

DLST010003432010



IN THE COURT OF SH. ARUL VARMA,
DISTRICT JUDGE-02, SOUTH DISTRICT, SAKET COURTS
COMPLEX, NEW DELHI

PC 5912/2016

Filing No. 39042/2010

CNR No. DLST-010003432010

In the matter of

Ms Amina Kidwai

W/o Late Sh Taufiq Naseem Kidwai

(THROUGH HER LEGAL HEIRS')

1. Mr Rafiq Kidwai

S/o Late Sh Taufiq Naseem Kidwai

R/o C-84 Sector 41, Noida

2. Ms Sonia Kidwai

D/o Late Sh Taufiq Naseem Kidwai

R/o K-32 Tara Apartments Alakhnanda New Delhi

3. Dr Sabina Kidwai

W/o Sh Himanshu Malhotra

D/o Late Sh Taufiq Naseem Kidwai

R/o C-50 Defence Colony, New Delhi

4. Dr Ayesha Kidwai

W/o Dr Rahul Roy

D/o Late Sh Taufiq Naseem Kidwai

R/o F-2 Tara Apartments, Alakhnanda New Delhi

.....Petitioners

VERSUS

1. State

2. Ms Salma Sultan

W/o Late Sh Amir Mustafa Kidwai

R/o 5, Jangpura-A Mathura Road, New Delhi

3. Mr Saad Kidwai

S/o Late Sh Amir Mustafa Kidwai

R/o 5, Jangpura-A Mathura Road, New Delhi

4. Ms Sana Kidwai

D/o Late Sh Amir Mustafa Kidwai

R/o 5, Jangpura-A Mathura Road, New Delhi

.....Respondents

Date of Institution	: 11.11.2010
Date of reserving the judgment	: 21.11.2025
Date of Pronouncement	: 22.11.2025
Decision	: Petition Allowed

JUDGMENT/ORDER

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I. BRIEF FACTS/CASE OF THE PETITIONER

1. The facts as asseverated by the Petitioner are hereby succinctly recapitulated: the deceased Shri Midhat Kamil Kidwai s/o Sh V.A Kidwai was the father of the petitioner and he died on March 17, 2000 at New Delhi. It was alleged that the petitioner herein is the daughter of Mr Midhat Kamil Kidwai from his first wife, Ms Safia Kidwai, who died when she was a small child. It was also stated that the ordinary place of residence of Shri Midhat Kamil Kidwai was house no B-28 situated in Diplomatic Enclave CHBS Limited Known as Westend Colony, New Delhi. It was further stated that after the death of his first wife, the deceased Mr Midhat Kamil Kidwai remarried to Ms Aziza Kidwai and a male child namely Mr Amir Mustafa was born out of the wedlock and thus the petitioner is the step daughter of Ms Aziza Kidwai and step sister of Mr Amir Mustafa Kidwai.
2. It was brought to the fore that Mr Amir Mustafa Kidwai predeceased his father Shri Midhat Kamil Kidwai on 19.10.1999 leaving behind his wife Salma Sultan, Mr Saad Kidwai (son) and Ms Sana Kidwai (daughter). It was stated that the Ms Aziza Kidwai, the second wife of Mr Midhat Kamil died on 01.12.2009.
3. It was alleged that as per the Muslim Law of Inheritance relating to Sunni Muslims, the deceased petitioner through

legal heirs is entitled to $\frac{1}{2}$ share in the estate of her father as a 'Sharer' since the only son of deceased Mr Midhat Kamil Kidwai had predeceased him and that at the time of his death, he had one surviving wife, Ms Aziza Kidwai, who inherited $\frac{1}{8}$ th share in the estate of Mr Midhat Kamil Kidwai as a sharer and that the remaining $\frac{3}{8}$ share in the estate of deceased became a 'Residuary' share and the same devolved upon the 2 children of the predeceased son of the deceased Mr Midhat Kamil Kidwai, i.e. Saad Kidwai (son) and Ms Sana Kidwai (daughter). It was further stated that upon the death of Ms Aziza Kidwai, her $\frac{1}{8}$ th share devolved on her 2 grandchildren Saad Kidwai (grandson) and Ms Sana Kidwai (grand-daughter) as residuaries, again the grandson taking double portion and the grand-daughter taking a single portion and therefore there is no impediment to grant of letter of Administration/Succession Certificate or any other impediment under Section 370 of Act. Hence, the petitioner pursued the present Probate Case for grant of Letter of Administration in Respect of her share in House no B-28 situated in Diplomatic Enclave C.H.B.S Limited Known as Westend Colony New Delhi of Sh Midhat Kamil Kidwai Deceased u/s 218 of Indian Succession Act.

II. WRITTEN STATEMENT /OBJECTIONS OF RESPONDENTS

4. As per the record, summons were issued to the respondents on 21.01.2011. On 25.03.2011, respondent no 2 3 and 4 entered appearance through their counsels. Written statements/amended objections were filed by the respondents on 24.01.2013 wherein they raised following objections:

1. That the petition for grant of letters of administration instituted by the Petitioner is not maintainable and is without any cause of action hence liable to be dismissed.
2. That the Petitioner does not have any cause of action to approach this Hon'ble Court for grant of letters of administration on account the estate of the deceased, Shri MK Kidwai. it is submitted that it is well settled and definite that the grant of letter of administration does not confer any title, but conveys merely a right to administer the estate of the deceased. In the present case neither the Petitioner has any right in the suit property bearing no. B-28, Diplomatic Enclave, CHBS Limited, known as the West End Colony, nor the estate has any need to be administered, considering the fact that the respondents no 2 & 3 are the absolute owners of the said property and peaceful possessors of the said property. Keeping in view the same, it is submitted that letter of administration may

not be granted to the Petitioner and the present petition stands liable to be dismissed.

3. That the present petition is not maintainable and ought to be rejected mere on the ground of deficiency in opting this Honourable Court for filing the petition. The court. Jurisdiction of this Hon'ble Court to entertain the present petition is not admitted by the answering Respondents in view of the fact that the value of the suit property even if the 'Unit Area Scheme' is kept for consideration stands more than 20 Lac. Since the Hon'ble High Court otherwise has original jurisdiction as well as concurrent jurisdiction to try and entertain petitions seeking grant of letters of administration, it is respectfully submitted that this Hon'ble Court does not have the jurisdiction to entertain the present petition.

4. That the petition is not maintainable and is liable to be dismissed being barred by limitation, besides being hit by inordinate delays and laches. The deceased, i.e. Late Shri Midhat Kamil Kidwal passed away on 17.03.2000, whereas the present petition appears to have been preferred sometime in November 2010. There is no explanation as to the delay during the intervening period of almost 10 years, before the Petitioner has approached this Hon'ble Court It is submitted that in the present case, the cause of action pleaded for grant of letters of administration accrued

(without prejudice to the contentions of the Respondents) at the time of death of late Shri MK Kidwai and the petition ought to have been filed within three years of the date of death. The Petitioner having slept over her alleged rights for ten years is not entitled to any relief from this Hon'ble Court and the petition is liable to be dismissed on account of the bar of limitation, delays and laches.

5. That the Petitioner has not approached this Hon'ble Court with clean hands and has distorted and concealed the true facts of the case, which are being set out below. It is submitted that in view of this conduct of the Petitioner, it is a fit case for the petition to be dismissed by this Hon'ble Court.

6. That during the course of the proceedings before this Hon'ble court, the objectors received an order of cancellation of conveyance deed passed by DDA and on its perusal the objectors revealed that the deceased Sh. M. K. Kidwal left behind a registered Will dated 17.09.1997 which was not earlier in the knowledge of the objectors. The certified copy obtained thereafter has already been placed on record. The contents of the will clearly show that deceased Sh. M. K. Kidwai was the owner of only the half of the property whereas the other half belongs to Mrs. Aziza Kidwai, which has been inherited by the respondent no. 2 to 4. As per settled Muslim law the will left behind

by the deceased Sh. M. K. Kidwai is a valid document and the properties bequeathed by him can only be devolved upon the beneficiaries as per the last will of the deceased. In view of the same the petition is liable to be dismissed.

7. That the petition is liable to be dismissed mere on the ground that the entire petition is based on concoctions and material concealments as despite of knowledge of the existence of the registered will, the petitioner preferred a petition for grant of letter of administration instead of preferring the probate of the will. The petition itself is not maintainable as the petitioner never challenged the genuineness of the will on the basis of which the conveyance deed has been sought to be cancelled from DDA. It is a material concealment that on one hand the petitioner filed a copy of the Will (though alleging to be an un-registered will) and on the other hand filed the petition alleging that the deceased Sh. M. K. Kidwai died intestate. It is not out of place to mention here that the so called un-registered will as alleged by the petitioner though the same is registered one was filed by the petitioner before the DDA prior to the filing the present petition. The petitioner is liable to be prosecuted U/s 340 of Cr. P. C. As the existence of will was concealed on oath by enclosing an attested affidavit on solemn affirmation before this Hon'ble court. It is further submitted that the registration

or non registration of will does not affect the right to file the petition for seeking probate of the same.

III. ISSUES FRAMED

5. Vide order dated 07.03.2013 following issues were framed:-

“1. Whether the petitioner is entitled for grant of Letters of Administration in respect of Property in question? OPP

2. Whether the objections filed on behalf of respondent no 2 to 4 are valid and maintainable? OPP

3. Relief.”

6. On 06.08.2014, issue no 1 was recasted as thus:

“1. Whether the petitioner is entitled for grant of letter of administration in respect of half of the property B-28, Diplomatic Enclave, CHBS Ltd., known as Westend Colony, Delhi?”

7. Further, on 21.11.2025, after allowing the application under Order issue no 1 was again recasted as thus:

“Whether the petitioner is entitled for grant of Letters of Administration/succession certificate in respect of half of the property B-28, Diplomatic Enclave, CHBS Ltd., known as Westend Colony, Delhi?”

IV. EVIDENCE LED BY PETITIONER.

8. In the proceeding **03** witnesses were examined petitioner succinct testimonies whereof are as follows:

9. **PW-1 Plaintiff Ms Amina Kidwai:** She tendered her evidence by way of affidavit as Ex. PW1/A. She relied upon certain documents i.e. death certificate of Sh Midhat Kamil Kidwai as

Ex PW1/1, copy of lease deed in favour of Sh Midhat Kamil Kidwai as Mark A, Original death certificate of Sh Amir Mustafa as Ex PW1/3, original death certificate of Ms Aziza Kidwai as Ex PW1/4, copy of legal notice as Ex PW1/6, letter dated 23.10.2010 as Ex PW1/7, another letter dated 03.11.2000 as ExPW1/8, original RTI application as Ex PW1/9, copy of affidavit dated 12.05.2005 as Mark B, Original letter dated 29.04.2010 as Ex PW1/11 and letter dated 20.10.2010 as Ex PW1/12. She was cross examined by Ld Counsel for respondent/objector.

10.PW-2 Sh Nanda Ballabh, Assistant Cooperative Society C Block DDA Vikas Sadan New Delhi: He was the summoned witness. He had brought the summoned record relating to property no B-28, Diplomatic Enclave, CHBS Ltd knows as West End New Delhi. He had proved the photocopy of affidavit of Mrs Aziza Kidwai in Judicial File as Ex PW2/1 and original relinquishment deed dated 27.04.2004 executed by Mr Saad Kidwai Mrs Salma Sultan and Ms Sana Kidwai in favour of Mrs Aziza Kidwai and its photocopy as Ex PW2/2. He was cross examined by the Ld Counsel for respondents.

11.PW-3 Ms Sonia Jain, UDC Sub Registrar-VII INA Vikas Sadan: She was summoned witness and she had brought the summoned record relating to Will executed by Mr MK Kidwai registered as document no 2712 in Addl Block No III Volume no 20, pages 177 to 179 registered on 17.09.1997 in

the Office of Sub-Registrar-VII, New Delhi. She deposed that she had seen the certified copy of the same from the judicial record and proved as Ex PW3/1. She had brought the summoned record relating to Will executed by Smt Aziza Kidwai registered as document no 2713 in Addl Block No III Volume no 20, pages 180 to 181 registered on 17.09.1997 in the Office of Sub-Registrar-VII, New Delhi. She deposed that she had seen the certified copy of the same from the judicial record and proved as Ex PW3/2. She was cross examined by Ld Counsel for respondents.

V. EVIDENCE LED BY RESPONDENTS

12. In the proceeding **05** witnesses were examined by the respondents, succinct testimonies whereof are as follows:

13.R3W1 Sh Saad Kidwai s/o Late Sh Aamir Mustafa Kidwai:

He tendered his evidence by way of affidavit as R1. He relied upon certain documents i.e. photocopy of Gift Deed dated 02.02.2007 as Ex RW1/3. He was cross examined by Ld Counsel for petitioner.

14.R3W2 Smt Salma Sultana w/o Sh Amir Kidwai: She tendered her evidence by way of affidavit as Ex. R-2. She relied upon certain documents i.e Original gift deed dated 02.02.2007 as Ex R3W2/A and Special power of attorney as Ex R3W2/B. She was cross examined by Ld Counsel for petitioner.

- 15.**R3W3 Ms Farzana Farooqi D/o Sh Nawab Yusuf Farooqi:** She tendered her evidence by way of affidavit as Ex. R-3W3/A. She was cross examined by Ld Counsel for petitioner.
- 16.**R3W4 (inadvertently mentioned as R3W3 in record) Mohd Naim Khan:** He tendered his evidence by way of affidavit as Ex. R-3. He was cross examined by Ld Counsel for petitioner.
17. **R4W4 Mr Vinay Kumar S/o Sh Sita Ram Verma:** He tendered his evidence by way of affidavit as Ex R4W4. He was cross examined by Ld Counsel for petitioner.
- 18.**RW5- Sh Jagbir Singh Designation-LDC/Record Keeper, Department-Assessor & Collector, South Zone:** He was the summoned witness who brought entire file pertaining to property no B-28, Westend Colony, New Delhi. He proved several documents viz, photocopy of letter submitted by Sh MK Kidwai dated 27.10.1971 as Ex RW5/1, affidavit of Sh MK Kidwai dated 23.11.1971 as Ex RW5/2, the letter written by Sh M.K Kidwai dated 22.01.1972 as Ex RW5/3 and the order of amendment to ownership dated 19.02.1972 as Ex RW5/4. He was cross examined by Ld Counsel for petitioner.
- 19.DE was closed vide order dated 05.04.2018. Thereafter, the matter was fixed for final arguments.

VI. ARGUMENTS OF COUNSELS FOR THE PARTIES

20. At the outset, Ld Counsel for petitioners submitted that the defense set up by the respondents herein is a complete sham.

It was submitted that Late Sh MK Kidwai was an absolute Owner of the Suit property bearing no B-28 Diplomatic Enclave, CHBS Limited, Westend Colony. To prove, that Late Sh MK Kidwai was an absolute Owner of the suit property in question, Ld Counsel for petitioner contended that a perusal of Mark A i.e. Perpetual Sub Lease deed issued by DDA in favour of deceased MK Kidwai clearly forbids the Lessee i.e. the deceased Mr MK Kidwai to part away with property either by way of sale, transfer etc. Ld Counsel invited the Court's attention to clause 6 (a) and (b) of the Sub-Lease Deed in this context. It was further submitted that a perusal of clause 6B would also make it explicit that the transfer could be made in case the transferee was a member of the society Diplomatic Enclave Extension Cooperative House Building Society Limited, and Ms Aziza Kidwai was not a member of the said society and therefore on this count also she could not have been a valid transferee.

21. Ld Counsel also contended that perpetual Sub-Lease Mark A was duly proved as per the Evidence Act inasmuch as on 03.12.2015, PW-2 Nanda Ballabh, Assistant, Cooperative Society, C Block DDA, was examined and who categorically averred that Mark A i.e. perpetual Sub-Lease corresponded with the copy on the file of the DDA. Thus, in a nutshell, Ld Counsel contended that during his death, Sh MK Kidwai was the absolute owner of the suit property and had not divested

himself of the ownership of the property either by way of gift etc. Ld Counsel thus contended that the defence of the respondents that ½ share of the suit property was given to his second wife Ms Aziza, by way of gift cannot be countenanced.

22. Ld Counsel further petitioner further contended the factum of Late Sh MK Kidwai being the owner of the property in question is also established by a perusal of Ex PW2/1 viz. Affidavit given to the DDA by Ms Aziza Kidwai wherein Ms Aziza had averred that Sh MK Kidwai was an allottee/Sub-Lease of property in question. The said affidavit dated 12.05.2005 is conspicuously silent qua the factum of gifting of this property by Mr MK Kidwai to Ms Aziza Kidwai. Ld Counsel also submitted that vide this affidavit, Ms Aziza deliberately concealed the name of the petitioner herein.

23. Ld Counsel submitted that the said affidavit Ex PW2/1 was duly proved as per law on 03.12.2015 vide testimony of PW-2 Sh Nanda Ballabh, Assistant, DDA. Further, Ld Counsel for petitioner contended that a perusal of Ex PW2/2 viz. Relinquishmen Deed dated 27.04.2004 would also reveal that the name of Sh MK Kidwai has been mentioned as an absolute owner/lessee of the suit property in question. It was contended that this averment was made in the relinquishment deed on 27.04.2004 despite taking a contrary stand that an oral gift was the property was made in December, 1999. Thus,

Ld Counsel has contended that respondents have no cogent defense and that Sh MK Kidwai was the absolute owner of the property in question and since he died intestate, the property ought to devolve upon the petitioner in terms of Muslim Law of Inheritance applicable to Sunni Muslims. According to Ld Counsel the petitioner herein is a *Sharer* and therefore she is entitled to $\frac{1}{2}$ share of the property of deceased. He further submitted that Ms Aziza Kidwai was entitled to only 1/8th share as per Muslim Law and therefore only the remaining 3/8th share would devolve upon the children of Sh Amir Kidwai, the predeceased son.

24. Ld Counsel further submitted that since the son of Sh MK Kidwai predeceased, Legal Heirs' of predeceased son would be excluded from estate of the deceased. Ld Counsel further contended that the Wills placed on record cannot be given effect to inasmuch as they are contrary to the tenets of the Muslim Law relating to Wills which clearly stipulates that a Sunni Muslim cannot bequeath more than 1/3rd of his share to Legal Heirs, and that too without consent of other Legal Heirs. He further substantiated his contention by inviting court's attention to cross examination of R3W1 Mr Saad Kidwai, and R3W2 Ms Salma Sultan that the said Wills were never acted upon. Thus, Ld Counsel contended that there is no impediment in granting of letter of Administration qua the petitioner herein.

25. Ld Counsel for petitioner conceded that succession certificate can be granted qua movable property only. However, he made submissions to amend the issues only to bring it in conformity with letter Ex PW1/11 reflecting the demand of DDA that property mutation would be done only upon filing of succession letter from the competent authority.
26. *Per contra*, Ld Counsel for respondents firstly assailed the maintainability of the present petition. He placed reliance of ***Salra Gupta Vs State and Ors Test case 15/2016 passed by Hon'ble High Court of Delhi*** to contend that the appropriate remedy for the petitioner would be to file a suit for partition which she has done by way of filing case bearing no 57741/2016 in New Delhi District, Patiala House Courts. Ld Counsel for respondents further contended that since the relationship between the Legal Heirs is bitter, in terms of judgment ***Sarla Gupta*** (supra), the petitioner cannot be expected to fairly distribute the estate between the claimants. Further, Ld Counsel for respondents contended that a Probate Court ought not to enter into the question of adjudication of title which is being surreptitiously sought by the petitioner. Lastly, he contended that since the present case involved contentious issue of fact and law, they cannot be decided in a summary proceedings u/s 218 of the Indian Succession Act.
27. Further, Ld Counsel for respondents highlighted certain inconsistencies in the cross examination of PW-1 Ms Amina

Kidwai to ostensibly impeach her credit as a witness. Ld Counsel contended that in cross examination dated 28.09.2011, the witness averred that she was only Legal Heir of her father and excluded the respondents herein as Legal Heirs. Further, she averred that she had written a letter Ex PW1/8 as the respondents had committed fraud upon her. However, in the same breath she stated that no fraud had taken place with her in the year 2000.

28. Ld Counsel for respondents further contended that vide cross examination dated 17.01.2015, she averred at one place that she became cognizant about Will only after filing the present petition whereas at another place she averred that she was given photocopies of the Will after 2 to 3 months after the death of her father. The other inconsistency pointed out by Ld Counsel for respondents revolves qua awareness of the Will by the petitioner herein.

29. Lastly, Ld Counsel for respondents submitted that in cross examination dated 27.08.2015 the witness has clearly specified that the present suit was filed by her to claim her share in the suit property, and therefore it has to be inferred that the present suit was not filed for obtaining letters of Administration rather they were filed as a ruse to obtain partition and declaration of title.

30. In rebuttal, Ld Counsel for petitioner submitted that it is too late in the day for Ld Counsel for respondents to rely on *Sarla*

Gupta (supra). Ld Counsel further submitted that this submissions made after 14 years of trial and this plea was not taken in the written statements filed by the respondents.

VII. ISSUE WISE ANALYSIS & FINDINGS THERETO

31. Before delving on issue wise analysis, it would be imperative to succinctly recapitulate the facts of this convoluted case:
32. Late MK Kidwai, who died on 17.02.2000 was the owner of suit property qua part of which Letter of Administration has been sought. He had two wives. The name of the first wife was Ms Safia Kidwai with whom MK Kidwai had a daughter named Amina Kidwai i.e. the petitioner herein.
33. After the death of his first wife, MK Kidwai married Aziza Kidwai. They had a son named Amir Mustafa Kidwai, who had a wife named Salma Sultan (respondent no 3) and son named Saad Kidwai (respondent no 1) and daughter named Sana Kidwai (respondent no 2). Amir Mustafa Kidwai, son of MK Kidwai predeceased his father i.e. he died on 19.10.1999. Further, Ms Aziza Kidwai had expired on 01.12.2009,
34. The petitioner has filed the present petition claiming 1/2 share in the suit property, being only surviving child (daughter) of deceased MK Kidwai.
35. According to the petitioner, the 2nd wife of MK Kidwai is entitled to only 1/8th share of the property.

36. This position is disputed by the legal heirs of Aziza Kidwai, who are the respondents herein. According to them, Aziza Kidwai is not entitled to mere 1/8th share of the property, but to the entire share of the property, as the same came to be vested in her vide oral Hiba dated 27.11.1999 (which was registered before the Sub-Registrar about 07 years later, on 07.08.2006).
37. The respondents have contended that vide the aforementioned oral Hiba, late MK Kidwai bestowed half of the share of his property to Aziza Kidwai by way of gift in the presence of witnesses Farzana Farooqi, Vinay Kumar and Naeem Khan. It was also contended that the remaining half of the share was already given to Aziza Kidwai and this was mentioned before the said witnesses.
38. On the basis of the said registered gift deed, Aziza Kidwai got the property mutated in her name in the DDA records and converted the property into freehold and a conveyance deed dated 07.08.2006 was executed in the name of Aziza Kidwai. The affidavit Ex PW2/1 filed by Aziza Kidwai and Relinquishment Deed Ex PW2/2 used for the purposes of mutation, according to the petitioner, burke essential facts and also allude towards ownership of late MK Kidwai qua the entire property in question. It is also brought on record that the abovesaid mutation of the property in the name of Aziza Kidwai stands cancelled as of now.

39. During the course of proceedings, two Wills whereof the testators are late MK Kidwai and Aziza Kidwai, qua the same property in question, have been introduced to this *lis*.

40. The petitioner essentially relies on the fact that under Section 218 of ISA, she being the only surviving child/daughter of MK Kidwai, and therefore ‘Sharer’ as per Muslim Law, is entitled to Letter of Administration qua half of her share of the property.

i. Issue no 1: *Whether the petitioner is entitled for grant of Letters of Administration/succession certificate in respect of half of the property B-28,Diplomatic Enclave, CHBS Ltd., known as Westend Colony, Delhi?*

41.To ascertain this issue, it would be imperative to *a fortiori* establish certain material propositions of fact as well as law.

WHETHER LATE MR M.K KIDWAI DIED INTESTATE.

42. Section 218 of the Indian Succession Act, 1925 under which the present petition has been moved, presupposes the existence of the fact that the deceased died intestate. Therefore, the grant of letters of administration to the petitioner herein is contingent upon establishing that the deceased died intestate i.e without leaving any will.

43.The above issue assumes significance in light of the fact that not only one, but two Wills have been introduced in the present *lis* by the respondents thereby leading to an inference that the deceased did not die intestate. However, the petitioner

disputed the validity of the Wills and contended that the said Wills were *non est* in law being contrary to Muslim Law of Inheritance, and therefore it ought to be deemed that the deceased died intestate.

Wills and Muslim Law of Inheritance

44. In order to adjudicate upon these rival claims, it would be imperative to delve upon the law qua this subject. It is not in dispute that the parties to the present *lis* are Sunni Muslims.

45. In *Sulaxani & Ors Vs Sattar Ali & Ors, SA No 474/2007 passed by Hon'ble High Court of Chattisgarh on 02.05.2022,*

It was observed as thus:

21. It is not in dispute that the execution of Will is Sunni Muslim Sect is governed by Hanifi Law. Since all the substantial questions of law are interconnected, therefore, they are being deciding analogously. Before examining the Will under Mahomedan Law, it is expedient for this Court to understand the requisite conditions for a valid Will. Chapter IX of Mulla's Principles of Mahomedan Law, deals Will and Section 115 provides for the person capable of making Wills. Section 116 provides that the forms of Will is immaterial. Section 117 provides for bequest of heirs & Section 118 provides limit of testamentary power. Sections 115, 116, 117 & 118 are as under:-

"115. Persons capable of making wills- Subject to the limitations hereinafter set forth, every Mahomedan of sound mind and not a minor may dispose of his property by will. 116. Form of will immaterial- A will (Vasiyat may be made either verbally or in writing. 117. Bequests to heirs- A bequest to an heir is not valid unless the other

heirs consent to the bequest after the death of the testator (l). Any single heir may consent so as to bind his own share (m). 118. Limit of testamentary power- A Mahomedan 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 (e).”

22. From the above stated provisions, it is quite vivid that following conditions must be filled up for a valid Will executed by Mahomedan.

(a) A bequest may be executed by any Muslim to another including institution and a class of people.

(b) The persons entitled to make or take a Will must have capacity to make or take a Will.

(c) A bequest must be made of some subject.

(d) Formalities of making a Will must be fulfilled.

(e) **Only one-third property can be bequeathed.**

(f) Bequest to heirs is restricted.

(g) Conditional contingent and future bequest are void.

46. Further, in ***Zoharbee & Anr Vs Imam Khan (D) Through LRS & Ors Civil Appeal no 4516-4517 of 2023*** wherein the Hon’ble Apex Court observed as thus:

“9. Reference may also be made to John T Platts’ A Dictionary of Urdu Classical Hindi and English which defines matruka as the estate of a deceased person. Also, a sper the

Rekhta Dictionary, 'matruka' is a work of Arabic origin and means "abandoned from his possession (property etc) [,] left by immigrants (property etc.) [,] inherited wealth and property etc. It is clear from the above that matruka property simple refers to property left behind by deceased person and nothing more. Regarding the devolution of matruka property, it has to be observed that the Will is the first document that is to be satisfied subject to the limits imposed by Muslim Law, namely, that it cannot exceed one-third of the estate and cannot ordinarily be made in favour of an heir without the consent of the other heirs, and then whatever remains hereafter, is to be distributed strictly as per the rules of intestate succession prescribed in Muslim Law.

10. Since the Agreement to Sell has no value in the eyes of law, all the property that vested in Chand Khan would become matruka property. The next question then to be considered is as to how the division thereof would take place.

11. In Mohammedan Law, the division of property is well defined. The Holy Quran itself delineates how division of property is to take place. Chapter IV, Verse 12 reads as under:

"And for you is half of what your wives leave if they have no child. But if they have a child, for you is one fourth of what they leave, after any bequest they [may have] made or debt. And for the wives is one fourth if you leave no child. But if you leave a child, then for them is an eighth of what you leave, after any bequest you [may have] made or debt. And if a man or woman leaves neither ascendants nor descendants but has a brother or a sister, then for each one of them is a sixth. But if

they are more than two, they share a third, after any bequest which was made or debt, as long as there is no detriment [caused]. [This is] an ordinance from Allah, and Allah is knowing and Forbearing.”

12. It would also be useful to, at this stage, refer to Mulla Principles of Mahomedan Law which in this regard says as follows:

51. Heritable property *There is no distinction in the Mahomedan law of inheritance between movable and immovable property or between ancestral and self-acquired property....*

A. THREE CLASSES OF HEIRS

61. Classes of heirs *There are three classes of heirs, namely, (1) Sharers (2) Residuaries and (3) Distant Kindred:*

(1) “Sharers” are those who are entitled to a prescribed share of the inheritance;

(2) “Residuaries” are those who take no prescribed share, but succeed to the “residue” after the claims of the sharers are satisfied

(3) “Distant Kindred” are all those relations by blood who are neither Sharers nor Residuaries.

B. SHARERS

63. Sharers- *After payment of funeral expenses, debts, and legacies, the first step in the distribution of the estate, of a deceased Mahomedan is to ascertain which of the surviving relations belong to the class of sharers, and which again of these are entitled to a share of the inheritance, and after this is done, to proceed to assign their*

respective shares to such of the sharers as are, under the circumstances of the case, entitled to succeed to a share. The first column in the accompanying table contains a list of sharers; the second column specifies the normal share of each sharer; the third column specifies the conditions which determine the right of each sharer to a share, and the fourth column sets out the shares as varied by the special circumstances.

TABLE OF SHARES- SUNNI LAW

<i>Sharers</i>	<i>Normal Share</i>		<i>Condition under which the normal share is inherited</i>	<i>---</i>
	<i>Of one</i>	<i>Of two of more collectively</i>		
<i>Wife</i>	<i>1/8</i>	<i>18</i>	<i>When there is a child or child of a son h.l.s</i>	<i>¼ when no child or child of a son h.l.s</i>

13. The first and foremost thing to be accomplished with the estate of a deceased person is the payment for expenses, debts and legacies. Thereafter, comes allotment of shares to such relations who are entitled to a prescribed share. What follows is that if any part of the estate remains, the same is divided among the residuaries. Should there be a situation where there are no sharers, the residuaries will come

into the entirety of the inheritance. It is further provided that if there are neither sharers nor residuaries, 'distant kindred' shall be entitled to the same.

14. A perusal of the above extracts principles of Muslim Law of Inheritance depicts that the sharers are entitled to a prescribed share of the inheritance and wife being sharer is entitled to 1/8th of the share but where there is no child or child of a son how low so ever, the share to which the wife is entitled is 1/4th."

47. Further, it would be apt to reproduce the following extract of ***Hamzah Muneer & Anr CS(OS) 353/2022*** wherein the Hon'ble Court held as thus:

"11. In the said judgment of the High Court, the Supreme Court judgment quoted at paragraph 12, which clarifies that where a Muslim man dies leaving behind surviving children and grandchildren of the predeceased child, the grandchildren of the predeceased child are excluded. And, the estate devolves upon the surviving children. This judgment of the Supreme Court explains that grandchildren cannot succeed if uncles and aunts are alive at the time of the demise of the grandfather.

14. Learned counsel for the defendant had also relied upon the judgment of the Division Bench of the High Court of Karnataka in Abdul Subhan vs. Khyroonibi 3 , more specifically upon paragraph '8' of the said judgment, which reads as under: -

"8. To a very limited extent only the learned Civil Judge was right. Under Muslim Law, no person has a right in the property by birth. It is known that there is no such thing as 'joint family' among the Muslims. So long as the father is alive, the

children do not possess any right in the property. It is only on the death of the father, the children living at that time would inherit. However, if any son dies earlier to the father, then the son's issues would not succeed to the father of the deceased son. Principle of 'representation' is entirely unknown to this Law, governing the Muslims (Sunni Law). Right of inheritance arises on the death of the person owning the property and the question of devolution of inheritance rests entirely decided at that point of time when the person through whom the heirs claim dies - death being the sole guide. The illustration given by Mulla on the Principles of Mohamedan Law (Sixteenth Edition) deriving the same from a reported Decision in Moolla Cassim v. Moola Abdul [(1905) 33 Calcutta 173.] makes the position very clear. It is as follows:

“A, a Sunni Mohamedan, has two sons B and C, B dies in the life time of A, leaving a son D, A then dies leaving C, his son, and D, his grand-son. The whole of A's property will pass to C to the entire exclusion of D. It is not open to D to contend that he is entitled to B's share as representing B: Moolla Cassim v. Molla Abdul(1905) 33 Cal. 173, 32 I.A. 177.

In the case cited above, their Lordships of the Privy Council observed: ‘It is well-known principle of Mohamedan Law that if any of the children of a man dies before the opening of the succession to his estate, leaving children behind, these grandchildren are entirely excluded from the inheritance by their uncles and their aunts’. The son of a predeceased son is therefore not an heir.”

15. In this judgment at paragraph no. 8, an extract from Mulla on the principles of Mohamedan law has been cited, which clearly explains the circumstances in which grandchildren are excluded. The grandchildren are excluded only if the grandfather has other surviving sons and daughters. As noted above, in the facts of this case, the deceased Mohd. Arif had no other surviving son or daughter and therefore the plaintiffs herein would inherit the said estate. This judgment of the Division Bench does not lend any support to the claims of defendant nos. 1 to 6 qua their entitlement to the estate of late Mohd. Arif.”

48. The lietmotif discernible from the above verdicts is that a Sunni Muslim cannot bequeath more than 1/3rd of his share to a legal heir unless other heirs consent to the same. Further, at the time of the death of Late M.K Kidwai, only one of his wives i.e. Aziza Kidwai was alive, and as per Muslim Law she was entitled to only 1/8th of his property as a ‘Sharer’. ***Thus, the deceased could not have bequeathed whole or half of the suit property to Aziza Kidwai.*** Such a bequest would be bad in law, and impermissible. Further, in the cross examination of R3W1 and R3W2 it has come on record that the Wills were never acted upon. Under such circumstances, the Will is to be treated as *non est* and it is to be deemed that the deceased died intestate, as is apparent from a perusal of Ex PW2/1 viz. affidavit given to DDA by Aziza Kidwai wherein she categorically averred that the deceased died without leaving any Will.

WHETHER LATE MR M.K.KIDWAI WAS THE OWNER
OF THE SUIT PROPERTY

49. This issue needs adjudication as for the purposes of grant of letters of administration qua his estate, the estate itself needs to be determined.

**Perpetual Sub-Lease issued by DDA in favour of deceased
MK Kidwai**

50. During the course of arguments. Ld Counsel for the petitioner had averred that a Perpetual Sub-Lease Deed dated 15.10.1966 issued in favour of Sh MK Kidwai establishes the absolute ownership of Sh MK Kidwai over the suit property.

51. At this juncture, it would be apposite to reproduce the following extracts of the deed which are germane to decide this issue:

“6(a) The Sub-Lessee shall not sell transfer assign, or otherwise part with the possession of the whole or any part of the residential plot in any form or manner, benmi, or otherwise, to a person who is not a member of the Lessee.

(b) The Sub-Lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the residential plot to any other member of the Lessee except with the previous consent in writing of the Lesser which he shall be entitled to refuse in his absolute discretion.”

52. The aforementioned Perpetual Sub-Lease Deed Mark A was proved as per law vide the testimony of PW2 Sh Nanda Ballabh from DDA who averred as thus:

“ I have seen photocopy of perpetual sub-lease deed in the judicial file, which is Mark A and it correspondence (sic) with the copy on our file.”

53. Clause 6 (a) and (b) clearly forbid the transfer of suit property viz. 28 B Diplomatic Enclave Extension Cooperative House Building Society Ltd., Village Basant Nagar, Munirka, by way of sale or otherwise to (i) a person who is not a member of the Lessee and (ii) without the previous consent in writing of the Lessor. Aziza Kidwai has not been proved to be a member of the aforementioned society nor any permission has been brought on record allowing MK Kidwai to part with the property. ***Therefore, on this count alone, MK Kidwai could not have been divested of his ownership in the property.***

54. Therefore, the defence of the respondents that half of the share in the above property was gifted by MK Kidwai to Aziza Kidwai by way of oral Hiba, cannot be countenanced inasmuch as the Perpetual Sub-Lease Deed itself forbade any kind of transfer.

55. At this juncture, it would also be apposite to refer to the law on oral Hiba to understand the implications thereof in the present case.

56. In *Dharamrao Sharanapp Shabadi & Ors Vs Syeda Arifa Parveen SLP(C) no 16996 of 20222*, the Hon'ble Court observed as thus:

35. In Abdul Rahim v. Sk. Abdul Zabbar, 8 Rasheeda Khatoon v. Ashiq Ali, 9 Hafeeza Bibi v. Sk. Farid, 10 and Mansoor Saheb v. Salima, 11 this Court had considered the various aspects underlying the transfer of property through Hiba. Hiba is a disposition between living persons and is fundamentally an act of benevolence. The theological underpinnings trace back to the Prophet Mohammed (PBUH), who is reported to have said, "Exchange gifts among yourselves so that love may increase."

36. The oral gift and the effect of a valid oral gift are reiterated as follows:

36.1 There are three essential conditions for an oral gift under Mohammedan Law. First, a clear manifestation of the wish to give on the part of the donor. Second, an acceptance of the gift by the donee, which can be either implied or explicit. Third, taking of possession of the subject-matter of the gift by the donee, either actually or constructively.

36.2 A gift under Mohammedan Law does not require a written document to be valid. An oral gift that fulfils the three essential requisites is complete and irrevocable. The mere fact that a gift is reduced to writing does not change its nature or character. A written document recording the gift does not become a formal instrument of gift.

36.3 The distinction that a written deed of gift is not required to be registered if it "recites the factum of a prior gift" but must be registered if

the “writing is contemporaneous with the making of the gift” is considered “inappropriate and is not in conformity with the rule of gifts in Mohammadan Law”.¹³ Section 129 of the Transfer of Property Act, 1882 (‘Transfer of Property Act’) excludes the rule of Mohammedan Law from the purview of Section 123, which requires registration for the gift of immovable property.

36.4 Delivery of possession is a critical and necessary element for a valid gift. It can be actual or constructive. Constructive possession can be demonstrated by overt acts by the donor that show a clear intention to transfer control. For example, the donor applies for the mutation of the donee's name in the revenue records.

38.2 Therefore, the evidence of acting under the gift (e.g., collecting rent, holding title, mutation) is essential to substantiate the claim of possession. While Mohammedan Law allows for a gift to be made orally without a written document, the validity of such a gift is contingent on the demonstration of all three essential elements, particularly the delivery of possession. The courts will scrutinise “contemporaneous” and “continuous” evidence of the donee's actions and control over the property to determine if possession was indeed transferred. The lack of evidence (e.g., failure to collect rent, donor's continued control, lack of mutation) will lead to proving that a gift was never completed, regardless of any written declaration.

57. Thus, declaration of the donor qua the gift, acceptance by the donee of the gift and taking of possession of the gift by the donee, are the essential elements of a valid Hiba.

58.To establish declaration of the gift, the respondents examined Mohd Naeem Khan as RW2, Farzana Farooqi as RW3 and Vinay Kumar as RW4, who all parroted on the same lines that on 27.11.1999, MK Kidwai made an oral Hiba that his half share in the property no B-28, Westend Colony, New Delhi, shall henceforth be of Aziza Kidwai, and also informed them that the other half share in the property already belongs to Aziza Kidwai. The three witnesses also asseverated that Aziza Kidwai was present throughout, and graciously accepted the oral Hiba in respect of portion of MK Kidwai in their presence.

59.R3W3 Mohd Naeem Khan withstood the test of cross examination, denied all suggestions put to him and nothing was elicited from his testimony.

60.However, as far as the other two witnesses are concerned i.e. Farzana Farooqi and Vinay Kumar they were also witnesses to the Relinquishment Deed Ex PW2/2 executed on 27.04.2004 by respondents Saad Kidwai Sana Kidwai and Salma Sultan, in favour of Aziza Kidwai. Vide this Relinquishment Deed, the releasers/respondents relinquished their share in favour of Aziza Kidwai.

61. At this juncture, it would be apt to reproduce certain extracts of the said Relinquishment Deed Ex PW2/2:

“WHEREAS Late Sh M.K Kidwai was absolute owner /sub-lessee of property bearing no B-28, in the lay-out plan of

Diplomatic Enclave Extension Co-operative House Building Society Ltd., in abadi of Villages Basant Nagar and Mohd. Pur, Munirka, New Delhi, (Zone F-6), by virtue of Lease Deed regd. As No 7808, in Addl. Book No.1, Volume No 1638, on pages 148 to 154, on 29.10.1996, in the office of Sub-Registrar, New Delhi.”

AND, WHEREAS after death of said Shri Amir Kidwai his 1/2 undivided share devolved upon his legal heirs and each become 1/6 undivided share in the said property.”

62. Upon a bare perusal of the above Deed, it becomes explicit that the Deed contains recitals *inter alia* that (a) Late Sh MK Kidwai was the absolute owner/Sub-Lessee of the suit property and (b) after his death, his half undivided share devolved upon his legal heirs.

63. **In essence, the respondents as well as witnesses to this Deed i.e. RW3 Farzana Farooqi and RW4 Vinay Kumar were cognizant of/affirmed the fact that MK Kidwai was the absolute owner of the property and half of his share was undivided.** This fact is substantiated upon a perusal of the cross examination of R3W3 Farzana Farooqi on 30.03.2017 wherein she avowed as thus:

“It is correct that the document Ex PW2/2 which is a relinquishment deed dated 27.04.2004 bears my signature at point X as an attesting witness.”

64. Further, in the cross examination of R4W4 Vinay Kumar dated 30.03.2017, it was elicited as thus:

“ The witness is confronted with documents Ex PW2/2 on record of the case. It is correct that my signature appears at point Y of this document as an attesting witness. I did not read this document completely. Vol. I recall that I signed this document after reading. However, I know that respondents 2 to 4 had given up their share in favour of Smt. Aziza Kidwai by way of this document. ”

65. Apart from these two witnesses of the respondents, R3W2 Salma Sultana also fumbled when the following questions were put to her:

“Q: You have stated in your affidavit R-2, that Mr. M.K. Kidwai had made an oral Hiba in favour of Mrs. Aziza Kidwai, please tell the date when this oral Hiba was made?

A: It was 27.11.1999.

Q: You have stated that Hiba was made on 27.11.1999, would that mean that Mrs. Aziza Kidwai had become owner of property on that date?

A: Obviously.

Q: If by virtue of oral Hiba of 27.11.1999, Mrs. Aziza Kidwai became the owner of the property, what was the need to write relinquishment deed dated 27.04.2004 in favour of Mrs. Aziza Kidwai?

A:I do not know.

Q:It is put to you that you and your children executed the relinquishment deed because Mr. M.K. Kidwai had died as owner of the property and the property devolved on his legal heirs in accordance of Muslim Law of Inheritance, what would you say?

A: It is not so. At the time when Shri M.K. Kidwai died, Mrs. Aziza Kidwai was already become owner of the property by virtue of Hiba in her favour.”

66. Thus, both these witnesses i.e. RW3 Farzana Farooqi RW4 Vinay Kumar were aware of the contents and import of the Relinquishment Deed. Both these witnesses have been examined as persons in the presence whereof the alleged oral Hiba was made qua half of the property of the deceased, and in whose presence, the deceased informed them that the other half of the property already belonged to Aziza Kidwai. Under these circumstances, the testimony of these witnesses is suspect, consequently it has not been cogently established that the declaration of the gift was made as per law.

67. *De hors* the above observation qua *declaration* of the gift, the other requirement of *taking of possession* of the gift, by the donee, has also to be proved. As discussed above, the Courts are bound to scrutinize *contemporaneous and continuous* evidence of the donee's actions and control over the property to determine if possession was indeed transferred. A *contemporaneous action* envisages *inter alia* mutation of the property of the donor in the name of the donee. The gift was allegedly made in the year 1999, however the mutation pertains to the year 2005. This is definitely not a contemporaneous action on the part of the donee. There are no other documents evincing the factum of transfer of possession

to the donee or to the factum of the donee exercising control over the property in question from the date of the alleged gift deed on 27.11.1999 till the date of demise of MK Kidwai.

68. Further, *continuous* evidence of acting under the oral gift is crucial qua delivery of possession, and the donee must be able to demonstrate exclusive control over the property by acts such as collection of rent, or by the donor performing acts like mutation on behalf of the donee. **Thus, in the absence of contemporaneous and continuous evidence of donee's action qua control over the property, it cannot be said with certainty that possession was duly transferred.** Therefore, as a consequence, it is hereby held that barring self serving evidence of interested witness of the petitioner and there being no public record of the oral gift or any proof evincing transfer of possession thereof, the gift too is *non est* and the claim of the respondents obtaining property by way of gift is discarded.

Affidavit dated 12.05.2005 of Aziza Kidwai.

69. Ld Counsel for the petitioner had rightly contended that the factum of MK Kidwai being the owner of the suit property in question, right up till his death, is established by perusing Ex PW2/1 viz. affidavit of Aziza Kidwai. In the said affidavit, it was averred as thus:

“3. That the said Sh M.K Kidwai had died on 17.03.2000 at Delhi without leaving any Will”

70. Thus, on 12.05.2005, Aziza Kidwai made an assertion that MK Kidwai had left without a Will, and on the strength of this assertion *had filed the affidavit Ex PW2/1 without making any averment qua the oral Hiba qua half of the property, executed in her favour by her late husband. The inference that can be drawn from the contents of this affidavit are that no part of the property had been transferred, by way of gift, to Aziza Kidwai and consequentially, it was MK Kidwai alone who was the absolute owner of the property in question.* Resultantly, the gift deed made by Aziza Kidwai in favour of respondents no 2 and 3 vide registered gift deed dated 02.02.2007 would also not be considered as a valid gift inasmuch as Aziza Kidwai herself was not the owner of the property in question.

WHETHER THE PETITIONER IS ENTITLED TO A PART OF THE ESTATE OF THE DECEASED

71. Section 218 of the ISA also makes it pellucid that administration of the estate of the deceased may be granted to any person who, according to the rules of distribution of the estate of the deceased, would be entitled to the whole or any part of the deceased's estate. Ordinarily, the most likely grantee of a letter of administration would be the legal heirs of the deceased, who would be entitled to the estate in terms of

the respective personal laws of the parties. The Court has thus to embark on a quest to ascertain firstly, whether any property was left by the deceased and to also determine if the petitioner, who is claiming grant of letter of administration, is entitled to the estate of the deceased.

72. The factum of the petitioner Amina Kidwai being the sole child/daughter of Late Sh MK Kidwai and his first wife Safia Kidwai has not been disputed, as is apparent from the testimony of the respondents themselves. And as discussed above, Amina Kidwai being the sole surviving daughter of MK Kidwai, as his other child i.e. son namely Amir Mustafa Kidwai had predeceased him on 19.10.1999, she is entitled to half of the share of the property of deceased MK Kidwai.

73. It would be also apt to refer to Section 236 which enumerates the categories of persons who are not entitled to a letter of administration:

“236. To whom administration may not be granted- Letters of Administration cannot be granted to any person who is a minor or is of unsound mind, nor to any association of individuals unless it is a company which satisfies the conditions prescribed by rules to be made by notification in the Official Gazette by State Government in this behalf.”

74. The petitioner herein is clearly not falling in the above category of excluded persons. Therefore, there is no impediment in granting her /her legal heirs letter of administration.

ii. Issue no 2: *Whether the objections filed on behalf of respondent no 2 to 4 are valid and maintainable?*

75. It would be apposite to deal with the objections of the respondents heading-wise:

MAINTAINABILITY OF THE PETITION UNDER SECTION 218 OF THE ISA, 1925

76. Ld Counsel for the respondents had contended that the present petition is not maintainable under Section 218 of the Indian Succession Act, 1925. Therefore, in order to adjudicate this objection, it would be appropriate to advert to the relevant part said provision, which reads as thus:

“218. To whom administration may be granted, where deceased is a Hindu, Muhammadan, Buddhist, Sikh, Jaina or exempted person- (1) If the deceased has died intestate and was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased’s estate.”

77. As has been held above, the petitioner herein, being the daughter of the deceased, was entitled to a *part (1/2 share)* of the share of the estate of the deceased, being a ‘Sharer’, and therefore the petition under Section 218 ISA is certainly maintainable. Moreover, it was observed by the Ld

predecessor of this Court, whilst disposing off an application under O VII R11 CPC filed by the respondents, that the preset petition for obtaining Letters of Administration was filed *without* a WILL, and therefore was within the scope of Section 218 ISA. The right of the petitioner to file the present suit under Section 218 ISA further gets fortified by a perusal of Ex PW2/1 viz. the affidavit dated 12.05.2205, of Ms Aziza Kidwai, submitted to DDA, for mutation of the property, wherein at para 3 she unequivocally affirmed as thus:

“3. That the said Sh M.K Kidwai had died on 17.03.2000 at Delhi without leaving any Will”

78. Thus, since the deceased had died intestate, the present petitioner for Letter of Administration under Section 218 ISA is maintainable.

79. Another objection was raised by Ld Counsel for respondents that since the relationship between the petitioner and respondents is bitter, in terms of *Sarla Gupta* (supra), the petitioner cannot be expected to, as Administrator, fairly distribute the estate between all the claimants, and therefore the Letters of Administration ought not to be granted to the petitioner. This contention is bereft of any justification inasmuch as this plea was not taken at the time of filing written statements nor was any such question put to the petitioner during her cross examination which would lend credence to any such bitterness as claimed. It is trite law that

what has not been pleaded, cannot be argued. Moreover, merely because a litigation is pending between the parties, that cannot be a ground to refuse grant of Letters of Administration for if this was to be taken as a ground, then in all contentious cases, Letters of Administration would never be granted. Furthermore, this Court concurs with the submissions of Ld Counsel for petitioner that the claim has been made highly belatedly, during the fag end of this protracted trial, and therefore this objection is overruled.

MAINTAINABILITY OF THE PETITION IN VIEW OF PENDING PARTITION SUIT

80.Ld counsel for the respondents had averred in his written submissions that considering the age of the petitioner as well as the fact that a suit for partition qua the suit property was pending in another Court, the present petition ought to be dismissed.

81.This contention is bereft of any justification inasmuch as it is trite law that the causes of action in a testamentary case and in a suit for partition, differ. It is no longer *res integra* that a suit for partition as well as a petition for probate of Will/Letters of Administration can simultaneously proceed. (See ***Praveer Chandra v Aparajita 2019 SCC OnLine 10820***).

82.In ***Amardeep Singh v State 2005 SCC OnLine Del 1046*** also an objection had been raised that in view of the pendency of a

civil suit between the parties, the proceedings before the Probate Court ought to be stayed. However, the Court observed as thus:

“The legal position which has emerged from the above decisions is that a probate Court seized with a petition for grant of probate of Will or Letters of Administration is not a Civil Court within the meaning of the term under the provisions of the Code of Civil Procedure though the proceedings of the Probate Court in relation to the granting of Probate and Letters of Administration is to be regulated, so far as the circumstances of the case may permit, by the Code of Civil Procedure 1908. Once a probate Court is considering a petition for grant of probate or Letters of Administration in respect of a Will, that Court alone is competent to decide on the question of execution and/or validity or otherwise of the Will in question. In such a situation, it is not open to the Civil Court to go into that question. Besides the exercise of jurisdiction by the two Courts/Forums simultaneously may lead to inconsistent and conflicting findings which has to be avoided. The special procedure laid down for grant of a probate and Letters of Administration which is required to be followed by a Probate Court is not required to be followed by the Civil Court while deciding the question of execution or validity of a Will. In view of this position, it must be held that the present probate petition though filed latter in point of time than the civil suit filed by the respondents in Panchkula Civil Court is not liable to be stayed. Consequently it must follow that these Civil Court at Panchkula has no jurisdiction to decide the validity of the said Will dated 8.11.1997 propounded by the petitioner in the present petition. All those objections which have been raised by the respondents in regard to the execution and/or validity of the aforesaid Will in the said suit filed by them can very well be looked into by this Court which is competent to decide on that question.”

83. Therefore, this objection of the respondents is not sustainable. Significantly, in the course of these protracted proceedings no such plea was raised by the defendants on an earlier occasion, nor was any effort made to stay the proceedings or to club the present petition and the civil litigation before one Court.

MAINTAINABILITY ON ACCOUNT OF AGE OF THE PETITIONER AND THE OBJECTION THAT HER HEIRS WOULD NOT BE ENTITLED TO ANY BENEFIT

84. In the written submissions, the respondents had taken the above plea. Unfortunately, the petitioner expired during the pendency of the present *lis* a fact which finds mention in order dated 16.10.2023. Thereafter, an application under Order XXII Rule 3 CPC was moved qua substitution of her legal heirs, and the said application came to be allowed on 10.11.2024.

85. The issue then arises for consideration is whether the legal heirs of the petitioner would be entitled for grant of letters of administration.

86. In this context, it would be prudent to refer to *Smt Raj Rani Bhasin Vs State Test Cas. No 37/1996* wherein the Hon'ble Court held as thus:

"1. The maintainability of the petition for grant of Letters of Administration on demise of applicant/petitioner and IA.No.14400/2007 for substitution of legal representatives moved therein is for consideration."

14. What has however weighed with me against blindly following the aforesaid dicta is the long span of time taken in the courts in disposal of such proceedings. The present petition, even though uncontested, has been pending for the last over 12 years. Though most of the said long span is attributable to the laxity of the petitioner, considerable time has also been taken in serving the respondents, who even though subsequently filed no objection and/or did not chose to contest, are under the law necessarily required to be served. Time in such cases is also taken in issuance of citation, and in obtaining valuation of the estate with respect to which the petition is filed. If such petitions are contested, at least insofar as for grant of probate, under Section 295 of the Indian Succession Act, the probate may not be instituted necessarily by the executor. The petition may be instituted by a beneficiary under the Will, either in absence of any executor or on the refusal of the executor to act. Such petitioners may either be the sole beneficiaries under the Will or may be only one of the beneficiaries. **The question which arises is, what is to happen in the case of demise of such a petitioner.** Since the petition even in those cases would be only for grant of probate, i.e. only for determining the validity of the Will and not for establishing any rights in any of the properties, if the judgments aforesaid are to be applied, the position in those cases would also be the same i.e., the petition would abate on the demise of the petitioner. **In such contested cases if substitution is not to be permitted and the person who on the demise of the original petitioner may be interested in seeking the probate/letters of administration is required to institute a fresh petition, it would entail waste of the proceedings undertaken till then** and would require fresh service of witnesses and examination of witnesses who may have already been examined. Some of such witnesses may not even survive for that long and possibility of disappearance of valuable evidence which may swing the ultimate result of the proceedings, cannot be ruled out.

17. Having examined the matter in the said light, I do not see any prejudice which would be caused to the opposition/competing party if the proceedings are permitted to be continued by a person other than original petitioner, whether by way of substitution or by way of impleadment. Order 23 Rule 1A also provides that in the case of withdrawal or abandonment of a suit by the plaintiff, a defendant may apply to the transposed as the plaintiff under Order 1 Rule 10 of the CPC. In a case for grant of Letters of Administration or a probate the particular of the close relatives of the deceased who interest in the estate are required to be given and are treated as respondents. **Any one of them, on the demise of the original petitioner, may be interested in continuing the proceedings and can be so substituted.** As far as the question of suffering the prejudice is concerned, I find that the fear of the administration/probate being granted to a person other than that to whom the respondents have given no objection/consent can be eliminated by providing that upon so happening the court may again seek the no objection/consent of such persons/respondents. In most of the cases requirement may not be found for the same. Even if in the cases where the petition is by the named executor or by a person being one of the several successors under the personal law applicable to the deceased, I feel that if any of the beneficiaries and/or another heir is interested in continuing the proceedings, the same ought to be permitted. The same will save the time and costs of the court and also may be beneficial to the litigants.

24. Ram Agarwal 2000(9) SCC 714 also disapproved of the dismissal of the applications for substitution of the petitioner in a probate case on the ground of the petitions having been filed in a personal right. **It was held that where an executor dies though his heirs cannot be substituted because the executor possessed personal right but this is not applicable where the heirs of a legatee apply for issuance of a letters of administration.** It was held that since there is no dispute that the applicants could file an independent petition for issuance of

letters of administration, there can be no objection to allow them to continue the petition.

25. *Coming now to the facts of the present case, the estate of which administration is sought is of the deceased brother of one of the petitioners and of the deceased brother of the predecessor of the other petitioners. They are claiming the rights through the mother of the deceased upon whom alone the said estate devolved by succession. All close relatives who could possibly have had objection have either consented to the grant of administration or chosen not to oppose. The only difference today is that of the two petitioners who were substituted in place of the original petitioner, one has expired. **The result of declining the application for substitution would be to compel them to institute proceedings afresh.** With respect, I am unable to concur with the old Division Bench of the Bombay High Court has proceeded on a technical view of the matter and with respect where to there can be no disagreement. However, the court in that case was not faced with the practical difficulties/delays arising in disposal of such petition and with the contention considered by me above of the waste in following such an interpretation/procedure. **I, applying the principles discussed above, hold the petition to be maintainable. Accordingly, IA.No.14400/2007 for substitution is allowed.***

26. *Otherwise on merit it is the un rebutted position that the deceased was at the time of his demise an ordinary resident within the jurisdiction of this court. This court would thus have jurisdiction to entertain the petition. The petitioners, who are now found entitled to the estate, of which letters of administration are sought are found suitable persons. **I, however, find that it would be impractical to grant administration jointly to a large number of persons. Accordingly, in the exercise and powers vested in the court under Section 218 of the Indian succession Act, the letters of administration are granted to Smt. Aneeta Bhasin wife of late Shri R.P. Bhasin and Shri Swarup Prakash Bhasin.***

87. Therefore, since the LRs of the deceased petitioner are major, and of sound mind, there is no impediment in granting them Letter of Administration. However, in terms of para 26 of ***Raj Rani*** (supra), the Letter of Administration is hereby granted to the eldest son of the deceased petitioner i.e. Mr Rafiq Kidwai.

VIII. RELIEF.

88. Ergo, in view of the above *in extenso* discussion, the present petition is allowed. The eldest son namely Mr Rafiq Kidwai, of deceased petitioner Ms Amina Kidwai is hereby entitled to grant of Letters of Administration in respect of share of petitioner Amina Kidwai in the property B-28, Diplomatic Enclave, CHBS Ltd., known as Westend Colony, Delhi, to administer the same subject to outcome of the Partition suit pending between the parties in another Civil Court in Delhi. In other words, the Letter of Administration is hereby granted to the LR of the deceased petitioner qua her share in the suit property, a share which would ultimately be adjudicated by the other Civil Court.

89. The letters of administration be issued in the prescribed form VII upon furnishing of the proper Court Fee, Administration Bond and Surety Bond by the petitioner. The formalities of issuance of letters of administration shall be completed by the petitioner/beneficiary within six months from the date of the judgment as per Section 290 & 291 of Indian Succession Act.

90. The petitioner, as per Section 317 of the Indian Succession Act, shall furnish full and true inventory of the properties and credits and exhibit the same in the Court within 6 months from the date of grant of letters of administration in prescribed Form No. 178. The petitioner shall also file true account of the properties and credits within 1 year in prescribed Form No. 179.
91. It is made clear that the granting of letters of administration would not tantamount to any declaration of the title of the deceased to the estate in question. It is further clarified that till the petitioner does not furnish the requisite Court Fee, Administration Bond and Surety Bond and does not obtain the letters of administration, duly signed and sealed by the Court as required under Section 290 of the Indian Succession Act, this judgment shall not be read as proof of the same.
92. File be consigned to record room after necessary compliance.

Pronounced in the open Court
on this 22nd November, 2025.

(ARUL VARMA)
DISTRICT JUDGE-02/SOUTH,
SAKET COURTS/NEW DELHI