

## SUCCESSION FOR MOHAMMEDANS, PARSIS AND CHRISTIANS

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**MARYLOU BILAWALA**  
Advocate and Solicitor

### A. SUCCESSION: MEANING, KINDS AND THE APPLICABLE LAWS IN INDIA

The law of succession is the law governing the transmission of property vested in a person at the time of his/her<sup>1</sup> death to some other person or persons. Generally, succession can broadly be divided into “intestate” and “Testate/ Testamentary” succession.

Intestate succession is when a person leaves behind no Will (or to the extent of that part of the estate of the deceased not covered under the Will of the deceased) and the estate of the deceased is distributed among the heirs of the deceased as per the laws applicable to the succession of the estate of the deceased (which in India would usually depend upon the religion professed by the deceased at the time of his death). Testamentary succession is when the deceased leaves behind a Will and his estate is distributed as per his wishes as expressed in his Will.

In matters relating to succession of property (both testate and intestate) in the case of Christians and Parsis in India, the provisions of the Indian Succession Act 1925 (“Succession Act”) would apply. However, in the case of Mohammedans, Mohammedan personal law would apply to both testate as well as intestate succession, except under certain circumstances which are dealt with below.

### B. SUCCESSION FOR MOHAMMEDANS

Mohammedans are broadly divided into two sects, namely, the Sunnis and Shias. The Sunnis are divided into four sub-sects, namely, the Hanafis, the Malikis, the Shafais and the Hanbalis. Shias are divided into 3 sects namely, Athna-Asharias, Ismailiyas and Zaidiyas. The principles of intestate succession differ for Hanafis (Sunnis) and Shias. As most Sunnis are Hanafis, the presumption is that a Sunni is governed by Hanafi law. However, Khojas who are a sect of Ismailiyas are, in certain matters relating to testate succession, governed by Hindu law (by virtue of custom).

1. *In this Article, a reference to the masculine gender shall include the feminine gender, except as otherwise stated.*

In India, as per section 2 of the Shariat Act, 1937 (“Shariat Act”), matters relating to succession and inheritance of a Mohammedan, are governed by Mohammedan Personal Law (as applicable to the sect of Mohammedans to which the deceased belongs), except;

I) in respect of certain sects of Mohammedans viz. Khoja Muslims, in the case of **testate succession** where such sect followed a different custom from Mohammedan personal law then in such cases customary law would apply, (except where the concerned Mohammedan makes a declaration before the prescribed authority that he/she would like to be governed by Mohammedan personal law in such matters as contemplated u/s. 3 of the Shariat Act); and

II) where a Mohammedan is married under the provisions of the Special Marriage Act, 1954, in which case the Indian Succession Act, 1925 becomes applicable to such person and his issues in all matters of succession (that is **both testate and intestate succession**).

The principles of Mohammedan law remain mostly uncodified and thus there exists no statute or legislation that governs succession for Mohammedans. Courts in India apply the principles of Mohammedan law [(which are derived from 4 sources, viz, the Koran, the Sunna (tradition), Ijmaa (consensus of opinion) and Qiyas (analogical deduction)] to deal with matters of succession with respect to the Mohammedans in India.

#### 1. Testamentary Succession: -

The following basic rules and principles should be borne in mind in respect of testamentary succession of Mohammedans, based on Mohammedan personal law read with customary law (as applicable to Khoja Muslims) and relevant Sections of the Succession Act.

- (i) Subject to the below, every Mohammedan of sound mind and not a minor may dispose of his property by Will.
- (ii) A Mohammedan cannot dispose of by Will more than one-third of what remains of his property after his funeral

expenses and debts are paid unless his heirs consent to the bequest in excess of one-third of his property.

(iii) A Khoja Mohammedan may dispose of the whole of his property by Will. The making and revocation of Khoja Wills and validity of trusts and *waqfs* created thereby are governed by Mohammedan law, but apart from trusts and *waqfs*, the construction of a Khoja Will is governed by Hindu Law.

(iv) In the case of Sunni Muslims, while a bequest to a stranger (i.e. a person who is not an heir) to the extent of one-third of his property is permissible, any bequest to an heir is not valid unless the other heirs of the Testator consent to such bequest, even if the bequest is within this permissible limit of one-third. The consent of the other heirs to such bequest must be given after the death of the Testator.

(v) In the case of Shia Muslims however, a bequest may be made to a stranger and/or to an heir (even without the consent of the other heirs) so long as it does not exceed one-third of the estate of the Testator. However, if it exceeds one-third of the Testator's property, it is not valid unless the other heirs consent to this, which consent may be given either before or after the death of the Testator.

(vi) A bequest to a person not yet in existence at the Testator's death is void, but a bequest may be made to a child in the womb, provided he is born within six months from the date of the Will.

(vii) Succession to the property of a Mohammedan whose marriage is solemnised under the Special Marriage Act and also of the issue of such marriage, shall be regulated by the provisions of the Succession Act and accordingly, there would be no restriction on him bequeathing more than 1/3<sup>rd</sup> of his property to any person and the consent of his heirs would not be required, even to bequeath more than one-third of the property.

(viii) No writing is required to make a valid Will and no particular form is necessary. Even a verbal declaration is a Will. The intention of the Testator to make a Will must be clear and explicit and form is immaterial.

(ix) A Mohammedan Will may, after due proof, be admitted in evidence even though no probate has been obtained.

## 2. Intestate Succession: -

### **Distributions on intestacy as per Hanafi Law:**

As per **Hanafi Law** there are three classes of heirs, namely:

(i) "Sharers"- being those who are entitled to a prescribed share of the inheritance as per Mohammedan law

(ii) "Residuaries" being those who take no prescribed share, but succeed to the residue after the claims of the Sharers are satisfied

(iii) "Distant Kindred" are all those relations by blood who are neither Sharers nor Residuaries

The first step in the distribution of the estate of a deceased Mohammedan (governed by Hanafi law), after payment of his funeral expenses, debts, and legacies, is to allot the respective shares to such of the relations as belong to the class of Sharers who are entitled to a share.

The next step is to divide the residue (if any) among such of the Residuaries as are entitled to the residue. If there are no Sharers, the Residuaries will succeed to the whole inheritance.

If there are neither Sharers nor Residuaries, the inheritance will be divided among such of the distant kindred as are entitled to succeed thereto. The distant kindred are not entitled to succeed so long as there is any heir belonging to the class of Sharers or Residuaries. But there is one exception to the above rule where the distant kindred will inherit with a Sharer, and that is where the wife or husband of the deceased is the *sole Sharer* and there are no other Sharers or Residuaries.

The question as to which of the relations belonging to the class of Sharers, Residuaries, or distant kindred, are entitled to inherit the estate of the deceased and the share which such relation will receive will depend upon the relationship of the Sharer or Residuary with the deceased and the other surviving relations<sup>2</sup>.

### **Distributions on intestacy as per Shia Law:**

As per Shia law, heirs are divided into two groups, namely (1) heirs by consanguinity, that is, blood relation, and (2) heirs by marriage, that is, husband and wife.

Heirs by consanguinity are divided into three classes, and each class is subdivided into two sections. These classes are respectively composed as follows: -

(i) (a) Parents (b) children and other lineal descendants h.l.s<sup>3</sup>.

(ii) (a) Grandparents h.h.s<sup>4</sup> (true<sup>5</sup> as well as false<sup>6</sup>), (b) brothers and sisters and their descendants h.l.s.

2. See *Mullas Principles of Mohammedan Law* (page [66(A and 74A)] Edn 20 for more details on the exact share of each relation)

3. *How low soever*

4. *How high soever*

5. *Male ancestor between whom and the deceased no female intervenes*

6. *Male ancestor between whom and the deceased a female intervenes*

(iii) (a) Paternal, and (b) maternal, uncles and aunts, of the deceased and of his parents and grandparents h.h.s and their descendants h.l.s.

Amongst these three classes of heirs, the heirs of the first (if living) exclude the heirs of the second and third from inheritance, and similarly the second excludes the third. But the heirs of the two sections of each class succeed together, the nearer degree in each section excluding the more remote in that section.

Husband or wife is never excluded from succession, but inherits together with the nearest heirs by consanguinity, the husband taking 1/4 (when there is a lineal descendant) or 1/2 (when there is no such descendant) and the wife taking 1/8 (when there is a lineal descendant) or 1/4 (when there is no such descendant).<sup>7</sup>

### C. SUCCESSION IN THE CASE OF INDIAN CHRISTIANS AND PARSIS

The Succession Act defines an "Indian Christian" to mean a native of India who is, or in good faith claims to be, of unmixed Asiatic descent and who professes any form of the Christian religion<sup>8</sup>. However, the term "Parsi" is not defined under the Succession Act. The Bombay High Court has, however, held that the word "Parsi" as used in the Succession Act includes not only the Parsi Zoroastrians of India but also the Zoroastrians of Iran.

The Succession Act applies to Parsis and Indian Christians for both testate and intestate succession. In the case of testate succession, the same rules apply to both Parsis and Indian Christians. However, the rules differ in the case of intestate succession.

#### 1. Intestate Succession for Indian Christians: - Devolution of property of Christians in the case of intestacy: -

In the case of Christians, the property of an intestate devolves upon his/her heirs, in the order and according to rules laid down under Chapter II, part V of the Succession Act. Some of the salient principles of devolution are set out below-

(i) If the deceased has left lineal descendants i.e. one or more children, or remote issue, the widow's share is

1/3<sup>rd</sup> and the remaining 2/3<sup>rd</sup> devolves upon the lineal descendants. In case the deceased has left no lineal descendants but only a father, mother, other kindred etc., the widow gets one half and the other half goes to the kindred. But if there is no kindred, the widow gets the whole estate. [Note: the rights of a widow in respect of her husband's property are similar to those of the surviving husband in respect of the property of his wife.]

(ii) Where the intestate has left no widow, his property shall go entirely to his lineal descendants and in the absence of lineal descendants, to those who are kindred to him (not being lineal descendants) in proportions laid down in sections 41 to 48 of the Succession Act.

(iii) Though the Indian law does not otherwise expressly recognise adoption by Christians, the courts have held that an adopted child is deemed to have all the rights of succession that are available to a natural-born child<sup>9</sup>.

(iv) A posthumous child has the same rights as if he was actually born at the time of the death of the intestate.

#### 1.1. The rules for distribution of Intestate's property with some examples: -

##### Distribution where there are lineal descendants:

Sections 37 to 40 of the Succession Act lay down the rules of distribution of the property of an intestate (after deducting the share of a widow, if the intestate has left a widow), where the intestate had died leaving lineal descendants and the rules of distribution are as under:

1.	If only a child or children and no more lineal descendants	Property belongs to the surviving child or equally divided amongst the surviving children	(s.37)
2.	If there are no children, but only a grandchild or grandchildren	Property belongs to the surviving grandchild or equally divided amongst the surviving grandchildren	(s.38)
3.	If there are only great-grandchildren or other remote lineal descendants all in the same degree only	Property belongs to the surviving great-grandchildren or other remote lineal descendants, equally, for both males and females.	(s.39)

7. See *Mullas Principles of Mohammedan Law* (page [112] Edn 20 for more details on the exact share of each relation)

8. Section 2(d) of the Act.

9. *Joyce Pushapalath Karkada Alias vs. Shameela Nina Ravindra Shiri* (Regular First Appeal No. 849 of 2010)

4.	If the intestate leaves lineal descendants not all in same degree of kindred to him, and those through whom the more remote are descended are dead	Property is divided in such a number of equal shares as may correspond with the number of the lineal descendants of the intestate who either stood in the nearest degree of kindred or of the like degree of kindred to him, died before him, leaving lineal descendants who survived him. For example; A had three children, J, M and H; J died, leaving four children, and M died leaving one, and H alone survived the father. On the death of A, intestate, one-third is allotted to H, one-third to John's four children, and the remaining third to M's one child.	(s.40)
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**Distribution where there are no lineal descendants:**

Sections 42 to 48 of the Succession Act lay down the rules of distribution of the property of an intestate, where the intestate had died without leaving children or remoter lineal descendants and the rules of distribution are as under in order of priority:

1.	Widow (1/2)	Father (1/2) (even if there are other kindred)	(s.42)
2	Widow (1/2)	Mother, Brothers and Sisters (1/2) equally	(s.43)
3.	Widow (1/2)	Mother, Brothers, Sisters and Children of any deceased Brother or Sister (1/2) equally per stirpes.	(s.44)
4.	Widow (1/2)	Mother and Children of Brothers and Sisters (1/2) equally per stirpes	(s.45)
5.	Widow (1/2)	Mother (1/2)	(s.46)
6.	Widow (1/2)	Brothers and Sisters and Children of predeceased Brothers and Sisters 1/2 equally per stirpes	(s.47)
7.	Widow (1/2)	Remote kindred 1/2 (in the nearest degree)	(s.48)

**2. Succession for Parsis: -**

**2.1 Intestate Succession: -**

Parsis are governed by the rules for Parsi intestates which are laid down under Part V Chapter III of the Act. A Parsi intestate's property is distributed among his heirs in accordance with sections 51-56 of the Act. **General principles relating to intestate succession:**

**2.2 No share for a lineal descendant of an Intestate who dies before the Intestate**

If a child or remoter issue of a Parsi intestate has predeceased him, the share of such child shall not be

taken into consideration, provided such predeceased child has left neither;

(i) a widow or widower; nor

(ii) a child or children or remoter issue; nor

(iii) a widow of any lineal descendant of such predeceased child. If a predeceased child of a Parsi intestate leaves behind surviving any of the above mentioned relatives, then such a child's share shall be counted in making the division as provided in section 53. If a predeceased child or remoter lineal descendant of a Parsi intestate leaves a widow or widower and a child or children, then if such predeceased child is a son, his widow and children will take the share of such predeceased son. If such predeceased son leaves a widow or a widow of a lineal descendant, but no lineal descendant, then the share of such predeceased son shall be distributed as provided u/s. 53(a) proviso.

Further, if such predeceased child is a daughter, her widower shall not be entitled to anything u/s. 53(b), but such daughter's share shall be distributed amongst her children equally and if she has died without leaving lineal descendant, her share is not counted at all.

No share is given to a widow or widower of any relative of an intestate who has married again in the lifetime of the intestate. However, the exception to this rule would be the mother and paternal grandmother of the intestate and they would get a share even if they have remarried in the lifetime of the intestate.

**2.3 Rules for division of the Intestate's property:**

Sections 51 to 56 lay down the rules of division of the property of an intestate Parsi and the rules of distribution are as under:

1	Son	Widow	Daughter	Equal shares	(s.51)
	No widow	Son	Daughter	Equal shares	
	Father/ Mother or both and widow	Son	Daughter	Widow, son and daughter get equal and each parent gets half the share of each child.	
2	If intestate dies leaving a deceased son		Widow and children take shares as if he had died immediately after the intestate's death		(s.53)

	If intestate dies leaving a deceased daughter	The share of the daughter is divided equally among her children	
	If any child of such deceased child has also died	Then his/her share shall also be divided in like manner in accordance with the rules applicable to the predeceased son or daughter	
	Remoter lineal descendant has died	Provisions set out in the box immediately above shall apply <i>mutatis mutandis</i> to the division of any share to which he or she would be entitled to	
3	intestate dies without lineal descendants and leaving a widow or widower but no widow or widower of any lineal descendants	Widow or widower (1/2) And residue as below*	(s.54)
	intestate dies leaving a widow or widower and also widow or widower of lineal descendants	Widow or widower (1/3) Widow or widower of lineal descendant (1/3) Residue as below*	
	intestate dies without leaving a widow or widower but leaves one widow or widower of a lineal descendant	The widow or widower of the lineal descendant (1/3) Residue as below*	
	intestate dies without leaving a widow or widower but leaves more than one widow or widower of lineal descendants	The widows or widowers of the lineal descendants together (2/3) in equal shares Residue as below *	
	*Residue after division as above	Residue amongst relatives in Schedule II Part I	
	If no relatives entitled to residue	Whole shall be distributed in proportion to the shares specified among the persons entitled to receive shares under this section.	
4	Neither lineal descendants nor a widow or widower, nor a widow or widower of any lineal descendant	The next-of-kin, in order set forth in Part II of Schedule II (where the next-of-kin standing first are given priority to those standing second) shall be entitled to succeed to the whole of the property of the intestate.	(s.55)
5	No relative entitled to succeed under the other provisions of Chapter 3 of Part V, of which a Parsi has died intestate	Property shall be equally divided among those of the intestate's relatives who are in the nearest degree of kindred to him.	(s.56)

## D. SUCCESSION PRINCIPLES COMMON FOR CHRISTIANS AND PARSIS

### 1. Rights of an illegitimate child

Christian and Parsi law do not recognise children born out of wedlock and deal only with legitimate marriages (*Raj Kumar Sharma vs. Rajinder Nath Diwan AIR 1987 Del 323*). Thus, the relationship under various sections under the Succession Act relating to the Christian and Parsi succession, is the relationship flowing from a lawful wedlock.

### 1.1 Difference between Christian and Parsi succession laws and succession laws of other religions:

The law for Christians and Parsis does not make any distinction between relations through the father or the mother. In cases where the paternal and maternal sides are equally related to the intestate, all such relations shall be entitled to succeed and will take equal share among themselves<sup>10</sup>.

Further there is no difference when it comes to full-blood/half-blood/uterine relations; and a posthumous child is treated as a child who was present when the intestate died, so long as the child has been born alive and was in the womb when the intestate died<sup>11</sup>.

### 2. Testamentary Succession (applicable to both Christians and Parsis)

#### 2.1 Wills and Codicils

**2.1.1 Persons capable of making Wills:** Every person of sound mind not being a minor may dispose of his property by Will<sup>12</sup>. Thus, a married woman, or other persons who are deaf, dumb or blind are not thereby incapacitated from making a Will if they are able to know what they do by it. Thus, the only people who cannot make Wills are people who are in an improper state of mind due to intoxication, illness, etc.

**2.1.2 Testamentary Guardian:** A father has been given the right to appoint by Will, a guardian or guardians for his child during minority.

10. Section 27 of the Act

11. Section 27 of the Act

12. Section 59 of the Act



**2.1.3 Revocation of Will by Testator's marriage:** All kinds of wills stand revoked by marriage which takes place after the making of the Will<sup>13</sup>.

**2.1.4 Privileged and Unprivileged Wills:** Wills that fulfil the essential conditions laid down u/s. 63 of the Succession Act are called Unprivileged Wills and Wills executed u/s. 66 of the Succession Act are called Privileged Wills.

As per section 63 of the Succession Act *inter alia* states that every Will must be signed by the person making the Will ("Testator") or his mark must be affixed thereto or signed by a person as directed by the Testator and in the presence of the Testator. The Will must also be signed by at least two witnesses, each of whom has seen Testator sign the Will or affix his mark or seen some other person sign the Will in the presence of the Testator.

A Privileged Will made u/s. 66 of the Succession Act is one which is made by a soldier employed in an expedition or engaged in actual warfare, or by an airman so employed or engaged, or by mariner being at sea and such Wills can be either in writing or oral. A Privileged Will need not be signed by the Testator, nor attested in any way. In case of unprivileged wills, the mode of making, and rules for executing privileged Wills shall be in accordance with Section 66 of the Act and many requirements such as attestation or signature of the Testator are not required in such special Wills.

**2.1.5 Bequests to religious and charitable causes:** Section 118 of the Succession Act (which applies to Christians but not Parsis) which provides that no man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a Will executed not less than

13. Section 69

twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the Wills of living persons, was struck down as being unconstitutional by the Supreme Court, and therefore Christians and Parsis can leave their property to charity without being bound by the above condition.<sup>14</sup>

## **2.2 Probate: -**

**2.2.1 Parsis:** In case of a Parsi dying after the commencement of the Act, a probate is necessary if the will in question is made or the property bequeathed under the will is situated within the "ordinary original civil jurisdiction" of Calcutta, Madras and Bombay and where such wills are made outside those limits in so far as they relate to immovable property situated within those limits<sup>15</sup>.

**2.2.2 Christians:** It is not mandatory for a Christian to obtain probate of his Will<sup>16</sup>.

**To conclude,** it may be noted that the laws of succession differ drastically depending upon the personal law by which the deceased person is governed at the time of his death. The religion which a person purports to profess at the time of his/her death (or is known to have last followed) would determine the personal law applicable to the succession of the deceased person's property. Therefore, it is essential to know and understand the personal laws applicable to the person making a Will or planning the succession of his estate. Further, in some cases, the law has evolved through judicial precedents and therefore apart from the letter of the law spelt out in the statute, it would be advisable to acquaint oneself with judicial precedents, to ascertain the present position. ■

14. Section 213 (2)

15. Section 213 (2)

16. Section 213 (2)

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effect given to the enacted provisions. A child in the womb has been conferred birthright in property. Gender discrimination between son and daughter eliminated, bestowing share and interest in coparcenary property to make females self-sufficient and financially strong. Right of testamentary succession granted in share in coparcenary property, Will has become a strong tool to choose beneficiaries, avoid stamp duty and family disputes. One can better manage tax with sound

planning. A female can throw her individual property in common hotch-potch or impress with the character of H.U.F. property being a coparcener. She can be even Karta of father's family, but not of husband's family. Male predominance stands curtailed. Rule of primogeniture stands abolished. View expressed in Uttam's case would be distinguishable on facts and under income-tax Act. Correct view is in *Narayan Rao Sham Rao (supra)* and *Shyam Narayan Prasad (supra)*. ■