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

MISCELLANEOUS PETITION NO.17 OF 2013

Purshottam Vasudev Nagpal)
Hindu Male Inhabitant of Mumbai)
residing at Flat No.22, 4th Floor)
D.Vatcha Road, Mumbai – 400 020,)
being the son of the deceased's)
sister above named) ...Petitioner

....Versus....

1. Rani Lalchand Kalro,)
Indian Sindhi, age about 57 years)
Occupation Housewife, residing at)
Flat No.21, Rihhumal Mansion)
Co-operative Housing Society Ltd.)
15/B, Pedder Road, Mumbai –)
400 026 being the Sole Executrix)
named under the Will dated)
3rd November, 2004 of the deceased)
above named))

2.Mr.Shivaji B. Chandani,)
of Mumbai Indian, Inhabitant, having)
his address at 205, Ocean View,Union)
Park, Khar (W), Mumbai – 400 052.)

3.Shirin Bahadurji of Mumbai Indian)
Inhabitant, having his address at)
Neelkanth Niranjana Premises)
Co-operative Society Ltd, 308-A,)
“Niranjana” 99, Marine Drive,)
Mumbai – 400 002.)

4.Neelkanth Niranjana Premises)
Co-operative Society Limited, a)
Co-operative Society registered under)

the provisions of Maharashtra)
Co-operative Societies Act, 1960)
bearing Registration No.BOM/HSG)
/87 OF 1967 having its address at)
Ground Floor, "Niranjan" 99,)
Marine Drive, Mumbai – 400 002.) ...Respondents

Mr.U.J. Makhija i/b Thakore Jariwala & Associates for the Petitioner.

Ms.F.Mussa i/b Mr.Prakash L. Mahadik for the Respondent No.1.

Mr.G.R.Joshi, Senior Advocate with Mr.Piyush Raheja i/b Federal & Rashmikant for the Respondent No.2.

Mrs.F. Behram Kamdin with Ms.Bhansali i/b FZB & Associates for the Respondent No.3.

CORAM : **R.D. DHANUKA, J.**
RESERVED ON : **4th AUGUST, 2017**
PRONOUNCED ON : **10th OCTOBER, 2017**

JUDGMENT :-

1] By this petition filed under section 263 of the Indian Succession Act, 1925, the petitioner has prayed for revocation and cancellation of the original grant of Probate dated 29th September, 2010 with the Will annexed and seeks a direction against the respondent no.1 to deposit the said Will and the grant of Probate dated 29th September, 2010 with the learned Prothonotary & Senior Master of this Court and for other reliefs.

2] This Court framed the following issues:-

Sr.No.	Issues	Findings
1]	Whether the Petitioner proves that the probate granted to the alleged Will dated 3 rd November, 2004 was not validly and properly granted for the reasons and on the grounds set out in paragraph 30 of the Miscellaneous Petition ?	No
2]	Whether the Respondent no.1 proves that she was legally adopted daughter of the deceased ?	Yes
3]	Does the Petitioner prove that he has a caveatable interest and the necessary locus to file the instant Petition ?	No
4]	What orders ?	As per order

3] The petitioner is a son of the sister of the deceased late Sattabai Lakhmichand Chhabria, who expired at Mumbai on 7th May, 2008 (hereinafter referred to as the 'said deceased'). It is the case of the petitioner that since the respondent nos.2 and 3 are claiming to be entitled to a portion of the estate of the said deceased i.e. Sattabai Lakhmichand Chhabria, they are impleaded as necessary parties to the petition. It is the case of the petitioner that since the respondent no.4 society is illegally threatening to transfer the flat in question which belonged to the said deceased, the said society has been impleaded as the respondent no.4 to the petition. It is the case

of the petitioner that he was a constituted attorney of the said deceased under a General Power of Attorney, which was executed in the year 1996 and was registered with the Reserve Bank of India. The said General Power of Attorney was executed in favour of the petitioner by the said deceased being the maternal aunt of the petitioner and also on account of proximity and trust, the said deceased executed the said General Power of Attorney in favour of the petitioner. It is the case of the petitioner that the said deceased died issueless. The respondent no.1 is neither the daughter nor adopted daughter of the deceased. According to the petitioner, the said deceased died intestate leaving behind no testamentary writing or Will and did not find any Will or testamentary writing of the said deceased inspite of due and diligence search taken by the petitioner.

4] The petitioner, however, was informed by Mr.Ramesh Baldev Gwalani through his Advocate's letter dated 20th June, 2008 in respect of the said Will dated 3rd November, 2004. A copy of the said alleged Will was handed over to the petitioner and the respondent no.1 along with the said letter dated 20th June, 2008. On 7th May, 2008, the said deceased expired. Some time in the year 2009, the respondent no.1 filed testamentary petition (139 of 2009) *inter-alia* praying for Letter of Administration to the property and credits of the said deceased with the Will annexed. The respondent no.1 filed the

supporting affidavits of other persons, including the alleged witnesses to the said alleged Will dated 3rd November, 2004.

5] It is the case of the petitioner that the name of another sister of the deceased was though initially mentioned as the legal heir and next of kin of the said deceased in the petition, pursuant to an objection raised by the office of this Court, the name of the said sister of the said deceased was deleted from the petition. The name of the brother in law of the deceased was however, included by carrying out an amendment to the testamentary petition.

6] On 9th February, 2010, this Court granted a Probate in favour of the respondent no.1. Mr.Makhija, learned counsel appearing for the petitioner invited my attention to a copy of the alleged Will annexed to the petition and would submit that the alleged signature of the said deceased on the alleged Will was in Hindi. There was no signature on page no.2. Mr.B.B. Parekh, advocate was one of the alleged attesting witness to the said alleged Will. There was no endorsement made on the said alleged Will that the said Will was explained to the said deceased in Hindi. He submits that Mr.B.B. Parekh, advocate had filed an affidavit in this Court as attesting witness. Even in the said affidavit, no averment was made by the said Mr.B.B. Parekh, advocate that the said alleged Will was explained to the said deceased in Hindi. Learned counsel for the petitioner placed

reliance on section 283(1)(c) of the Indian Succession Act, 1925 and also Rule 397 of the Bombay High Court (Original Side) Rules and submits that it was mandatory for the petitioner in the testamentary petition to serve a citation on the legal heirs and next of kin of the said deceased.

7] Learned counsel placed reliance on section 15(2)(a) of the Hindu Succession Act and would submit that since the said deceased had inherited the property from her father, the petitioner herein would be a legal heir of the said deceased for all purposes under the provisions of the Hindu Succession Act and the Indian Succession Act, 1925. He also placed reliance on Rules 397, 399 and 400 of the Bombay High Court (Original Side) Rules. He invited my attention to the affidavit of service filed by the bailiff on 1st April, 2010 and would submit that there was no personal service on any of the parties or the legal heirs and/or next of kin of the said deceased of the citation as contemplated under Rule 399 of the Bombay High Court (Original Side) Rules. Learned counsel invited my attention to a copy of the alleged Will and would submit that the wife of the petitioner is one of the beneficiary under the said alleged Will, who has not accepted the said Will.

8] Learned counsel for the petitioner placed reliance on Form No.97 of the Bombay High Court (Original Side) Rules and submits

that the names of all the heirs and next of kin have to be disclosed in the testamentary petition and a citation has to be served upon them. The said deceased had three sisters. The name of however only one sister was mentioned initially in the testamentary petition. The mother of the petitioner was not alive on the date of death of the said deceased. Learned counsel invited my attention to the answers given by the petitioner in his cross-examination in reply to questions 69 to 76 and submits that the petitioner had categorically deposed that his wife Mrs.Sarla P. Nagpal, who was one of the beneficiary named in the Will did not inform him when she was served with citation in the probate petition about filing of the testamentary petition. He answered the question in negative when he was asked whether his sister had told him that the petition had been filed for Probate of the alleged Will of the deceased. He also denied the suggestion given to him that he was personally aware that Probate Petition No.139 of 2009 had been filed and that citation had been served on his sister.

9] Learned counsel for the petitioner also invited my attention to the cross-examination of the petitioner by the learned senior counsel, who appeared on behalf of the respondent no.2. He invited my attention to some part of the deposition of the petitioner from his affidavit of evidence dated 21st January, 2015 and more particularly paragraph 23 and submits that it was a specific plea of the petitioner

that various properties were inherited by the said deceased from her father. He invited my attention to the family tree annexed to the petition and submits that in the said family tree, the name of the mother of the petitioner is also mentioned. He invited my attention to the cross-examination of the petitioner by the respondent no.2 and more particularly his reply to question nos.34, 35 to 39, 41 and 45. He submits that though the witness examined by the petitioner was put various suggestions by the respondent no.1 during the course of the cross-examination, none of the respondents entered the witness box to prove their case. Learned counsel invited my attention to the issues framed by this Court and would submit that though in respect of one of the issue at least, the onus was on the respondent no.1 to prove that she was adopted daughter of the said deceased, she did not enter the witness box.

10] It is submitted that the respondent no.1 had filed various affidavits of the alleged beneficiaries under the said alleged Will. The affidavits of the wife and the sister of the petitioner who were also the beneficiaries under the said Will however, were not filed. Learned counsel invited my attention to the affidavit dated 16th July, 2010 which was a new affidavit filed by Mr.B.B. Parekh, advocate. He submits that even in the said affidavit, Mr.B.B. Parekh, advocate did not make any averment that the said alleged Will was explained to

the said deceased in Hindi. He submits that the averments made in the new affidavit dated 16th July, 2010 filed by Mr.B.B. Parekh, advocate was inconsistent with the statement made in the affidavit dated 16th August, 2008.

11] Learned counsel submits that since the probate petition was uncontested, the respondent no.1 did not lead any oral evidence. None of the parties to the probate petition verified whether the alleged Will was proved by the respondent no.1 or not. He invited my attention to the affidavit of Dr.Deepti Mukesh, Advocate, who was alleged to be the second attesting witness to the alleged Will. He submits that even in the said affidavit of the alleged second attesting witness, no statement was made by her that the said alleged Will was explained to the deceased in Hindi.

12] Mr.Makhija, learned counsel for the petitioner invited my attention to the affidavit dated 16th July, 2010 filed by Mr.B.B. Parekh, advocate and submits that in the said affidavit of the said deponent, it was alleged that the said alleged Will was executed at the house of the deceased at Flat No.12, 3rd Floor, 94, Krishna Kunj, Marine Drive, Mumbai – 400 002. He also invited my attention to the affidavit cum declaration dated 7th November, 2008 filed by Mr.Shivaji Bhagwandas Chandani and Ms.Ishwari Baldevdas Gwalani who were also the beneficiaries under the said alleged Will that they were also present

when the deceased had alleged to have executed the said Will dated 3rd November, 2004 in the presence of advocate Mr.B.B. Parekh and Dr.Deepti Mukesh in the office of Mr.B.B. Parekh, advocate on 3rd November, 2004. He submits that there is a clear inconsistencies and contradictions in the affidavit filed by the alleged two attesting witnesses and the alleged beneficiaries under the said alleged Will about the place of execution of the alleged Will by the said deceased.

13] Learned counsel for the petitioner invited my attention to the affidavit in reply filed by the respondent no.1 alleging that she had got a copy of the Will from Mr.Ramesh Gwalani. He invited my attention to the affidavit in reply dated 7th April, 2014 filed by Mr.Shivaji Bhagwandas Chandani, the respondent no.2 herein alleging that after execution of the said alleged Will, the same had been handed over to him by the said deceased for safe custody and in turn he had alleged to have handed over the same to the petitioner as he had asked for it on the ground that he was handling the business affairs of the deceased. In the said affidavit it was alleged subsequently that the petitioner gave a Will to Mr.Ramesh Gwalani and asked him to keep the Will in safe custody. The said deponent alleged that the petitioner was always aware of the existence of the alleged Will. Learned counsel for the petitioner submits that there are different stories of the respondent nos.1 and 2 as to how the said

alleged Will was surfaced.

14] Mr.Makhija, learned counsel for the petitioner invited my attention to the copy of letter dated 17th June, 2008 addressed by the learned advocate for the respondent no.1 to Mr.B.B. Parekh, advocate calling upon him to furnish the true copy of the Will and also requesting him to inform in writing as regards to the progress made for the Probate of Will in which the respondent no.1 was appointed as executrix and was also a beneficiary under the said alleged Will. On 6th January, 2009, the respondent no.1 filed Probate petition in this Court. There was no reply to the said letter dated 17th June, 2008 addressed by the respondent no.1 through her advocate on 20th June, 2008.

15] Learned advocate for Mr.Ramesh Gwalani addressed a letter to Mr.A.K. Chavan, advocate, who was representing the respondent no.1 herein and alleged that the Will of the said deceased dated 3rd November, 2004 was in possession of her client and custody i.e. Mr.Ramesh Gwalani and stated that the said Mr.Ramesh Gwalani was ready and willing to hand over the original Will to the respondent no.1. The said Mr.A.K. Chavan, advocate representing the respondent no.1 was requested to attend his office on 23rd June, 2008 to collect the original Will and to give his acknowledgement. The said Mr.A.K. Chavan, advocate was further informed that the said

Mr.Ramesh Gwalani had made three notarized copies of the Will dated 3rd November, 2004 and one of the copy would be kept in the custody of Mr.Ramesh Gwalani and the other two copies will be given to Purushottam V. Nagpal and Shivaji B. Chandani. It is submitted by the learned counsel that Mr.Ramesh Gwalani is not the beneficiary under the said alleged Will.

16] Mr.Makhija, learned counsel placed reliance on the judgment of the Supreme Court in case of **Mrs. Elizabeth Antony vs. Michel Charles John Chown Lengera (2000) 3 SCC 333** and more particularly paragraphs 5 and 9 thereof and submits that any person even having slight and even a bare possibility of interest is sufficient to entitle a person to enter caveat in a probate proceeding. It is held in the said judgment that the findings regarding that the caveatable interest of the party have a limited effect and are relevant only to the extent of granting probate but that can deprive his right, if he has only to invoke section 263 of the Indian Succession Act, and it is up to that party to satisfy the Court. He submits that even if caveatable interest of the petitioner is not proved, the petitioner has still right to file a petition under section 263 of the Indian Succession Act, 1925 for revocation of the grant of Letters of Administration. Mr.Makhija, learned counsel for the petitioner has placed reliance on the judgment of the Supreme Court in case of **Krishna Kumar Birla**.

vs. Rajendra Singh Lodha, 2008(4) SCC 300 and in particular paragraphs 76, 86, 88 to 95, 100 to 103, 109 and 110.

17] Insofar as issue nos.1 and 2 framed by this Court as to whether the respondent no.1 proves that she was an adopted daughter of the said deceased or not, is concerned, it is submitted by the learned counsel that the respondent no.1 has admittedly not led any evidence on the said issue, though the onus to prove the issue was on the respondent no.1. He submits that though this Court had granted second opportunity to the respondent no.1 to prove that the alleged Will of the said deceased was validly executed, in accordance with law and to prove that she was an adopted daughter of the said deceased, the respondent no.1 admittedly did not enter the witness box. This Court thus shall draw an adverse inference against the respondent no.1.

18] It is submitted that the alleged Will of the said deceased has not been proved in accordance with the provisions of section 68 of the Indian Evidence Act. The documents on record does not prove the Will even in absence of the cross-examination. He submits that the Probate granted by this Court was without complying with the legal requirements and thus cannot remain on record and has to be recalled. Learned counsel submits that the order passed by this Court granting Letters of Administration with the Will annexed in favour of

the respondent no.1 is *in rem* and thus affects the world at large.

19] It is submitted by the learned counsel for the petitioner that unless the issue nos.1 and 2 framed by this Court are decided in favour of the respondent no.1, all the questions of intestacy can be considered by this Court in an appropriate proceedings. This Court has also to consider the effect of the respondent no.1 not having entered the witness box to prove that she was an adopted daughter of the said deceased. Learned counsel for the petitioner invited my attention to the order passed by this Court thereby directing the parties to delete some portion of the affidavit in lieu of examination of chief filed by the petitioner.

20] It is submitted by the learned counsel that the respondent no.1 did not prove the alleged Will left by the said deceased. None of the attesting witnesses or other witnesses were able to show whether the said alleged Will was ever interpreted to the said deceased in Hindi. Mr.B.B. Parekh, Advocate gave the alleged Will to the third party is not proved. Since the citation was though served on the beneficiaries under the alleged Will, it was not served on the person like the petitioner having like interest in the estate of the said deceased and thus the Probate granted by this Court deserves to be revoked.

21] It is submitted by the learned counsel that if the alleged

Will is not proved, the respondent no.1 would inherit the properties and estate of the said deceased as the daughter of the said deceased only if she would have proved that she was an adopted daughter of the said deceased. She however, did not enter the witness box in this petition and was not able to show that she was an adopted daughter of the said deceased. He invited my attention to the averments made in the miscellaneous petition and also the stand taken by the respondent no.1 alleging that she was an adopted daughter of the said deceased.

22] Insofar as issue no.3 that he has a caveatable interest and the necessary locus to file the instant petition is concerned, it is submitted by the learned counsel that even if the petitioner had slightest interest in the estate of the said deceased, the petitioner had locus to file the miscellaneous petition under section 263 of the Indian Succession Act, 1925, the Court has to independently satisfy itself that the Probate could be granted or not irrespective of the fact whether the petitioner had locus and/or caveatable interest or not. It is submitted that since the respondent no.1 obtained the Probate *ex-parte* without service of citation, this Court had no opportunity to make any enquiry as to whether the alleged Will was genuine or not.

23] It is submitted that the conscious of the Court has to be satisfied that the alleged Will executed by the said deceased was a

genuine Will and was executed in accordance with law. He submits that once these facts are brought to the notice of this Court by the petitioner at this stage, which were not brought to the notice of this Court by the respondent no.1, the Court can make an enquiry as to whether the Probate ought to have been granted to the respondent no.1 or not. He submits that even after grant of Probate granted in favour of the respondent no.1 is set aside in this petition, no prejudice would be caused to the respondents. The respondents in that event will have to prove the execution of the alleged Will in accordance with law, the Probate petition in that event would be restored to file and would not be dismissed in this petition itself. He submits that the said judgment of the Supreme Court in case of **K.K. Birla** (supra) has been referred to the Larger Bench in the case in **Jagjit Singh & Ors. vs. Pamela Manmohan Singh (2010) 5 SCC 157.**

24] Learned counsel for the petitioner placed reliance on an unreported judgment of this Court in case of **Peter John D'Souza & Ors. vs. Armstrong Joseph D'Souza** in Miscellaneous Petition No.69 of 2012 delivered on 28th March, 2014 and in particular paragraphs 13 to 17. Learned counsel submits that since the respondent no.1 had suppressed the true and correct facts and had not served the citation upon the petitioner and had fraudulently obtained the Probate, the Court has even *suo-moto* powers to look

into such allegations of fraud and can revoke such Probate obtained by a party by committing fraud upon the Court.

25] Learned counsel for the petitioner placed reliance on section 114(g) and (h) of the Indian Evidence Act and submits that since the respondent no.1 did not enter the witness box, though the onus to prove was on the respondent no.1 in respect of the two issues framed by this Court in this miscellaneous petition, this Court has to draw an adverse inference and has to draw a presumption against the respondent no.1. In support of this submission, learned counsel for the petitioner placed reliance on the judgment of this Court in case of *Sardar Gurbaksh Singh vs. Gurdial Singh & Another* **AIR 1927 PC 230** and in particular paragraphs 29 to 34. He also placed reliance on the judgment of the Supreme Court in case of *Vidhyadhar Vs. Manikrao & Another* **(1999) 3 SCC 573** and in particular paragraphs 16 and 17.

26] Learned counsel for the petitioner placed reliance on the judgment of the Supreme Court in case of *Basantidevi Vs. Ravi Prakash Ramprasad Jaiswal* **(2008) 1 SCC 267** and in particular paragraphs 12, 18 to 24 and would submit that the Testamentary Court is not concerned with the title of the property of the said deceased.

27] Ms.Mussa, learned counsel for the respondent no.1, on the

other hand, submits that the respondent no.1 was appointed as an Executrix and was the beneficiary under the said Will and last testament of the deceased Smt.Satabai Lakmichand Thakurdas Chhabria. It is submitted that though the name of one of the sisters of the said deceased was mentioned in the testamentary petition as one of the next of kins, the same was subsequently deleted in view of the fact that the said sister was not entitled to inherit any part of the estate of the said deceased even on intestacy.

28] It is submitted by the learned counsel that the petitioner in miscellaneous petition has alleged that the respondent no.1 was not a daughter or an adopted daughter of the said deceased. In reply to the miscellaneous petition, the said allegation is denied by the respondent no.1. She submits that in any event, the respondent no.1 had not filed the testamentary petition for grant of probate in respect of the last Will and Testament of the said deceased as an adopted daughter but was filed as an Executrix and one of the beneficiaries under the said Will. She invited my attention to the issues framed by this Court in this miscellaneous petition. She submits that though the issue of adoption has been framed by this Court in this miscellaneous petition, no such issue was required to be framed in the testamentary petition filed by her client. She submits that the respondent no.1 is even otherwise falls in Class-I

category of heirs under the Hindu Succession Act, 1956.

29] Learned counsel for the respondent no.1 invited my attention to the affidavit-cum-declaration dated 7th November 2008 filed by Mr.Ramesh B. Gwalani who is the son of one of the sisters of the said deceased. She submits that in the said affidavit, the said Mr.Ramesh B. Gwalani has stated that the said deceased had nominated the respondent no.1 being treated as her daughter in respect of the amounts lying in the HDFC Bank at Lower Parel Branch. She invited my attention to the cross-examination of the original petitioner Mr.Purshottam Vasudev Nagpal in reply to question nos.35 to 37 and would submit that in the said deposition, the petitioner was confronted with the said affidavit dated 29th December 2008.

30] My attention is also invited to the affidavit-cum-declaration dated 20th December 2008 signed by Mr.Vasudev Gurmukhdas Chhabria and Mr.Girdhari Lalchand Chhabria and in particular paragraph 3 thereof stating that the respondent no.1 had been treated as their loving and caring daughter and had been the supporting pillar through their entire lifetime. At every stage, the said respondent no.1 was treated more than as a real daughter of the said deceased and her husband till they were alive. It is stated that the said deceased also performed 'KANYA DAN' of the

respondent no.1 on 30th January 1971.

31] It is submitted that the respondent no.1 and her son had performed the last rites of the said deceased as per her wishes in the presence of all the close family members, relatives and family friends wherein the said deceased had declared openly that her flat no.12 at Krishna Kunj, her wealth, money, jewellery articles, shares, bonds and all other movable and immovable assets and property were given to the respondent no.1 which desire was expressed by the said deceased in the last Will and Testament dated 3rd November 2004. It is stated that the respondent no.1 had not only stood as daughter but also provided the emotional support through out the life to the said deceased which had been witnessed by the deponent of the said affidavit from the very inception.

32] Learned counsel for the respondent no.1 invited my attention to the letter dated 22nd May 2008 of the petitioner herein to the respondent no.1 and would submit that along with the said letter, the petitioner herein had handed over to the respondent no.1 one bank statement of saving account in Bank of Baroda in the name of the said deceased and other various documents including cheque books. It was mentioned in the said letter that the said cheque books were kept with the petitioner herein at the request of the said deceased and also due to close relationship. She submits that since

the petitioner herein himself had handed over various documents to the respondent no.1 of the said deceased, it is clear that the petitioner herein recognized the close relationship of the respondent no.1 with the said deceased.

33] Learned counsel for the respondent no.1 invited my attention to the passbook issued by the Bank of Baroda in respect of the Account No.04050100005559 standing in the name of the deceased jointly with the respondent no.1 which was marked as Exhibit 'Y-1/1.' My attention is also invited to the another passbook of the same bank marked as Exhibit 'Y-1/2.' She invited my attention to various photographs marked as Exhibits 'R-1/5', 'R-1/6', 'R-1/7' and 'R-1/10' in support of her submission that Kanya Dan of the respondent no.1 was performed by the said deceased and her husband. She also invited my attention to the Nomination Form submitted by the said deceased to "Neelkanth Niranjana" premises Co-operative Housing Society Ltd. nominating the respondent no.1 in respect of the said flat bearing no.99 in the said 'Neelkanth Niranjana' premises as her husband brother's grand daughter. She submits that the said flat was thus bequeathed by the said deceased in favour of the respondent no.1.

34] Learned counsel for the respondent No.1 invited my attention to the cross-examination of the petitioner herein and more

particularly to question at serial nos.52 to 54, and 59. She submits that admittedly the petitioner herein had attended the wedding of the respondent no.1. He has recognised the said deceased Smt.Satabai, her husband, from the photographs shown to him. He has also confirmed that those photographs were taken at the wedding of the respondent no.1. She submits that the petitioner, however, did not deliberately identify the respondent no.1 and her husband though identified the said deceased and her husband in the photographs.

35] Learned counsel invited my attention to the averments made in paragraph 22 of the miscellaneous petition and would submit that the petitioner himself has admitted that the said deceased had given a gift to the respondent no.1. My attention is also invited to the cross-examination of the petitioner in reply to question no.59 admitting that a Gift Deed was executed by the said deceased in favour of the respondent no.1.

36] Learned counsel for the respondent no.1 invited my attention to the letter dated 17th June 2008 (Exhibit-'P-8') addressed by the learned advocate on behalf of the respondent no.1 herein to Mr.B.B. Parekh, Advocate informing that being the daughter of the said deceased, the respondent no.1 was legally entitled to the copy of the Will made by the said deceased during her lifetime. In the

said letter, the respondent no.1 had contended that she was the sole executrix in respect of immovable and movable properties of her late mother. She had alleged to have performed the rituals being the dearest daughter of the said deceased and had been herself under the serious grief. She submits that there was no reply to the said letter given by the petitioner herein denying that the respondent no.1 was not the daughter of the said deceased or any other facts mentioned in the said letter dated 17th June 2008. Learned counsel for the respondent no.1 invited my attention to the public notice dated 9th May 2008 in respect of "Chautha" ceremony in respect of the said deceased in which the name of the respondent no.1 was mentioned as daughter of the said deceased.

37] Learned counsel for the respondent no.1 invited my attention to the complaint dated 23rd January 2009 (Exhibit-'P-10') made by the petitioner herein to the Marine Drive Police Station against the respondent no.1, Mr.Shivaji Chandani and Mr.Ramesh Gwalani alleging that those persons were pressuring him to part away with the premises no.307, Niranjana Building, 99 Marine Drive, Mumbai – 400 002 and in respect of the other properties in their favour under a Will dated 3rd November 2004 and alleging that the same was forged. Learned counsel submits that in the said complaint, the petitioner had himself stated that he had told the

respondent no.1 and two others to obtain probate of the said Will and he was assured by respondent No.1 that she would get probate.

38] The petitioner showed his willingness to hand over possession upon the respondent no.1 and two others upon getting probate of the said alleged Will by the respondent No.1. She also invited my attention to the reply of the petitioner to question nos.39 in cross-examination and would submit that the petitioner replied that he did not recollect whether he had written any letter in protest or complaint after the announcement of the death of the said deceased about the alleged false representation of the respondent no.1 as the daughter of the said deceased. She submits that the respondent no.1 though had initially made averment in the testamentary petition filed by her that she was an adopted daughter of the said deceased, the said averment was subsequently deleted.

39] Learned counsel submits that the respondent no.1 though had not led oral evidence in this miscellaneous petition however by producing various documents and by cross-examining the petitioner and his witnesses, the respondent no.1 has proved before this Court that she was an adopted daughter of the said deceased though she had filed testamentary petition *inter alia* praying for probate not as an adopted daughter but as an executrix and beneficiary under the said

Will.

40] In so far as the allegations of fraud made by the petitioner against the respondent no.1 in the miscellaneous petition are concerned, learned counsel for the respondent no.1 submits that the petitioner has invoked Section 263 of the Indian Succession Act, 1925, Explanations (b) and (c) and Illustrations (ii) and (iii). Learned counsel invited my attention to paragraph 21 of the miscellaneous petition alleging fraud against the petitioner by the respondent no.1. In the said paragraph, it has been alleged by the petitioner that on the death of her father late Tawarmal Hinduja in the year 1960, the said deceased had inherited the substantial sum along with her other sisters being the legal heirs. The amount was inherited by the deceased from her father as per the last wishes and as per desire of her father partly invested in the partnership firm with her husband.

41] It is alleged that various properties had been inherited by the deceased through her father. It is submitted that it is the case of the petitioner in the miscellaneous petition that as the son of one of the sisters of the said deceased, the petitioner is entitled to share in the said property under Section 15(1) of the Hindu Succession Act, 1956. The petitioner has alleged that the respondent no.1 had committed fraud by not showing the name of the petitioner in the

petition as the legal heir and also concealed from this Court that the part of the estate of the deceased was inherited by the deceased from her parents and the same in law was to devolve by succession as provided under the law to the legal heirs of the parents/father. It is the case of the petitioner that as part of the estate left behind by the deceased is to be governed by sub-section (2) of Section 15 of the Hindu Succession Act, 1956 and consequently, the interest of the petitioner, who is the legal heir of the deceased, is prejudiced by the probate proceedings.

42] Learned counsel for the respondent no.1 invited my attention to the grounds raised in the miscellaneous petition and more particularly ground (xxiv) alleging that the said grant was obtained by the respondent no.1 by means of an untrue allegation to the effect that other than the legal heirs mentioned in paragraph 9 of the Testamentary Petition No.139 of 2009, there were no other legal heirs.

43] Learned counsel appearing for the respondent no.1 invited my attention to ground No.(xxxii) raised by the petitioner in the Miscellaneous Petition and paragraphs 23 and 24 of the affidavit in lieu of the examination-in-chief filed by the petitioner. She also invited my attention to the answers of the petitioner in his cross-examination and in particular to questions 17 to 24, 45 and 106 and 107 and

would submit that the petitioner has in his cross-examination admitted that he did not have any documents on record to show that the said deceased had inherited any property from her father. He was also not a party to any transactions. He also admitted that the said deceased had given the gift of Rs.40,00,000/- to the respondent no.1.

44] Learned counsel invited my attention to the wealth tax return of the said deceased for the assessment year 1998-99 showing various movable assets and immovable assets standing in the name of the said deceased. She also invited my attention to the fixed deposit made by the said deceased with HDFC Bank which was in the joint name of the said deceased, the petitioner herein and Mr.Ramesh Gwalani. He submitted that though the petitioner had led oral evidence, he could not prove before this Court that the said deceased had inherited any properties from her father and thus the claims of the petitioner fell on that ground itself under section 15(2) of the Hindu Succession Act, 1956. She submits that since the petitioner or his mother were not class-I heirs, the citation could not have been served on the mother of the petitioner or the petitioner himself.

45] Learned counsel for the respondent no.1 invited my attention to the answers given by the petitioner in his cross-examination in particular to questions 77 to 81 and would submit that the petitioner has identified the signature of Smt.Ishwari Baldevdas

Gwalani who was the maternal aunt i.e. the sister of the mother of the petitioner on the affidavit dated 11th April, 2014. The said affidavit is marked as **Exhibit Y-1/4** for identification.

46] It is submitted by the learned counsel for the respondent no.1 that the petitioner has all through out acted prejudicial to the interest of all by using the funds of the estate after the death of the said deceased. Some of such instances are on record of the present proceedings. She invited my attention to a letter dated 13th October, 2008 addressed by Mr.Ramesh Gwalani to the petitioner herein alleging that after the demise of the said deceased, the petitioner had withdrawn various amounts from her bank account without the knowledge of the said Mr.Ramesh Gwalani and the same were without any authority. He also invited my attention to paragraph 14 of the miscellaneous petition filed by the petitioner admitting withdrawal of some of the amounts from the joint account of the said deceased by the petitioner.

47] It is submitted that in his cross-examination, the petitioner admitted that the letter dated 13th October, 2008 was addressed by Mr.Ramesh Gwalani to the petitioner alleging withdrawal of various amounts of the deceased after her demise. The petitioner did not give any response to the said letter. She submits that the petitioner was fully aware of the Will of the said deceased. A copy of the said Will

was sent to the petitioner by Mr.Ramesh Gwalani. She submits that the wife and the sister of the petitioner are the beneficiaries of the said Will. The petitioner was also aware of filing of the Probate petition. Learned counsel invited my attention to the cross-examination of the petitioner on this issue in reply to the questions and more particularly his reply to questions 66 to 70, 73 to 77. She submits that the wife of the petitioner was served with citation in the testamentary petition filed by the respondent no.1. The petitioner admitted that the wife of the petitioner was the beneficiary under the said Will.

48] Learned counsel for the respondent no.1 placed reliance on Rule 373 of the Bombay High Court (Original Side) Rules and would submit that the respondent no.1 had fully complied with the procedure described under the said provision. She invited my attention to the affidavit of the attesting witness Mr.B.B. Parekh, Advocate dated 16th October, 2008 annexed at page 585 of Volume E2. She also relied upon the affidavit of the attesting witness Dr.Deepti Mukesh, Advocate, which was identical to the affidavit of Mr.B.B. Parekh, Advocate. She also placed reliance on the affidavit dated 16th July, 2010 filed by Mr.B.B. Parekh, Advocate and would submit that the affidavit of the attesting witness was not mandatory under Rule 374 of the Bombay High Court (Original Side) Rules at all.

She submits that the affidavit dated 16th July, 2010 was filed by Mr.B.B. Parekh, Advocate after two years of filing the first affidavit i.e. dated 16th October, 2008. She submits that there is no inconsistency between the affidavits filed by Mr.B.B. Parekh, Advocate and Dr.Deepti Mukesh, Advocate. She submits that in any event, the Court has to consider the entire evidence on record.

49] Insofar as the name of Mrs. Ishwari Baldevdas Gwalani originally mentioned in the testamentary petition filed by the respondent no.1 is concerned, it is submitted by the learned counsel for the respondent that the said Mrs.Ishwari Baldevdas Gwalani was also not the heir and next of kin of the said deceased and thus even her name could not have been cited in the said testamentary petition. The said name was thereafter deleted. She submits that all the legal heirs and next of kin of the said deceased had filed the consent affidavits and had waived service of citation and granted the consent for grant of Probate in favour of the respondent no.1. Some of the legal heirs and next of kin were the beneficiaries under the said Will. She submits that the wife and two sisters of the petitioner who were also the beneficiaries under the said Will did not file any consent affidavits. They however, did not challenge grant of Probate granted by this Court also.

50] Learned counsel for the respondent no.1 invited my

attention to ground No.(xxiv) raised in the Miscellaneous Petition alleging that grant of Probate obtained by the respondent no.1 was defective in substance. She submits that the petitioner not being the heir or next of kin of the said deceased, could not have raised such ground in the petition.

51] Insofar as the submission of the learned counsel for the petitioner that the respondent no.1 not having entered the witness box and thus an adverse inference shall be drawn against her under Section 114 of the Indian Evidence Act, 1872 is concerned, learned counsel for the respondent no.1 placed reliance on Section 114 of the Indian Evidence Act and would submit that presumption under Section 114 is rebuttable. The respondent no.1 has proved her case by documentary evidence and by cross-examining the petitioner. She submits that the case of the respondent no.1 has been admitted by the petitioner in his cross-examination. Learned counsel placed reliance on an unreported judgment of this Court dated 28th April, 2014 in Second Appeal No.437 of 2008 in case of **Smt.Kunda wd/o Mahadeo Supare & Ors. vs. Haribhau s/o Husan Supare** in support of the said submission.

52] Learned counsel for the respondent no.1 distinguished the unreported judgment of this Court in case of Peter D'Souza and would submit that in that case the original petitioner had suppressed

the Will. In this case the petitioner was fully aware of the existence of the Will and has acted prejudicial to the interest of the testatrix and her estate. She submits that the petitioner has not been able to show even the slightest interest in the estate of the said deceased in the miscellaneous petition and thus this miscellaneous petition is not maintainable. She submits that the only allegation of fraud made by the petitioner is on the false premise that the citation was not served upon the petitioner. She submits that the facts before this Court in case of **Peter John D'Souza & Ors.** (supra) are totally different.

53] Learned counsel appearing for the respondent no.1 distinguished the judgment of the Supreme Court in case of **Jagjit Singh & Ors.** (supra) on the ground that the facts before the Supreme Court were totally different than the case before this Court. She submits that in any event, the issue in respect of caveatable interest is referred to a Larger Bench by the Supreme Court in the said judgment.

54] Insofar as the judgment of the Supreme Court in case of **Basanti Devi** (supra) relied upon by the learned counsel for the petitioner is concerned, the said judgment is distinguished by the learned counsel for the respondent no.1 on the ground that the said matter was filed by grand-son of the deceased, who had caveatable interest. He submits that the facts before the Supreme Court are

clearly distinguishable in the facts and circumstances of this case and the said judgment would not assist the case of the petitioner.

55] Learned counsel for the respondent no.1 placed reliance on section 15 of the Hindu Succession Act, 1956 and would submit that the petitioner in this petition falls in class (d) if the petitioner proves that the properties were acquired by the said deceased from her parents which the petitioner has failed. She submits that under section 15(2) of the Hindu Succession Act, only if the said deceased would have inherited the property from her parents, the heirs of the deceased would have inherited some share and would have caveatable interest which conditions are not satisfied by the petitioner. My attention is also invited to the family tree annexed at page no.524 of the compilation of documents. She also invited my attention to page no.25 of the Miscellaneous Petition and submits that admittedly the petitioner had visited the office of the Collector and was thus fully aware of the execution of the Will by the respondent no.1.

56] Learned counsel for the respondent no.1 invited my attention to the affidavit of Mr.B.B. Parekh and Dr.Deepti Mukesh, Advocate and would submit that both the attesting witnesses had categorically mentioned in their respective affidavits that the said deceased was of sound and disposing mind on the date of execution

of the Will. She submits that the judgment of the Supreme Court reported in **(1999) 3 SC 573** has been dealt with by the learned single Judge of this Court in an unreported judgment rendered in Second Appeal No.437 of 2008 in case of **Smt.Kunda wd/o Mahadeo Supare & Ors. vs. Haribhau s/o Husan Supare**. She placed reliance on an unreported judgment of this Court delivered on 8th July, 2014 in case of **Jagdish Asarpota & Anr. in the matter between Smt.Kusum Bharat Asarpota vs. Jagdish Damodardas Asarpota & Anr.** in Chamber Summons No.64 of 2014 and in particular paragraphs 19, 28 to 31, 34 and 39 in support of her submission that the petitioner in this case did not even have slightest caveatable interest and thus was not entitled to be served with the citation. She also placed reliance on the judgment of this Court in case of **Mrs.Perviz Sarosh Batliwalla & Anr. vs. Viloo Plumber & Anr., AIR 2000 Bombay 189** and in particular paragraphs 7 and 8 in support of her submission that the petitioner does not have even slightest interest in the estate of the said deceased and is thus not entitled to maintain the present petition for revocation of the Probate granted in favour of the respondent no.1.

57] Mr Joshi, learned Senior Counsel for respondent No.2 submits that the petitioner has no locus or caveatable interest for filing this petition under section 263 of the Indian Succession Act,

1925, for revocation of probate granted by this Court on 29th September 2010. He submits that to maintain an application for revocation of grant of probate, some interest in the estate of the deceased has to be established by a person, who claims through the testator or through a legal heir or representative of the testator. He submits that the petitioner has to establish that by virtue of issuance of grant of probate in favour of respondent No.1, the interest of the petitioner is adversely affected. Learned Counsel submits that the petitioner has not established before this Court that he was entitled to contest the grant of probate in favour of respondent No.1.

58] In support of this submission, the learned Senior Counsel placed reliance on the judgment of this Court in case of **Prakash P. Bambardekar Vs. Avinash Vishwanath Ajgaonkar {2013 (5) Mh.L.J. 399}**, and in particular, paragraph 21 thereof. It is submitted by the learned Counsel that the petitioner has not established before this Court that he would be entitled to estate of the deceased in case of intestacy and to show as to how he has any interest in the property of deceased. He submits that the petitioner admittedly does not fall in the list of Class I heirs under the provisions of the Hindu Succession Act, 1956. In support of this submission, learned Senior Counsel placed reliance on the judgment of this Court in case of **Ramesh Nivrutti bhagwat Vs. Dr. Surendra Manohar Parakhe (AIR 2001**

Bombay 461), and in particular, paragraph 10 thereof.

59] It is submitted by the learned Senior Counsel that since the petitioner does not fall in Class I heirs, the petitioner cannot claim any interest in the estate of said deceased. It is submitted that the claim of the petitioner as an heir is based upon Section 15(2)(a) of the Hindu Succession Act, 1956. He submits that under the said provision, since heirs of husband of the said deceased are alive, who are entitled to inherit in case of intestate of property of a female Hindu dying intestate, the petitioner is not entitled to any share in the property of said deceased, even in case of intestacy. He submits that the petitioner has failed to prove before this Court that any of the property is inherited by said deceased from her father or mother and, thus, the petitioner would not get any share in the property, even under section 15(2)(a) of the Hindu Succession Act.

60] Learned Senior Counsel placed reliance on the judgment of this Court in case of **Arjundas s/o Narayandas Panjwani and others Vs. Vera Mishra of Bombay and another, {1995(3) Bom. C.R. 497}** and, in particular, on paragraphs 10 to 12 of the said judgment. He also placed reliance on the judgment of this Court in case of **George Anthony Harris Vs. Millicent Spencer {1932 Bombay Law Reporter (Volume XXXV) 708}**, and in particular, 11th Paragraph at page 712, and would submit that the person applying for

revocation of grant of probate or letter of administration, has to show that he is interested in alleged will though the said interest may be very slight, which the petitioner is entitled to claim in estate of the said deceased.

61] Learned Senior Counsel for respondent No.2 placed reliance on an un-reported judgment of this Court delivered on 28th March 2014 in **Miscellaneous Petition No.5 of 2013 in Testamentary Petition No. 722 of 2010** in case of **Peter John D'Souza and others Vs. Armstrong Joseph D'Souza** and would submit that the Court can take cognizance of the allegation of fraud, fabrication or concealment even at the instance of a party, however, he should establish the interest in the property of the deceased, though the said interest may be even slightest interest. He also placed reliance on the judgment of the Supreme Court in the case of **G. Gopal Vs. C. Baskar and others, {(2008) 10 Supreme Court Cases 489}** and submits that the petitioner not having even slightest interest in the estate of the testator was not entitled to be served with citation, and consequently, could not maintain this petition for revocation of grant of probate. He submits that in view of the conflicting view taken by the Supreme Court on the issue of caveatable interest for grant of probate in case of **K.K. Birla** reported in **(2008) 4 Supreme Court Cases 300** and in case of **G. Gopal,**

cited supra, the issue has been referred to a Larger Bench by the Supreme Court in case of **Jagjit Singh and others Vs. Pamela Manmohan Singh, {(2010) 5 Supreme Court Cases 157}**.

62] Learned Senior Counsel for the respondent No.2 distinguished the judgment in the case of **Basanti Devi Vs. Ravi Prakash Ram Prasad Jaiswal {(2008) 1 Supreme Court Cases 267}**, relied upon by the learned Counsel for the petitioner on the ground that in the said judgment, appellant was held to be an heir of deceased. It was held by the Supreme Court in the said judgment that a person, who is aggrieved by grant of probate, is entitled to file an application for revocation. He submits that in this case, petitioner is not aggrieved by grant of probate in favour of respondent No.1 in any manner whatsoever, and thus, not entitled to maintain this application for revocation of grant of probate. He submits that the facts before the Supreme Court in the case of **Basanti Devi**, are clearly distinguishable.

63] Learned Senior Counsel invited my attention to the order dated 8th December 2014 passed by this Court rejecting the request of respondent No.1 to frame an issue as to “Whether petitioner proves that he is class I heir of the deceased and is entitled to a share in her property”. He submits that however, while rejecting the said request for framing such issue, this Court had clarified that said issue was

entirely covered by issue No.3, which requires petitioner herein to establish that he has and is entitled in law to a share, right, title and interest in the property of the deceased. He submits that in this case, the said deceased had no natural children admittedly and her husband had predeceased her.

64] It is submitted that notwithstanding the claim of respondent No.1 to be an adopted daughter of the deceased, which is an issue in the present proceedings, even if it is assumed that there are no children of the deceased, the heirs of said deceased would be as per section 15(1)(b) of the Hindu Succession Act, 1956, the heirs of the late husband of said deceased. Learned Senior Counsel invited my attention to some of the averments made in the petition making a claim of heirship under section 15(2)(a), which is an exception of general rule of succession in section 15(1) on the ground that the petitioner is the son of pre-deceased son of the deceased, and therefore, he is an heir of father of the deceased. It was alleged that the said deceased had allegedly inherited substantial amount upon the death of her father, which was particularly invested by the said deceased in property at Warali, in Niranjana building, Marine Drive and property at Warali. It is further alleged by the petitioner that said deceased had inherited substantial amount, jewelery upon her mother's death and invested in purchase of

property, and therefore, upon her intestacy, this part of her estate purchased from sums inherited from her parents, would revert to the heirs of father of the deceased under section 15(2)(a) and not upon the heirs of husband of the deceased under section 15(1)(b) of the Hindu Succession Act, 1956.

65] Learned Senior Counsel invited my attention to the deposition of the petitioner, and more particularly, in paragraph 23 and 24 of his affidavit in lieu of his examination-in-chief in this regard. He submits that apart from assertions of petitioner in paragraphs 23 and 24 of affidavit of examination-in-chief, he has not led any independent evidence, either documentary or parole to corroborate any of the claims made by him in said two paragraphs.

66] Learned Senior Counsel for the respondent No.2 invited my attention to various answers given by the petitioner during the course of his cross-examination and would submit that the petitioner had admitted that he was not a party to any transactions mentioned in paragraph 23 of his affidavit in lieu of his examination-in-chief. He did not have any document on record in relation to any of the transactions as mentioned in paragraph 23 of his affidavit. Though he claims to have acted as a witness to a sale deed, he neither produced alleged document nor has mentioned about he being a witness to such a alleged sale deed in his affidavit in lieu of examination-in-chief.

67] It is submitted by the learned Senior Counsel that the petitioner also admitted that he had access to all the documents lying in the office of the said deceased and that he was providing assistance to said deceased in managing her money lending business. The said deceased was also consulting him for filing her returns in tax matters. He submits that petitioner also admitted that amounts of Rs. 1.15 crore and 32 lacs, which the petitioner claimed that the same were obtained by the said deceased from sale of suit premises, was not reflected in the tax returns produced by him. He also admitted that he has not produced any tax record of the said deceased except tax returns of 1998-1999. The petitioner could not identify even single document, which according to him, was supporting his case that the said deceased has inherited various amounts from her late father or mother.

68] Learned Senior Counsel for the respondent also invited my attention to some of the answers given by the petitioner in his cross-examination by learned Counsel for respondent No.2. He submits that the petitioner admitted in his cross-examination that he has not produced any document to show that the said deceased has inherited substantial sums from her father. He submits that petitioner also admitted that husband of said deceased had passed away in 1980 and that premises of "Niranjan" building was acquired in the year

1965. The petitioner also admitted that husband of deceased was a money lender and does not know whether parents of said deceased were money lenders. Deceased was carrying on money lending business with her husband. Learned Senior Counsel submits that the petitioner has categorically admitted that he had no personal knowledge of any such transaction, as alleged in affidavit in lieu of his examination-in-chief.

69] It is submitted by the learned Senior Counsel that the petitioner has not led any independent evidence of any other witness, who would have personal knowledge of the alleged inheritance including sole surviving sister of the deceased i.e. Ishwari Gwalani, who would have been the best person to confirm or deny whether any such inheritance was actually received by sisters, as alleged by the petitioner. In the alternate, the learned Senior Counsel submits that it is not the case of the petitioner that the property, allegedly inherited by said deceased, is available even today, and has also failed to show as to how the alleged inheritance was being used by deceased. The petitioner himself has admitted that said amounts or jewelery in specie are not available but had been used by the said deceased herself.

70] It is submitted by the learned Senior Counsel that since the property in its original form itself is not available but is mixed up with

property of the deceased or her husband, Section 15(2)(a) would have no application. In support of this submission, the learned Senior Counsel placed reliance on the judgment of the Andhra Pradesh High Court in case of **Emana Veeraraghavamma Vs. Gudiseva Subbarao and another (AIR 1976 AP 337 and at page 339.)** It is submitted that the ownership of the said deceased cannot be traced in such property, or that as to whether such property was inherited by parents of the said deceased cannot be decided.

71] It is submitted by the learned Senior Counsel that since the petitioner has no chance of succeeding to the estate of the testator, he cannot maintain this application for revocation of probate. In support of this, the learned Senior Counsel placed reliance on the judgment in the case of **Dular Khan Vs. Kesar Kuer (AIR 1964 Patna 518).**

72] It is submitted by the learned Senior Counsel for the respondent No.2 that the petitioner is not a credible witness and his testimony cannot be believed. He submits that in paragraph 32(xv) of his affidavit in lieu of examination-in-chief, the petitioner had claimed that at the time when the will was executed, deceased was sick, infirm and was not in a position to have independent advice or to resist the influence of the presence of the witnesses present at the time of execution of the will. The petitioner has relied upon the bank

account opening form for a fixed deposit account where he was a co-applicant with the deceased, which was dated 24th March 2004 while the will was executed on 3rd November 2004. In his cross-examination, he admitted that in 2004 deceased was in a sound state of mind and good physical health. He agreed with the suggestion that the statement made by him in paragraph 32(xv) of affidavit in lieu of his examination-in-chief was incorrect.

73] It is submitted by the learned Senior Counsel that the petitioner has produced a letter dated 17th February, 2009 seeking information from respondent No.4 society in respect of the nomination form executed by the said deceased. However, in his cross-examination, the petitioner denied that he was aware of nomination made by the deceased in respect of premises of the said society. He also pleaded ignorance about the nominations made by said deceased in respect of her flats in “Krishnakunj” building and “Neelkanth Niranjana” building. He further claimed that he had never asked the said deceased about nomination made by her in the “Neelkanth Niranjana” Society despite being member of the society.

74] It is submitted that when the witness was confronted in respect of his deposition relating to the letter dated 17th February, 2009, in paragraph 18 of his affidavit in lieu of examination-in-chief with the photo copy of the nomination forms by the deceased initially

in favour of respondent No.1 and subsequently in favour of respondent No.2, he admitted those documents in the cross-examination. He submits that the petitioner was also aware of the existence of those nomination forms but deliberately claimed ignorance of the same.

75] It is submitted that the petitioner was referred to certain payments made by him and claimed that he might have been mis-advised in respect of such payments. In his cross-examination, he alleged that he had sought advice from the Counsel, mentioned in paragraph 16, after the death of the deceased and he made payments on the basis of power of attorney granted by the said deceased to look-after the estate. Petitioner subsequently deposed in cross-examination that he had made a mistake in claiming that he had taken any legal advice after the death of the deceased and claimed that he had only paid Counsel's fees. It is submitted by the learned Senior Counsel that the evidence of the petitioner would clearly indicate that he had made various inconsistent and contradictory statements, and thus, his evidence cannot be believed by this Court on the ground that he is not a credible witness.

76] In so far as issue No.1 is concerned, it is submitted that while considering an application for revocation under section 263 of the Indian Succession Act, 1925, it is necessary that there should be

strict proof of existence of one or the other circumstances, enumerated in the Illustrations of Section 263. The grant of revocation is a matter of substance and not merely a matter of form. He submits that powers, which could be exercised by Court under Section 263 of the Indian Succession Act, are discretionary, and unless the Court comes to the conclusion that the cause mentioned in Explanation to Section 263 of the Indian Succession Act is made out by the petitioner, Court cannot pass order of revocation of grant of probate or letter of administration. In support of this submission, the learned Counsel placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Anil Behari Ghosh Vs. Smt. Latika Bala Dassi and others (AIR 1955 Supreme Court 556)**, and in particular, paragraphs 16 to 19, 21 & 22. He submits that the Court has power to refuse to grant revocation, where there is no likelihood of proof being offered that the will admitted to probate was either not genuine or has not been validly executed. He submits that the petitioner has failed to prove that his case falls in any of the just cause, mentioned in Explanation to Section 263 of the Indian Succession Act.

77] Learned Senior Counsel placed reliance on the judgment of this Court in case of **Lydia Agnes Rodrigues and others Vs. Joseph Anthony D'Cunha and others**, delivered on 14th October

2013 in Miscellaneous Petition No.86 of 2013, in support of his submission that the petitioner has not led any foundation in the Misc. Petition about his allegations of forgery of will, and thus, on that ground itself, no order of revocation can be passed by this Court.

78] Learned Senior Counsel placed relied on the judgment of the Madras High Court in case of **Shanmugham Chetti Vs. Chinnammal {(1978) 91 L.W. 237 (Mad.)(DB) 239}**, and more particularly, on paragraph 6 thereof, and submits that since the petitioner has suppressed various true and correct facts, this petition for revocation of grant of probate deserves to be dismissed on that ground itself.

79] Learned Senior Counsel submits that the will had been executed by said deceased on 3rd November 2004. The petitioner in his cross-examination has admitted that in the year 2004, the deceased was in a sound state of mind and in good physical health. The deceased had signed a form in the year 2004 opening a fix deposit. The petitioner himself was the second applicant in the said application form. In support of this submission, the learned Senior Counsel placed reliance on the answers of the petitioner in his cross-examination, and more particularly, to question Nos. 66 to 70 by respondent No.2. He invited my attention to the reply given by the petitioner to question No. 71 and would submit that when the witness

was shown paragraph No. 32(xv) of his affidavit in lieu of examination-in-chief and was asked whether his statement in paragraph 32 (xv) that the said deceased was aged, thin, infirm and was not in a position to have independent advice or to resist influence, is incorrect, the said witness deposed that what he had said in Court was correct and agreed to the said suggestion made by respondent No.2 to the witness. It is submitted that the petitioner has also admitted that several contemporaneous documents were signed by the said deceased, which clearly match the signature of the deceased on the will. He submits that petitioner has accepted that nomination form was filed by said deceased on 9th November 2004.

80] It is submitted by the learned Senior Counsel that the petitioner was required to furnish better particulars under Order VI Rule 4 of the Code of Civil Procedure 1908 while alleging fraud, undue influence and coercion, which in this case petitioner has failed, and thus, this Court shall dismiss the petition on this ground alone. In support of this submission, learned Senior Counsel placed reliance on the judgment of the Supreme Court in case of **Bhishundeo S/o Seogeni Rai (AIR 1951 Supreme Court 280)**, in particular paragraphs 24 and 25.

81] Learned Senior Counsel for respondent No.2 invites my attention to various grounds raised by the petitioner in Misc. Petition

and made various submissions on each of those grounds. He submits that since the petitioner was not a legal heir or next of kin of the deceased and does not have caveatable interest, he was not entitled to be served with the citation. He submits that all the heirs of the said deceased under section 15(1)(b) of the Hindu Succession Act, 1956, i.e. the heirs of her late husband had been already disclosed in the Testamentary Petition filed by respondent No.1. He submits that Testamentary Petition was, thus, not defective in substance or that the grant of probate was not obtained by false suggestion that there was no other heirs than disclosed in paragraph No. 9 of the petition.

82] In so far as the submission of the learned Counsel for the petitioner that the signature of the said deceased on the will was not genuine is concerned, it is submitted by the learned Senior Counsel for respondent No.2 that the said will has been duly proved by respondent No.1, as required by law under section 63 of the Indian Succession Act, 1925. The signature on the will is the same as that on another contemporaneous document i.e. nomination form filed by said deceased in favour of respondent No.2 in respect of Flat in “Niranjan” building. The said nomination form also contains mark of the office bearer of the society accepting that the signature was verified and that the person signing it was genuine. He submits that

to prove the allegations made by the petitioner in the Misc. Petition regarding specimen signature of the said deceased on the will, the petitioner did not lead any evidence to prove such allegations specifically. Petitioner also did not examine any expert evidence though has stated that the will was required to be examined by an examiner of the documents for ascertaining whether the same was original or copy or forged. He submits that there is no requirement in the probate proceedings to produce any specimen signature.

83] In so far as alleged variance in affidavits of Mr. B.B. Parekh Advocate (attesting witness), Ishwari Gwalani and Ramesh Gwalani as to the discrepancies shown by the petitioner regarding the attesting witness Mr. B.B. Parekh that the deceased had signed on each page, whereas there was no signature on page No.2, the second attesting witness had projected as a doctor though the said doctor was conferred doctorate other than in medicine is concerned, it is submitted by the learned Senior Counsel that there was no irreconcilable variance between the affidavits of attesting witnesses i.e. Mr. B.B. Parekh and Dr. Dipti Mukesh. He submits that only discrepancy in the two statements by two attesting witnesses was that one of the attesting witness had stated that the will was executed at the house of the deceased, while in the affidavit dated 7th November, 2008 filed by other witnesses, it was claimed that the will was signed

at the office of the Advocate.

84] It is submitted that for grant of probate, due execution was to be proved by the attesting witness. The petitioner himself has admitted in the petition that the contents of affidavit filed by the relatives of the deceased are genuine. He submits that the alleged discrepancy does not in any manner affect the genuineness of the will or create any suspicious circumstance. It is submitted that it is not the case of the petitioner that deceased was not in a position to execute will at her residence or at the office of the Advocate. He submits that alleged discrepancy pointed out by the petitioner is not of such egregious nature so as to enable the petitioner to claim just cause on the ground of any false suggestion or concealment of any material fact.

85] In so far as the grounds raised in paragraphs XII and XXXIV of the Misc. Petition is concerned, it is submitted by the learned Senior Counsel that the petitioner has not led any evidence to show that the same was willful or done fraudulently, and thus, it cannot amount to just cause under section 263 of the Indian Succession Act. He submits that grounds raised in paragraph XXII are without any basis.

86] In so far as the grounds raised by the petitioner that respondent No.1 in her Testamentary Petition has not given complete

list of brothers and sisters of the said deceased as well as the complete list of brothers and sisters of husband of said deceased in Paragraph 9 of the petition is concerned, it is submitted by the learned Senior Counsel that respondent No.1 had given names of next of kins under Section 15(1) of the Hindu Succession Act, 1956, in paragraph 9 of the amended petition.

87] It is submitted by the learned Senior Counsel that the petitioner in his cross-examination in response to question Nos. 30 and 31 has admitted that respondent No.1 was in occupation of premises of deceased and that he had not objected to the same at any point of time. The petitioner has also not furnished any details of any alleged property collected, which was omitted to be mentioned and did not produce any material in support of these allegations. He submits that the petitioner has also failed to produce any material in support of his allegation that respondents No.1 and 2 had inter-meddled with the property of the deceased before grant of probate. Petitioner admitted that he had retained the passbooks and cheque books of various accounts of the said deceased and had returned the same to respondent No.1 alongwith his letter dated 22nd May 2008. The petitioner admitted that those documents were returned to respondent No.1 as she was a joint holder of the account with the said deceased. The petitioner also did not lead any evidence to

establish that the amounts in those accounts belonged to the said deceased.

88] Learned Senior Counsel for the respondent No.2 submits that the petitioner has failed to prove the allegation that respondent No.2 had practiced fraud in purchase of flat in "Niranjan" building in capacity as a nominee of the deceased. The petitioner himself has admitted that the signature on the said nomination form filed was of the said deceased. He submits that on the contrary, the petitioner himself has intermeddled with the estate of the deceased. In support of this submission, the learned Senior Counsel placed reliance on letter dated 13th October 2008 addressed by Mr. Ramesh Gwalani alleging that the petitioner had withdrawn funds from the account of the deceased after her demise.

89] In so far as the issue as to whether respondent No.1 was an adopted daughter of the said deceased or not, is concerned, the learned Senior Counsel for respondent No.2 adopted the arguments advanced by the learned Counsel for the respondent No.1.

90] In so far as the submission of the learned Counsel for the petitioner that the execution of the will was surrounded by suspicious circumstances is concerned, he submits that the petitioner has not led any evidence to prove these allegations and these allegations are based on conjectures. He submits that the said deceased had lot of

love and affection towards respondent No.2. The petitioner has named only respondent No.1 and respondent No.2 as being recipients of gifts from the deceased during her life time. Petitioner also admitted that only loans and not gifts were given to his family by the said deceased. Petitioner has also admitted that the deceased had her own money lending business, huge investments and several litigations. The said deceased died after four years of making will.

91] In so far as submission of the learned Counsel for the petitioner that there was no statement made in the will that the will was read-over to the deceased is concerned, he submits that no such ground has been raised by the petitioner in the Misc. Petition. He submits that since there was no plea in the Misc. Petition to this effect, no evidence could be led by the petitioner beyond the pleadings. He submits that no evidence was led by the petitioner to show that the deceased did not understand English. On the other hand, the petitioner himself has produced various documents of the said deceased, the contents of which were in English, and while referring to those documents, the petitioner had not claimed that the deceased was required to be explained the contents of those documents before the same was signed by the said deceased. He submits that there is no substance in the submission of the learned Counsel for the petitioner, made across the bar, that there was no

statement in the will that the same was read-over to the said deceased.

92] The learned Senior Counsel for respondent No.2 also filed written submissions on behalf of his client in addition to oral submissions made by him.

93] Learned Counsel for respondent No.3 tendered a list of events and would invite my attention to various documents annexed to the documents on record. She also invited my attention to order dated 10th December 2013 passed by this Court, holding that the title of respondent No.3 to the property in question is not a matter that can be decided in the Misc. Petition for revocation. It is not in dispute that there are no reliefs claimed by the petitioner against respondent No.3 in this Misc. Petition. The learned Counsel for respondent No.3 submits that her client has purchased the flat in question from respondent No.2 after grant of probate by this Court in favour of respondent No.1. She placed reliance on Section 273 of the Indian Succession Act, 1925, in support of her submission that grant of probate granted by this Court is conclusive. Respondent No.3 has also filed an affidavit in reply opposing this petition.

94] It is submitted that her client was a *bona-fide* purchaser. She placed reliance on the judgment of the Madras High Court in

case of **G.F.F. Foulkes and others Vs. A.S. Suppan Chettiar and another {(1995) ILR Mad 607}** and in particular, pages 609, 624, 639 and 640, in support of her submission that the executor or administrator has power to dispose of the property of the deceased vested in him under Section 211 and they cannot be followed either by the creditors or by the legatees into the hands of the alinee. Learned Counsel for respondent No.3 also placed reliance on the judgment of the Supreme Court in the case of **Crystal Developers Vs. Smt. Asha Lata Ghosh (Dead) through Les. And others (AIR 2004 Supreme Court 4980)**, and in particular, on paragraphs 28 to 32 and 53. She submits that once this Court has granted probate, the same is conclusiveness of the representative title. Grant of probate operates as judgment-in-rem and cannot be said to be as grant on fraud or collusion, unless the same is pleaded and proved by the parties so alleging. Mr. Makhija, learned Counsel for the petitioner, fairly admits that no relief is sought by his client against respondent No.3 in Miscellaneous Petition.

95] Mr. Makhija, learned Counsel for the petitioner in rejoinder submits that in so far as issue of locus raised by respondents against his client is concerned, though locus of the petitioner was challenged by the respondents. This Court having been satisfied that the petitioner had locus to file this petition, has admitted this petition.

96] In so far as submission of learned Counsel for the respondents, based on Section 15(2) of the Hindu Succession Act, 1956, is concerned, it is submitted that even if this Court comes to conclusion that petitioner has not produced any document to show that said deceased has inherited property from her parents, that would not take away the rights of the petitioner to apply for revocation. He submits that the petitioner has interest in the estate of the said deceased and, thus, even the slightest interest in the estate is sufficient to maintain the petition for revocation for grant of probate. Such slightest interest cannot be equated to the caveatable interest.

97] In so far as reframed issue No.1 is concerned, it is submitted by the learned Counsel for the petitioner that none of the respondents led any evidence to show that the testator had understood the contents of the will, which were in English, though the testator has signed in Hindi. He submits that though one of the attesting witnesses had deposed that every page of the will was signed by the testator, admittedly, even according to the respondents, page No.2 did not bear any signature of the deceased. He submits that the power of attorney produced on page 357 of the record was also signed by the said deceased in Hindi.

98] It is submitted by the learned Counsel for the petitioner

that alleged will was not in the solemn form. He submits that signature on nomination forms if compared with the alleged signature on the will, it will be clear that the alleged signature of the deceased on the will was fabricated.

99] In so far as issue No.2 regarding adoption is concerned, the learned Counsel for the petitioner submits that the onus was on respondent No.1 to prove that she was an adopted daughter of said deceased. The learned Counsel invites my attention to Sections 5 to 11 of the Hindu Adoption and Maintenance Act, 1956, and would submit that the adoption has to be proved in accordance with those provisions, which the respondent No.1 failed to prove by leading any evidence before this Court. He submits that conditions set out in Sections 5 to 11 of the said Act are not at all satisfied by respondent No.1. He submits that affidavits and photographs would not prove the adoption of respondent No.1. The affidavit relied upon by respondent No.1 was not marked as exhibit and, thus, no such affidavit can be relied upon.

100] Learned Counsel for the petitioner placed reliance on the judgment of the Hon'ble Supreme Court in case of **Nilima Mukherjee Vs. Kanta Bhusan Ghosh {(2001) 6 Supreme Court Cases 660}** and, in particular, paragraphs 4 and 5, on the issue of adoption raised by the petitioner. He also placed reliance on the judgment of the

Hon'ble Supreme Court in the case of **Pentakota Satyanarayana and others Vs. Pentakota Seetharatnam and others {(2005) 8 Supreme Court Cases 67}**, and in particular, paragraph 35 in support of aforesaid submission.

101] Learned Counsel for the petitioner placed reliance on the judgment of this Court in case of **Bama Kathari Patil Vs. Rohidas Arjun Madhavi and another {2004(2) Mh.L.J. 752 (Bom.)}**, and judgment of Hon'ble Supreme Court in the case of **Narbada Devi Gupta Vs. Birendra Kumar Jaiswal and another {(2003) 8 Supreme Court Cases 745}**, and in particular, paragraphs 16 and 17; and judgment of this Court in case of **Geeta Marine Services Pvt. Ltd. and another Vs. State and another {2009(2) Mh. L.J. 410}**, and in particular, paragraphs 21 and 22, in support of the submission that merely because some of the documents are marked as exhibits, proof is not dispensed with without formal proof of the said document. He submits that since some of the documents, which were in custody of the petitioner, were returned to respondent No.1 by the petitioner, he could not produce those documents, and thus, no inference can be drawn by this Court against petitioner for not producing such documents.

102] It is lastly submitted that this Court has ample power to set aside the grant of probate if this Court is satisfied that the grant of

probate was obtained fraudulently by respondent No.1 or on the ground that the execution and attestation of will was not proved.

103] I shall first deal with issue No.3 i.e. as to “whether the petitioner proves that he has a caveatable interest and the necessary *locus* to file the instant petition ?”

104] It is not in dispute that the petitioner does not fall in Class-I prescribed under the Hindu Succession Act, 1956. The claim of the petitioner as an heir is based upon Section 15(2)(a) of the Hindu Succession Act, 1956. It is also not in dispute that the heirs of the husband of the said deceased are still alive and in case of intestacy those heirs of the husband would be entitled to inherit the properties of the deceased in case of intestacy. If the said deceased would have died intestate, even in that event the petitioner would not have been entitled to any share in the property of the said deceased unless the said properties would have been inherited by the said deceased from her father or mother.

105] The question that arise for consideration of this Court is whether the petitioner had proved by leading cogent evidence before this Court that the said deceased had inherited any of the properties from her father or mother and thus on intestacy the petitioner would have a share under Section 15(2)(a) of the Hindu Succession Act, 1956, and consequently will have a *locus* to challenge the property

granted by this Court by invoking Section 263 of the Indian Succession Act, 1925.

106] The petitioner had admittedly entered the witness box in this Miscellaneous Petition. This Court had passed an order on 8.12.2014 rejecting the request of respondent No.1 to frame an issue as to “whether petitioner proves that he is Class-I heir of the deceased and is entitled to a share in her property”. This Court, however, while rejecting such request for framing such issue clarified that such issue was entirely covered by Issue No.3, which require the petitioner to establish that he is entitled in law to share title and interest in the property of the said deceased. Admittedly, in this case, the said deceased had no natural children and her husband had predeceased her. The heirs of the said deceased would be those as per Section 15(1)(b) of the Hindu Succession Act, 1956 i.e. heirs of the late husband of the said deceased.

107] A perusal of the averments made by the petitioner in the Miscellaneous Petition indicates that the petitioner has made a claim of heirship under Section 15(2)(a) of the Hindu Succession Act, 1956, which is an exception of General Rule to succession under Section 15(1) on the ground that the petitioner is the son of predeceased son of the said deceased.

108] A perusal of the deposition made in paragraph Nos.23 and

24 of the affidavit in lieu of examination-in-chief filed by the petitioner and the cross-examination of the petitioner and more particularly his reply to question Nos.17 to 24, 45, 106 and 107 clearly indicates that the petitioner has admitted that he did not have any document on record to show that the said deceased had inherited any property from her father. The petitioner also admitted that he was not a party to any transactions. The wealth tax return filed by the said deceased for the assessment year 1998-99 also clearly shows that various movables and immovable assets had been standing in the name of the said deceased.

109] A perusal of the evidence thus clearly indicates that the petitioner has failed to prove that the said deceased has inherited any properties from her father. In my view, the claim of the petitioner thus would fall **on the ground** under Section 15(2) of the Hindu Succession Act, 1956. In my view, since the petitioner or his mother were not Class-I heirs admittedly, the respondent No.1 was not required to serve any citation on the petitioner or his mother in the Testamentary Petition filed by the respondent No.1.

110] Mr.Makhija, learned counsel for the petitioner could not point out any other evidence on record whether oral or documentary in support of his submission that the said deceased had inherited any of the properties from her father. The learned counsel could not

dispute before this Court that the petitioner in his cross-examination had admitted that he had no documents to show that the said deceased inherited any of the properties from her father or that he was party to any such transactions. In my view, the petitioner would have become entitled to claim some share in the assets of the said deceased only if the petitioner would have proved that the properties were acquired by the deceased from her parents under Section 15(2) of the Hindu Succession Act, 1956, and in that event would have caveatable interest. In my view, the Judgments of this Court in case of **Ramesh Nivrutti Bhagwat** (supra) and **Prakash P.Bambardekar** (supra), would squarely apply to the facts of this case and would assist the case of the respondents. I am respectfully bound by the said Judgments.

111] A perusal of the record further indicates that though the petitioner has claimed to have acted as a witness to the sale deed, he has neither produced any alleged documents nor has mentioned anything about being a witness to such alleged sale-deed in his affidavit in lieu of examination-in-chief. The petitioner had admitted that he had access to the documents lying in the office of the said deceased and had allegedly provided assistance to the said deceased. The petitioner also admitted that husband of the said deceased had passed away in the year 1980 and that premises in

'Neelkanth Niranjani' building was acquired in 1965. The deceased herself was carrying on money lending business with her husband. The petitioner also admitted that he had no personal knowledge of any transaction in his affidavit in lieu of examination-in-chief.

112] It is not in dispute that the petitioner also did not lead any independent evidence of any other witness, including sole surviving sister of the deceased i.e. Ishwari Gwalani, who was the best person to confirm or deny whether any such inheritance were actually received by sisters as alleged by the petitioner. Be it as may, it is not the case of the petitioner that property allegedly inherited by the said deceased, is available even today or has also failed to show before this Court as to how alleged inheritance was being used by the deceased. The petitioner has admitted in his evidence that the jewellery and some other property in specie is not available, but had been used by the said deceased herself during her life time.

113] In my view, since admittedly the properties of the said deceased are not available in its original form, but has been mixed-up with the property of her husband or other properties, Section 15(2)(a) of the Hindu Succession Act, 1956 would have no application. The Judgment of Andhra Pradesh High Court in case of ***Emana Veeraraghavamma*** (supra) squarely applies to the facts of this case. I am in agreement with the views expressed by the Andhra Pradesh

High Court in the said Judgment.

114] In my view, since the petitioner was not having any interest of any nature in the properties of the said deceased or could not claim any right therein even in case of intestacy, and since the petitioner failed to prove that the said deceased inherited any properties from her parents, the petitioner did not have any caveatable interest and is thus not entitled to maintain this petition for revocation under Section 263 of the Indian Succession Act, 1925. In my view, the Testamentary Petition is not defective in substance or that the grant of Probate was not obtained by respondent No.1 by any false suggestion that there was no other heir other than disclosed in paragraph No.9 of the petition.

115] In my view, even though at one stage the name of the another sister of the said deceased was disclosed in the Testamentary Petition as one of the heir of the said deceased, fact remains that the said name was subsequently deleted by carrying out amendment. If the name of a person is wrongly mentioned in the Testamentary Petition as one of the heir or next-of-kin, by mentioning such name in the Testamentary Petition, itself would not create any caveatable interest in favour of such party unless it is proved that on intestacy, he or she would have inherited any property from the deceased. Be that as it may, though the petitioner had ample

opportunity to prove before this Court by leading cogent evidence that the said deceased had inherited any properties from her deceased parents and in that event the petitioner could make claim in respect of some share in the estate of the said deceased, the petitioner failed to prove such allegation before this Court. In my view, the entire case of the petitioner thus falls on the ground that he had caveatable interest or had locus to apply for revocation of the Probate granted in favour of the respondent No.1.

116] In so far as submission of the learned counsel for the petitioner that though various suggestions were put to the petitioner during the course of his cross-examination, none of the respondents had entered in the witness box and thus an adverse inference shall be drawn against them is concerned, in my view, since the respondents had proved their case by cross-examining the petitioner, the respondents were not required to lead any separate evidence once again to prove their case. No adverse inference thus can be drawn against the respondents by this Court as canvassed by the learned counsel for the petitioner.

117] In so far as Judgment of the Supreme Court in case of **Mrs.Elizabeth Antony** relied upon by the learned counsel for the petitioner in support of his submission that any person having even slightest or even a bare possibility of interest is sufficient to entitle a

person to enter caveat in a Probate petition is concerned, in my view, in this case, the petitioner has failed to prove that he had even slightest interest or had even a bare possibility of interest in the estate of the said deceased. The Judgment of the Supreme Court in case of **Mrs.Elizabeth Antony** is squarely distinguishable in the facts of this case and would not advance the case of the petitioner.

118] Similarly, the Judgment of the Supreme Court in case of **Krishna Kumar Birla** (supra) also would not assist the case of the petitioner. The issue of caveat interest is referred to the Larger Bench in the case of **Jagjit Singh & Ors.** (supra) by the Supreme Court and the said issue is pending.

119] In so far as Judgment of this Court in case of **Peter John D'Souza and Others**, relied upon by Mr.Makhija, learned counsel for the petitioner is concerned, in my view, the said Judgment would not assist the case of the petitioner in view of the fact that the respondent No.1 had not suppressed any true and correct facts that there were no other legal heir and next-of-kin of the said deceased in the petition or had suppressed any other facts from this Court. In my view, the averments made by the petitioner in the Miscellaneous Petition in respect of the allegations of the fraud against the respondent No.1 are totally vague and without particulars. Even otherwise, the petitioner has totally failed to prove the allegations of fraud against

the respondent No.1 or other respondents.

120] The Judgment of this Court in case of **Sardar Gurbaksh Singh** (supra) and Judgment of the Supreme Court in case of **Vidhyadhar** (supra) relied upon by the learned counsel for the petitioner for drawing adverse inference against the respondent No.1 would not assist the case of the petitioner in view of the fact that the respondents had proved their case by leading documentary evidence and by cross-examining the petitioner. No such adverse inference thus can be drawn by this Court against the respondents as canvassed by the learned counsel for the petitioner.

121] In so far as the Judgment of the Supreme Court in case of **Basanti Devi** (supra) relied upon by the learned counsel for the petitioner in support of the plea that Testamentary Court has no concern with the title of the property of the deceased is concerned, there is no dispute about this proposition of law. Neither the Testamentary Court nor this Court has adjudicated the issue of title of the said deceased.

122] In so far as submission of the learned counsel for the petitioner that unless Issue Nos.1 and 2 framed by this Court are decided in favour of respondent No.1, all the questions of intestacy can be considered by this Court in appropriate proceedings is concerned, since this Court is of the view that the respondent No.1

has proved that she was an adopted daughter and since this Court has also decided Issue No.2 in favour of respondent No.1, there is no question of deciding question of intestacy in any other appropriate proceeding by this Court or any other Court. Issue No.3 is accordingly answered in negative.

123] I shall now decide issue No.1 i.e. “whether the petitioner proves that the Probate granted to the alleged will dated 3rd November, 2004, was not validly and properly granted for the reasons and on the grounds set out in paragraph no.30 of the Miscellaneous Petition ?” In so far as submission of the learned counsel that even if the petitioner had not proved his locus or caveatable interest, this Court has to be satisfied and convinced that the said deceased had executed her last Will and Testament and the same was duly attested in accordance with law and was having sound and disposing mind on the date of execution of the said Will is concerned, in my view the petitioner at the first instance failed to convince this court that the said Will and Testament was forged or fabricated or was not executed by the said deceased in accordance with law. None of the heir and next-of-kin of the said deceased or beneficiaries under the Will had challenged the said Will and Testament. It is not in dispute that the wife and sister of the petitioner were also beneficiaries under the said Will and Testament. At no point of time, any of the heir had filed any

objection to the grant of Probate in favour of the respondent No.1.

124] I am thus not inclined to accept the submission of the learned counsel for the petitioner that the petitioner was not at all aware of the filing of the Probate proceedings by respondent No.1. The petitioner had himself in his complaint with local Police Station had informed that respondent No.1 had assured him that she will get grant of Probate of the said deceased and the petitioner had shown his willingness to handover possession of the Flat situated in 'Neelkanth Niranjana' premises Co-operative Housing Society to the respondent No.1 upon getting probate of the said alleged Will.

125] Though Mr.Makhija, learned counsel for the petitioner tried to point out the alleged inconsistency in the affidavits filed by the two attesting witnesses appointed under the said Will and Testament in support of his submission that in such situation, the Testamentary Court could not have granted Probate without first being satisfied that the alleged Will was a genuine Will and was executed in accordance with Law, a perusal of the affidavits filed by attesting witnesses and other documents on record, in my view, the respondent No.1 had even otherwise proved the execution of the said Will and Testament in accordance with law. The Court has to consider the entire evidence in toto and not any alleged inconsistency in the affidavits filed by the attesting witnesses. Though the petitioner was fully aware

of filing of Probate proceedings by respondent No.1, the petitioner never objected the grant of the said Probate, even if the petitioner could have objected to such grant at the relevant time.

126] A perusal of the Testamentary Petition filed by the respondent No.1 clearly indicates that the respondent No.1 had complied with rules prescribed under the Bombay High Court (Original Side) Rules and other provisions, and the Testamentary Petition was not defective as canvassed by the learned counsel for the petitioner. A copy of the Will was already sent to the petitioner by Mr.Ramesh Gwalani. The petitioner also admitted in his cross-examination that the wife of the petitioner was beneficiary under the said Will. The petitioner did not give any reply to the letter dated 13.10.2008 addressed by Mr.Ramesh Gwalani to the petitioner alleging withdrawal of various amounts after demise of the said deceased.

127] In my view, there is substance in the submission made by learned counsel for the respondents that the petitioner had all through out acted prejudicial to the interest of the respondent No.1 and beneficiaries in the said Will by using the funds of the said deceased after death of the said deceased. The petitioner had admittedly withdrawn amounts from the Bank account of the said deceased without knowledge of Mr.Ramesh Gwalani and without any authority.

128] In so far as the submissions made by the learned Counsel for the petitioner that there was no personal service on any of the parties or the legal heirs and/ or next of kin of the said deceased of the citation as contemplated under Rule 399 of the Bombay High Court (Original Side) Rules is concerned, there is no merit in the submissions made by the learned counsel for the petitioner. The said deceased had no class I legal heirs. The persons who were entitled to be served with citation were already served. Affidavit of service was already filed by Respondent No.1. There was thus compliance of the said Rule 397 of the Bombay High Court (Original Side) by the Respondent No.1.

129] In so far as submissions made by the learned counsel for the petitioner that in the both affidavits filed by Mr. B.B. Parekh, Advocate, he did not make any averments that the said alleged Will was explained to the said deceased in Hindi is concerned, or that the averments made in the affidavit dated 16th July, 2010, was inconsistent with his averments made in the affidavit dated 16th August, 2008 is concerned, the petitioner could not prove before this court that the said deceased was not familiar with any other language other than Hindi. On the contrary petitioner himself had produced several documents sent by the deceased in English which were without any interpretation in Hindi. It is thus clear that said deceased was familiar with the English. In so far as alleged inconsistency in the affidavit dated 16th June 2010 and 16th August 2008, is concerned, in my view both the affidavits have to be read together and not in isolation. The Respondent No.1 was nominated by the said deceased in respect of the

said flat bearing No. 99 in the said 'Neelkanth Niranjana' premises Co-operative Housing Society Ltd' which document was also in English. She had also signed various Bank Accounts opening forms in English admittedly.

130] The petitioner has invoked Section 263 of the Indian Succession Act, 1925, Explanations [b] and [c] and Illustrations (ii) and (iii) of the Indian Succession Act, 1925. The petitioner, however, has not made out case for revocation of grant of probate granted in favour of Respondent No.1 and could not satisfy the conditions prescribed under Section 263. In my view, Miscellaneous Petition itself was not maintainable in view of the case of the petitioner not having fallen under any of the explanations and the illustration provided in Section 263 of the Indian Succession Act, 1925.

131] In my view, the learned counsel for Respondent No.2 has rightly distinguished the judgment of the Supreme Court in case of **Basanti Devi** (supra) relied upon by the learned counsel for the petitioner on the ground that the said matter was filed by grand-son of the deceased, who had caveatable interest. The said judgment is clearly distinguishable, in the facts and circumstances of this case. The petitioner admittedly does not fall in class I category of heirs. The petitioner has not satisfied the conditions under Section 15(2)(a) of the Hindu Succession Act, 1925.

132] A perusal of the record indicates that the petitioner in his cross-examination though initially deposed that he had sought advice from the counsel, after the death of the deceased and he made payments on the

basis of power of attorney granted by the said deceased in his favour, he further deposed in the cross-examination that he had made a mistake in claiming that he had taken legal advice after the death of deceased and claimed that he had only paid Counsel's fees. A perusal of the evidence lead by the petitioner clearly shows that his deposition is full of inconsistent and contradictions. In my view, the petitioner in these circumstances cannot be considered as credible witness and his evidence cannot be believed by this Court.

133] This Court in case of *Lydia Agnes Rodrigues and others Vs. Joseph Anthony D'Cunha and others* (*supra*) has held that if the petitioner has not led any foundation in the Miscellaneous Petition about his allegations of forgery of Will, on that ground itself, no order of revocation can be passed by this Court in such petition. In my view this judgment squarely applies to the fact of this case. The pleading of the petitioner is not only vague and without particulars but a petitioner has also failed to lead any cogent evidence in support of this vague pleading.

134] A perusal of the cross-examination of the petitioner further indicates that he has admitted that in the year 2004, the deceased was in a sound state of mind and was in good physical health and had also signed a form in the year 2004 for opening a Fixed Deposit. In his cross-examination, and in particularly, to question Nos. 66 to 70, the petitioner admitted that, what he had deposed in his cross-examination was correct and had agreed to the said suggestion made by the learned senior counsel for the respondent No.2 to the witness and what was stated by him in

paragraph No.32 (XV) that the said deceased was aged, thin, infirm and was not in a position to have independent advice or to resist influence, is incorrect. The petitioner also admitted that several contemporaneous documents were signed by the said deceased, which clearly match the signature of the deceased on a Will. He also admitted that nomination form was filed by the deceased on 9th November, 2004.

135] In my view, the petitioner was bound to furnish better particulars Under Order VI Rule 4 of the Code of Civil Procedure, 1908, in support of his pleading of fraud, undue influence and coercion. Perusal of the averment made in the Misc. petition clearly indicates that the pleading were totally vague and without particulars. The Judgment of the Supreme Court in case of **Bhishnudeo S/o Seogeni Rai** (supra) relied upon by the learned senior counsel for Respondent No.2 would clearly apply to the facts of this case. The Misc. petition alleging fraud, undue influence, coercion thus cannot be entertained by this Court, the same being vague, without particulars and not in compliance with the provision of Order VI Rule 4 of the Code of Civil Procedure, 1908.

136] A perusal of the nomination form placed on record clearly indicates that the said form contains endorsement mark of the office bearer of the society accepting that the signature was verified and that person signing it was genuine. The petitioner did not examine any Handwriting Expert, though had stated that the Will was required to be examined by an examiner of the documents for ascertaining whether the same was original or copy or forged.

137] On perusal of the record, I am inclined to accept the submissions made by the learned counsel for the Respondent No.2 that, there was no irreconcilable variance between the affidavits of attesting witnesses. The petitioner himself admitted in the petition that the contents of affidavit filed by the relatives of the deceased were genuine. Be that as it may, the alleged discrepancy pointed out by the petitioner does not affect the genuineness of the Will or creates any suspicious circumstance.

138] In my view, Mr.Joshi, the learned Senior counsel for Respondent No.2 is right in his submission that it is not the case of the petitioner that deceased was not in a position to execute Will at her residence or at the office of the Advocate.

139] The petitioner did not furnish any details of the alleged properties collected by Respondent No.1 which was not mentioned in the testamentary petition. The petitioner has also failed to plead and to prove before this court that Respondent No.1 and 2 had intermeddled with the property of the deceased before grant of probate. On the contrary the respondent No.1 and 2 have proved on the basis of the material produced on record and on the cross-examination of the petitioner that the petitioner had intermeddled with the estate of the said deceased. The petitioner has not lead any evidence to prove his allegations that the Will and testamentary of the deceased was surrounded by any suspicious circumstance. The petitioner himself had admitted that, the deceased had own money lending business, huge investments, and had died after four years of making Will.

140] In so far as submission of the learned counsel for the petitioner that there was no statement made in the Will that the said Will was read-over to the said deceased is concerned, on perusal of the Miscellaneous Petition clearly indicates that no such ground has been raised by the petitioner in the said Misc. Petition. The petitioner thus could not have lead any evidence beyond the pleadings. The petitioner also did not lead any evidence to show that the said deceased did not understand English, and has produced various documents signed by the deceased contents thereof were in English. It was not the case of the petitioner that deceased was required to be explained the contents of those documents before the same were signed by the said deceased.

141] In so far as the submissions made by the learned counsel for the Respondent No.3 is concerned, it is not in dispute that no relief are sought by petitioner against the Respondent No.3 in the Misc. petition. This Court by order dated 10th December, 2013 had clearly held that the title of the respondent No.3 to the property in question is not a matter that can be decided in the Misc. Petition for revocation. The Respondent No.3 has purchased the property after grant of probate by this Court in favour of the Respondent No.1. The judgment of the Madras High Court in case of *G.P.F. Foulkes and others Vs. A.S. Suppan Chettiar and another* (supra) relied upon by the learned counsel for the Respondent No.3 would assist the case of her client on the issue that the executor or administrator has power to dispose of the property of the deceased vested in him under Section 211 of the Indian Succession Act, 1925 and they cannot be

followed either by the creditors or by the legatees into the hands of the alienee. The grant of probate operates as judgment-in-rem and cannot be said to be as grant on fraud or collusion, unless the same is pleaded and proved.

142] In so far as the submissions made by Mr. Makhija, learned counsel for the petitioner that one of the attesting witness had deposed that every page of the Will was signed by the testator whereas in fact there was no signature of the deceased on the page No.2 is concerned, this Court has to consider the entire evidence and not isolated line in the deposition made by the party. Issue No.1 is accordingly answered in negative. The petitioner failed to discharge the burden cast on him.

143] I shall now deal with the issue No.2 i.e. as to whether the respondent No.1 proves that she was legally adopted daughter of the said deceased ?

144] It is not in dispute that it was the case of the petitioner in the Miscellaneous Petition that the said deceased i.e. Sattabai Lakhmichand Chhabria died issueless and the respondent No.1 is neither a daughter nor an adopted daughter of the said deceased. These allegations made in the Miscellaneous Petition were denied by the respondent No.1 in the affidavit in reply. In view of such pleading, this Court has framed issue as to whether the respondent No.1 was an adopted daughter of the deceased or not ?

145] Mr.Makhija, learned counsel for the petitioner vehemently

urged before this Court that though the onus is on the respondent No.1 to prove that she was an adopted daughter of the said deceased, the respondent No.1 did not enter the witness box to discharge the said onus and thus adverse inference has to be drawn by this Court against the respondent No.1. It is vehemently urged that if the respondent No.1 was not an adopted daughter or a legal heir, falling in Class-I, of the said deceased, the petitioner will have share in the said properties of the said deceased including all other legal heirs falling in Class-II.

146] A perusal of the record indicates that the respondent No.1 has not filed Testamentary Petition for grant of Probate in respect of the last Will and Testament of the said deceased as an adopted daughter, but had filed as an executrix and one of the beneficiaries under the said Will and Testament. The respondent No.1 had placed reliance on the affidavit-cum-declaration dated 7.11.2008 filed by Mr.Ramesh B.Gwalani, who is son of one of the sisters of the said deceased. The petitioner, who had entered in the witness box, was confronted with the said affidavit dated 7.11.2008 in his cross-examination and more particularly in question Nos.35 to 37.

147] The respondent No.1 also placed reliance on the affidavit-cum-declaration dated 20.12.2008 signed by Mr.Vasudev Gurmukhdas Chhabria and Mr.Girdhari Lalchand Chhabria stating

that the respondent No.1 had been treated as their loving and caring daughter and had been the supporting pillar through their entire life time. The respondent No.1 was all throughout treated as real daughter by the said deceased and her husband till they were alive. The said deceased also performed 'Kanyadan' of the respondent No.1 on 30.01.1971. The respondent No.1 and her one son has also performed last rites of the said deceased in the presence of close family members, relatives and family friends. It was stated in the affidavit that respondent No.1 had not only stood as a daughter, but also provided support throughout the life of the said deceased.

148] It is not in dispute that both the deponents of these two affidavits were not examined as witnesses by the respondent No.1. It was vehemently urged by Mr.Makhija, learned counsel for the petitioner that since those deponents of those affidavits-cum-declaration were not examined as witnesses, the contents of those affidavits cannot be considered by this Court as the same were not proved. I am thus not inclined to consider the contents of those affidavits relied by the respondent No.1 in support of her case that her adoption was proved based on such affidavits. However, the respondent No.1 has not only relied upon these two affidavits-cum-declaration to prove that she was an adopted daughter of the said deceased, but has relied upon other documentary evidence and also

upon some of the portion of the examination of the petitioner.

149] It is not in dispute that the petitioner had handed over to the respondent No.1 bank statement of saving account in Bank of Baroda in the name of the said deceased and various other documents including cheque books to respondent No.1. It is thus clear that the petitioner himself had accepted the close relationship of the respondent No.1 with the said deceased and thus had handed over those crucial documents to the respondent No.1.

150] A perusal of the photographs marked as Exhibits R-1/5, R-1/6, R-1/7 and R-1/10 also proves that the 'Kanyadan' of the respondent No.1 was performed by the said deceased and her husband. The respondent No.1 was also nominated by the said deceased in respect of the Flat bearing No.99 in the "Neelkanth Niranjana" Premises Co-operative Housing Society Ltd. In the alleged Will, the said Flat was bequeathed in favour of the respondent No.1. The petitioner admitted in his cross-examination that he had attended wedding of respondent No.1. In the photographs shown to him, the petitioner recognized the said deceased and her husband. He also confirmed that those photographs were taken at the wedding of the respondent No.1. The petitioner, however, did not identify the respondent No.1 and her husband in the photographs.

151] The petitioner admitted in paragraph No.22 of the

Miscellaneous Petition filed by him that the said deceased had given a gift to the respondent No.1. He also admitted about such gift in reply to question No.55 in his cross-examination.

152] A perusal of the record further indicates that respondent No.1 through her Advocate's letter dated 17.6.2008 addressed to Mr.B.B.Parekh, Advocate had informed that being a daughter of the said deceased, she was entitled to a copy of the Will made by the said deceased during her life time. In the said letter, it was contended by the respondent No.1 that she was sole executrix in respect of the moveable and immovable properties of her Late mother and had performed rituals being the dearest daughter of the said deceased and had been herself under the serious grief. There was no reply given to the said letter by the petitioner, though copy of the said letter was also forwarded to him. The petitioner did not controvert that respondent No.1 was not the daughter of the said deceased.

153] A perusal of the public notice dated 9.5.2008, which was published in a Newspaper in respect of 'Chautha' Ceremony in respect of the said deceased, name of the respondent No.1 was mentioned as daughter of the said deceased. There was no objection to the said public notice raised by the petitioner that the name of the respondent as the daughter of the said deceased could not have been mentioned.

154] A perusal of the complaint dated 23.1.2009 filed by the petitioner with the Marine Drive Police Station against the respondent No.1 and others, indicates that it was alleged by the petitioner himself that he had told the respondent No.1 and two others to obtain Probate of the said Will and that he was assured by respondent No.1 that she would get the Probate. The petitioner also showed his willingness to handover possession of the flat upon the respondent Nos.1 and two others getting Probate of the said alleged Will.

155] It is the case of the respondent No.1 that though initially respondent No.1 has made an averment in the Testamentary Petition filed by her that she was an adopted daughter of the said deceased, the said averment was subsequently deleted. The petitioner did not lead any evidence even in rebuttal to show that the respondent No.1 was not an adopted or was not a close relative of the said deceased. In my view, though the respondent No.1 did not enter in the witness box to prove that she was an adopted daughter of the said deceased, the respondent No.1 has proved that she was an adopted daughter by cross-examining the petitioner and by producing various documentary evidence. Based on such evidence, this Court can independently arrive at a conclusion that the respondent No.1 was an adopted daughter of the said deceased.

156] Be that as it may, a perusal of the record clearly indicates

that the respondent No.1 had not filed Testamentary Petition in this Court, *inter-alia*, praying for Probate in respect of the said Will and Testament of the said deceased, as an adopted daughter, but had filed in the capacity as an executrix under the said Will and Testament. The said Will and Testament having been proved before this Court, the Probate was granted by this Court in favour of the respondent No.1.

157] In so far as the Judgments of the Supreme Court in case of **Nilima Mukherjee** (supra) and in case of **Pentakota Seetharatnam and others** (supra) are concerned, in my view, the respondent No.1 having proved that she was an adopted daughter of the said deceased irrespective of the fact whether she had applied for Probate as an executrix of the said Will and Testament of the said deceased, these two Judgments relied upon by the learned counsel for the petitioner would be of no assistance to the petitioner.

158] In so far as the Judgment of this Court in case of **Bama Kathari Patil** (supra), the Judgment of the Supreme Court in case of **Narbada Devi** (supra), the Judgment of this Court in **Geeta Marine Services** (supra) in support of the submission that merely because some of the documents were marked as exhibits, proof is not dispensed with is concerned, there is no dispute about the propositions laid down by the supreme Court and this Court in those

Judgments. This Court has not considered those two affidavits-cum-declaration relied upon by the respondent No.1 in view of the fact that deponents of those two affidavits were not examined as witnesses by the respondent No.1.

159] In my view, there is no merit in the submission of the learned counsel for the petitioner that respondent no.1 having not entered in the witness box to prove that she was an adopted daughter of the said deceased, an adverse inference shall be drawn by this Court. The presumption under Section 114 of the Indian Evidence Act, 1872, is rebuttable. The respondent No.1 has already proved her case by documentary evidence and by cross-examining the petitioner. The case of the respondent No.1 has been admitted by the petitioner in his cross-examination on this issue. The unreported Judgment of this Court in case of **Smt.Kunda Mahadeo Supare and Others** (supra) would apply to the facts of this case and would assist the case of respondent No.1. I am respectfully bound by the said Judgment. Issue No.2 is accordingly answered in affirmative.

160] In so far as the submissions made by the learned counsel for the petitioner that alleged adoption of the Respondent No.1 was not in compliance with the provision of Section 5 to 11 of the Hindu Adoption and Maintenance Act, 1956 is concerned, in my view there is no merit in the submissions of the learned counsel for the petitioner. The respondent No.1 has proved that she was adopted daughter of the said deceased

which issue is already discussed at length in the aforesaid paragraphs of this judgment.

161] In my view, the petition is totally devoid of the merit. I, therefore, pass the following order.

ORDER

1. Miscellaneous Petition No.17 of 2013 is dismissed.
2. There shall be no order as to costs.

(R.D. DHANUKA, J.)

At this stage, learned counsel for the petitioner seeks continuation of the ad-interim protection granted by this Court for a period of four weeks. The application for stay is vehemently opposed by Ms.Mussa, learned counsel for the respondent no.1.

Ad-interim protection granted by this Court to continue for a period of four weeks from today. It is made clear that if any appeal is filed by the petitioner against this judgment and order, the copies of such proceedings shall be served upon the respondents well in advance.

(R.D. DHANUKA, J.)