

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

**NOTICE OF MOTION NO.81 OF 2017**  
**IN**  
**TESTAMENTARY PETITION NO.160 OF 1994**

|                                                         |                         |
|---------------------------------------------------------|-------------------------|
| Vijay Janardan Pandit                                   | ...Applicant/Petitioner |
| vs                                                      |                         |
| Janardan Pandurang Pandit                               | ....Deceased            |
| ....                                                    |                         |
| Mr. Hemant Mehta, i/b. Mehta & Co., for the Petitioner. |                         |
| ....                                                    |                         |

**CORAM : S.C. GUPTE, J.**

**DATED: 16 NOVEMBER, 2017**

**P.C. :**

1. Heard learned Counsel for the Petitioner. This Notice of Motion is moved for recall of an order dated 10 February 1995 passed in Miscellaneous Petition No.29 of 1994 and directing the Prothonotary and Senior Master to return to the Applicant/Petitioner the original probate dated 17 September 1994 issued to him in the Testamentary Petition herein.

2. The Petitioner claims to be the son of the deceased testator. On his petition for probate, grant was made to him on 17 September 1994. On 10 November 1994, the Petitioner's sister Kamini Janardan Pandit (since deceased) filed a miscellaneous petition, being Miscellaneous Petition No.29 of 1994, for revocation of the probate. It was her case *inter alia* in her miscellaneous petition that her consent affidavit, originally produced with the probate petition, was a forged

and fabricated document. By consent order dated 10 February 1995, the miscellaneous petition of the Petitioner's sister came to be disposed of. The probate granted on 17 September 1994 was set aside and the probate petition was converted into a Testamentary Suit. By the same order, the Petitioner was directed to deposit the original probate issued to him on 17 September 1994 with Prothonotary and Senior Master. In compliance with that order, the Petitioner has deposited original probate dated 17 September 1994 with the Prothonotary and Senior Master. The Testamentary Suit appeared on board on a few dates, when none appeared for the parties. Eventually, by an order dated 15 September 2009, the suit was dismissed for default. That order necessarily implies that the suit as well as the petition had stood dismissed in default. It appears that on a Notice of Motion taken out by the Petitioner, Notice of Motion No.183 of 2016, by an order dated 30 September 2016, this Court restored the suit to file. It is the Petitioner's case that in the meanwhile his sister died intestate in Mumbai on 13 March 2015; she died a spinster and left behind her the Petitioner (her brother) as her only heir and legal representative under the Hindu Succession Act, 1956, by which she was governed at the time of her death. It is the submission of the Petitioner that in view of the death of his sister, who was the original caveator and Defendant to the Testamentary Suit, the challenge to the last will and testament does not survive and, in the premises, he is entitled to return of the original probate issued to him earlier and which was deposited by him in pursuance of the order passed on his sister's miscellaneous petition.

3. On these facts, it is not permissible to recall the consent

order dated 10 February 1995 passed on Miscellaneous Petition No.29 of 1994. The order clearly stands. In pursuance of that order, the petition has stood converted into a suit. If the petition is restored, it is but natural that the suit itself gets restored and unless that suit is disposed of, the relief claimed by the Petitioner (Plaintiff in the Testamentary Suit) cannot be granted. If it is the case of the Petitioner that in view of the death of the Defendant, who has died issue-less, the Petitioner is the only heir and legal representative entitled to succeed to her, a decree in the suit must follow. The Court may, on such decree, even consider revival of the original grant made in his favour, but that could be as a result of the disposal of the suit. It cannot be said that on a disposal of the Notice of Motion, the order passed on the miscellaneous petition of the original Caveator/Defendant, which has attained finality, can be set aside, and the parties could be relegated at the stage of the miscellaneous petition. The Notice of Motion is accordingly disposed of with a clarification that Testamentary Suit No.11 of 1995 is restored to the board. The Plaintiff may apply for a decree in the suit in the facts and circumstances recounted above.

**( S.C. GUPTE, J. )**