dated 19th August 1901.

Signature of *Shaikh Khadim Husain*.
(The Will executed by me is correct, in autograph)."

The principal question in this appeal is as to the construction of the will so far as regards what is referred to therein as the "panchmi" property. The appellant, the younger of the two sons of the testator, sued to establish his right, under the events which had happened since his father's death, to a moiety of this property. Respondent 1 denied his brother's right to any share at all, though it is not clear how far he claimed the property for himself. The trial Judge decided in favour of the appellant, but gave him a quarter shares only. Both parties appealed to the High Court (their appeals being numbered respectively 132 and 164 of 1925), with the result that the suit was dismissed. These appeals were heard jointly with two other appeals in suits instituted by one of the daughters of *Khadim Husain*, but in which no appeal has been taken to His Majesty in Council, and with which therefore the Board are not concerned. The other respondents are alienees from respondent 1 and have taken no part in the proceedings.

It is not disputed that under the Hanafi law, if the effect of the will was to confer a beneficial interest in the panchmi property upon respondent 1, it was invalid unless consented to by the other heirs after the testator's death. The first question therefore is whether this was the true effect of the will. The trial Judge held that it was; the High Court, on the other hand, took the view that respondent 1 was a mere trustee with no beneficial interest in the property.

The decision no doubt concerns directly only the Will of *Khadim Husain*, but the references by the testator to the Will of his father *Amam Ullah*, and the trend of the arguments in the case, make it necessary to consider the terms of his will also, and this in turn brings in the will of *Kadir Baksh*, the grandfather of *Khadim Hussain*, under which the panchmi property originated.

The Will of *Kadir Baksh* is dated 13th June 1837. He in effect divided his estate into five shares, bequeathing one-fifth, to each of his four sons, and setting aside the remaining fifth

"for the expenses of the male and female slaves and the other dependants, *etc.*, who are at present in addition to the sons and who may survive hereafter."

This share he made over to his youngest son, *Aman Ullah*. The slaves and dependants were to remain in his control; they were to get from him their necessary expenses for food and clothing, but were not to be in possession of the land, and if they were disobedient they were to get nothing. It is admitted by Counsel for respondent 1 that this bequest was, as, indeed the terms of the will show, confined to slaves and dependants living at the testator's death. It is also clear, their Lordships think, that they took no interest in the corpus of the share, and that the Will made no express disposition of it as such.

The Will of *Aman Ullah* followed much, the same lines. It is dated 25th September 1866. It recites the Will of *Kadir Baksh*, and after referring to the one-fifth made over to him (*Aman Ullah*) for the maintenance of the slaves and dependents, continues:

"Under the terms of the will executed by the ancestor and admitted by his heirs, two-fifths of the whole of the taluka (meaning evidently the one-fifth for the slaves and his own personal one-fifth)

was settled to be my own share and property of which I am in possession and occupation by virtue of private partition."

He goes on to state that he also has four sons who are "heirs and owners of my estate and property," and that following the ways of his ancestor, he has made "a Will regarding, and division of, my estate." He then makes over to *Khadim Hussain*, his eldest son,

"the one-fifth share which my ancestor has given to me for the maintenance of the dependent slaves boys and girls, as well as one-fifth of all my self acquired villages (subject to all the conditions laid down in the Will of my ancestor, dated 13th June 1837), together with the slave boys and girls that are alive at present and that may be born hereafter."

He repeats that the slaves are to be entitled to maintenance only; that they are to have "no concern with the possession of the lands"; and that if disobedient they will forfeit their rights. The balance of his estate he divides equally among his sons. It appears that some years before the date of this Will there had been litigation between the brothers, *Miran Baksh*, the second son of *Kadir Baksh*, suing for partition, and claiming that the panchmi share was divisible with the rest of the property left by his father. The principal *Sadar Amin* of Gorakpur, by a judgment dated 28th August 1860, held against the plaintiff's claim in respect of the panchmi villages, and gave him a decree for partition of his share only in the other property. The issues raised the question directly whether *Kadir Baksh*'s will established that the panchmi villages "solely belonged to the contesting defendant," *i.e.*, *Aman Ullah*, and their Lordships think that the decision must be regarded as having, answered this question in the affirmative. They have very little doubt that *Aman Ullah*'s Will was based upon this decision, and that he regarded himself as the owner of the

panchmi villages, subject only to the obligation of maintaining the slaves.

The construction of *Kadir Baksh's* will in raised in 1898, after the death of the last of the slaves, the claimant on this second occasion being *Karamat Bibi*, a daughter of *Zahur Uddin*, the eldest son of *Kadir Baksh*. *Aman Ullah* was then dead, and *Khadim Baksh* was the principle defendant to the suit. The case went into the High Court on second appeal, the sole question for decision being the construction of the Will with reference to the panchmi share. The learned Judges, their judgment dated 8th August 1901, held that there was a gift of this share to *Aman Ullah*,"

"but a gift burdened for the time being with the necessity of making provision, suitable and lifelong for the slaves and slave girls who might survive the testator.

They thought that the assignment of the share "was as regards time unconditional," and they accordingly affirmed the dismissal of the suit which the District Judge had decreed. It will be observed that this decision was in substantial account with that of the *Sadar Amin* in 1860.

Turning now to the Will of *Khadim Hussain*, with which the present appeal is more directly concerned, their Lordships note that it was made very shortly after the decision of the High Court above referred to, and they think that its terms must have been influenced by that decision. The testator begins by stating that he is

"in possession and enjoyment as a proprietor without the participation of anyone else,"

of immovable properties which include both the original and increased panchmi shares. He affirms that these shares were conferred upon him "as proprietor" under his father's Will and that he had

been in possession and occupation of them since his father's death. He then proceeds to declare that respondent 1 "shall remain in proprietary possession of the panchmi share in taluqa Ganeshpur together the with panchmi property acquired by my deceased father given to me under his Will."

Apart from any question of a wakf has been put forward for the first time, on the argument of this appeal, and with which their Lordships will presently deal, they think that *Aman Ullah* took under the will of his father *Kadir Baksh* beneficial interest in the original panchmi share, subject to the maintenance of the slaves during their lives. The slaves clearly took no interest in the corpus of the share, or in the surplus income as the life interests dropped out, and the only reasonable construction of the will would seem to be that arrived at by the High Court in 1901, which as between the parties to that suit was clearly *res judicata*.

Whether *Khadim Husain* took a similar interest under *Aman Ullah*'s Will may be more doubtful, but reading the will as a whole in the light of the surrounding circumstances, their Lordships think that the intention of *Aman Ullah* was to pass on to his son the same quality of interest in the now increased panchmi share as that which he himself had taken under his father's Will. The exact date of *Aman Ullah*'s death seems to be uncertain. It was probably not long after the date of his Will, and must in any event have occurred before July 1871, as is shown by the proceedings in a suit which went upto the High Court in 1872. *Khadim Husain* was therefore in possession of the villages for at least 30 years and their Lordships have no doubt that he regarded himself as the owner, subject only to the maintenance, at his discretion, of the slaves. The only persons interested to deny his proprietorship would be the other heirs of *Aman Ullah*, who seem to have taken no steps to assert a claim, and they are not parties to or in any way represented in the present litigation.

Khadim Husain's Will, in their Lordships' opinion, clearly purported to pass on to respondent 1 a proprietary interest in the panchmi property, now again increased by the addition of one-fifth of the other estate of the testator, subject to similar obligations. The learned Judges of the High Court would attach little, if any, weight to the references in the Will to "proprietorship" and "proprietary" rights. Their Lordships are unable to take this view of the expressions employed by the testator. They regard them as used in their ordinary acceptance, and as intended to make it clear that respondent 1 was to be the owner of the villages, subject to provision for the slaves. The latter were to be maintained out of the income only and were to have no proprietary interest in the property: whatever surplus income there might be and the reversionary interest in the corpus was to go to respondent 1

Their Lordships take no exception to the view of the High Court that there was a trust for the slaves. They think that this is probably a more correct way, of looking at the bequest than to refer to it as an onerous gift: it would, they think, clearly come within the definition of a trust under the Trusts Act 1882, by which the Will of *Khadim Husain* would be governed. But in the view their Lordships take, the learned Judges were wrong in thinking that the proprietorship conferred upon respondent 1 by the will was a bare trusteeship accompanied by no interest of a beneficial nature.

In their Lordships' opinion therefore the Will of *Khadim Husain* did purport to confer a beneficial interest in a part of his estate upon respondent 1, who was one of his heirs, and it would seem to follow that (apart from any question of consent by the appellant) the will was invalid under the Mohammedan law.

But it has been contended before the Board that the setting apart of the panchmi share under each of the three Wills, to which

reference has been made, was in reality the creation of a wakf, and that so considered it must be presumed that there was a dedication of the whole interest of the testator in each case to charitable purposes, leaving nothing to which the devisee could be beneficially entitled, his position being that merely of the muttwali or manager of the charity.

No case of wakf was made by respondent 1 in his defence to the suit, nor was it suggested in his memorandum of appeal to the High Court, and there is no trace of such a contention having been raised in the judgments. No one of the three Wills purports to create a wakf nor is there in any of them anything that could be regarded as a gift of the ultimate residue to charitable purposes, and no suggestion of wakf was made in any of the previous suits. It is admitted that a trust for slaves and dependants is not within the terms of the Wakf Validating Act 6 of 1913, and it is therefore unnecessary to consider the effect of Act 32 of 1931, which purports to give retrospective effect to the Act of 1913. The argument which has been addressed to their Lordships on this point is in reality only an attempt to reopen the controversy which was finally settled by decisions of this Board nearly 40 years ago: see *Mahomed Ahsanulla v. Amarchand*, (1890) 17 Cal. 498 = 17 IA 28 (PC); *Abdul Gafur v. Nizamudin*, (1892) 17 Bom. 1 = 19 IA 170 = 6 Sar. 238 (PC), *Abdul Fata Mahomed Ishak v. Russumoy Dhur*, (1895) 22 Cal. 619 = 22 IA 76 = 6 Sar. 572 (PC), Under these circumstances their Lordships think it sufficient to say that the contentions of respondent 1 on this part of the case must necessarily fail.

Unless therefore the appellant can be shown to have consented to the terms of his father's will it cannot be binding upon him.

At the time of *Khadim Husain*'s death both respondent 1 and the appellant were minors. The former attained his majority in 1915

and the latter in 1919. Before the trial Judge an attempt was made to prove that the appellant upon attaining majority consented to the terms of the will. It was held that his consent was not proved. The High Court makes no reference to this contention, and before their Lordships no serious attempt has been made to support it.

In the High Court however it was contended for respondent 1 that the appellant was in effect bound to the terms of the will by what was said to be a "family arrangement" embodied in a registered instrument dated 11th March 1910. The learned Judges accepted this contention and their finding has been supported before the Board; if it is correct, the appellant necessarily fails.

The document in question was executed, during the minority of the contesting parties to this appeal, by their mother on her own behalf and purporting to act as guardian of her sons. The other parties were their sisters, the three daughters of *Khadim Husain*, who disputed the validity of his will. Shortly put, the effect of this arrangement was that the mother gave up, in favour of her sons, a claim to dower amounting to about a lakh of rupees, taking for herself only a life annuity of Rs.600/- out of the estate, while the sisters accepted perpetual annuities of Rs.400/- each charged upon specified immovable properties. Elaborate schedules of the various properties were annexed to the document the first of which, referring to the panchmi properties, was headed:

"List of property which belongs exclusively to Shaik *Ghulam Husain* (*i.e.* respondent 1) and with the income of which the slaves and slave girls will be maintained according to the conditions and restrictions laid down in the wills of the ancestors."

The learned Judges of the High Court thought that this should be read as an agreement make by the mother, acting on behalf of

the younger son, with herself, acting on behalf of the elder son, that the latter should be the owner of the panchmi properties, and that it was binding upon the appellant. But quite apart from the question whether the mother could legally bind the appellant by such an agreement, their Lordships are unable to hold that this was either the intention or the effect of the document. The only object of the management was, they think, to get rid of the daughters' claims, leaving the landed estates for the sons. Apart from the heading to the schedule of the panchmi properties, there is nothing to suggest that the rights of the sons *inter se* were considered. There was, and indeed could be, no dispute between them at their then ages, and the mother was evidently upon the terms of the document acting for them both jointly. Their Lordships must accordingly hold that the appellant was, when he came of age, free to dispute the validity of *Khadim Husain*'s Will, and to claim his share according to the Mohammedan law in the panchmi properties.

The last line of respondents 1's defence was limitation : it was contended first that the deed of March 1910, should be read as having effected a transfer of the panchmi properties by the mother, acting on behalf of the appellant, to respondent 1 and that therefore the suit fell under Article 44, Schedule 1, Limitation Act, which runs as follows :

Description of suit	Period of Limitation	Time from which period began to run
44.—By a ward who has attained majority, to set aside a transfer of property by his guardian	Three years	When the ward attains majority.

The trial Judge held that this article has no application on the ground that there was no transfer by the deed: the High Court

took the opposite view. It is manifest, on the construction which their Lordships have put the deed, that the trial Judge was right.

Alternatively, it was argued that the suit was barred by 12 years' adverse possession under Article 144. Both the Courts in India have negatived this contention, and their Lordships have no doubt that they were right. Respondent 1 only attained majority in 1915, and the suit was, instituted in July 1924. Until 1915 the mother was in possession of all the immovable properties of the estate on behalf of both her sons, and it would be impossible to, hold that her possession was adverse to the appellant.

Before the Board it was for the first time suggested that the suit in reality falls under Article 123, which applies to a suit

"for a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the properties of an intestate."

The period of limitation in such a case is 12 years from the date "when the legacy or share became payable or deliverable." It is said that on the contentions of the appellant, "*Khadim Husain* must be deemed to have died intestate, and that what the appellant is claiming is a distributive share in his estate. There is however a long series of decisions in India, dating at least from 1882, that this article only applies where the suit is brought against an executor or administrator or some person legally charged with the duty of distributing the estate: *Issur Chunder v. Juggut Chunder*, (1883) 9 Cal. 79; *Keshav Jagannath v. Narayan Sakharam*, (1890) 14 Bom. 236, *Umardaraz Ali Khan v. Wilayat Ali Khan*, (1897) 19 All. 169 = (1897) A.W.N. 34, *Khadersa Hajee Bappu v. Puthen Veettil*, (1911) 34 Mad. 511 = 6 IC 50 and see *Mahomed Riasat v. Hasin Banu*, (1893) 21 Cal. 157 = 20 IA 155 = 6 Sar. 374 (PC).

Counsel for respondent 1 drew their Lordships' attention to a decision of this Board reported as *Maung Tun Tha v. Ma Thit*, AIR 1916 PC 145 = 38 IC 809 = 44 IA 42 = 44 Cal. 379 (PC), where Article 123 was apparently applied in a suit by a Burmese-Buddhist son for his share in the paternal estate. No reference was made to the Indian case law on the subject, and the main question debated was as to whether the son was bound under the Burmese law to elect within a reasonable time after his father's death.

Their Lordships have referred to the record of this case, and they find that in the Courts of Burma no issue was raised as to limitation, and that there was no discussion as .to the article of the Act which should be applied. There had been at least one previous decision in the Lower Burma Court that Article 123 was applicable to such a case, and it seems to have been assumed on all hands that it must equally apply in the case then under consideration. After the decision in *Tun Tha v. Ma Thit*, (supra) it appears to have been considered in one case in the Bombay High Court that the Indian authorities had been overruled [*Shrinbai v. Ratanbai*, (1919) 43 Bom. 845 = 51 IC 209], but in two later cases the same High Court refused to apply Article 123 to claims by Mohammedan heirs; see *Nurdin Najbudin v. Bu Umrao*, AIR 1921 Bom. 56 = 59 IC 780 = 45 Bom. 519. The specific question was considered by a Full Bench of the Allahabad High Court in 1928 [*Rustam Khan v. Janki*, AIR 1928 All. 467 = 111 IC 809 = 51 All. 101 (FB)] another case between Mohammedan heirs, when the same conclusion was come to as in *Nurdin Najbuddin v. Bu Umrao*, (supra) the article applicable being held to be Article 144 and not, Article 123.

Their Lordships have no doubt that it was not intended by the judgment in *Maung Tun Tha v. Ma Thit*, (supra) to overrule the decisions to which they have referred, and they think that, at all

events in cases from the Indian Courts, these authorities should be followed. They are therefore of opinion that the present case does not fall within Article 123, and that the appellant's suit was not barred by limitation.

It only remains to consider whether the trial Judge was right in holding that the appellant was entitled to recover a quarter share only, and not a half, of the panchmi property, and it is to be noted that upon this point the learned Judges of the High Court were in agreement with him.

The appellant's share in his father's estate under the Mohammedan law would be one-quarter only, but he contends that the widow and daughters having surrendered their rights in exchange for annuities which were charged upon the whole estate, he was entitled to share equally with his brother in all the residue.

The view taken by the Indian Court was that the allocation of the panchmi property to respondent 1 was an integral term of the arrangement under which the surrenders were made, and that if the appellant refused to be bound by this allocation he could claim no benefit from the surrenders.

In their Lordships' opinion, this view is based upon a misinterpretation of the deed of March 1910. They think that the rights of the widow and daughters being in effect bought out by payments from the general estate, their interests enured for the benefit of the other heirs, irrespective of their rights *inter se*, and that the whole, subject to the annuities so charged and the debts (which were considerable) became divisible equally between the two sons. If the annuities and the debts had been made payable out of respondent l's share only, all in consideration of this the panchmi property had been allotted to him, the position would have been different but this was not the effect of the deed.

> Their Lordships are therefore of opinion that the appellant is entitled to share equally with respondent 1 in the panchmi properties, and that a decree should have been entered in his favour for possession of a moiety thereof. This would of course, be without prejudice to the rights of any persons claiming as slaves or disciples under the will of *Khadim Husain*. They are not parties to the present litigation, and such rights as they may be entitled to assert are not affected by it.
>
> Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decrees of the High Court in Appeal Nos.132 and 164 of 1925 should be set aside, and that in lieu thereof a decree should be made in favour of the appellant for the shares in the several panchmi Villages claimed by him in his plaint. Respondent 1 must pay the costs of the appellant in the High Court and before this Board, but, having regard to the order for costs made by the trial Judge, and to the fact that the appellant had raised issues on which he failed, their Lordships think that justice will be met by ordering respondent 1 to pay only half of the appellant's costs in the Court of first instance.

Thus according to the Muslim law of Wasiyath a Muslim cannot bequeath more than one-third of his property by will. The remaining two third of this property will devolve on his heirs and they will be entitled to succeed. This rule has been approved by A.P. High Court in the case of *Mohammed Ali Nayyer vs. Azhar Hussain*, which is reported in 2004 (6) ALD 845. This latest view of A.P. High Court is extracted below:

> These three civil miscellaneous appeals under Order 43, Rule 1 read with Section 104 C.P.C. arise out of the proceedings initiated for execution of the decree in O.S. No.774 of 1994 on the file of the V Senior Civil Judge, City Civil Court, Hyderabad. The

appellants are third parties to the suit. The appellant in C.M.A.No.109 of 1996 and 1295 of 1999 is the father and the appellants in C.M.A.No.1104 of 1999 are his wife and son. For the sake of convenience, they are referred to as Appellants 1, 2 and 3 respectively. The first appellant and the second respondent are brothers. The first respondent in all the three appeals is the decree holder and the second respondent is the judgment-debtor.

The first respondent filed the suit against the second respondent for recovery of certain amount. Along with the suit, he filed IA. No.846 of 1994 under Order 38, Rule 5 C.P.C. and secured an attachment before judgment of a house bearing No.11-6-832, Red Hills, Hyderabad. The first appellant filed I.A. No.874 of 1994 under Order 38, Rules 8 and 10 C.P.C. to raise the attachment. According to him, the property, comprising of cellar, ground, first and second floors, was owned by his father by name *M.A. Shakoor*. He stated that the ground floor was sold to him through sale deed dated 15.6.1991 and that on the same day, his father executed another sale deed in favour of the second appellant, transferring the first floor. It was further alleged that his father executed a Will dated 8.7.1992 bequeathing cellar and second floor of the building, in favour of the third appellant. *M.A. Shakoor* is said to have died on 24.6.1993. With these contentions, the first appellant pleaded that the attachment of the said property is without basis.

The suit was decreed *ex parte* on 10.8.1994. The application filed by the first appellant was dismissed on 5.12.1995. Against the same, C.M.A. No.109 of 1996 is filed. On the basis of the *ex parte* decree, the first respondent filed E.P. No.53 of 1995 and sought for sale of the attached property. At that stage, the first appellant filed E.A. No.153 of 1995 under Order 21, Rule 58 read with 151 C.P.C. This application was

dismissed by the executing Court through its order dated 3.12.1998. Assailing the same, he filed C.M.A. No.1295 of 1999. The first respondent filed E.P. No.107 of 1995 with a view to bring the other portions of the same building to sale. Appellants 2 and 3 filed E.A.No.263 of 1996 under Order 21, Rule 58 read with 151 C.P.C. The executing Court dismissed this application also through order dated 3.12.1998. This order gave rise to C.M.A. No.1104 of 1999.

Sri *V. Ravinder Rao*, learned Counsel for the appellants, submits that an application filed under Order 38, Rule 8 C.P.C. ought to have been considered either during the pendency of the suit or along with the suit and that there cannot be any justification for consideration of the same after the suit was decreed. He submits that the sale of the ground and first floors of the building was affected in favour of the Appellants 1 and 2 respectively way back on 15.6.1991 much before the filing of the suit and there was absolutely no justification for the Trial Court in rejecting the claims made by the appellants in respect of those premises. He further contends that through a validly executed Will, the owner of the property bequeathed the cellar and second floor in favour of the third appellant and on account of the death of the testator much before the filing of the suit, the third appellant became the absolute owner of the said premises. He submits that the Court below has rejected the applications on technical grounds without appreciating the contentions of the parties, and did not apply the relevant provisions of law. He submits that all the three appellants are residing abroad and in that view of the matter they executed G.P.A. in favour of *M.A. Wahab* and that the Trial Court refused to act upon the same on hyper-technical grounds even though there was no dispute in this regard.

Sri *M.M. Firdos*, learned Counsel for the first respondent, on the other hand, submits that the sales in favour of Appellants 1

and 2 are vitiated by fraud, since they were brought into existence only with a view to defeat the claim of the first respondent. He contends that the very fact that the second respondent, another son of *M.A.Shakoor*, was not left with any property, discloses that efforts were made to keep the entire property out of reach of the first respondent in the execution proceedings. His other contention is that the Will executed by late *M.A. Shakoor* in favour of the third appellant is invalid and contrary to the principles of Mohammedan Law. According to him, a Muslim is not entitled to execute a Will bequeathing more than one-third of the property held by him.

The same Court dealt with I.A. No.874 of 1994, on the original side and E.A. Nos.153 of 1995, 263 of 1996 on execution side. For the sake of convenience, it is referred to as the 'Trial Court'. Though the Trial Court referred to certain deficiencies as to the form of G.P.A. executed by the appellants in the respective proceedings, there is no serious dispute about the same in these appeals. From the contentions of the parties, the following questions arise for consideration.

(a) Whether an application filed under Order 38, Rules 8 and 10 C.P.C. needs to be dealt with before the disposal of the suit.

(b) Whether the sales affected in favour of Appellants 1 and 2 by late *M.A. Shakoor* are valid and legal; and

(c) Whether late *M.A. Shakoor* was entitled to execute a Will bequeathing the remaining portion of the premises bearing No.11-6-832.

As regards the first question, it needs to be seen that an attachment before judgment is affected on the basis of an application made by the plaintiff in a suit under Order 38, Rule 5 C.P.C. If a person, who is not a party to the suit, has a claim *vis-a-vis* the

attached property, an application for raising the attachment can be made under Rule 8 thereof. It provides that the adjudication of the claims made by such parties shall be in the same manner, as provided for the disposal of the claims of property attached in execution of a decree for payment of money. In effect, the procedure prescribed under Order 21, Rule 58 C.P.C. is made applicable for disposal of the applications filed under Order 38, Rule 8 C.P.C.

By its very nature, an application under Order 38, Rule 8 C.P.C. is made during the pendency of the suit. Strictly speaking, the suit on the one hand and the claim under Order 38, Rule 8 C.P.C. on the other, are parallel and they have no similarity from the point of view of adjudication. While the former relates to the claim of the plaintiff against the defendant, the latter is in relation to the rights of a third party, in respect of a property, that is meant to be proceeded against, in the execution of a probable decree in that suit. Still, disposal of the application under Rule 8 would facilitate the effective adjudication of the entire matter. The reason is that if the objection raised under such application is sustained, the plaintiff may choose to select any other property for this purpose. On the other hand, if the claim is rejected, the claimant may pursue his further remedies. From the point of view of suit also, it becomes important *i.e.,* if the suit is dismissed, it makes little difference whether the claim in the application is considered or not. On the other hand, if the suit is decreed and the application is kept pending, it leads to any amount of uncertainty and may, in a way, hamper the progress in the execution proceedings.

As is evident from the instant case, the suit was decreed on 10.8.1994 and the application filed under Order 38, Rule 8 was kept pending. The first respondent filed E.P. No.53 of 1995 for selling the attached property. That necessitated the filing of E.A. No.153 of 1995 by the first appellant himself under

Order 21, Rule 58 C.P.C. In effect, there were two sets of applications for the same relief and claim, one under Order 38, Rule 8 and the other under Order 21, Rule 58 C.P.C. Such a complex situation is brought about on account of the failure of the Trial Court in disposing of the application under Order 38, Rule 8 either before, or along with the disposal of the suit. If an application under Order 38, Rule 8 is rejected, it would disentitle such claim to raise similar objection under Order 21, Rule 58 C.P.C. For the foregoing reasons, it is held that an application under Order 38, Rule 8 has to be disposed of either during the pendency of the suit or along with the suit, though not as a matter of compliance with any mandatory provisions, but, as a measure to ensure proper implementation of the provisions of the Code of Civil Procedure.

It is not disputed that late *M.A.Shakoor* was the absolute owner of the entire premises in house bearing No.11-6-832. He executed sale deeds on 15.6.1991 in favour of Appellants 1 and 2, transferring ground and first floors respectively. The allegation of the first respondent that the sales were affected with a view to keep the suit properties out of reach of the Court in the execution proceedings, could have gained acceptability had it been a case where the suit was filed by the time the transfers took place. The suit was filed in the year 1994, whereas the sales took place three years earlier to that. In fact, there is nothing in law, which could have prevented the owner of the property to transfer any portion of it even after the suit is filed, as long as it was not established that the defendant in the suit has acquired any definite interest in that property. Under these circumstances, it cannot be said that the sale of ground and first floor of the premises in favour of Appellants 1 and 3 is vitiated in any manner. Consequently, the said portion of the building cannot be proceeded against any execution.

Now remains the third, but most important aspect of the appeals. Late *M.A. Shakoor* is said to have executed a Will dated

8.7.1992 in favour of the third appellant bequeathing the cellar and second floor of the building. The testator of the Will died on 24.6.1993. The genuinty of the Will is not in serious dispute. The controversy is as to the capacity of the testator to execute the Will. An individual is entitled to bequeath his self-acquired property in the manner he chooses. The Law of Succession has to give way to the mode of devolution provided for under the Will. In addition to proving the Will, a person claiming under it has to explain away various doubtful circumstances, surrounding it. The Will executed by a Muslim, however, stands on a different footing. Though he is entitled to execute a Will, obviously in relation to his self-acquired properties, his freedom is restricted. He can bequeath only one-third of the properties held by him. *Mulla* in his book, 'Principles of Mahomedan Law' (7th Edition Page 127) had summed up the law on this aspect as under:

"*Limit of testamentary power :* A Mohammedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator."

The basis for this restriction does not emanate from Koran. The origin is said to be a conversation and interaction between The *Prophet* and *Abee Vekass*. Legend has it that when *Abee Vekass* was ailing. The *Prophet* visited him and the former expressed his desire to bequeath his entire property in favour of his only daughter and asked the opinion of the Prophet. It is said that the *Prophet* replied to the effect that he could not dispose of his property more than one-third in favour of his daughter. With the passage of time, the principle came to be supported by reasons such as, that the freedom of a person holding the property cannot be permitted to leave his other legal heirs without any means. The principle was further developed to the extent that in case the legal heirs of a

testator approve of such a course, the entire property can be bequeathed by a Will.

Reverting to the facts of the case, by the time the late *Shakoor* executed the Will on 8.7.1992, he parted with two of the four floors of the building by sale in favour of Appellants 1 and 2. Through the Will, he bequeathed the entire property that remained with him. The will does not disclose that he held any other items of property. Since it is a matter of principle of personal law, the persons claiming under the Will are under obligation to establish that the extent of the property bequeathed under the Will did not exceed one-third of the property held by the testator. The Trial Court did not have an occasion to go into this aspect, because it was not pointedly raised. It becomes necessary to examine this question not only from the point of view of entitlement of the third respondent to derive title through the Will, but also from the point of view of the entitlement of the judgment-debtor, or persons claiming through him. If the testator did not hold any other property by the time he executed the Will, two-third of the same has to be shared by other legal heirs including the second respondent; in accordance with the principles of Mohammedan Law.

For the foregoing reasons, it is held that:

The ground and first floors in premises bearing No.11-6-832 sold in favour of Appellants 1 and 2 cannot be proceeded against, in the execution of the decree. Consequently, C.M.A. Nos.109 of 1996 and 1295 of 1999 and the applications out of which they arise stand allowed.

The order in E.A.No.263 of 1996 in E.P. No.107 of 1995 insofar as it relates to the cellar and second floor of the premises bearing No.11-6-832 is set aside. It stands remitted to the executing Court for fresh disposal, wherein the validity of the Will dated 8.7.1992 executed by late *Shakoor* shall be examined

with reference to the properties that were held by him as on the date of execution of the Will. In case, it emerges that the property bequeathed under the Will did not exceed one-third of what was held by him, the claim of the third appellant shall be sustained. On the other hand, if it emerges that late *Shakoor* did not hold any other property, the claim of the third appellant shall stand restricted to one-third of the said property. The question as to whether the property covered by the Will was attached before or after judgment shall also be considered. C.M.A. No.1104 of 1999 stands allowed to the extent indicated above. The executing Court shall permit the parties to lead such evidence as is permissible in law and dispose of the matter as early as possible.

Earlier to this decision the Apex Court of India has also made its endorsement of approval on the limits of testamentary powers of a Muslim in the case of *John Wallam Atten vs. Union of India*,[1] in the following way "*a restriction to make testamentary disposition of property to some extent is prevalent under Mohammedan Law but there the purpose is to protect the near relatives*".

It is for person who claims under a will to establish that other heirs had consented to bequest. Bequest in excess of 1/3rd of estate cannot take effect unless such bequest, consented to by heirs after death of testator.[2]

Under the Mohammedan law a bequest to an heir is not valid, without the consent of the other heirs; and such consent may be inferred from their conduct.[3] The policy of that law is to prevent a testator from interfering by will with the course of

1. 2003 (1) DECISIONS TODAY (SC) 596.
2. *Yasin Imambhai Shaikh vs. Hajarabi*, 1986-Bom-357.
3. *Mohamed Husain v. Aishabai* (1934) 36 Bom. L.R. 1155, 155 I.C. 334, ('35) A.B 84.

devolution of property according to law among his heirs, although he may give a specified portion, as a third to a stranger.[1] The reason is that a bequest in favour of an heir would be an injury to the other heirs, as it would reduce their share, and "would consequently induce a breach of the ties of kindred" Hedaya, 671. But it cannot be so if the other heirs, "having arrived at the age of majority," consent to the bequest.

In the case of *Salay Bee vs. Fatima Bi*, it was ruled that under Muslim law of Will where bequest is made in favour of one heir, consent is necessary.[2]

CHAPTER VII
DEATH BED WILL

ACKNOWLEDGMENTS BY A PERSON SUFFERING FROM DEATH-ILLNESS

"If a person suffering from a mortal disease were to make an acknowledgment of debt in favour of a woman not related to him or were to make a bequest or gift in her favour and

1. *Khajoor unnisa vs. Rowshan Jehan,* (1876) 2 Cal. 184, 196, 3 I.A.291, 307.
2. A 22 PC 291

afterwards were to marry her and were then to die, the acknowledgment would be valid, but the bequest or gift would be void, for the nullity of an acknowledgment in favour of an heir depends on the person having been an heir at the time of making it, whereas the nullity of a bequest in favour of an heir depends on the legatee being so at the time of the testator's death as has already been explained, and as the woman was not an heir at the time of acknowledgment, but had become so by (marriage) at the time of the testator's death the acknowledgment is therefore, valid, but the bequest is void and so likewise the gift, it being subject to the same rule as the bequest."

"If such a sick person were to make an acknowledgment of a debt due by him to his son or were to make a bequest or gift in his favour at a time when the son was a Christian, and he (the son) afterwards, previous to his father's death became a Mussulman, all those deeds of acknowledgment, gift or bequest are void, the bequest and the gift, because of the son being an heir, at the death of his father as above explained; and the acknowledgment, because, although the son on account of the bar (namely, difference of religion) was not an heir at the time of making it, still the cause of inheritance (namely, consanguinity) did then exist, which throws an imputation on the father, as it engenders a suspicion that he may have made a false declaration in order to secure the debt or part of his fortune to his own. It is difference in the case of marriage as above stated, for there the cause of inheritance (namely, marriage) occurred after the acknowledgment and had no existence previous thereto, for supposing the marriage to have existed at the period of making the acknowledgment, and that the wife, being then a Christian, should afterwards, before the husband's death, become a Musalman in that case (the acknowledgment) would not be valid."

CHAPTER VIII
EXECUTORS

Having studied the nomenclature of will and its components let us know study regarding appointment of executor, his duties and power.

The testator is fully empowered to appoint anyone irrespective of sex and religion as the executor to execute his last wishes. In the case of *Mohammed Ameenuddin vs. Mohd Khairuddin*[1], it was held that a Muslim may appoint a Christian, a Hindu and any Non-Muslim as his executor. According to Fatawa-e-Khazikhan, Raddul Mukhtar and Jama-e-Ush Shittat, the executor is bound to carry out the wishes of the testator which are valid in law with utmost fidelity, to safeguard the interest of testator and to administer his estate. The executor may be appointed for a specific purpose or for general purpose.

MINOR AS EXECUTOR

According to Fatawa-e-Alamgiri when an infant or an insane person, is appointed, as an executor whether permanently or with lucid intervals, it is not valid.[2]

A minor can be associated with an adult executor in the office but he has no power to interfere in the administration of the state until he has attained puberty.

The adult executor can act alone until the minor attains puberty.

1. 1825 (4) SDA (BNG).
2. Fatawa-e-Alamgiri, Vol VI, Page 214.

A slave may also be appointed as executor.

The difference between the acts done by the minor executor and acts done by a slave and non Muslim executor is that when former are invalid the latter are valid.[1]

In the case of *Jehan Khan vs. Mandy*[2], it was held that the appointment of a Non Muslim executor will not invalidate the will. All the acts and deeds done by such executor are valid unless he is removed or superseded by a Civil Court of law.

SHIA LAW

There is no difference between the Shia Law and the Sunni law, with regards to the appointment of executor and his qualifications except, that a small rider is added by the Shia juris to the effect that the executor should be honest or just person because a FASIK, (dishonest person), is unworthy of trust. So it is requisite, that the executor may be a Muslim.

APPOINTMENT OF EXECUTOR

As stated supra, a testator may appoint any person subject to certain qualifications as the executor of his will and such appointment will be effective from the date of acceptance, by the executor. Such acceptance may be express or implied and it may take place either during the lifetime of testator or after his death.

According to Durrul Mukhtar, page 834, any dealing with the testator's property after his death, by the executor amounts to his acceptance.

1. Raddul Mukhtar, Vol. V, Pg 687.
2. 1BLRSN 16 = W.R. 185

An executor is also empowered to refuse to accept the office, and he may also renounce the same at any time.[1]

If once the executorship is accepted and the property of a legatee is dealt within accordance with the terms of will the executor cannot renounce his office unless sanction is accorded by a judge[2].

SHIA LAW

The provisions of Shia Law regarding appointment of executor are analogous.

An executor may be appointed under Shia law in any manner, which indicate the intention of the testator to make him as executor. In Fatwa-e-Khazikhan it is stated that when a testator uses any expression by which authority is given to another to do certain acts on his behalf, after his death it would amount to creation of the office of executor. More than one person can be appointed as executor.

Under the Hanafi rules governing wills, when more than one person are appointed as joint executors one cannot act individually in disposing off the property of testator.

According to Durrul Mukhtar, page 835, when a Muslim has appointed two executors, the act of one of them acting singly is void, like the act of two joint Mutawallis acting singly.

According to Abu Hanifa, Mohammed, Abu Yousuf and Fatawa-E-Khazikhan, when there are more than one executors the acts of any one of them are void, unless ratified by the other.

1. Raddul Mukhtar Vol. V, Page 686
2. Fatawa-e-Alamgiri, Vol. VI, Page 212.

SHIA LAW

Under the Shia law when joint executors are appointed one of them can act singly unless his acts are positively incumbent or necessary. They may lawfully divide the property of the testator between them and each one can take upon himself the management of such divided property.

When one of the two executors dies appointing his co executor, as his executor, the surviving executor can act singly, but the Shia law says, that an executor cannot entrust the property of his testator to joint executor in absence of such power given to him under the will.

THE POWER AND DUTIES OF EXECUTORS

The powers and duties of executors appointed by a Muslim under his will are closely analogous to those under the English Law and analogous to the provisions of Indian Succession Act. According to Hidaya, Vol. IV, Book LII, Chapter VII, page 543, it is stated that when the heirs of the testators are minors the powers of the executor are absolute, but within certain limits. The executor has the power of selling the property and invest the sale proceeds if there is necessity to do so and such a step should be taken only after discharging the debts of the testator, if any, and after making maintenance to the minor children of the testator. The sale must be for an adequate consideration.

According to Durrul Mukhtar, Page 837, the executor has no power to sell the property of the testator, to himself or to any of his relatives. He can enter into a partition with the co-sharers of the deceased or the legatee.

According to Durrul Mukhtar, page 837, Fatawa-e-Alamgiri, Vol. VI, Page 220, and Fatawa E Khazikhan it is lawful for the executor to sell, other than immovable property against an absent adult heir to pay the debts of the testator and even the sale of immovable property is valid if it is apprehended that it will be lost. If the deceased dies heavily indebted, then by consensus a sale of immovable property is valid.

According to Fatawa-e-alamgiri, Vol VI. Page 221, an executor cannot make a partition of the shares of the minor amongst themselves. When an executor makes a partition among the minor heirs of the testator, the partition is unlawful, according to the Raddul Mukhtar.

If the executor is empowered as per will to sell the property of the testator and to invest the proceeds in any other kind of property the executor is fully empowered to alienate the property of the testator.

An executor according to Fatawa-e-Alamgiri may give out the property of a minor in partnership, but he has no power to lend to another, the property of an orphan.

According to Abu Yousuf the executor is not entitled to lend the property of the orphan and if he does so he will be liable.

A father is like the executor but not like a Qazi. According to Abu Yousuf the father is not entitled to pay the debts with the property of the minor nor is he entitled to pledge his property for his debts.

According to Fatwa-e-Alamgiri, Vol VI, Page 228, if the executors sells the estate for the payment of the debts of the deceased which do not cover the entire estate, it is lawful. The

testator has the power of selling the inheritance for paying the debts of the deceased and to give operation to his legacies. But the father of the deceased, *i.e.*, the grand father of minors can sell the inheritance for his own son but he is not empowered to sell the estate for the payment of the debts, due from the minor children on behalf of his son *i.e.* their father.

The testator in short is empowered to do all acts from which benefit may accrue to the orphan, so is the father.

According to Durrul Mukhtar, executor cannot trade with the goods of the infant on his own account, but he can do so for the orphan and the profits derived therefrom would belong to the minor, according to Abu Yousuf.

According to Durrul Mukhtar, page 838, unless any remuneration is fixed by the testator, the executor cannot take anything for himself from the estate. But according to Fatawa-e-Khazikhan, when no allowance is fixed for executor he can take a limited and reasonable sum, as his remuneration.

According to Fatawa-e-Khazikhan, executor cannot make a binding acknowledgment of a debt against the estate of the testator and the acknowledgee would not be entitled to receive his demand until he establishes his claim.

The executor is entitled to repay himself any expenditure incurred by him on behalf of the infants, but he must keep proof thereof, as stated in the Fatawa-e-Khazikhan.

SHIA LAW

According to Shia law an executor is not responsible for any loss of destruction of the property of the testator unless occasioned by his departure from the conditions of his office.

SHAFII DOCTRINES

According to Shafii doctrines, the power of making will is vested in everybody.

Testamentary disposition in favour of public, must have a lawful object. A will cannot be made in support of a Christian Church. Testamentary disposition in favour of animals is absolutely void, but if a declaration has been made that the animals should never want for necessary food, doctrine admits the validity.

A will for a mosque is valid.

Testamentary disposition in favour of Shafei should not exceed the third of the property of the testator.

A person who is suffering from an illness from which there is an apprehension of death, he cannot make a valid disposition of more than 1/3rd of his assets.

A legacy in favour of poor people as clause need not be accepted expressly.

CHAPTER IX

RULE OF INTERPRETATION OF WILL

Ameer Ali in his celebrated work has carved out the role of interpretation of will as under:

The general rule of interpretation of wills as was generated under Mohammedan Law is that property owned by the testator at the time of his death and answering the description contained in the will, will pass to the legatee.

The bequest does not take effect until after the death of the testator, and therefore, the condition of the validity is his being in possession of property at the time of his decease, and is capable of being transferred.[1]

Accordingly, if a person who is a poor, bequeaths to another the third of his property and afterwards becomes rich, the legatee is, in that case, entitled to a third of his estate, whatever the amount, the law is also the same in case the testator, being rich at the time of making the will, should afterwards become poor, and again acquire wealth.[2]

Likewise if a person bequeathed "a fourth of my goats" to Z, and it happened either he had no goats or that such as he had were destroyed before his death, the bequest would be null and void. However, if he should afterwards acquire goats, so as to be able to leave some at his death, one-fourth of them would go as a legacy to Z.[3]

A Mohammedan will, must be construed primarily in accordance with the rules laid down in that law, with due regard to the social habits and manners and customs of the parties, the language of the will and the surrounding circumstances.[4]

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1. See Hedaya, BL, II, Ch 1, p. 679; Faizee, 2nd Ed., p. 307; Mulla, Ss. 122, 123; Tayabji, 4th Ed., S. 691 p.792.
2. See Hedaya, BL, II, Ch 1, p. 679; Faizee, 2nd Ed., p. 307; Mulla, Ss. 122, 123; Tayabju, 4th Ed.
3. Ibid. see Wilson's Mohammedan Law, 3rd Ed. P. 312
4. Faizee, 2nd Ed., p.312.

HANAFI LAW

The following rules have been enumerated by the Hanafi lawyers to the interpretation of will

1. When the testator uses the expression relations of my wife in his will the same should be construed as the relation of his wife including paternal as well as maternal.
2. When the bequest discloses an expression of "the nearest kin" it would mean to say maternal kindred only in default of paternal kindred.
3. If the will is made in favour of the relatives of the stranger it would mean for the benefit of all his relatives.
4. If the will is made in favour of orphans, blinds or the people of such a race or of such a locality the legacy would be divided among all those who answer the description.
5. If the legacy is left in favour of heir of 'X' and if 'X' is no more and dies, leaving several heirs, the legacy would be divided among them in proportion of their legal shares.
6. If the bequest is made to a family the bequest will be in favour of the head of that family.
7. If the legacy is made in favour of the neighbors it will go to such of the neighbors as are nearest to the testator's residence.
8. If a person bequeaths his son's or his daughter's share, and if he has a son or a daughter, the bequest is not valid because he is bequeathing what does not belong to him but if he has no son or daughter the

bequest is valid. If the bequest is in favour of like his son's or like his daughter's, then the bequest is valid.

Following are some of the illustrations which would be helpful for the readers for the interpretation of wills.

Illustrations

(a) A Mohammedan dies leaving him surviving a son, a father, and a paternal grandfather. Here the grandfather is not an "heir", and a bequest to him will be valid without the assent of the son and the father.

(aa) A Mohammedan dies leaving a son, a widow and a grandson by a predeceased son. The grandson is not an heir and a bequest to him is valid to the extent of one-third without the consent of the son and widow.[1]

(b) *A*, by his will, bequeaths certain property to his father's father. Besides the father's father, the testator has a son and a father living at the time of the will. The father dies in the lifetime of A. The bequest to the grandfather cannot take effect, unless the son assents to it, for the father being dead, the grandfather is an "heir", at the time of A's death.

(c) *A*, by his will bequeaths certain property to his brother. The only relatives of the testator living at the time of the will are a daughter and the brother. After the death of the will, a son is born to A. The son, the daughter and the brother all survive the testator. The bequest to the brother is valid, for though the brother was an expectant heir *at the date of the will*, he is not

1. *Abdul Bari v. Nasir Ahmed* ('33) A.O. 142, 150 I.C. 330.

an "heir" *at the death of the testator,* for he is excluded from inheritance by the son. If the daughter and the brother had been the sole surviving relatives, the brother would have been one of the heirs, in which case the bequest to him could not have taken effect, unless the daughter assented to it.[1]

(d) *A* bequeaths property to one of his sons as his executor upon trust to expend such portion thereof as he may think proper "for the testator's welfare, hereafter by charity and pilgrimage," and to retain the surplus for his sole and absolute use. The other sons do not consent to the legacy. The bequest is void, for it is, "in reality an attempt to give, under colour of a religious bequest," a legacy of the heirs.[2] If the bequest had been exclusively for religious purpose, and if those purposes had been sufficiently defined, it would have been valid to the extent of the bequeathable third.

(e) A Mohammedan leaves behind him a son and a daughter. To the son he bequeaths three-fourths of his property, and to the daughter one-fourth. If the daughter does not consent to the disposition, she is entitled to claim a third of the property as her share of the inheritance.[3]

(f) A document named as a partition deed is executed to which the father and his sons are parties. It embodies a condition that two of the sons will not, after the father's death, claim any share in any property not covered by the deed and that such property will

1. Bailee, 625; Hedaya, 672.
2. *Khajoorunnisas vs. Rowshan Jehan* (1876) 2 Cal. 184, 3 I.A. 291.
3. See *Fatima Bibee V. Ariff Ismailjee* (1881) 9 C.L.R. 66.

go to the other three sons. Such a disposition in favour of the three sons is testamentary and this bequest not having been consented to, by the other two sons after the father's death, it is invalid under Mohammedan Law.[1]

SHIA LAW

Under the Shia law when the legacy is bequeathed to several persons or to a class of persons it is divisible among them all equally.

DEATH OF LEGATEE

If the legatee dies during the life of testator the legacy would lapse under the Hanafi Law, but under the Shia law upon the death of testator legacy does not lapse but it devolves on his heirs.

CHAPTER X
REVOCATION

A testator has a right to revoke a bequest or any part of it, at any time even during MARZ-UL-MAUT, whether expressly or by implication, as stated in bailee I, 625, Durrul Mukhtar, Page 406.

1. *Kunhi Avulla v. Kunhi Avulla* ('64) A. Ker. 201, See also *Abdul Kafoor v. Abdul Razzack* ('59) A.M. 131.

EXPRESS REVOCATION

A will made by a testator would stand revoked if he bequeaths the same property subsequently to some other person. Such is the express form of revocation. A will may also be expressly revoked by tearing it off or by burning or by express declaration as held in the case of *Kiran Baksh vs. Mehar Bibi*,[1] it was further held in this case that a statement in the court expressing the intention to revoke a will, amounts to revocation, even if the will is not destroyed or a fresh will is not executed.

A will or bequest can be revoked by express declaration either oral or written under Muslim Law.[2]

IMPLIED REVOCATION

If a testator raises construction on a plot bequeathed by him, or sells the same or transfers it by gift to another person the will is revoked by implied revocation. But Bombay High Court is of the view, that construction of the building would not amount to revocation in all cases. In *Ashraf Ali vs. Mohammad Ali,*[3] it was also held in this decision, that under Mohammedan Law revocation can be express or implied. In each case the court must consider whether the acts of the testator were such from which, it could be legitimately inferred that he had an intention of revoking the bequest made by him. Every case must depend upon its own facts and there is no rule of law as such which can be applied to determine whether a bequest is revoked or not. The intention has got to be ascertained from the particular facts of each case.

1. 31 I.C. 693.
2. 25 Mad 678 PC.
3. AIR 1947 BOM pg. 122

DENIAL OF BEQUEST

It is stated in Hidaya, Page 675 that denial of a will is not revocation in the opinion of Mohammed but according to Abu Yousuf it is a revocation. According to Tayyabji, Page 816, denial of bequest is not revocation. But Baillee in his translation states that the denial of a bequest is a revocation of it. Even though these two divergent opinions were expressed by Mohammed and Abu Yousuf, the view of Abu Yousuf has been considered to be most correct.

According to *Ameer Ali* a testamentary disposition is wholly revocable.

Conclusion

Thus a detailed study of Muslim Law of Will, which is different from Hindu Law and English law would lead us to a conclusion, that Islam has given this power to its follower, to be used in just and appropriate manner enabling him to distribute his wealth among his heirs and as well as among the poor, orphan and other helpless persons irrespective of religion so that none on earth should live in destitute. Unfortunately the followers of Islam are mostly not inclined, to firstly know their own laws and secondly if they know, they don't want to follow it. If the will is prepared during the lifetime itself and if the property is distributed in accordance with the commandments of Almighty the society will be beneficial at large.

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