

IN THE HIGH COURT AT CALCUTTA

TESTAMENTARY AND INTESTATE JURISDICTION

Present :
THE HON'BLE JUSTICE ARINDAM MUKHERJEE

P.L.A. No. 373 of 2021

IN THE GOODS OF :

**Manadath Mohamed Ibrahim Kutty @ M M Ibrahim Kutty,
Deceased**

For the Petitioner : Mr. Udaynarayan Betal,
Mr. Biswadip Ghosh.
..... Advocates

Heard on : 4th December, 2025

Judgment on : 9th December, 2025

Arindam Mukherjee, J:

1. This is an application for grant of probate of the last Will and Testament left behind by Manadath Mohamed Ibrahim Kutty @ M.M. Ibrahim Kutty, on 20th March, 2015 (hereinafter referred to as the said will). The deceased was a Mohammedan governed by the Sunni School of Mohammedan Law who died on 21st August, 2016 at Bengaluru though he ordinarily resided at G.D-278, Sector III, Salt

Lake City, P.S. Bidhannagar (South), Kolkata-700 106 as will appear from the death certificate annexed to the petition. The application for grant of probate has appeared before this Court as a non-contentious cause for final disposal since citations have been issued to the persons who have caveatable interest or right to object to the grant but none has come forward to challenge the grant. The department as a consequence whereof has issued a “No Caveat Certificate”.

2. On a perusal of the affidavit of assets filed in this proceedings, it appears that the deceased left behind only one immovable property situate and lying at plot no. 278, Sector III, Salt Lake City, P.S. Bidhannagar (South), Kolkata-700 106 (hereinafter referred to as the said property) which is in the State of West Bengal but outside the ordinary original civil jurisdiction of this Court which is also the jurisdiction of the City Civil Court at Calcutta in terms of the provisions of the City Civil Courts Act, 1953 (hereinafter referred to as the 1953 Act).
3. The cause of action in this case going by the abode and the jurisdiction of the said property, therefore, has arisen outside the jurisdiction of the City Civil Court at Calcutta and as such it can be easily said this Court can receive, try and determine the application by exercising its concurrent jurisdiction but the task is not so easy since the subject Will is a Mohammedan Will.

4. Before the grant can be allowed, the following questions are, therefore, required to be answered:

- i. Can a Mohammedan like the deceased can make a Will?*
- ii. Is there any legal embargo in granting probate to the Will left behind by the deceased?*
- iii. Is the Will of the petitioner governed by the provisions of Succession Act, 1925?*
- iv. Does this Court exercise jurisdiction under Clause 34 of Letters Patent, 1865 while considering a Will left behind by a person professing Mohammedan Law at the time of his death?*
- v. By which law the testate and intestate succession of a Mohammedan like the deceased is governed?*

5. The fact as to which law governs the testate and intestate succession in case of a Mohammedan will be clear from the judgment of the Hon'ble Supreme Court reported in **2024 SCC Online 3809 (Mansoor Saheb (Dead) & Ors. vs. Salima (D) by Lrs. & Ors.)** and a Division Bench judgment of this Court reported in **AIR 2012 Cal 7 (Pandraj Kunjilal Sadh vs. Santosh Kumari Mahendra Kumar Sadh)**. It is clear from the judgment of Mansoor Saheb (supra) that the testate and intestate succession in case of a Mohammedan is governed by their personal laws. In Pandraj (supra) the Division Bench of this Court has clearly held that the provisions of the

Succession Act, 1925 is not applicable to a Muslim in view of the provisions of Section 58 of the said Act. The personal law of a Muslim as it stood on the date of the Constitution of India having come into effect also stands protected. This position is clear from the judgment reported in **2001 (4) SCC 325 (Clarence Pair & Ors. vs. Union of India)**. On a conjoint reading of the two judgments as aforesaid, it will be apparent that:-

- a) Partition of the properties belonging to a Mohammedan cannot be made amongst his lineal descendants, heirs, heiresses and/or legal representatives as applicable in view of their respective personal law before the death of the said person.
 - b) A Mohammedan is entitled to make a Will and his succession opens only after his death.
 - c) A Mohammedan in his/her lifetime can gift a property belonging to him not only by a registered deed but also by way of *Hiba* provided the conditions necessary to demonstrate a valid gift is apparent from the conduct of the doner and the donee.
6. There is however, a restriction in respect of the properties that can be bequeathed by a Mohammedan by way of a Will. A Mohammedan cannot dispose of by the Will more than one-third of his properties and assets as held in **(2011) 9 SCC 223 (Shehammal v. Hassan**

Khani Rawther.) The restriction however according to a coordinate bench after considering several judgments operating in this field has been held to be not an absolute embargo. The said judgment is reported in ***(Nurun Nahar Deceased Sheikh Abdus Sadek v. Sheikh Abdul Mukim, 2017 SCC OnLine Cal 21473)***. The heirs can, therefore, give consent to a bequeath by a Mohammedan in excess of one-third of his estate.

7. The Division Bench in Pandraj (supra) has further gone to hold that in case of a Mohammedan Will despite there being an embargo on this Court in entertaining an application for grant of probate or Letters of Administration wherein the cause of action arise within the City Civil Court jurisdiction in view of the 1980 amendment to the 1953 Act, this Court still retains jurisdiction under Clause 34 of Letters Patent, 1865 to directly receive, try and determine an application for grant of probate or Letters of Administration in connection with a Mohammedan Will or estate.
8. In Pandraj (supra) the testator who was a Hindu died in Mumbai i.e. outside the State of West Bengal but had left the only immovable property within the City Civil Court jurisdiction which is also the Ordinary Original Civil Jurisdiction of this Court. The Division Bench after discussing the relevant provisions of law held that the probate application in that case was required to be filed in the City Civil Court as the immovable property was within City Civil Court's jurisdiction

and the deceased being a Hindu. The ratio laid down in Pandraj (supra) if applied to the facts of this case permits this Court to entertain the application for grant under Clause 34 of Letters Patent, 1865 as the deceased is a Mohammedan and has left behind his only property within the State of West Bengal but outside the City Civil Court's jurisdiction. Even if the property was within the City Civil Court's jurisdiction then also this Court could not have entertained the application since the deceased is a Mohammedan and the 1980 amendment to the 1953 Act has no exclusion effect like a Hindu to whom the provisions of The Succession Act, 1925 applies. This view has not been interfered with by a recent Division Bench judgment in ***Prabir Chandra Sen (2025 SCC OnLine Cal 7999)*** wherein Pandraj (supra) fell for consideration.

9. On a conjoint reading of the judgments, referred to hereinabove, I am of the view that, the provisions of Succession Act, 1925 has no application in respect of a Will left behind by a Mohammedan or in respect of an application or grant of Letters of Administration of his/her estate. A Mohammedan can make a Will but it should normally be restricted to one-third of his estate. However, this embargo is not an absolute one and can be relaxed if all the heirs consent to such excess bequeath that is more than one-third of his estate. This Court according to me, in view of the settled position of law, discussed in the two Division Bench judgments, referred to in

Pandraj (supra) and Prabir Chandra Sen (supra) exercises jurisdiction under Clause 34 of Letters Patent, 1865 in respect of an application for grant of probate of a Mohammedan or for Letters of Administration in respect of his estate with regard to the whole of State of West Bengal provided the assets left behind by the deceased are within the State of West Bengal.

10. In case of a Muslim governed by Sunni Law like the testator the successors in intestacy are broadly divided into three categories- sharers, residuaries and distant kindered.
11. The testator had left behind his son and daughter who are not only attesting witnesses but also are entitled to object to the grant as the only legal heirs. The son and daughter despite cited has not objected to the grant.
12. The probate proceeding, therefor, is in the non-contentious state. There is as such, no embargo in proceeding with the grant at this stage.
13. Although, in the instant case there is no concrete proof that the deceased had bequeathed under the subject will only one-third of his estate but the same being not an absolute embargo as the heirs can give consent for a bequeath in excess of 1/3rd, I am not inclined to go into this aspect at this stage where a factual enquiry as to the title of the properties owned by the deceased is required to be conducted which is impermissible while adjudicating an application for grant of

probate. Moreover, there is always a check guard. As anyone be it his legal heirs/heirress or persons entitled to challenge the grant or the right of the testator to bequeath the property forming his estate on being aggrieved by the grant can seek revocation thereof apart on such grounds alone.

14. In the aforesaid facts and circumstances, the will having been proved in common through an affidavit of an attesting witness, no one has come forth to object the grant despite issuance of citation and that the Department has issued a “no objection certificate” after complete scrutiny of record, the application appearing for final disposal as a non-contentious cause is allowed by granting the executor probate in terms of prayer (d) of the instant application.

15. The application being PLA 373 of 2021 is accordingly disposed of.

Urgent photostat certified copy of this judgment and order, if applied for, be supplied to the parties on priority basis after compliance with all necessary formalities.

Arindam Mukherjee, J.