TESTAMENTARY CAPACITY AND THE BEQUEATHABLE THIRD IN THE ISLAMIC LAW OF WILLS

Amanullah bin Haji Ali Hasan
v.
Hajjah Jamilah binti Sheik Madar[1]

In Malaysia, intestacy is the rule rather than the exception, particularly among Muslims. The Holy Quran lays down clearly and meticulously the rules for the distribution of the estate of a deceased Muslim and perhaps because of this reason Muslim sentiment is in most cases, opposed to testate succession.[2] Malaysian cases on Muslim wills are therefore rare and as *Amanullah's* case is one of these rare treats it must not go unnoticed and uncommented.

The case involved a Muslim will which, though prepared under legal advice, conflicted with three basic principles of the law relating to Islamic wills. This is not the first case where a Muslim will prepared in a solicitor's office disregarded basic principles of Islamic law.[3] It is suggested that the reason for this apparent shortcoming is the general belief among some lawyers that, beyond the fact that a Muslim cannot bequeath more than one third of his property, the law of wills applicable to Muslims and non-Muslims is the same. Since, in general, the Probate and Administration Act 1959, the Small Estates Distribution Act 1955 and the Rules made under both apply to Muslims and non-Muslims it is tempting to misconceive that the requirements of the Wills Ordinance 1959 must also apply to both groups. The reverse is nearer the truth and for this reason *Amanullah's* case is worthy of study and comment because it deals with the common errors of Muslim testators and their legal advisers.

The facts of the case were as follows. The deceased, Haji Ali Hasan bin Zufran, made a will on May 7, 1961 (hereinafter referred to as the "1961 will") which named the plaintiff and the defendant as executors and trustees and directed them to distribute his estate according to Muslim law. About seven years later, on February 13, 1968, the deceased, who suffered from chronic diabetes, was admitted into the General Hospital, Johore Bahru. On February 18, he was discharged at the request of his

[1] [1975] 1 MLJ 30. Affirmed on appeal by the Federal Court (as yet unreported).

[2] See Fyzee A.A., *Outlines of Mohammadan Law*, (1964) 3rd ed., p. 348. See also Taylor E.N., *Customary Law of Rembau* (JMBRAS Vol. VII) p. 92 and the Small Estates (Distribution) Act 1955 s. 22.

[3] See *Siti binte Yatim* v. *Mohamed Nor bin Buyai* (1928) 6 F.M.S.L.R. 135.

family but on 24th February he was again admitted, this time while in coma and aphasic. The plaintiff, his eldest son, alleged that the deceased, while in hospital for the second time, told him to bring a lawyer to his bedside. A lawyer was duly brought and a will revoking all former wills and codicils was made. The will (hereinafter referred to as the "1968 will") appointed the plaintiff sole executor and gave him the deceased's entire estate beneficially. One of the witnesses[4] to the will, Encik Wan Hashim, gave evidence[5] that he read a translation of the will aloud to the deceased and the members of the deceased's family, who were present by the deceased's beside. The plaintiff sought probate of the "1968 will". Alternatively, he claimed one third of all the property mentioned in the same will. The defendant contended that the "1968 will" was invalid because it was executed when the deceased was not of "sound mind, memory and understanding" and argued that the only share the plaintiff was entitled to was his fraction as determined by Muslim law. She also sought probate of the "1961 will". Justice Syed Othman first dealt with the question of testamentary capacity. After considering the medical and factual evidence he found that the deceased was totally unconscious from the time he was admitted on February 24 to the time of his death on February 27, 1968. He rejected the evidence of the plaintiff and the lawyer that the deceased could talk. Speaking on the testamentary capacity of a Muslim the learned judge said:-

> "[t]he Wills Ordinance 1959 does not apply to Muslims.[6] But Muslim law is the same as the statutory provision in section 3[7] on requiring that a person must be of sound mind when making a will".

Professor Ahmad Ibrahim's *Islamic Law in Malaya* which at page 263 reads,

> "The capacity to make a will is accorded by law to everyone without distinction of sex, who is adult, sane and free... Such capacity is

[4] The other witness was the solicitor who prepared the will.

[5] Encik Hashim told the court, "I was reading it to him and all persons in the room. I was partly looking at him and partly at the will. Deceased was looking up. He was not looking at me. I did not see any nod. But I saw his lips were moving but no words came out." *op. cit.* n.1 at p. 31.

[6] See the Wills Ordinance 1959, section 2(2). See also the Singapore Wills Ordinance (Cap. 35) and *Katchi Fatimah* v. *Mohamed Ibrahim* (1962) MLJ 374.

[7] Section 3 reads, "Except as hereinafter provided, every person of sound mind may devise, bequeath or dispose of by his will, executed in manner hereinafter required, all property which he owns or to which he is entitled either at law or in equity at the time of his death notwithstanding that he may have become entitled to the same subsequently to the execution of the will."

not possessed by a madman, by a person in faint. . . ."
was cited with approval. Having found as a matter of fact that the deceased was "totally unconscious" at the time of the making of the will His Lordship held that the "1968 will" was invalid for lack of testamentary capacity. He admitted the 1961 will for probate.

Lest it may be misunderstood that the details of the requirement of testamentary capacity and the formalities of will-making under Islamic Law and the Wills Ordinance are similar in all respects the following brief comment may be made. As the learned judge pointed out both Islamic Law and the Wills Ordinance (or generally the law as applicable to non-Muslims in Malaysia) require the testator to be of sound mind.[8] In other areas there are wide gaps. Under the Wills Ordinance 1959[9] no will may be made by a person under the age of twenty-one years.[10] Under the Muslim Law, a person attains majority at puberty, though on this point the opinions of leading Islamic jurists are not unanimous.[11] Most countries have settled this question by legislation.[12] In Malaysia, by virtue of section 4(1) of the Age of Majority Act 1971, the relevant age is eighteen years. The strict formalities required for the making of a valid will under the Wills Ordinance[13] (such as writing) do not apply to a Muslim. Indeed the Privy Council speaking of Muslim Wills, has held in an appeal from India that, "(b)y the Mohamedan 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."[14] Needless to say a Muslim will though in writing, need not be signed; and even if signed, does not require attestation.[15]

In *Amanullah's* case, the learned judge went on to say that even if the "1968 will" satisfied the requirements of testamentary capacity it would offend two other primary rules of the Muslim Law on wills, namely,

(a) A testamentary disposition is invalid if it purports to dispose of

[8] See *Udham Singh* v. *Indar Kaur* [1971] 2 MLJ 263 where the facts were almost similar to *Amanullah's* case.

[9] Section 4.

[10] The Age of Majority Act 1971 does not apply. See section 5(d) of the Act.

[11] See Tyabji, *Muslim Law*, (1968) 4th ed., pp. 756–75, and Mulla, *Principles of* Mohamedan Law, (1968) 16th ed., pp. 122–123.

[12] See for instance The Indian Majority Act of 1875.

[13] See section 6 and 5 of the Wills Ordinance 1959.

[14] *Mohamed Altaf* v. *Ahmed Baksh* (1876) 25 WR 121 PC.

[15] Mulla, *op. cit.*, n. 11, p. 123.

more than a third[16] of the deceased person's estate, and

(b) A testamentary dispostion is invalid if it purports to benefit any of the testator's heirs above his share as prescribed by the Muslim Law of distribution.

The first of the two rules was litigated in Penang in 1835 in the unsatisfactory case of *In the Goods of Abdullah*[16a] This was an application by some of the deceased's beneficiaries to set aside the grant of administration to the deceased's widow on the ground that his will professed to deal with his entire estate and not with the bequeathable one-third. As the basic law in the Straits Settlements at that time was the English law, the court applied the English law of succession and ruled that a Muslim may by will alienate his entire property and that "such alienation will be good although contrary to Muslim Law." Apart from its historical interest *In the Goods of Abdullah* is of little value today.[17] In the Malay States in 1915 it was established in *Shaik Abdul Latif* v. *Shaik Elias Bux*[17a] that a Muslim who has the required testamentary capacity has the power to dispose of by will one-third and not more of property belonging to him at the time of his death. The learned judge in *Amanullah's* case relied on this decision.

While the rule is that a Muslim can dispose by will only one-third of his net assets, a bequest in excess of the fraction is valid if his heirs whose rights are infringed thereby consent to the same. Such consent may be expressed or implied but cannot be inferred from mere silence.[18]

The second principle mentioned by his Lordship was first accepted in the Seremban case of *Siti binte Yatim* v. *Mohamed Nor bin Buyai* in 1928.[18a] In this case,one Buyai bin Datoh Rajah died in 1924 leaving a will in which he devised the major part of his property to his son Mohamed Nor bin Buyai. The plaintiff, the deceased's wife, was completely deprived of the share due to her under the Muslim Law of succession. Burton J., after referring to several Indian authorities said,

[16] The bequeathable third has been defined by Tyabji as "one-third of the estate after payment of the funeral expenses and the debts of the deceased and also such property as does not pass under the Muslim Law of succession but a special law."

[16a] (1835) 2 Ky. Ecc. 8.

[17] Ahmad Ibrahim, *Islamic Law in Malaya*, p. 268 (1965). Also see *Syed Hassan bin Abdullah Aljofri Deceased, The Estates and Trusts (1927)* v. *Syed Hamid bin Hassan Aljofri and Two Others* [1949] MLJ 198, at page 200.

[17a] (1916) 1 F.M.S.L.R. 204.

[18] See Gopalakrishnan, *Law of Wills* (1965) 2nd ed., p. 169 where the Indian authorities are set out.

[18a] *Op. Cit.* n. 3.

> "The inference from these cases is clear that a will which attempts to prefer one heir to another by giving him a larger share of the estate then (*sic*) he is entitled to by Mohammedan Law is wholly invalid as to such bequest. The will of Buyai attempted to prefer his son at the expense of his widow and is consequently invalid."[19]

The rule that a bequest to an heir is invalid is subject to the exception that it will be allowed if the other heirs consent to it after the death of the testator. Any single heir may consent so as to bind his own share. In *Amanullah's* case counsel for the plaintiff argued that the silence of the relatives after Encik Wan Hashim had read out the will should be taken as consent to the bequest of the deceased's entire estate to the plaintiff. To this the learned judge said,

> "To my mind, in Muslim Law, before the court can accept that an heir consents to a will where required, it must be shown that the will was validly made and that the heir declares his approval to the disposition, and if the will is invalid the question of consent does not arise. The effect of a declaration of approval to the disposition under a properly made will, according to a jurist, is that the heir donates his share to the person taking under the disposition. See page 261 Minhaj et Talibin. In the case here I can see no evidence that any beneficiary present declared his approval to the plaintiff taking the whole of the estate. Considering the circumstances in which the document was made, I am convinced that the plaintiff was taking advantage of the situation by exerting his status as the eldest son in the family and that he knew no one would dare to challenge him by reason of his status, and particularly at that time when the others were concerned with the deceased who was on the throes of death, all he seemed to care was to get the deceased's estate to himself by any means. In these circumstances if interpretation of the silence of the relatives is required, I would construe it as contempt of the plaintiff's conduct."[20]

It may be commented that the alleged consent in this case was given before the testator's death. His Lordship did not mention the point that, to be effective, the consent of the heirs must be given after, not before, the testator's death.[21] It is submitted that in *Amanullah's* case, notwithstanding the testator's incapacity the alleged consent would have been worthless even if it had been proved to be expressly given because it was obtained before the testator's death.

[19] *Ibid.*, p. 137.

[20] *Op. Cit.*, n. 1. p. 32.

[21] See Gopalakrishnan, *op. cit.* n. 20 p. 169, where the Indian authorities are cited.

His Lordship has clearly and forcefully given his reasons why he did not consider the silence of the heirs, when Encik Wan Hashim read aloud its contents to them, as consent. However, it is well established at least by the Indian cases that silence on the part of the heirs after they have knowledge of the bequest cannot be construed as implied consent.[22] On the other hand consent given *before the testator's death* may be acquiesced in by silence after the death and thus become effective in the eyes of the law.[23]

It is not often that a lawyer has to draft a Muslim will or to advise on one. As *Amanullah's* case has forcefully indicated, Muslim Law on wills is an area where the testator and his legal adviser must tread with caution. Despite its apparent severity the Muslim Law on wills has its fascinating features and convincing philosophy and a lawyer may do well for himself and his client by his understanding and appreciation of it.

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[22] Mulla, *op. cit.* n. 11, p. 125, where the Indian authorities are set out.

[23] *Sarifa Bibi* v. *Ghulam Md.* 16 Mad. 43. See Gopalakrishnan, *op. cit.*, n. 20, p. 167.

NOTES ON LEGISLATION

The Civil Law (Amendment) Act, 1975.

This amendment to the Civil Law Act, 1956, (Act 67) has the effect of changing the law enunciated in the case of *Ti Tuck and another* v. *Mohamed Yusoff* ([1973] 2 M.L.J. 72).

In that case the respondent, a police constable, had been injured in a road accident. As a result of the injuries he was retired from the police force and was given a pension. The only question for determination was the question of damages. The learned trial judge had held that in assessing damages for loss of earnings the gratuity and pension received by the respondent should not be brought into account. On appeal, it was held by the Federal Court that as the gratuity and pension were non-contributory they should have been taken into account and deducted from the damages awarded.

There was at that time no statutory provision dealing with the point at issue and the Federal Court therefore were referred to the law in England. The Federal Court referred to the case of *Browning* v. *War Office* ([1963] 3 All. E.R. 1089), where "the true principle applicable in the assessment of damages at common law" was stated by Lord Denning that the plaintiff should –

> "give credit for all sums which he receives in diminution of his loss, save in so far as it would not be fair or just to require him to do so."

Thus contributory pensions would not in the view of the Federal Court be deductible but a non-contributory pension or pension should be. The case of *Browning* v. *The War Office* has for practical purposes been overruled by the decision of the House of Lords in *Parry* v. *Cleaver* ([1969] 1 All. E.R. 555) and in *Raja Mokhtar* v. *Public Trustee, Malaysia* ([1970] 2 M.L.J. 151), Raja Azlan Shah had in reliance on that case held that the pension awarded to the plaintiff in that case by the Government should not be taken into account in assessing the damages at common law. He relied on what Lord Reid had said in *Parry* v. *Cleaver* –

> "In my judgment, a decision that pensions should not be brought into account in assessing damages at common law is consistent with general principles, with the preponderating weight of authority and with public policy as enacted by Parliament and I would therefore so decide."

The Federal Court however held that *Parry* v. *Cleaver* was not a relevant authority. It is interesting to note that the Federal Court said of the