IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION

INTERIM APPLICATION NO. 3619 OF 2025
IN/WITH
CAVEAT NO. 405 OF 2025
[CAVEAT (L) NO. 17978 OF 2024]
IN
TESTAMENTARY PETITION NO. 3197 OF 2019

Late Gulam Hussain Abdul Karim Khatri ... **Deceased.**
And
Mohammed Yusuf Gulam Hussain Khatri ... **Applicant/Petitioner.**
Versus
Rabiya Mohammed Iqbal Khatri ... **Caveator.**

Mr Arshad Shaikh, Senior Advocate a/w Mr Anuj Jhaveri, Ms Vinsha Acharya, Mr Ranjit Agashe and Mr Mihir Modi for the Applicant-Petitioner.
Mr Zain Shroff a/w. Ms Shaista Pathan and Mr Dev Mistry i/by YNA Legal LLP for the Defendant in TS/81/2022 and for the Caveator in CTS/405/2023.

Coram : Sharmila U. Deshmukh, J.
Reserved on : March 09, 2026
Pronounced on : March 25, 2026

ORDER :

1. Interim Application has been preferred seeking dismissal of the Caveat No.405 of 2025 filed in Testamentary Petition No.3197 of 2019. The Testamentary Petition is filed by present Applicant seeking grant of Letters of Administration in respect of estate of the deceased Gulam Hussain Abdul Karim Khatri, Sunni Muslim who expired on 30th July, 2019. The Petition pleads that the deceased died intestate and had left him surviving as his heirs and next of kin according to the applicable Mohammedan Law, the widow of the deceased and three sons including the present Applicant and the fourth son who had expired on 17th February, 2002. The Petitioner claimed to be entitled to 7/24th in the estate left by the deceased.

2. The grant is opposed by the wife of the pre-deceased son of the deceased by setting up oral Will of the deceased. In the affidavit in support of the caveat, it is contended that the Applicant herein in furtherance of oral Will of the deceased has mutated the name of the Caveatrix and her daughter in revenue records. It is contended that upon the death of the Caveatrix's husband in the year 2002, the deceased told the Caveatrix that she and her daughters have an equal share as other sons of the deceased.

3. It is stated that on 29th March, 2002, after the 40th day of the demise of the husband of the Caveatrix, there was meeting held in which the parents and brothers of the Caveatrix and Gulam Mustafa Khatri and his wife were present. The deceased made an oral Will in the meeting bequeathing one share of his estate to the Caveatrix and his daughters which was 1/4th of his estate i.e. 25% of his estate.

4. It is contended that the deceased prior to his demise in presence of his three sons, the Caveatrix and his eldest grandson reiterated the oral Will and that it was his desire that his estate be divided into four parts and be bequeathed to his three sons and family of his predeceased son. The deceased stated that it is his desire that after his demise, five equal shares be made from his estate giving 20% each to the sons, 20% to the Caveatrix and 20% to his grandson. As per the oral Will, the widow of the deceased was to have right over everybody's share and each shareholder of the estate ought to contribute towards expenses of his wife till her demise.

5. It was proposed by the Applicant that 20% share belonging to the Caveatrix and her daughters shall be kept in the name of widow of the deceased and upon her demise, the same will devolve completely upon them. Accordingly an oral family arrangement was agreed upon. wherein, it was decided that the estate would be divided between the three surviving sons, the widow of deceased and the grandson with 20% share each. It is stated that the Petitioner proposed that the share of the grandson i.e. Asif Gulam Mustafa Khatri should be transferred in the name of Gulam Mustafa Khatri since the showing of one grandson on paper was creating complication and accordingly another partnership deed was executed wherein the share of the grandson was transferred in the name of Gulam Mustafa Khatri.

6. The affidavit pleads that the Caveatrix was informed by her brother-in-law Gulam Mustafa Khatri that Applicant has fraudulently claimed that the deceased died intestate and his estate be divided as per the Mohammedan Law and that the Caveatrix would not be therefore entitled to any share in his estate. The existence of the oral Will has been suppressed by the Petitioner by claiming that the deceased had died intestate.

7. In the application seeking dismissal of the caveat it is stated that in the caveat filed by the other brother-Gulam Mustafa Khatri, there is no mention about the oral Will. Similarly, the affidavit of the widow of the deceased denies that any such meeting has taken place and states that there is no oral Will of the deceased. It is further pleaded that as per the succession law governing the deceased, since the husband of the Caveatrix had predeceased the deceased, there is complete exclusion of his legal heirs including the present Caveatrix.

8. It is pleaded that there are varying stands taken in the Affidavit from claiming bequest of 1/4th share in the estate to 1/5th share with the grandson getting a share and the proposal that Caveatrix's 1/5th share will be transferred in name of widow of deceased. It is pleaded that none of these versions is put forth by the widow of the deceased or by the other brother-Caveator. It is pleaded that the alleged oral Will is *ex facie* illegal as Mohammedan Law prohibits bequest of the entire estate of the testator. The names of the Caveatrix and her daughters were added in 7/12 extracts on account of being the legal heirs of the deceased son Mohammed Iqbal Khatri. The partnership deed mentioned by the Caveatrix does not even mention her name as partner. The Caveat is required to be dismissed as the Caveatrix has no caveatable interest in the estate of the deceased as per Mohammedan Law governing the deceased.

9. Mr. Shaikh, learned Senior Advocate appearing for the Applicant submits that the Caveatrix has no caveatable interest as per the Mohammedan Law as the right of inheritance is available only to the surviving heirs. He submits that the oral Will put up by the Caveatrix is no Will as the testator could not have bequeathed his entire estate. He submits that under Mohammedan Law, partition is possible provided there is consent by all heirs. He submits that the Caveatrix claims that the oral Will was made in presence of Gulam Mustafa Khatri, however, in the Caveat filed by Gulam Khatri, there is no mention of oral Will. He submits that the division in five shares of the estate would amount to bequest of entire estate of the deceased. He submits that varying stands have been taken by the Caveatrix as regards the share under the oral Will, the division of estate and partnership deed. He submits that the case of Caveatrix about transfer of share of Asif to Gulam Mustafa Khatrai by reason of complication by showing name of grandson on paper is unsustainable as she has put up a oral Will. He submit that the oral Will set up by the Caveatrix is *ex facie* suspicious as the widow has not been bequeathed any property under the oral Will. In support, he relies upon the following decisions:

(i) ***Krishna Kumar Birla vs. Rajendra Singh Lodha and Ors.***[1]
(ii) ***Mansoor Saheb (D) and Ors. vs. Salima (D) by LRs. and Ors.***[2]
(iii) ***Smt. Ashabi vs. Smt. Faziyabi and Ors.***[3]
(iv) ***Abdul Bari Khan and Anr. vs. Nasir Ahmad Khan and Ors.***[4]

10. *Per contra*, Mr. Shroff, learned counsel appearing for the Respondent submits that the deceased acted on his oral Will as during his lifetime he had made provision for the Caveatrix and her daughters, which has not been disputed by the Applicant. He points out the partnership deed annexed to the application which shows 20% share of the widow and other sons of the deceased except Gulam Khatri who has 40% share in the partnership which is in consonance with the case of the Caveatrix that share of the grandson was transferred to Gulam Khatri.

11. He submits that the Caveatrix has caveatable interest by virtue of two oral Wills, one in the year 2002 under which the deceased

1 *(2008) 4 SCC 300*
2 *2024 DGLS (SC) 1297*
3 *ILR 2004 KAR 3599*
4 *AIR 1933 Oudh 142*

bequeathed 25% out of 33% of his estate, and, the second oral Will before his demise which was acted upon as family arrangement as is evident from the partnership deed. He submits that the Applicant has admitted that the deceased during his lifetime had transferred certain properties to the Caveatrix which is in furtherance of oral family arrangement and the Applicant is estopped from claiming otherwise.

12. Rival contentions now fall for determination:

13. The grant is opposed by the widow of pre-deceased son of the deceased. The personal law governing the parties is the Mahomedan Law applicable to Sunni Muslims. Mulla in the 24th Edition of Principles of Mahomedan Law has elucidated in Paragraph 53 that according to Sunni law the expectant right of an heir - apparent cannot pass by succession to his heir, nor can it pass by bequest to a legatee under the Will. If any of the children of a man dies before the opening of the succession of his estate, leaving children behind, these heirs are entirely excluded from inheritance. Paragraph 116 states that a Will may be made either verbally or in writing but in either case the intention of the testator to make a Will must be clear and explicit. Paragraph 118 states that a Muslim cannot, by a Will, dispose of more than a third of the surplus of his estate. Bequests in excess of the legal third cannot take effect, unless, the heirs consent thereto after the death of the testator.

14. Paragraph 119 states that if the bequests exceed the legal third and the heirs refuse their consent, under the Sunni law, the bequests abate ratably. Paragraph 130 states that a bequest to a person is revoked by another bequest in a subsequent Will of the same property to another person.

15. Under the Mohammedan Law, the widow of pre-deceased son is not entitled to any share in the estate of the deceased upon intestacy, which position is undisputed. The Caveatrix claims caveatable interest by setting up two oral Wills of the deceased, the first oral Will by the deceased on 29th March, 2002 bequeathing 25% i.e. 1/3rd of his estate in favour of the Caveatrix and her daughters. The first oral Will is claimed to have been made in presence of the Caveatrix's family members and brother in law Gulam Mustafa Khatri. Though caveat has been filed in the testamentary proceedings by Gulam Mustafa Khatri, there is no contention by Gulam Khatri in the caveat that the deceased had made any oral Will. The 2nd oral Will is claimed to have been made by the deceased prior to his death dividing his estate in five parts including his grandson in proportion of 20% each leaving out the widow of the deceased and stating that each share holder shall contribute towards expenses of the widow till her demise.

16. The 2nd oral Will set up by the Caveatrix would revoke the bequest in the earlier Will. It is claimed that by the 2nd oral Will, the deceased has bequeathed his entire estate in favour of the legatees i.e. the three sons, the Caveatrix and the grandson in proportion of 20% each constituting bequest of 100% of the estate.

17. The Muslim law of inheritance does not permit a Muslim to bequeath more than 1/3rd of his estate and in event of such bequest, it is mandatory to obtain consent from all legal heirs. The Hon'ble Apex Court in ***Shehammal vs Hasan Khani Rawther and Ors*** reported in ***2011(4) CTC 790*** has reiterated the principles of Mohammedan Law as under:

> *"24. ... . Paragraph 118 of Mulla's "Principles of Mohammedan Law" embodies the concept of the limit of testamentary power by a Mohammedan. It records 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. Bequests in excess of one-third cannot take effect unless the heirs consent thereto after the death of the testator. The said principle of testamentary disposition of property has been the subject matter of various decisions rendered by this Court from time to time and it has been consistently stated and reaffirmed that a testamentary disposition by a Mohammedan is binding upon the heirs if the heirs consent to the disposition of the entire property and such consent could either be express or implied. Thus, a Mohammedan may also make a disposition of his entire property if all the heirs signified their consent to the same. In other words, the general principle that a*

Mohammedan cannot by Will dispose of more than a third of his estate after payment of funeral expenses and debts is capable of being avoided by the consent of all the heirs. In effect, the same also amounts to a right of relinquishment of future inheritance which is on the one hand forbidden and on the other accepted in the case of testamentary disposition."

18. The case of Caveatrix is that the desire of the deceased to bequeath the property in favor of Caveatrix manifested in form of maintenance by the deceased of the Caveatrix and her daughters. It is claimed that in furtherance of the oral Will, there was family arrangement under which it was agreed that share of 20% of Caveatrix and her daughters should be kept in name of widow of the deceased and and thereafter there was another understanding that share of the grandson be transferred to Gulam Mustafa Khatri and accordingly partner ship deed was executed.

19. The oral Will takes effect upon the death of the testator and there cannot be any assumption that as the deceased took care of Caveatrix and her daughters, the same was manifestation of intention to bequeath estate to the Caveatrix. The Affidavit in support of the Caveat does not give any details of estate of the deceased in which the Caveatrix claims 20% as per the 2nd oral Will. It is not demonstrated that the bequest in favour of Caveatrix was to the extent of 1/3rd share of the estate of deceased. On the contrary the assertion is that the entire estate is divided in five parts. There is not a single assertion that the bequest in excess of 1/3rd of estate of deceased was consented by the other legal heirs. The pleading in the Affidavit in support of Caveat swings between two oral Wills of the deceased to family arrangements between the parties in order to justify that pursuant to the family arrangement, the bequest in faour of the Caveatrix was transferred to widow of the deceased.

20. Though submission canvassed is that the bequest was to extent of 20% i.e. 1/3rd of estate, to substantiate the said submission, it was necessary to plead and produce material to demonstrate the extent of estate of the deceased and that the bequest to the Caveatrix was to the extent of 1/3rd estate of deceased. *Sans* any pleadings detailing the estate of the deceased, it is difficult to accept the contention about bequest being within the restricted 1/3rd.

21. The grant can be opposed by setting up Will of the deceased, however, the Affidavit takes varying stands and there is no clarity as to whether the Caveatrix opposes the grant under the oral Will or under the family arrangement. Any claim in the right title or interest in the estate of the deceased under the family arrangements is an issue to be adjudicated in the civil courts and not in testamentary jurisdiction.

22. The submissions canvassed by Mr. Shroff on the partnership deed faintly borders on the consent of the legal heirs by reason of the constitution of the partnership between the parties in which except Gulam Mustafa Khatri others have 20% share. The partnership firm has been constituted in August, 2019 i.e. after the death of the deceased and has commenced its business from August, 2019. The Caveatrix is not a partner in the partnership firm which has been constituted amongst the sons of the deceased and the widow of the deceased. It cannot be comprehended as to how the constitution of the partnership firm would tantamount to consent of the heirs to the bequest in excess of 1/3rd estate of the deceased. The partnership deed does not mention about any asset being brought in the partnership by the partners which could have been termed as estate of the deceased. There is no validation by the legal heirs of bequest of more than 1/3rd of estate of the deceased.

23. In the case of ***Krishna Kumar Birla vs. Rajendra Singh Lodha and others***, (supra) the Apex Court had culled out the proposition of law to be applied for determining the caveatable interest in paragraph 86 of the judgment as under:

> *"86. The propositions of law which in our considered view may be applied in a case of this nature :*
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> *(i) To sustain a caveat, a caveatable interest must be shown.*

> *(ii) The test required to be applied is: Does the claim of grant of probate prejudice his right because it defeats some other line of succession in terms whereof the caveator asserted his right?*
>
> *(iii) It is a fundamental nature of a probate proceeding that whatever would be the interest of the testator, the same must be accepted and the rules laid down therein must be followed. The logical corollary whereof would be that any person questioning the existence of title in respect of the estate or capacity of the testator to dispose of the property by will on ground outside the law of succession would be a stranger to the probate proceeding inasmuch as none of such rights can effectively by adjudicated therein."*

24. The objection that are germane in a testamentary petition are those that concern the issuance of grant. The opposition must make out cogent ground for opposing the grant. The deceased expired on 30th July, 2019 and there is no justification for inaction to propound the purported oral Will of the deceased. In the present case, the Caveatrix claims under an oral Will, which is invalid as it bequeaths more than 1/3rd share in the estate of the deceased. There is no single assertion or material to demonstrate the estate of the deceased to consider whether the bequests can be reduced rateably. The Caveatrix has taken the partnership deed and has reverse engineered the shares to claim family arrangements and oral Will. The oral Will set up by the caveatrix is suspicious as the widow of deceased has denied any such oral Will. The caveat filed by Gulam Mustafa Khatri, the brother of the Applicant in whose presence the oral Will is claimed to have been made, makes no mention about the oral Will.

The Caveatrix therefore has no caveatable interest to oppose the grant of Letters of Administration.

25. In light of the above, the Application succeeds. Caveat No.405 of 2025 stands dismissed. The testamentary suit is reconverted into testamentary petition. The Petition to proceed for grant.

[Sharmila U. Deshmukh, J.]