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Bequeathable Property under Hindu Law and Muslim Law: A Comparative Analysis

Abstract

A man makes a Will or testamentary disposition in respect of his properties, also known as a bequest. Bequeathable property is the property in respect of which a person can a make a Will which is defined in Section 2 (h) of the Indian Succession Act, 1925. The article focuses on bequeathable property under Hindu law and Muslim law and presents a comparative picture. Section 30 of the Hindu Succession Act, 1956 deals with testamentary succession .A Muslim cannot dispose of more than one-third of his net estate by Will; nor can bequeath to an heir.

Keywords: Bequeathable, Heir, Will.

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Introduction

It is the human nature that a person not only loves the property in his life but also desires that even after his death the property should pass according to his will to whom he wants to convey it. Thus, a man makes a Will or testamentary disposition in respect of his properties. This is also known as a bequest. Under Hindu Law the property is classified under two categories viz. self acquired property or separate property and joint family property or coparcenary property. The law relating to making bequests by a Hindu in respect of these two properties is different. Under Muslim Law the Muslims are mainly classified under two classes viz. Sunnis, mostly Hanafi and Shias, mostly Ithna Ashari. The Muslim Law of bequests applicable to these two sects is not uniform but different. Bequeathable property is the property in respect of which a person can a make a Will which is defined in Section 2 (h) of the Indian Succession Act, 1925. Accordingly, Will is the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. The article focuses on the different law applicable to bequeathable property under Hindu Law and Muslim Law and presents a comparative picture under these two laws.

Review of Literature

The article is an original work. There is no any other work on the topic of the article.

Bequeathable Property under Hindu Law

Law of Bequeathable Property under Hindu Succession Act, 1956

Section 30 the only section dealing with testamentary succession is as:

"**30-Testamentary Succession**

Any Hindu may dispose of by Will or other testamentary disposition any property, which is capable of being so disposed of by him [or by her][1] in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus.

Explanation

The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a *tarwad, tavazhi, illom, kutumba or kavaru* in the property of the *tarwad, tavazhi, illom, kutumba or kavaru* shall, notwithstanding any thing contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this section."

Thus, according to the aforesaid provision when a person bequeaths his or her property by Will, the succession under HSA is excluded and the property passes to the testamentary heirs.[2]

It will be observed that there is no mention of Dayabhaga in Section 30. It was not necessary to mention Dayabhaga law in Section 30 as under that school every coparcener has already got the right to dispose

of his interest in the coparcenary property by a Will. Thus, according to Dayabhaga law a Hindu is entitled to dispose of by Will his property whether ancestral or self acquired.

No Fetters on the Power of A Hindu Male in Respect of Separate Property

A Hindu can bequeath his separate or self acquired property by Will and HSA does not lay any fetters on the separate property on a Hindu being dealt with by him.[3]

Testamentary Power of a Hindu Female

A Hindu female is empowered to make a Will in respect of her property like a Hindu male as by virtue of Section 14 (1) of HSA she has become an absolute owner of the property.

Impact of Amendment to Section 30 by Hindu Succession (Amendment) Act, 2005

According to amendment to Section 30 by the Hindu Succession Amendment Act, 2005 a daughter of a coparcener has been given a right by birth to become a coparcener in a Mitakshara Coparcenary. Accordingly, the property to which she became entitled is capable of being disposed of by her testamentary disposition.

Analytical Comment on Hindu Law of Testamentary Disposition

It is submitted with due deference to the Parliament that the Explanation to Section 30 is the most important part of the Section and has been enacted in a very cumbersome manner. It might have been enacted in more direct manner indicating that the interest of a male Hindu in a Mitakshara coparcenary or the interest of a member in the property of a *Tarward etc.* is a property now capable of being disposed of by Will, notwithstanding any other rule of law to the contrary.

Bequeathable Property under Muslim Law

Bequeathable One-Third Rule

A Muslim cannot dispose of more than one-third of his net estate by Will; nor can he bequeath to an heir. This one-third is calculated after deducting funeral expenses and debts of the deceased.[4] For example, A dies leaving ` 10,05,000. His funeral costs ` 5,000 and his debts are of ` 1,00,000. The net estate after deducting funeral expenses and debts work out to ` 9,00,000. Hence, the bequeathable one- third amounts to ` 3,00,000 and A cannot dispose of more than ` 3,00,000. Thus, the bequest made by the deceased A will be valid to the extent of ` 3,00,000 only.

Exceptions

The following are the exceptions to the above rule. In other words, a bequest of more than one-third can be validly made.

1. When at the time of testator's death those who are the heirs, they give their consent.
2. When there is no heir of the testator.
3. When the bequest of more than one-third is valid according to custom.
4. When the husband or the wife is the sole heir and bequest of more than one-third does not affect his or her share.

Origin of Rule of One-Third of Estate

The limitation of bequest of one-third of the net estate is not laid down in the Quran, though it has recognised the validity of bequest. The limit of one-third is traceable to the tradition of the Prophet. Abubacus had no heir other than his daughter. He asked the Prophet how much of his whole property he could give in bequest. The Prophet replied that he could not give in bequest the whole property or two-thirds or even half of the whole property; he could bequeath only one-third of the property.

Consent of Heirs

Under Sunni Law bequest of more than one third of the estate in favour of non-heirs or strangers to be valid it is necessary that the heirs give the consent after the testator's death and for a bequest up to one- third of the estate no consent of the heirs is required.[5] Under Shia Law for a bequest up to one-third of the estate in favour of heirs or non-heirs consent of heirs is not essential but for a bequest exceeding one- third of the estate consent of the heirs is necessary.

When Consent to be Given?

According to Sunni Law (Hanafi law) the consent must be given after the death of the testator. If the consent is given during his life time, it is of no legal effect.[6] Under Shia Law the consent may be given before or after the death of the testator.[7]

Who is An Heir?

In order to determine whether a particular person is an heir of the testator or not, the position at the time of testator's death is significant. It is possible that a person is an heir at the time of making a bequest but he may not be an heir at the time of testator's death. In a contrary position, he may not be an heir at the time of making the bequest but may be an heir at the testator's death. Therefore, if a person is an heir at the testator's death, he will be deemed to be an heir otherwise not.

Consent How Given?

The consent of the heirs may be expressed or implied. It may be inferred from the conduct of the persons giving the consent that the consent has been given for instance, the heirs being witnesses in the Will, legatee taking benefit for long time but no objection is raised.[8] We may take an example of implied consent. Suppose A's Will is attested by A's two sons S and S1 who are the only heirs. The bequest is made of the entire property in favour of X a stranger. This indicates that there is implied consent of S and S1. Mere silence of other heirs cannot be treated as implied consent in the proceedings of the Will.[9]

Consent by Guardian

If the heirs are minor at the time of death of testator, they may give their consent on attainment of the majority. Their guardian is not competent to give the consent on behalf of the minor. Consent given by guardian on behalf of the guardian is invalid.[10]

Let us take some hypothetical problems and also take the facts of some cases decided by the hon'ble courts in the form of problems and find their solutions in order to understand the intricacies of the aforesaid rules of law.

Problem 1

A, a Muslim makes a bequest of one-third of his property in favour of C his grandson. A dies leaving behind son B, widow D, and grandson C. Is the bequest valid?

Solution

Testator A's son B and widow D are his heirs at the time of his death and grandson C is not an heir. The bequest is valid. The facts of the problem are based on the case of *Muhammad Hussain* v. *Aisha Bai*.[11]

Problem 2

A, a testator makes a bequest of one-third of his property in favour of his grandson C. He has son B, and wife D at the time of making bequest. Son B dies during the lifetime of the testator A. Is the bequest valid?

Solution

C, grandson legatee was not a heir at the time of making bequest but C becomes an heir at the time of testator's death as the son B has predeceased the testator. The bequest is invalid.

Policy behind the Consent of the Heirs

The rational behind the rule of giving consent by the heirs is that the limitation on the testator's power of disposition is entirely for the benefit of the heirs and if they want to forego the benefit, they are fully free to do so.[12]

Consent not Rescindable

Consent once given cannot be subsequently rescinded.

Consent of Some of the Heirs

Where all the heirs do not give consent but some of them give their consent, the shares of those heirs who consent will be bound and the legacy in excess will be payable out of the share of the consenting heirs.

Insolvency of Consenting Heirs

The consent of the heirs who are insolvent is effective in validating a bequest.

Bequest to Heirs and Non-Heirs

When a bequest is made in favour of some heirs and some non-heirs, the bequest in favour of non-heirs up to one-third of the estate is valid but the bequest in favour of heirs in absence of the consent of the other heirs is invalid.

Problem 3

A, a Muslim makes a bequest of one- third (1/3) and two-thirds (2/3) of the estate in favour of Muslim B, non-heir and C, an heir respectively but the other heirs do not give their consent. Is the bequest valid?

Solution

When a bequest is made in favour of heirs and non-heirs and the other heirs do not give their consent, the bequest in favour of non-heir of one-third of property is valid. Therefore, the bequest of one-third of the property (1/3) in favour of B, a non-heir is valid and the remaining 2/3 estate will go to the heirs according to the Muslim Law of Inheritance. The facts of the problem are based on the case of *Gulam Jannat* v. *Rahamatdin.*[13]

Problem 4

A, a Muslim testator made a bequest of one-third of his estate in favour of B, an heir and C, a non-heir. Other heirs do not give their consent. Is the bequest valid?

Solution

Bequest in favour of B is invalid for want of consent of other heirs but it is valid in favour of non-heir C. C is entitled to get 1/6 of the estate (half of the bequest i.e. $\frac{1}{3} \times \frac{1}{2} = \frac{1}{6}$)

Problem 5

A, a Muslim testator made a Will of his whole estate in favour of wife W, daughter D and the children of pre-deceased daughter. The son of the paternal uncle who is an heir does not give consent. Is the Will valid?

Solution

The children of predeceased daughter are non-heirs and therefore, Will in their favour up to one-third of the estate is valid. The remaining estate will be inherited by other heirs according to the Muslim Law of Inheritance. The facts of the problem are based on the case of *Chutta Veetil* v. *Ponmanichand*.[14]

Effect of Registration of Marriage under the Special Marriage Act, 1954

If a Muslim had married or got his marriage registered under the Special Marriage Act, 1954, he is governed by the Indian Succession Act, 1925 and the Muslim Law of Inheritance does not apply to him. The bequeathable one-third rule does not apply in such a case and the testator has power to bequeath his entire property by a Will.

Abatement of Legacies

If a testator makes a bequest of more than one-third of his property and the heirs do not consent, the legacy will be abated as under:

The bequest will be divided into two parts: (i) for pious purposes, and (ii) for other purposes. The bequest will be proportionately reduced and the proportionately reduced portion will be allotted for two purposes.

Pious Bequests

The bequest for pious purposes is of following types and priority in the order given below will be given.

Faraiz

The duties which are expressly ordained in the Quran i.e.

1. Performance of haj (pilgrimage journey)
2. Jakat (charity for the poor)
3. Expiation, for example, for the missed prayer

In this category of bequests, precedence will be given in the order given above.

Wajibat

Those duties which are recommended by the Quran but not obligatory as per the injunctions of the Quran, for example, charity given on the day of breaking the fast.

Nawafil

The acts that are voluntary for a Muslim and not even recommended in Quran. For example, gift for building a maszid or inn or bridge, non-obligatory charity to the poor etc.

Bequest of the first class takes precedence over that of the second, and bequest of the second class takes precedence over that of the third.[15]

Secular bequests or bequests for other purposes

Rateable abatement will be made in respect of various bequests under this category.

Problem 6

T, a Hanafi testator made bequests of ` 50,000 for pious objects- ` 20,000 for haj ` 20,000 for jakat and ` 10,000 for expiation; and for other purposes- `20,000 for legatee A and ` 30,000 for legatee B. The testator left the estate worth ` 75,000 at the time of his death. His funeral expenses and debts amount to `5,000 and `10,000 respectively. The heirs do not consent. Which bequests are valid and to what extent?

Solution

The bequests for pious purposes are for ` 50,000 (` 20,000 haj +` 20,000 zakat+ `10,000 expiation) and other purposes `50,000(`20,000 A +`30,000 B). The net estate of the testator after deducting the funeral expenses and amount of debts works out to `60,000 i.e. {` 75,000 - (`5000+ ` 10,000)}. The bequests made by the testator are valid to the extent of 1/3 of `60,000 i.e. ` 20,000. The amount of ` 20,000 will be allotted for pious purposes and other purposes in the ratio of bequests made for these purposes i.e. 1:1 (` 50,000: `50,000). Thus, ` 10,000 will be allotted to each category for pious purposes and other purposes. As regards the pious purposes the law of precedence/priority will be made applicable and the bequest for faraiz-haj will be valid only upto ` 10,000 only. The bequests for other purposes `50,000 ( i.e. ` 20,000 + `30,000) have been made whereas the bequest for ` 10,000 only is valid. The bequests for A and B legatees will be rateably reduced. The bequest out of ` 20,000 in favour of A will be valid for ` 4,000 i.e. $\frac{20,000\times10,000}{50,000}$. and the bequest out of ` 30,000 made in favour of B legatee will be valid only for ` 6,000 i.e. $\frac{30,000\times10,000}{50,000}$.

Shia Law

Priority will be given to the bequests for pious purposes which are obligatory on the testator over the bequests which are discretionary. The bequests for other pious purposes will be rateably reduced. Shia Law does not recognise the rule of rateable reduction in respect of other purposes. The abatement of the bequests will be made according to the following rules.

Rule No. 1

If the bequests are made for obligatory and discretionary duties and the amount of the bequests is not sufficient for both these purposes; and the heirs do not consent, the amount for obligatory duties will be satisfied out of the general estate and the bequests for other purposes out of the one-third of the remaining estate in the order in which the bequests have been made or in the order in which the legatees have been mentioned.

Problem 7

T, a Shia testator made bequests of ` 10,000 for pious purposes-haj, and for other purposes- 1/3 of the estate in favour of A, 1/4 of the estate in favour of B and 1/6 of the estate in favour of C. The testator left the estate of ` 70,000 at the time of death. Which bequests are valid and to what extent?

Solution

Bequest of `10,000 for pious purpose- haj will be satisfied out of the general estate and is valid. The other bequests made will be valid in the order given out of 1/3 of the remaining estate. Therefore, the bequest of 1/3 of the remaining estate made in favour of A i.e. 1/3 of `60,000= `20,000 is valid and the bequest in favour of B and C are invalid and they will get nothing.

Problem 8

T, a Shia testator made bequests of 1/9 of estate in favour of A, 1/3 in favour of B and 5/9 in favour of C. Are all the bequests valid?

Solution

The bequests made in favour of the legatees will be valid in the mentioned order up to 1/3 of the estate. Therefore, the bequests of 1/9 to A and 2/9 to B only will be valid as the total of these two bequests 1/9+2/9=3/9 is 1/3 and C will get nothing.

Rule No. 2

There is a curious exception to the above rule. If the bequests are made to different persons of exact 1/3 of the estate, the bequest made in the last is valid as the last bequest is treated in revocation of earlier bequests. If a Muslim bequeaths one-third of his estate to two different persons in the same Will, the latter bequest will prevail.

Problem 9

T, a Shia testator made bequests of 1/3 of the estate to A, then 1/3 to B and then 1/3 to C. Which bequest is valid and to what extent?

Solution

The last bequest of 1/3 of the estate made in favour of C is valid because the bequests of exact 1/3 have been made in favour of various legatees and the last bequest made is valid being in revocation of earlier bequests made in favour of A and B.

Problem 10

T, a Shia testator by Will gives 1/3 to A and later he says in the same Will that 1/3 be given to B. In whose favour will the bequest be valid and to what extent?

Solution

The bequest in favour of B is valid and B will get 1/3 of the estate to the exclusion of A as the bequests are of exact 1/3 of the estate and B is mentioned later in the same Will.

Rule No. 3

If the bequest of the whole property is made in favour of a single legatee, such bequest up to 1/3 of the estate is valid. However, if the bequests of the whole property are made for various purposes, such bequests are not valid because there is no rule to reduce the amount of bequests for each purpose up to 1/3.

Problem No. 11

T, a Shia testator made a bequest of his whole estate in favour of legatee A. Examine the validity of the bequest.

Solution

The bequest is valid up to 1/3 of the estate only.

A Critical Analysis of One-Third Rule

Professor Anderson[16] observed that a Muslim testator may not make bequests which, in aggregate, exceed one-third of his net estate unless his heirs consent after his death (or in the Shia Law either after his death or during his life time). This may work reasonable in most of the cases. However, a Sunni Muslim is also refrained from making any bequest to a person who is entitled to a share in his estate as an heir unless the other heirs consent thereto after his death. The intention behind this rule is to prevent testator from altering in any way the division of his estate between various heirs as prescribed under the Muslim Law of Inheritance. As general rule, this restriction may be reasonable but there may arise circumstances in which there may be cogent reasons for making special provisions for a disabled child. He or she might have been deprived of the education or financial opportunities enjoyed by other members of the family. Shia Law has always allowed this. Some reforms in Egypt[17], Sudan[18] and Iraq[19] have made special provisions lawful for all Muslims. It is obvious that as a result of relaxation of the rule of one-third Sunnis would benefit widows since their husbands could leave them a bequest to augment their inadequate share on intestacy.

Conclusion

Bequeathable property is the property in respect of which a person can make a Will which is defined in Section 2 (h) of the Indian Succession Act, 1925. Accordingly, Will is the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. A Hindu male can bequeath his separate or self acquired property by Will. A Hindu female is empowered to make a Will in respect of her property like a Hindu male as by virtue of Section 14 (1) of Hindu Succession Act, 1956 she has become an absolute owner of the property. According to amendment to Section 30 by the Hindu Succession (Amendment) Act, 2005, a daughter of a coparcener has been given a right by birth to become a coparcener in a Mitakshara Coparcenary. Accordingly, the property to which she became entitled is capable of being disposed of by her testamentary disposition. Explanation to Section 30 of the Hindu Succession Act is worded in cumbersome language. According to this Explanation the interest of a male Hindu in a Mitakshara coparcenary or the interest of a member in the property of a *Tarward etc.* is a property now capable of being disposed of by Will, notwithstanding any other rule of law to the contrary. A Muslim cannot make a Will exceeding one-third of the estate without the consent of the heirs. Rateable abatement is made in respect of secular bequests or bequests for other purposes. There may arise circumstances in which one-third rule may not be reasonable when there may be cogent reasons for making special provisions, for instance, a disabled child who might have been deprived of the education or financial opportunities enjoyed by other members of the family. As a result of relaxation of rule of one-third, Sunnis would benefit widows since their husbands could make bequest to augment their inadequate share on intestacy. Reforms have been made in Egypt, Sudan and Iraq by making special provisions for such persons lawful for all Muslims. The Government of India may enact law on the lines of these reforms made in Islamic countries many years ago.

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Endnotes

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3. *Ibid*
4. *Fyzee Asaf A.A., (1974) Outlines of Muhammadan Law, Oxford University Press, Delhi, 4th edition, p.360*
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