IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

MISCELLANEOUS PETITION NO. 7 OF 2019
IN
TESTAMENTARY PETITION NO. 558 OF 2016

Kamal Prasad)
Age : 69 years, Occ. Agriculturist)
Residing at Dehradun Club,)
Ugra Sen Road, Dehradun –248001) ….. Petitioner

VERSUS

Kumud Vaidya)
Age : 64 years, Occ.Housewife)
Residing at 3rd Floor, 251, Suraj,)
Walkeshwar Road, Mumbai 400006) ..… Respondent

Mr.Ashish Kamat, a/w. Mr.Kunal Mehta, Mr.Ashwin Bhadang, Mr.Gautam Sahni, Mr.Robin Fernandes, Ms.Ruchika Motwani, Mr.Kayomars Kerwalla, i/b. Vesta Legal for the Petitioner.

Dr.Birendra Saraf, a/w. Mr.Samit Shukla, Ms.Raveena Dhawan, i/b. DSK Legal for the Defendant.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 14th FEBRUARY, 2019

PRONOUNCED ON : 5th APRIL, 2019

JUDGMENT :

By this petition filed under section 263 of the Indian Succession Act, 1925, the petitioner seeks revocation of the Letters of Administration issued by this court 29th August,2016 in Petition

No.558 of 2016 filed by the respondent in this court in respect of the last Will and Testament and first codicil annexed to the property and credit of Ms.Rajkumari Padmakumari Devi (hereinafter referred to as the said deceased). Some of the relevant facts for the purpose of deciding this petition are as under :-

The said deceased was a permanent resident of 59, Rajpur Road, Dehradun 248001 and at the time of her death the fixed place of abode was 3rd Floor, 251, Suraj, Walkeshwar Road, Mumbai 400 006.

2. It is the case of the respondent that the said deceased had left two writings in English language which were her last Will and Testament and First Codicil to the said Will dated 25th August,2015 and 15th September,2015 respectively. No executor was appointed under the said Will and Codicil by the said deceased. It is the case of the respondent that the said deceased died as a spinster. The parents of the deceased had already per-deceased the deceased. The said deceased had only sister viz. Rajkumari Pushpakumari Devi (Smt.Pushpa Prasad) and had two brothers viz. Kunwar Chandra Bahadur Singh and Kuwar Padam Bahadur Singh. The said sister and two brothers predeceased the deceased. The said sister viz. Rajkumari Pushpakumari Devi (Smt.Pushpa Prasad) who passed away on 11th April,2010. The petitioner and the respondent are the son and the daughter of Smt.Pushpa Prasad respectively. It is the case of the petitioner that the petitioner and the respondents were the only legal heirs of the said deceased. The said deceased expired on 24th October,2015.

3. On 29th March,2016, the respondent filed a petition (558 of 2016) inter alia praying for Letters of Administration of the Will and Last Codicil thereto annexed to the properties and credits of the said deceased in this court. In paragraph (9) of the said petition, the respondent stated that the said deceased had left her surviving as her only heirs and next-of-kin as per the provisions of the Hindu Succession Act, 1956 i.e. (1) Mr.Kamal Prasad and (2) Ms.Kumud Deepak Vaidya (respondent herein and the original petitioner in the Testamentary Petition No.558 of 2016).

4. It is the case of the petitioner that during the period between 1984 and 2003, the petitioner looked after the day to day needs of the deceased including her expenses. It is also the case of the petitioner that in the year 1979, the respondent was married and since then, has at all times resided in Mumbai. According to the petitioner, the respondent did not share a close or affectionate relationship with the deceased and on the other hand the petitioner and the said deceased shared a very good relationship, she being a maternal aunt to the petitioner.

5. Sometime in the year 2004, the said deceased, the petitioner and the mother of the respondent had filed a suit bearing no. 422 of 2004 before the learned Civil Judge, Senior Division, Dehradun against the Reserve Bank of India and others for various reliefs. In the year 2007, the said deceased and the mother of the petitioner filed a suit bearing no. 7 of 2007 before the Court of learned Additional District Judge, Dehradun against Hindustan Petroleum Corporation and others. On

11th April,2010, the mother of the petitioner and the respondent i.e. late Ms.Pushpa Prasad expired. Both the parties have propounded a separate Will in respect of their mother Ms.Pushpa Prasad.

6. It is the case of the petitioner that sometime in the year 2009, various third parties filed criminal proceedings against the petitioner and as a result thereof, the petitioner had been staying away from Dehradun for certain period of time. However, he continued to look after the said deceased who was staying at Dehradun. It is the case of the petitioner that sometime in the year 2014, the respondent visited the said deceased and persuaded the deceased to move to Mumbai on the pretext of taking care of the day to day needs of the deceased. At that time, the said deceased was around 96 years old and had become senile. It is the case of the petitioner that on 30th June, 2014, the petitioner came to Mumbai to visit the said deceased. On 24th October,2015, the said deceased expired. It is the case of the petitioner that during the period between October 2015 and January 2018, because of the ongoing false criminal proceedings filed by the third parties against the petitioner, the petitioner was staying either at Chandigarh, Karnal, Shimla or Delhi.

7. The Bailiff of clerk working in the office of the Sheriff of Mumbai filed an affidavit of service in the said Testamentary Petition No.558 of 2016 filed by the respondent on 6th June, 2016 stating that the packet containing the duplicate citation and a copy of the petition was sent by him on instruction of the learned advocate appearing for the respondent herein to the petitioner at the address 10th Floor, Tower

B, Unitech World (Cyber Park), Gurgaon, Haryana by the registered post with acknowledgement. The said packet was however received back unserved on 31st May, 2016 with the remark 'incomplete address' thereon and the same was received by the Office of the Sheriff of Mumbai. The said packet containing the duplicate citation and a copy of the petition could not be served upon the petitioner herein at the Gurgaon address. The respondent thereafter filed a chamber order bearing no. 291 of 2016 in the said Testamentary Petition No.558 of 2016 *inter alia* praying for leave to serve the citation on the petitioner herein by publication of the citation in two newspapers viz. Indian Express in English language and Navbharat Times in Hindi language being the newspapers published at Delhi and widely circulated at Gurgaon, Haryana respectively. The learned Prothonotary and Senior Master passed an order on the said chamber order on 21st June, 2016 allowing the said chamber order. The petitioner had filed a contempt petition bearing no.695 of 2017 before the Hon'ble Supreme Court. It is the case of the respondent that the petitioner was thus fully aware of the Will left by the said deceased in the month of January 2016 itself.

8. On 20th September,2017, the suit bearing no.422 of 2004 which was filed by the said deceased, the petitioner and the mother of the respondent came to be compromised. It is the case of the petitioner that he had through his advocate objected to the compromise application on 10th October,2017. It is the case of the petitioner that only in the month of January 2018, the petitioner for the first time derived the knowledge of the existence of the last Will and Testament of the said deceased before one of the hearing before the Hon'ble

Supreme Court in Contempt Petition (C) No.695 of 2017.

9. On 29th August,2016 this court granted Letters of Administration in respect of the Will and Codicil of the said deceased. It is the case of the petitioner in this petition that the petitioner learnt/objected in respect of the Letters of Administration of the said deceased only after 5th March,2018 when the petitioner and/or his advocate inspected the court proceedings thereunder. On 5th May, 2018, the petitioner lodged this petition under section 263 of the Indian Succession Act, 1925 (for short the said Act).

10. Mr.Ashish Kamat, learned counsel appearing for the petitioner invited my attention to the various documents annexed to this petition, averments made in this petition, various allegations made in the affidavit in reply by the respondent and the averments made in the affidavit in rejoinder. It is submitted by the learned counsel for the petitioner that the petitioner was one of the surviving as her only heirs and next-of-kin of the said deceased. He submits that the petitioner was born in the year 1949 and had been residing at all material time at Dehradun, State of Uttarakhand till part of 2014. He submits that in view of the criminal proceedings filed by the third parties against the petitioner, the petitioner was travelling during the period between October 2015 and January 2018 and was living away from Dehradun and was either at Chandigarh, Karnal, Shimla or Delhi. It is stated that the relations between the petitioner and the respondent were strained and thus the petitioner was not even aware or informed of the fact that the deceased had passed away on 24th October,2015. The respondent

did not bother to inform the petitioner about the demise of the said deceased.

11. It is submitted by the learned counsel that during the hearing of the contempt petition before the Hon'ble Supreme Court in the month of January 2018, the learned counsel on behalf of the respondent made a statement before the Hon'ble Supreme Court that pursuant to the provisions of the alleged last Will, all the properties of the said deceased had been bequeathed to the respondent. He submits that in view of the said statement made by the learned counsel appearing for the respondent before the Hon'ble Supreme Court, the petitioner upon returning to Dehradun, made an application on 5th March,2018 to inspect the records and proceedings filed before the learned Additional Civil Judge, Dehradun. At that point of time, the petitioner came to know of the probate and/or Letters of Administration granted by this court in the Testamentary Petition No.558 of 2016. He submits that his client came to know about the Letters of Administration on 5th March,2018. The petitioner returned to Dehradun in the month of February 2018 and since then he has been staying at Dehradun Club, Ugra Sen Road, Dehradun – 248 001.

12. Learned counsel for the petitioner submits that the respondent was fully aware that in the year 2016 when the respondent filed an affidavit of service before this court in Testamentary Petition No.558 of 2016 that the petitioner was not residing at Dehradun. He invited my attention to the affidavit of service dated 6th June, 2016 filed by the Bailiff of Clerk working in the Office of the Sheriff of Mumbai stating

that the packet containing the citation and a copy of the petition was sent by the registered post with acknowledgment at Gurgaon, Haryana. The said packet was however received back unserved on 31st May, 2016 with a remark 'incomplete address' thereon and the same was received by the Office of the Sheriff of Mumbai. He invited my attention to the letters dated June 2011 from the Unitech Limited addressed to the petitioner at the address House no.8-B, Laxmi Road, Dehradun – 248 001 (Utranchal – UP). On the basis of this letter which was received by the respondent on which there was address of Unit Nos.B-10-1007, 10th floor in Tower – 'B' of Uni-Tech World (Cyber Park) Complex at Gurgaon mentioned. The respondent deliberately forwarded the packet containing citation along with copy of the petition at that address.

13. Learned counsel appearing for the petitioner submits that the respondent had telephone number of the petitioner which fact is admitted by the respondent in the affidavit in reply. The petitioner also used to sent messages to the respondent at the said telephone number. The respondent thus could have enquired about the current address of the petitioner before forwarding the citation along with a copy of the petition at the Gurgaon address deliberately or before obtaining an order of substituted service from the learned Prothonotary and Senior Master of this court. He submits that it was a clear intention on the part of the respondent not to serve the citation in the said testamentary petition filed by the respondent upon the petitioner and to obtain an ex-parte order for grant of Letters of Administration in respect of the property and credits of the said deceased. He submits that the alleged

Will and the Codicil propounded by the respondent was totally forged, fabricated and concocted. The said deceased was incapable of executing any such alleged Will or Codicil. The deceased was around 98 years old when she passed away.

14. Learned counsel appearing for the petitioner submits that the respondent had deliberately obtained an order for substituted service by publication of the citation in the newspapers published at Delhi, Gurgaon and Haryana. He invited my attention to the affidavit in support of the chamber order filed by the respondent and submits that the respondent had deliberately given the Gurgaon address of the petitioner. In the said affidavit it was stated that the respondent herein was not aware of the exact address of the petitioner, however as per information and best to her knowledge, the petitioner was residing at the address mentioned in the said affidavit.

15. Learned counsel for the petitioner strongly placed reliance on the order passed by the learned Prothonotary and Senior Master allowing the said chamber order seeking permission to serve the citation by substituted service upon the petitioner and submits that the said order passed by the learned Prothonotary and Senior Master is contrary to the provisions of order under Order 5 Rule 20 of the Code of Civil Procedure, 1908 and also contrary to the Rule 399 and Rule 400 of the Bombay High Court Original Side Rules. It is submitted that the service of citation under Rule 399 personally is mandatory. The respondent did not make out a case that service of citation upon the petitioner personally was not possible and thus the respondent could

not have been granted permission to serve the petitioner with citation by publishing the same in the local newspapers under Rule 400 of the Bombay High Court Original Side Rules.

16. It is submitted that the respondent thus could not have obtained *ex-parte* order of Letters of Administration from this court without effecting service of the citation personally upon the petitioner and in any event without satisfying the conditions under Rule 399 and 400. He placed reliance on the following judgments in support of his submission that the service of the personal citation upon the petitioner under Rule 399 of the Bombay High Court Original Side Rules was mandatory and in any event the respondent not having satisfied that the service of the citation upon the petitioner personally was not possible, no order of substituted service under Rule 400 could have been obtained by the respondent.

a) Judgment of this court in case of ***Ganpatraj K. Sanghvi vs. Vishal Udyog & Ors., in Notice of Motion No. 1683 of 2015 in Summary Suit No. 454 of 2012*** dated 23rd June, 2016 (Paragraphs 7, 9)

b) Judgment of Hon'ble Supreme Court in case of ***Neerja Realtors Private Limited vs. Janglu (Dead) through legal representative (2018) 2 SCC 649*** (Paragraphs 14, 15)

c) Judgment of Hon'ble Supreme Court in case of ***Rabindra Singh vs. Financial Commissioner,***

Cooperation, Punjab and Others, (2008) 7 SCC 663 (Paragraphs 1 to 20)

d) Judgment of Hon'ble Supreme Court in case of ***Great Punjab Agro Industries Ltd. vs. Khushian and others, (2005) 13 SCC 503*** (Paragraph 3)

17. It is submitted by the learned counsel for the petitioner that it was not the case of the respondent that the petitioner was avoiding the service nor such case is made out by the respondent. He also placed reliance on the judgment of this court in case of ***Peter John D'Souza & Ors. vs. Armstrong Joseph D'Souza in Misc. Petition No.69 of 2012*** in Testamentary Petition No.722 of 2010 with Misc. Petition No.5 of 2013 in Testamentary Petition NO.722 of 2010 dated 28th March,2014 and in particular paragraphs 15 to 20 in support of the submission that since the respondent had given false and incomplete address of the petitioner of Gurgaon and had committed fraud upon this court and had concealed the equivalent and correct address of the petitioner, this court has suo-motu power to revoke the said Letters of Administration under section 263 of the said Act on that ground.

18. Dr. Saraf, learned counsel appearing for the respondent in this petition (original petitioner in Testamentary Petition No.558 of 2016) submits that even in this petition, which is filed in the month of May 2018, the petitioner had given address of Dehradun Club, Ugra Sen Road, Dehradun – 248 001. He invited my attention to the paragraph 4(j) of this petition and would submit that even according to the

petitioner, between October 2015 and January 2018, the petitioner was travelling and living away from Dehradun because of the ongoing false criminal proceedings against the petitioner. He submits that in the said paragraph, the petitioner himself states that the petitioner was staying either at Chandigarh, Karnal, Shimla or Delhi. The petitioner has not produced any proof in this court in support of this allegation.

19. Learned counsel invited my attention to the letter dated June 2011 annexed at Ex.A to the affidavit in rejoinder filed by the petitioner which was issued by the Unitech Limited addressed to the petitioner at the address House no.8-B, Laxmi Road, Dehradun – 248 001 (Utranchal – UP). He submits that in the said letter which was received by the respondent at the said Dehradun address, it was mentioned by the said Unitech Limited that the rent cheque for the month of June 2011 in the saving account of the petitioner was deposited with HDFC Bank towards the monthly rent of the Unit Nos.B-10-1007 admeasuring 2,688.00 sq.ft. leased to IBM DAKSH on 10th Floor in Tower – 'B' of Uni-Tech World (Cyber Park) Complex at Gurgaon.

20. Learned counsel invited my attention to the ground (l) in this Miscellaneous Petition filed by the petitioner and would submit that the story of the petitioner about alleged date of knowledge of Will and grant of Letters of Administration is *ex-facie* false and concocted. It is submitted by the learned counsel that in paragraph 4(m) of the petition, it is alleged by the petitioner that the petitioner returned to Dehradun in February 2018 and since returning to Dehradun, he has been staying at

Dehradun Club, Ugra Sen Road, Dehradun – 248 001. He tendered compilation of documents containing some of the pleadings before the learned Civil Judge, Senior Division, Dehradun in Suit No.422 of 2004 and in Suit NO. 7 of 2007 before the 3rd Additional District Judge, Dehradun, police report.

21. It is submitted that insofar as Suit No. 422 of 2004 which was filed before the learned Civil Judge, Senior Division, Dehradun is concerned, the said suit was filed by the said deceased and the mother of the petitioner and the respondent against Reserve Bank of India and others. The said suit was compromised. In the said compromised decree, it was clearly provided that it was acceptable to the parties to the said compromise property bearing no.262/467, Rajpur Road, Dehradun and property bearing no.262/1, Rajpur Road, Dehradun was owned property which was exclusively owned by the deceased Ms.Rajkumari Padmakumari Devi and by virtue of her Will dated 25th August,2015 and Codicil dated 15th September,2015 duly proved before this court in Testamentary Petition No.558 of 2016, the plaintiff no.2/1 there was exclusive owner in possession of the said property. The defendant nos. 3 to 5 in the said suit accepted the said position and acknowledged the exclusive title and possession of the plaintiff no.2/1 over the aforesaid property bearing no.262/467, Rajpur Road, Dehradun. He submits that thus the petitioner was fully aware of the said Will and Codicil and about the Letters of Administration granted by this court in Petition No.558 of 2016.

22. Learned counsel appearing for the respondent also invited my attention to the objection dated 10th October,2017 filed by the petitioner to the compromise application in the said suit no.422 of 2004 before the 1st Additional Civil Judge Senior Division, Dehradun. In the said objection filed by the petitioner referred to the averments made by the respondent about the Will of the said deceased and contended that the said deceased was not an exclusive owner of the said property. The said objection was raised on 10th October, 2017.

23. Learned counsel appearing for the respondent also invited my attention to the application dated 20th January,2016 filed by her client in the said Suit No.422 of 2004 *inter alia* praying for impleadment in place of the said deceased who was the original plaintiff no.1 on the ground that the original plaintiff no.1 had expired on 24th October,2015 leaving behind her Will and Codicil whereby she had bequeathed her entire estates to the respondent herein. Learned counsel submits that the petitioner herein had filed a reply to the said application for impleadment filed by the respondent denying that the said deceased had left a Will or Codicil or that any grant of probate had been bequeathed issued by any court of law. The said affidavit in reply was filed on 26th August,2016.

24. It was further contended in the said affidavit in reply that on 25th August,2015 and 15th September,2015, the original plaintiff no.1 (the said deceased) was not competent physically and mentally to execute any Will and Codicil and thus no cognizance thereof can be formed by that court. It is submitted by the learned counsel that the petitioner was

thus fully aware of the said Will and Codicil propounded by the petitioner prior to the month of August 2016 when the application for impleadment was filed by the respondent herein in Suit No. 422 of 2004. Learned counsel submits that the averments made in this petition that the petitioner came to know about the alleged Will and Codicil of the said deceased only in the month of January 2018 when the learned counsel appearing on behalf of the respondent made a statement before the Hon'ble Supreme Court in contempt petition bearing no.695 of 2017 is false and misleading.

25. The petitioner has suppressed all these pleadings filed by the parties including the petitioner before Dehradun Court. The petitioner having suppressed the true and material facts and has not come to this court with clean hands cannot be shown any indulgence by this court in this petition filed under section 263 of the Indian Succession Act, 1925. He submits that even in the said affidavit in reply dated 26th August,2016 filed by the petitioner in the said Dehradun proceedings, the petitioner had given his address as 8-B, Laxmi Road, Dehradun – 248 001 (Utranchal – UP).

26. Learned counsel appearing for the respondent invited my attention to the proceedings in S.C.C.Suit No. 7 of 2007 filed by the said deceased and the mother of the petitioner and the respondent against Hindustan Petroleum Corporation Ltd. *inter alia* praying for eviction of the said Hindustan Petroleum Corporation Ltd. In the said suit also the respondent herein had prayed for impleadment in place of the original plaintiff i.e. the said deceased placing on record that the

deceased had left behind her Will and Codicil and had bequeathed her entire estate in favour of the respondent. The said application was filed on 20th January,2016. Along with the said application, the respondent had filed a copy of the said registered Will and Codicil left by the said deceased. He submits that the said impleadment application was allowed by the Dehradun Court. The petitioner was thus fully aware of the said impleadment application filed by the respondent and the order passed by the Dehradun Court allowing the said application for impleadment. The petitioner was fully aware of the Will and Codicil a copy whereof was filed along with the said application for impleadment.

27. Learned counsel for the respondent submits that in view of the criminal proceedings pending against the petitioner, the petitioner was absconding since 2009 from Dehradun. The relationship between the petitioner and the respondent was totally strained and had no contact with each other from 2009 onwards. Save and except the occasional phone calls or text messages from the petitioner, the respondent did not have any knowledge of address at which the respondent could serve citation upon the petitioner in terms of Bombay High Court Original Side Rules. He submits that only address available with the respondent which came to the notice of the respondent was from the letter addressed to the petitioner by the said Unitech Limited which was received by the respondent a the Dehradun address. The respondent had accordingly given the said Gurgaon address in the citation which was forwarded by the office of the Sheriff of Mumbai to the petitioner, however was returned unserved on the ground that the address was

incomplete.

28. It is submitted by the learned counsel that since it was not possible to serve the petitioner at any address known to the respondent, the respondent had rightly filed a chamber order before the learned Prothonotary and Senior Master of this court praying for permission to serve citation upon the petitioner by publication in the two leading newspapers viz. Indian Express in English language, New Delhi Edition and Navbharat Times in Hindi language being the newspapers published at Delhi and widely circulated at Gurgaon, Haryana respectively at the last known address of the petitioner. He submits that it is the case of the petitioner himself that he had stayed and resided in Delhi. Learned counsel strongly led emphasis on the averments made by the petitioner in paragraph 4(j) of the petition alleging that during the period between October 2015 and January 2018, the petitioner was travelling and was living away from Dehradun and was either at Chandigarh, Karnal, Shimla or Delhi. The petitioner has not disclosed any details of his stay on any of these places during the period between October 2015 to January 2018. It is submitted that the petitioner has also not disclosed that he was not in Delhi when the citation was published in the two leading newspapers at Delhi.

29. Learned counsel appearing for the respondent strongly placed reliance on Rule 399 of the Bombay High Court Original Side Rules and would submit that the citation is required to be served personally only when possible. He submits that since in this case, the petitioner had not disclosed any permanent address other than the address

available with the respondent and had not informed about the new address at which the petitioner had shifted even in Dehradun proceedings, there was no possibility of service of citation personally upon the petitioner in compliance with Rule 399 of the Bombay High Court Original Side Rules. The respondent had thus rightly served with the citation by publishing same in the local newspapers after obtaining permission from the Additional Prothonotary and Senior Master under Rule 400 of the Bombay High Court Original Side Rules by filing chamber order. He invited my attention to the affidavit in support of the chamber order and would submit that in the said affidavit, the respondent had made out a case for seeking permission to serve the citation by publishing in the local newspapers having wide circulation at Gurgaon and at Delhi.

30. Learned counsel distinguished various judgments referred to aforesaid, relied upon by the learned counsel for the petitioner on the ground that there was no breach of Rule 399 of the Bombay High Court Original Side Rules committed by his client in view of the service of citation personally upon the petitioner being not possible. Learned counsel also invited my attention to the affidavit of service filed by the Bailiff of Clerk of Sheriff of Bombay in support of his submission that the aforesaid requisite procedure under Rules 399 and 400 of the Bombay High Court Original Side Rules was followed by the respondent. He submits that after publication of the citation, the respondent also filed an affidavit of service of publication on 13th July, 2016. The said citation was published in Indian Express and Navbharat Times in Hindi language both published in Delhi and

Gurgaon. A copy of the said citation published in those two newspapers was also annexed to the affidavit of service filed by the respondent.

31. Learned counsel for the respondent also invited my attention to the police report annexed at page 59 of the compilation of documents filed by the respondent in support of his submission that the Police Station, Dehradun had submitted a report before the Criminal Court, Dehradun reporting that the service of non-bailable warrant against the petitioner could not be effected on the ground that there was no information about the place of residence of the petitioner. The concerned police station had also recorded the statement of the respondent stating that she had no knowledge about the place where the petitioner was residing.

32. Insofar as the submission of the learned counsel for the petitioner that the respondent ought to have enquired about the current address of the petitioner by contacting the petitioner on telephone before effecting service of the citation is concerned, it is submitted by the learned counsel for the respondent that the relationship between the petitioner and the respondent was very strained and thus the respondent could not have been obtained any address from the petitioner. He submits that the petitioner also admittedly did not inform about the address of the petitioner at which the petitioner had shifted or was staying when the testamentary petition was filed by the respondent.

33. Learned counsel appearing for the respondent placed reliance on the judgment of the Hon'ble Supreme Court in case of ***Lynette Fernandes vs. Gertie Mathias since deceased by legal representatives, (2018) 1 SCC 271*** and more particularly paragraphs 7, 12, 13, 14 and 19 in support of the submission that since the Letters of Administration was granted by this court in favour of the respondent after satisfying with the publication of citation in compliance with the provisions of the Bombay High Court Original Side Rules and in absence of any evidence on record showing any prejudice caused to the petitioner produced by the petitioner, no just cause for revocation of the grant of probate under section 263 of the Succession Act was made out by the petitioner. He submits that no just cause referred in explanation to section 263 of the Act has been made out by the petitioner for seeking indulgence of this court to set aside the grant of Letters of Administration granted in favour of the respondent. The petitioner has not led any oral evidence in support of his allegation that he was not at Delhi or at Gurgaon when the citation was published in the local newspaper at the relevant time. He has also not led evidence to show that the petitioner was staying at some other place other than Gurgaon or Delhi when the citation was published in the newspaper.

34. Learned counsel appearing for the respondent placed reliance on the judgment of this court in case of ***Gurbir Shivdev Singh and others vs. Naresh Nathulal Pal and others, 2017(5) Mh.L.J.930*** and in particular paragraphs 17 and 19 in support of the submission that the petitioner not having come to this court with clean hands and have suppressed true and material facts, this court shall not pass any order of

revocation of grant of Letters of Administration.

35. Learned counsel for the respondent placed reliance on the judgment of this court in case of ***Major Gen.Jonathan Reuben Samson vs. Zillah Solomon and others, (1991) Bom.C.R.334*** and in particular paragraphs 11 and 12 in support of the submission that though the petitioner was fully aware of the execution of Will and Codicil by the said deceased and about the respondent having filed a testamentary petition in this court and having obtained Letters of Administration, the petitioner having not taken any steps to remain present for opposing the said grant of Letters of Administration, this court shall not pass any order for revocation of such Letters of Administration.

36. Learned counsel for the respondent placed reliance on the judgment of this court in case of ***Adil Phiroz Makhania vs. Dilip Gordhandas Gondalia, (2014) 5 Bom.C.R.384*** and in particular paragraphs 10, 28 to 30 in support of his submission that since the petitioner had not taken any reasonable steps or did not make any enquiry about filing of the testamentary petition by the respondent within the reasonable period inspite of the knowledge of filing of such petition, the petitioner is not entitled to apply to revocation of the Letters of Administration.

37. Mr.Ashish Kamat, learned counsel for the petitioner in rejoinder submits that the respondent had applied for permission to serve the citation upon the petitioner by publication in the newspaper by filing

chamber order solely relying upon the alleged letter dated June 2011 addressed by the Unitech Limited to the petitioner at Dehradun address in which there was a reference to the premise Unit Nos.B-10-1007, 10th floor in Tower – 'B' of Uni-Tech World (Cyber Park) Complex at Gurgaon. He submits that the respondent did not make any enquiry as to whether the petitioner was residing at the said Gurgaon address or not. The said letter was allegedly addressed by the said Unitech Limited in the month of June 2011 whereas the respondent had obtained an order of publication of citation in the newspaper after four years from the date of the said alleged letter.

38. Learned counsel for the petitioner invited my attention to the unamended paragraph (9) of the testamentary petition filed by the respondent stating that initially it was averred by the respondent in the said paragraph that the whereabout of the petitioner was not known to the respondent herein. It was further stated that as per the information and to the best of knowledge of the petitioner therein, the petitioner herein was lastly residing somewhere in Gurgaon, Haryana. It is further stated that the petitioner therein seeks permission of this court to publish the citation in the newspaper at Gurgaon, Haryana. He submits that these five lines of paragraph (9) were deleted by carrying out amendment in the said petition on 28th April,2016. Simultaneously the address of the petitioner which was not mentioned earlier alleging that the whereabout of the petitioner was not known was mentioned that of 10th Floor, Tower B, Unitech World (Cyber Park), Gurgaon, Haryana at which address, the respondent had purported to have published the citation and also at Delhi. He submits that if the

respondent already had the Gurgaon address of the petitioner, the respondent would not have deleted any part of paragraph (9) of the petition.

39. It is submitted that the respondent could not have invoked Rule 400 of the Bombay High Court Original Side Rules until condition prescribed under Rule 399 were complied. He submits that the learned Additional Prothonotary and Senior Master permitted the substitution of the citation upon the petitioner though the respondent had not taken all possible steps to serve the citation personally upon the petitioner under Rule 399 of the Bombay High Court Original Side Rules. He submits that the service of the citation personally ought to have been made by the respondent at every possible place. He submits that it is not in dispute that the petition was cited in the testamentary petition filed by the respondent as the legal heir and next-of-kin of the said deceased.

40. Insofar as the submission of the learned counsel for the respondent that the petitioner was fully aware of the execution of the Will and Codicil and also about the filing of the testamentary petition by the respondent due to the application made by the respondent for impleadment in the Dehradun proceedings is concerned, it is submitted by the learned counsel for the petitioner that even if the petitioner had any knowledge of such alleged execution of Will or Codicil or about filing of petition for Letters of Administration, that cannot be the ground for not effecting service of citation personally or in accordance with law as prescribed under Rules 399 and 400 of the Bombay High

Court Original Side Rules.

41. Learned counsel for the petitioner also placed reliance on Rule 445 of the Bombay High Court Original Side Rules prescribing the procedure for service of process by the office of Sheriff of Bombay within the local limit of Ordinary Original Civil Jurisdiction of this court. He submits that there is departure of the procedure under Rule 445 from the procedure prescribed under Rules 398 to 400 of the Bombay High Court Original Side Rules. He placed reliance on Rule 86 of the Bombay High Court Original Side Rules which provides for the procedure for effecting service by substituted service of writ of summons. He also placed reliance on Order 5 Rule 20 of the Code of Civil Procedure, 1908 in support of his submission that no attempt could be made by the respondent to effect service of the citation at the incomplete address. He submits that the order passed by the learned Additional Prothonotary and Senior Master on 21st June, 2016 is *ex-facie* perverse and contrary to the Rules 399 and 400 of the Bombay High Court Original Side Rules.

42. It is submitted by the learned counsel for the petitioner that the petitioner was totally kept in dark. Only in the month of September 2017, the petitioner was informed about the grant of Letters of Administration by this court in the said Dehradun proceedings. He submits that the respondent had committed fraud upon this court and the petitioner and has concealed true and correct facts. This court has ample power to revoke the grant of Letters of Administration issued by this court on that ground itself. He submits that the respondent has

made a false suggestion before this court that the place of residence of the deceased was Gurgaon.

43. Learned counsel for the petitioner placed reliance on the judgment of this court in case of ***Pooja Deepak Patil vs. Savita Vasant Rao Patil in Miscellaneous Petition No.33 of 2017 in Testamentary Petition No.294 of 2012*** dated 23rd October,2018 and in particular paragraphs 26, 28, 54, 58, 84, 87, 98, 106, 107, 110, 118 in support of the submission that the knowledge of filing of the petition for Letters of Administration is not enough for not effecting of service of citation personally. He submits that the compliance of Rule 399 of the Bombay High Court Original Side Rules is mandatory and till such conditions were satisfied of effecting service of citation personally upon the petition, the learned Prothonotary and Senior Master could not have exercised his power under Rule 400 of the Bombay High Court Original Side Rules. He submits that in this case, the learned Additional Prothonotary and Senior Master has not rendered any finding that personal service of citation under Rule 399 is not possible.

44. Learned counsel appearing for the petitioner placed reliance on the judgment of the Hon'ble Supreme Court in case of ***R.R.Shah & Ors. vs.V.Padmanabhan*** dated 10th December, 1987 in ***Appeal (Civil) No.(5) 14975 of 1987*** and in particular paragraph 2 in support of the submission that since the respondent could not obtain the current address of the petitioner by contacting the petitioner on telephone, the respondent could not have applied for substituted service by invoking Rule 400 of the Bombay High Court Original Side Rules without

obtaining current address from the petitioner for effecting service of citation personally upon the petitioner under Rule 399.

45. learned counsel for the petitioner also placed reliance on the judgment of this court in case of ***Captain Makhan Lal Barua alias M.L.Barua (deceased) Sunita Barua and Miss Mihika Barua and another in Chamber Summons No.73 of 2012*** in Petition No.830 of 2010 decided on 2nd September, 2013 and in particular paragraphs 9 to 13 in support of his submission that till the respondent would have satisfied the learned Prothonotary and Senior Master that the service of citation personally upon the petitioner was not possible, the respondent could not have applied for service of citation by publication under Rule 400. Learned counsel also placed reliance on judgment of this court in case of ***Abhiraji Bansraj Singh vs. Vimal Narsingh Bahadur Singh*** dated 18th February, 2010 in Petition Nos.70 of 2009 and 71 of 2010, (2010) 4 ALL MR 236 and in particular paragraphs 1 and 2 in support of the submission that the compliance of Rule 399 is mandatory.

46. Learned counsel appearing for the petitioner made an attempt to distinguish the judgment of the Hon'ble Supreme Court in case of ***Lynette Fernandes*** (supra) relied upon by Dr.Saraf, learned counsel for the respondent on the ground that in that matter, the petition for revocation was filed by the petitioner after 36 years from the date of grant of probate. The Hon'ble Supreme Court has rendered a finding that the service of citation was effected upon the petitioner. Learned counsel placed reliance on paragraphs 7, 12 to 14 and 19 of the said judgment.

47. Learned counsel appearing for the petitioner placed reliance on the judgment of Division Bench of this Court in case of ***Nina Agarwalla vs. Ashok Gupta and others, 2013(4) Mh.L.J. 464*** and in particular paragraphs 2, 4, 7, 12 and 13 in support of his submission that the service of citation under Rule 399 is mandatory. The court has to be satisfied with the service of citation personally or in accordance with the Bombay High Court Original Side Rules before passing any order for grant of probate or Letters of Administration.

48. Learned counsel for the petitioner distinguished the judgment of this court in case of ***Adil Phiroz Makhania*** (supra) and would submit that in the said judgment, this court had considered the issue of limitation in filing application for revocation of grant of probate. There was no issue of service of citation personally under Rule 399 of the Bombay High Court Original Side Rules. The revocation petition was filed after 10 years from the date of grant of probate.

49. Learned counsel for the petitioner distinguished the judgment this court in case of ***Major Gen.Jonathan Reuben Samson*** (supra)on the ground that the citation was served on the petitioner and thus the grant of probate was not revoked. The petitioner had admitted the service of citation upon him and had not disputed the Will. The petitioner had also not disputed the grant of execution of Will. Learned counsel for the petitioner distinguished the judgment of Hon'ble Supreme Court in case of ***Anil Behari Ghosh vs. Smt.Latika Bala Dassi and others, AIR 1955 SC 566*** on the ground that the petition

was filed by the petitioner after 28 years of the issuing grant by the court.

50. Learned counsel for the petitioner distinguished the judgment of this court in case of ***Gurbir Shivdev Singh and others vs. Naresh Nathulal Pal and others, 2017(5) Mh.L.J.930*** on the ground that in this case, the petitioner has not made any false or misleading statement in the miscellaneous petition filed by him. He states that no benefit has been derived by the petitioner mentioning any alleged incorrect dates of knowledge of the execution of the alleged Will, the Codicil or the date of order passed by this court granting Letters of Administration. He submits that it is not the case of the respondent that the miscellaneous petition filed by the petition is beyond a period of limitation. It is stated that on the other hand the respondent has obtained grant of Letters of Administration without effecting service of citation upon the petitioner in accordance with Rules 399 and 400 by making false and misleading statement before this court.

51. Dr.Saraf, learned counsel for the respondent states that the petitioner was admittedly on the run for several years in view of the criminal proceedings filed against the petitioner by third parties. Even according to the petitioner during the period between 2014 and 2018 the petitioner had not come to Dehradun. Several false statements have been made by the petitioner about his knowledge of the Will and Codicil and about the grant of Letters of Administration by this court. The petitioner had already filed affidavit in reply in the Dehradun proceedings to the application for impleadment filed by the respondent

annexing copy of the Will and Codicil executed by the said deceased. There is thus no sanctity to any of the statement made by the petitioner in this miscellaneous petition. There is no substance in the submission of the learned counsel for the petitioner that no benefit was derived by the petitioner by maintaining any alleged wrong date of knowledge of the miscellaneous petition.

52. Learned counsel for the respondent placed reliance on the paragraph 4H of the rejoinder filed by the petitioner contending that the citation of the probate proceedings could have been served on his advocate having his office at Dehradun. He submits that even in the affidavit in rejoinder, the petitioner has falsely denied that he had any knowledge of the purported Will on January 2016 or until January 2018. He submits that though the petitioner was fully aware of the Will, Codicil and grant of Letters of Administration by this court, the petitioner still made a false statement that the said deceased died intestate.

53. Insofar as the submission of the learned counsel for the petitioner that there was no service of citation personally on the petitioner is concerned, it is submitted by Dr.Saraf, learned counsel for the respondent that even till today, the petitioner could not have been served personally under Rule 399 of the Bombay High Court Original Side Rules. The respondent could not have chased the petitioner for not effecting the service of the citation. He submits that the petitioner has not informed even this court though the query was raised to disclose as to the place of residence of the petitioner when the citation

was published by the respondent in the two leading newspapers having wide circulation in Delhi and Gurgaon. The petitioner knew the place of his residence on the date of publication of the citation in the newspapers. He submits that if the respondent would have forwarded the citation at the Dehradun address of the petitioner, he would have contended that since he was not staying at Dehradun during that period, the citation could not have served upon him at his Dehradun address.

54. Learned counsel for the respondent distinguished the judgments relied upon by the learned counsel for the petitioner during his rejoinder on the ground that none of the judgments would benefit the petitioner and are clearly distinguishable in the facts of this case. It is submitted that after obtaining the Letters of Administration, the respondent has already dealt with certain properties comprising the estate of the deceased which are disclosed in Ex.M to the affidavit in reply. He submits that no case is made out by the petitioner for revocation of the grant of Letters of Administration by his court.

REASONS AND CONCLUSIONS : -

55. The question that arises for consideration of this Court is whether the respondent was justified in issuing citation upon the petitioner by publication in the newspapers in the city in which the petitioner lastly resided and which was the last known address of the petitioner known to the respondent on record or not or whether the petitioner was not served with citation and thus the grant of Letters of

Administration issued by this Court on 29th August 2016 in favour of the respondent deserves to be set aside on the ground of non service of citation upon the petitioner.

56. It is not in dispute that the petitioner was the nephew of the deceased Ms.Rajkumari Padmakumari Devi who was spinster. It is not in dispute that the petitioner was entitled to be served with citation under the provisions of the Indian Succession Act, 1925 read with Rule 399 and 400 of the Bombay High Court (Original Side) Rules, 1980.

57. I shall now first consider whether the respondent (original petitioner) in Testamentary Petition No.558 of 2016 had taken appropriate steps to serve citation upon the petitioner at the last known address in accordance with the provisions of the Bombay High Court (Original Side) Rules, 1980 or not. There is no dispute that the said deceased Ms.Rajkumari Padmakumari Devi had filed a suit bearing No.422 of 2004 before the learned Civil Judge, Senior Division, Dehradun against the Reserve Bank of India and others for various reliefs. In the said suit, the petitioner and the respondent were also the parties. The said suit was compromised between the respondent and the Reserve Bank of India. In the said compromised decree, it was clearly provided that it was acceptable to the parties that the said immoveable property bearing no.262/467, Rajpur Road, Dehradun and property bearing no.262/1, Rajpur Road, Dehradun which was exclusively owned by the deceased Ms.Rajkumari Padmakumari Devi and by virtue of her Will dated 25th August 2015

and Codicil dated 15th September 2015 duly proved before this court in Testamentary Petition No.558 of 2016, the respondent herein was the exclusive owner in possession of the said property. The petitioner herein was appearing through her advocate in the said matter.

58. A perusal of the record further indicates that the petitioner herein filed an objection dated 10th October 2017 to the compromise application in the said Suit No.422 of 2004 before the 1st Additional Civil Judge Senior Division, Dehradun. It is thus clear that the petitioner was fully aware of the Will of the said deceased propounded by the respondent and that this Court had granted Letter of Administration in respect of the said Will dated 25th August 2015. The petitioner however did not take any steps to apply for setting aside the Letters of Administration granted by this Court immediately.

59. A perusal of the record in Suit No.422 of 2004 further indicates that the respondent had filed an application dated 20th January 2016 for her impleadment on the ground that the said deceased who was the original plaintiff no.1 had expired on 24th October 2015 leaving behind her Will and Codicil thereby bequeathing her the entire estate in favour of the respondent herein. The petitioner had filed a reply to the said application for impleadment denying that the said deceased had left a Will or Codicil or any grant of probate had been issued by any Court of law. The said affidavit-in-reply was filed on 26th August 2016. In the said affidavit-in-reply, the original petitioner contended that on 25th August 2015 and 15th September 2015, the original plaintiff no.1 (the said deceased) was not

competent physically and mentally to execute any Will and Codicil and thus no cognizance could be taken by this Court. The petitioner however did not take any steps to apply for revocation for grant of Letters of Administration inspite of knowledge about the Will of the said deceased propounded by the respondent and about the Letters of Administration granted by this Court immediately.

60. On the contrary, the petitioner made various false and incorrect statements before this Court that the petitioner was not aware about the said alleged Will and about the Letters of Administration granted by this Court till the month of January 2018 when the learned counsel appearing on behalf of the respondent made a statement before the Hon'ble Supreme Court in contempt petition bearing no.695 of 2017 that the said deceased died leaving a Will and Codicil. The petitioner also made a false and incorrect statement that the petitioner came to know about such alleged Will and Codicil only when the petitioner took inspection of the proceedings in Dehradun Court on 5th March 2018. The petitioner suppressed about the affidavits and the application filed by the petitioner in the proceedings filed by the said deceased before the Civil Judge Senior Division, Dehradun in which the respondent herein had placed on record the Will and Codicil of the said deceased propounded by the respondent and also that this Court had granted Letters of Administration in favour of the respondent. These documents and pleadings are brought on record by the respondent in this proceeding by filing a compilation.

61. It is not in dispute that the criminal proceedings were pending against the petitioner for last several years. The relationship between the petitioner and the respondent were totally strained. It is the case of the respondent that save and except the occasional phone calls or text messages from the petitioner, the respondent did not have any knowledge about the address at which the respondent could serve citation upon the petitioner personally.

62. It is the case of the respondent that Unitech Limited had addressed a letter to the petitioner at the address House No.8-B, Laxmi Road, Dehradun – 248 001 (Utranchal – UP). The said letter was received by the respondent at the said Dehradun address. The petitioner was not staying at the said address at that point of time. It was mentioned that the rent cheque for the month of June 2011 in the saving account of the petitioner in HDFC Bank towards the monthly rent of the Unit Nos.B-10-1007 admeasuring 2,688.00 sq.ft. leased to IBM DAKSH on 10th Floor in Tower – 'B' of Uni-Tech World (Cyber Park) Complex at Gurgaon had been issued.

63. The petitioner in miscellaneous petition and more particularly in paragraph 4(j) of the petition has averred that during the period between October 2015 and January 2018, he was travelling and was leaving away from Dehradun because of on going false proceedings against the petitioner. It was further averred by him that he was staying either at Chandigarh, Karnal, Shimla or Delhi during the said period. Though this Court repeatedly called upon the petitioner's counsel to point out at least now the place of residence of the

petitioner where the petitioner resided even temporarily when the citation was sought to be served upon the petitioner by the respondent personally, learned counsel for the petitioner could not produce any record even at this stage to show that the petitioner was residing either at Chandigarh, Karnal, Shimla or Delhi.

64. It is also the case of the petitioner that he had inspected the records and proceedings filed before the learned Additional Civil Judge, Dehradun on 5th March 2018 and came to know about the grant of Letters of Administration by this court in the Testamentary Petition No.558 of 2016. In paragraph 4(m) of the petition, it is alleged by the petitioner that he returned to Dehradun in February 2018 and since the date of returning to Dehradun, has been staying at Dehradun Club, Ugra Sen Road, Dehradun – 248 001. In my view, even this averment made by the petitioner is false and misleading and contrary to the record produced by both the parties before this Court. The petitioner was already appearing in Suit bearing No.422 of 2004 and in Suit No.7 of 2007 and was fully aware of the Will and Codicil of the said deceased propounded by the respondent including the factum of issuance of grant of Letter of Administration issued by this Court.

65. This Court shall now consider the documents produced by the respondent forming part of the record to show the steps taken by the respondent and to serve citation upon the petitioner at the last known address of the petitioner. In the testamentary petition filed by the respondent, the respondent had given Dehradun address of the petitioner. The petitioner at that point of time was not staying at

Dehradun. The citation was accordingly sought to be served upon the petitioner at Gurgaon address which address was mentioned in the said letter addressed by Unitech Limited. The said citation was however returned unserved on the ground that the address was incomplete. In these circumstances, since the respondent did not have any other address of the petitioner, the respondent filed a chamber order before the learned Prothonotary and Senior Master of this Court *inter-alia* praying for permission to serve citation upon the petitioner by publication in the two leading newspapers viz. "Indian Express" in English language, New Delhi Edition and "Navbharat Times" in Hindi language to be published at Delhi as well at Gurgaon, Haryana at the last known address of the petitioner.

66. It was the case of the petitioner that he was staying at Delhi. The citation was accordingly published in those two newspapers having wide circulation at Delhi and Gurgaon. The respondent also filed an affidavit of service in that regard in Testamentary Petition No.558 of 2016. There was no caveat filed by the petitioner in response to the said citation being served by publication in two leading newspapers in compliance with Rule 400 of the Bombay High Court (Original Side) Rules, 1980 by the petitioner. Since there was no caveat and affidavit in support filed by the petitioner, this Court after verifying all these factual aspects passed an order of grant of Letters of Administration in favour of the respondent in respect of the Will and Testament of Ms.Rajkumari Padmakumari Devi dated 25th August 2015.

67. The question that arises for consideration of this Court is whether the respondent in these circumstances could have served citation upon the petitioner by publication of citation under Rule 400 of the Bombay High Court (Original Side) Rules, 1980 on the ground that the service of citation personally upon the petitioner was not possible. In my view, the petitioner himself did not give any address of those four places even in the miscellaneous petition filed by the petitioner and also across the bar though this Court called upon him to furnish such address with proof of his place of residence on the date of respondent making an attempt to serve the citation upon the petitioner personally. The respondent was thus justified in placing reliance upon the letter addressed by Unitech Limited which indicated the address of the petitioner having property at Gurgaon. It was thus in no circumstance possible for the respondent to serve the petitioner with citation permissible under Rule 399 of the Bombay High Court (Original Side) Rules, 1980. It was not the case of the petitioner that he did not have the address mention in the said letter at Gurgaon.

68. A perusal of the Rule 400 of Bombay High Court (O.S.)Rules clearly indicates that service of citation upon a party by publication is permissible if the citation cannot be served personally upon such party. The learned Additional Prothonotary & Senior Master of this Court was fully satisfied while permitting the respondent to publish the citation in the two newspapers for the purpose of effecting service upon the petitioner in view of the fact that service of citation upon the petitioner at the last known address was not possible. In my view, service of citation upon a party personally is mandatory only if the

same is possible and not otherwise.

69. I shall first deal with the judgments cited by the learned counsel for the parties on the issue as to whether personal service of citation under Rule 399 of the Bombay High Court (O.S.) Rules is mandatory or directory and whether an order passed by the learned Additional Prothonotary & Senior Master permitting the respondent to serve the petitioner by substituted service under Rule 400 of the Bombay High Court (O.S.) Rules was justified or not.

70. This Court in case of ***Captain Makhan Lal Babua*** (supra) has held that the time to file caveat or affidavit in support of the caveat would not commence from the date of knowledge of filing of the petition but would commence only upon the service of citation. This Court in the said judgment held that citation has to be served personally when possible. The time to file affidavit in support of caveat under Rule 402 of the Bombay High Court (O.S.) Rules commences from the date of service of citation upon next of kin. In my view, in the facts of this case, the respondent had made an attempt to serve the petitioner with citation personally under Rule 399 of the Bombay High Court (O.S.) Rules. Since the service of citation personally upon the petitioner was not possible, the learned Additional Prothonotary & Senior Master after considering the material placed on record and considering the affidavit of service filed by the respondent and from the office of Sheriff of Mumbai, rightly permitted the respondent to serve the petitioner by substituted service under Rule 400 of the

Bombay High Court (O.S.) Rules and to file affidavit of service after publication of citation.

71. There is no dispute about the proposition of law laid down by this Court in the said judgment in case of ***Captain Makhan Lal Babua*** (supra). However, since the respondent had satisfied the learned Additional Prothonotary & Senior Master of this Court that service of citation personally was not possible upon the petitioner, the respondent had rightly applied for service of citation by substituted service. After completing the service upon the petitioner by substituted service, the respondent had also filed an affidavit of service before this Court in compliance with the order passed by the learned Additional Prothonotary & Senior Master. There is no substance in the submission of the learned counsel for the petitioner that order passed by the learned Additional Prothonotary & Senior Master is perverse or illegal.

72. Insofar as the judgment of this Court in case of ***Abhiraji Bansraj Singh*** (supra) is concerned, this Court has interpreted Rule 399 of the Bombay High Court (O.S.) Rules and has held that the citation should be served personally when possible. The manner in which the service has to be effected also is provided in the said rule. This Court is satisfied that the respondent had complied with all requisite rules, including Rules 399, 400, 401 and 402 of the Bombay High Court (O.S.) Rules.

73. In the said judgment in case of ***Abhiraji Bansraj Singh*** (supra) also this Court has categorically held that even if after following the procedure under Rule 399 of the Bombay High Court (O.S.) Rules, citation cannot be served, then in that event the procedure laid down in Rule 400 of the of the Bombay High Court (O.S.) Rules will have to be adopted viz. by serving by publication in such local newspapers as the Prothonotary & Senior Master may direct. It is also held that the Court cannot read Rules 399 and 400 in isolation with other rules viz. Rules 398 and 445 of the of the Bombay High Court (O.S.) Rules. There is no dispute about the proposition of law laid down by this Court in the said judgment. The respondent in this case had proved that service of citation personally upon the petitioner was not possible and had thus effected service upon the petitioner by substituted service permissible under Rule 400 of the Bombay High Court (O.S.) Rules.

74. This Court in case of ***Pooja Deepak Patil*** (supra) has also held that citation shall be served personally when possible under Rule 399 of the Bombay High Court (O.S.) Rules. The personal service shall be effected by leaving true copy of the citation with a party cited and taking his acknowledgement on the original. This Court after adverting to various judgment of the different High Courts held that since the respondent did not serve the citation upon the petitioner in the testamentary petition in the mode and manner prescribed under Rules 397 to 399 of the Bombay High Court (O.S.) Rules, grant of probate issued in favour of the respondent deserved to be set aside on that ground alone. This Court in the said matter had rendered a finding that

the petitioner who was admittedly a legal heir of the deceased was not served personally with citation though the executor in that case was fully aware about the whereabouts of the petitioner and place of residence. The judgment of this Court in case of ***Pooja Deepak Patil*** (supra) thus would not assist the case of the petitioner.

75. Insofar as the reliance placed on the judgment of this Court in case of ***Ganpatraj K. Sanghvi*** (supra) relied upon by the learned counsel for the petitioner is concerned, this Court while dealing with an application to set aside an *ex-parte* decree under Order XXXVII Rule 4 of Civil Procedure Code, 1908 has held that the onus was on the plaintiff to prove that the defendant was keeping out of way for the purpose of avoiding service. The Court must record a reason as to why summons cannot be served in normal way. In the said judgment, this Court also had rendered a finding that it was not the case of the plaintiff that the defendant was avoiding service.

76. In the facts of this case, even according to the petitioner, the petitioner was travelling and living away from Dehradun because of ongoing criminal proceedings against the petitioner during the period October, 2015 and January, 2018. Though the respondent had produced a copy of the testamentary petition and a copy of Letters of Administration granted by this Court in the proceedings before Dehradun Court, the petitioner suppressed those facts and continued to plead that he was not aware of any such testamentary proceedings filed by the petitioner or that the Letters of Administration was obtained by

the respondent without effecting service of citation personally upon the petitioner. The judgment of this Court in case of ***Ganpatraj K. Sanghvi*** (supra) thus would not assist the case of the petitioner and is clearly distinguishable in the facts of this case.

77. This Court in case of ***Maj. Gen. Jonathan Reuben Samson*** (supra) has held that there would be no purpose in revoking the grant only for non-compliance with the technicalities for issuing of citation and again issuing a fresh grant in the same manner. It is held that though omission to issue citations to persons who should have been apprised of the probate proceedings would be a ground by itself for revocation of the grant, in the facts of that case, no revocation was called for on that ground. In the facts of this case, the petitioner was served by substituted service. The petitioner however, did not file any caveat as well as affidavit in support of the caveat.

78. If the petitioner was keeping himself away from Dehradun for several years because of the criminal proceedings filed by some of the parties against him without disclosing the current address of the petitioner in the pending proceedings, the petitioner cannot be allowed to urge that the respondent was bound to serve the petitioner at each and every address of the petitioner personally. Even till today, the petitioner could not disclose his prevailing address at the time of making an attempt to serve the citation on the petitioner personally. In my view, there is thus no substance in the submission made by Mr.Kamat, learned counsel for the petitioner that the respondent had

telephone number of the petitioner and thus the respondent ought to have made an enquiry about the current address of the petitioner before making an attempt to serve the petitioner with substituted service.

79. The petitioner does not dispute that the relationship between the petitioner and the respondent was very strained. The respondent thus was not expected to ask the petitioner to furnish the prevailing address before making an attempt to serve the petitioner with citation personally under Rule 399 of the Bombay High Court (O.S.) Rules. It is not the case of the petitioner that though various criminal proceedings were pending against the petitioner, the petitioner would have disclosed the prevailing address of the petitioner to the respondent for effecting service of citation personally.

80. Since the petitioner has not produced any proof of the prevailing address when the citation was attempted to be served personally by the respondent even today by leading oral or documentary evidence, this Court cannot permit the petitioner to urge that it was the duty of the respondent to find out from all sources the prevailing address of the petitioner before obtaining an order of substituted service of citation under Rule 400 of the Bombay High Court (O.S.) Rules. The judgment of this Court in case of ***Maj. Gen. Jonathan Reuben Samson*** (supra) thus would assist the case of the respondent.

81. The Hon'ble Supreme Court in case of ***Lynette Fernandes*** (supra) has considered the explanation to section 263 of the Indian Succession Act, 1925 which provides for revocation or annulment of grant of probate or Letters of Administration for "just cause". The Hon'ble Supreme Court in the said judgment has held that section 263 of the Indian Succession Act, 1925 vests a judicial discretion in the Court to revoke or annul a grant for "just cause". Defective in substance must mean that defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings. In my view, the petitioner has not shown any "just cause" explained in section 263 of the Indian Succession Act, 1925. The petitioner himself was responsible for remaining absent and not opposing the grant of Letters of Administration in the proceedings filed by the respondent at an appropriate time though was served with citation in compliance with Rules 399 and 400 of the Bombay High Court (O.S.) Rules.

82. Be that as it may, in this case the respondent has made without prejudice offer to pay 50% share in the property of the deceased during the course of arguments before this Court. Learned counsel appearing for the petitioner however, did not agree to the said without prejudice offer to made by Dr.Saraf, learned counsel appearing for the respondent. No prejudice thus of any nature whatsoever has been caused to the petitioner. The principles of law laid down by the Hon'ble Supreme Court in case of ***Lynette Fernandes*** (supra) would apply to the facts of this case and would assist the case of the

respondent.

83. The Hon'ble Supreme Court in case of ***Anil Behari Ghosh*** (supra)while dealing with the proceedings arising out of an order passed under section 263 of the Indian Succession Act, 1925 has held that omission to issue citations to persons who should have been apprised of the probate proceedings may well be in a normal case a ground by itself for revocation of the grant. But this is not an absolute right irrespective of other considerations arising from the proved facts of a case. In the facts of this case also, the petitioner was served with citation by substituted service in view of the petitioner not having disclosed the prevailing address of the petitioner to the respondent in view of the petitioner keeping himself away from Dehradun in view of the criminal proceedings pending against him. The petitioner thus cannot apply for revocation of Letters of Administration in the facts and circumstances of this case on the ground of want of personal service of citation upon the petitioner. The principles of law laid down by the Hon'ble Supreme Court in case of ***Anil Behari Ghosh*** (supra) would apply to the facts of this case. I am respectfully bound by the said judgment.

84. The Division Bench of this Court in case of ***Nina Agarwalla*** (supra) has held that the learned single Judge had recorded finding of fact from the record available in the Testamentary Department of the Court that there was a noting to the effect that citation with regard to probate proceedings had been served upon the next of kin as well as

was put up in the notice board respectively. In the absence of the appellant being able to show any evidence of citation not being served upon her, there was no reason to disbelieve the record as maintained by the Court. Learned single Judge in that matter had rejected the application for revocation of grant of probate. The said judgment was upheld by the Appeal Court in the said judgment. In the facts of this case also, considering the material placed on record, the learned Additional Prothonotary & Senior Master was rightly satisfied that inspite of efforts made by the respondent to effect service of citation personally upon the petitioner since personal service was not possible, the respondent was allowed to serve the petitioner by substituted service under Rule 400 of the Bombay High Court (O.S.) Rules.

85. I do not find any infirmity in the said order passed by the learned Additional Prothonotary & Senior Master of this Court permitting service of citation by substituted service upon the petitioner under Rule 400 of the Bombay High Court (O.S.) Rules. The judgment of the Division Bench of this Court in case of ***Nina Agarwalla*** (supra) would apply to the facts of this case. I am respectfully bound by the said judgment.

86. This Court in case of ***Gurbir Shivdev Singh & Ors.*** (supra) has held that if a party comes to the Court with unclean hands, such party should be dealt with very strongly and substantial costs also should be imposed on the parties. It is held that judiciary is the bedrock and handmaid of orderly life and civilized society. It is held that if a party

approaches the Court with dishonest averments to pollute the pure stream of justice, such party cannot be shown any leniency. In this case also, the petitioner has made various false and incorrect statements in the miscellaneous petition about his alleged knowledge of date of grant of Letters of Administration by this Court which are *ex-facie* inconsistent, contradictory and false. The petitioner has not come to this Court with clean hands and thus on that ground also cannot seek revocation of the Letters of Administration issued by this Court. The principles of law laid down by this Court in case of ***Gurbir Shivdev Singh & Ors.*** (supra) would squarely apply to the facts of this case. I am respectfully bound by the said judgment.

87. In case of ***Adil Phiroz Makhania*** (supra) delivered by this Court, this Court after following the principles of law laid down by the Division Bench of this Court in case of ***Lydia Agnes Rodrigues*** rejected the petition for revocation of grant of probate. The principles of law laid down by this Court in the said judgment would also assist the case of the respondent. Insofar as the judgments of the Hon'ble Supreme Court in case of ***Neerja Realtors Private Limited*** (supra), in case of ***Rabindra Singh*** (supra), in case of ***R.R.Shah & Ors.*** (supra) and in case of ***Great Punjab Agro Industries Ltd.*** (supra) relied upon by the learned counsel appearing for the petitioner are concerned, the Hon'ble Supreme Court had considered the provisions of Order V Rule 20 of the Code of Civil Procedure, 1908 in those judgments. There is no dispute about the proposition of law laid down by the Hon'ble Supreme Court in those four judgments.

88. Since in this case this Court is of the view that the petitioner even did not provide the prevailing address at the relevant time even at this stage, nor could prove the place of residence of the petitioner during the period when an attempt was made by the respondent to effect service of citation personally upon the petitioners, those aforesaid judgments referred to and relied upon by the learned counsel for the petitioner would not advance the case of the petitioner.

89. In my view, the petitioner has failed to show any “just cause” provided in the explanation to section 263 of the Indian Succession Act, 1925 and thus no case is made out for revocation of the Letters of Administration granted by this Court.

90. I therefore, pass the following order :-

(a) Miscellaneous Petition No.7 of 2019 is dismissed.

(b) There shall be no order as to costs.

(R.D.DHANUKA, J.)

At the request of the learned counsel appearing for the petitioner, *ad-interim* relief granted, if any, to continue for a period of four weeks from today.

(R.D.DHANUKA, J.)