
(2018) 10 BOM CK 0103

In the Bombay High Court

Case No : Miscellaneous Petition No.33 Of 2017 In Testamentary Petition No.294 Of 2012

Pooja Deepak Patil

APPELLANT

Vs

Savita Vasant Rao Patil And Ors.

RESPONDENT

Date of Decision : 23-10-2018

Acts Referred:

Indian Succession Act, 1925 — Section 2(1)(c), 60, 222, 227, 234, 246, 263, 283, 295
Evidence Act, 1872 — Section 41
Mental Health Act, 1987 — Section 2(l), 52, 53, 54
Code of Civil Procedure, 1908 — Order 32 Rule 1, Order 32 Rule 2, Order 32 Rule 3, Order 32 Rule 4, Order 32 Rule 5, Order 32 Rule 6, Order 32 Rule 7, Order 32 Rule 8, Order 32 Rule 9, Order 32 Rule 10, Order 32 Rule 11, Order 32 Rule 12, Order 32 Rule 13, Order 32 Rule 14, Order 32 Rule 15, Section 148A
Bombay High Court (Original Side) Rules, 1980 — Rule 397, 397(1), 397(4), 399, 400, 401, 402, 403

Citation : (2018) 10 BOM CK 0103

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : Dr.Birendra Saraf, Rajeev Carvalho, Raksha Thakkar, Trisha Mehta, Rajesh Shah, Neelam Vyas, Purnima G. Bhatia

Final Decision : Allowed

Judgement

@Judgmenttag-Judgment

1. By this petition filed under Section 263 of the Indian Succession Act, 1925, the petitioner has prayed for revocation and/or for anulment of the grant

of probate dated 14th March 2014 passed by this Court in Testamentary Petition No.294 of 2012 in favour of the respondent no.1 and also seeks

recall of the order dated 7th August 2013 passed by this Court in the said Testamentary Petition No.294 of 2012. Some of the relevant facts for the

purpose of deciding this petition are as under : -

2.Â The petitioner is the daughter of late Mr.Deepak Vasantrya Patil. The said deceased Mr.Deepak Vasantrya Patil was married to Mrs.Jyoti Patil

on 12th May 1985. On 19th May 1986, the petitioner was born out of the said wedlock. Due to marital discord, a customary divorce was obtained by

the said deceased Mr.Deepak Patil and Mrs.Jyoti Patil on 8th August 2002 in presence of Bhorgaon Leva Panchayat.

3.Â It is the case of the respondents that the said Mr.Deepak V. Patil had expired on 26th May 2011 and had left his last Will and Testament dated

8th August 2009 allegedly executed at Savada, Jalgaon. It is also the case of the respondents that the said deceased Mr.Deepak Patil had appointed

the respondent no.1 as executrix under the said last Will and Testament dated 8th August 2009. The said respondent no.1 is the sister of the said

deceased Mr.Deepak V. Patil and alleged to have been appointed as the main trustee under the said Will. The petitioner is the only heir and legal

representative of the said deceased Mr.Deepak V. Patil.

4.Â It is the case of the petitioner that after demise of the deceased Mr.Deepak V. Patil, the petitioner lived with the respondent no.1 at their family

house i.e. 18A, Ravindra Mansion, Dinshaw Vachha Road, Churchgate for about four months.

5.Â It is the case of the petitioner that due to the ill effects of familial discord and tensed atmosphere caused by the divorce of the parents of the

petitioner, it took a toll on the petitioner and prejudicially affected her academic life. She was weak and lagged behind in her academic pursuits.

Pursuant to extensive consultation with teachers and thereafter doctors, it was discovered that the petitioner had a low intelligence quotient (IQ). The

petitioner was a slow learner and was advised to attend a special school. The petitioner was thus enrolled in Vidyajyoti School of Slow Learners to

pursue her studies in the said school. It is the case of the petitioner that after dissolution of the marriage of the said deceased Mr.Deepak V. Patil and

Mrs.Jyoti Patil, the said Mrs.Jyoti Patil relinquished all her rights in the estate of the deceased and did not make any claim and/or for alimony and/or

maintenance.

6.Â The father of the petitioner was granted custody of the petitioner by mutual consent of the said deceased and the mother of the petitioner. It is

the case of the petitioner that she had always resided with the deceased in

Savada, Taluka Raver, District Jalgoan. The mother of the petitioner however was in constant touch with the petitioner and ensured the progress of petitioner as well as the well being of the petitioner. The mother of the petitioner and the petitioner shared a close bond as they used to travel together including a trip to Singapore in or about 2006.

7.Â The mother of the petitioner thereafter filed a Mental Health Petition in the City Civil Court at Bombay inter alia seeking custody of the petitioner. During the proceedings before the City Civil Court, the petitioner expressed her desire to live with her mother in Pune. The petitioner thereafter shifted her residence to the house of her mother in Pune and continues to live there till today. In the said proceedings filed by the mother of the petitioner before the City Civil Court, the City Civil Court directed that an IQ test be conducted on the petitioner by the JJ Hospital.

8.Â On 26th March 2012, after conducting the IQ test on the petitioner by the JJ Hospital, the said Grant Medical College and Sir JJ group of hospital issued a Certificate setting out an analysis of psychiatric report of the petitioner. In the said certificate, it was stated that during mental status examination, the petitioner was found to be conscious, cooperative, communicative, mood/euthymic affect-appropriate, speech/ thought continues, coherent, relevant no delusion or hallucination, memory intact, intelligence subnormal, judgment intact as well as insight present. The said certificate stated that there was an impression that the petitioner might have had mild mental retardation. It is the case of the petitioner that the said certificate however did not conclusively establish that the petitioner was in any manner incapacitated to look after her personal affairs as well as that of the estate of the deceased father.

9.Â It is the case of the petitioner that mother of the petitioner was thereafter advised to approach the Samaj Kalyan Office to seek the custody of the petitioner under the 'National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999' (for short â??the Act of 1999â?). The mother of the petitioner accordingly applied for custody of the petitioner under the Act of 1999 in the month of January 2014 before the Samaj Kalyan office.

10.Â On 25th January 2012, the respondent no.1 filed a Testamentary Petition (294 of 2012) in this Court inter alia praying for Letters of

Administration with Will annexed dated 8th August 2009. In the said petition, the respondent no.1 alleged that the said deceased father of the petitioner had left his last Will and Testament dated 8th August 2009 allegedly executed at Savada, Jalgaon. She alleged that she was appointed as executrix according to the tenor of the said alleged Will. It was averred in the said testamentary petition that she was the main trustee under the said Will. It was alleged that the petitioner herein was the only heir and legal representative of the said deceased Mr. Deepak V. Patil but she was being unfit to apply for Letters of Administration of the property of the said deceased.

11.Â Office of this Court raised various objections in the said petition for Letters of Administration with Will annexed including issue of locus. In view of objection raised by the office about locus of the respondent no.1 to file the said petition for Letters of Administration, learned Advocate for the respondent no.1 filed a praecipe in the said petition for Letters of Administration for placing the matter on board for directions before this Court on 7th August 2013. The said praecipe was filed on 31st July 2013. Similar praecipe was also filed by the learned Advocate for the respondent no.1 in the month of February 2013. On 14th December 2012, the respondent no.1 through her Advocate filed a praecipe alleging that the petitioner herein was mentally retarded and not able to take care of herself and her properties.

12.Â In the said praecipe, it was stated that the respondent no.1 was the main trustee named under the last Will of the said deceased. The deceased had full faith on the respondent no.1 as she was taking care of the said mentally retarded daughter of the deceased and in that capacity, the respondent no.1 had filed the said petition. The respondent no.1 accordingly prayed that she may be allowed to proceed with the said petition into for Letters of Administration with Will annexed and that to amend and convert the said petition into Letters of Administration with Will annexed and for limited grant for the use and benefit of the mentally retarded as per Section 246 of the Indian Succession Act, 1925.

13.Â The matter was placed on board on 7th August 2013. The learned Advocate for the respondents pointed out that one of the requisitions raised by the office was that the respondent no.1 should have written her capacity correctly in title and in paragraph 5. The requisition no.8 was asking the respondent no.1 to explain how sister of deceased could file a petition when the

daughter of the said deceased was alive.

14.Â Learned counsel for the respondents placed on record a Certificate dated 26th March 2012 issued by Grant Medical College and Sir J.J. Group

of Hospitals certifying that the petitioner is having Mild Mental Retardation with IQ -58. This Court recorded the statement made by the learned

counsel for the respondents based on the said certificate dated 26th March 2012 that the petitioner herein was not in a position to give any consent in

the said proceedings. Learned counsel also placed reliance on the alleged copy of the Will annexed to the petition to demonstrate that the deceased

had directed the executor to set up a trust for the benefit of the petitioner. The respondent no.1 also claimed to be one of the trustees under the said

alleged Will. This Court accordingly observed that since there were no other legal heirs, according to the learned counsel, the respondent no.1 who

was one of the trustees of the said Will had locus to file the said petition. This Court accordingly dispensed with the requisition nos.5 and 8 dated 9th

November 2012. This Court made it clear that consent of the petitioner was also dispensed with.

15.Â It appears that the respondent no.1 thereafter filed a praecipe on 13th March 2014 inter alia praying for various amendments to the said petition

for Letters of Administration. The said Testamentary Petition No.294 of 2012 was accordingly converted into a petition for probate of the last alleged

Will and Testament of the said deceased. The name of the respondent no.1 who had filed the said petition for Letters of Administration as the sister of

the said deceased Mr.Deepak V. Patil was deleted in her capacity as sister and amended showing that the said petition was filed by her as an

executrix appointed on tenor. In the entire body ofÂ the petition whereverÂ theÂ words â??sisterÂ? mentionedÂ asÂ her capacityÂ to file the

petition were replaced by the word â??executrix.Â?Â The words â??Letters of AdministrationÂ? were substituted by the words â??Probate of last

Will and TestamentÂ? dated 8th August 2009.

16.Â By an order dated 13th February 2014, the learned District Collector, Pune passed an order under Section 17 of the Act of 1999 declaring that

the said Jyoti Patil to be the guardian of the petitioner. On 11th December 2015, the respondent no.1 herein preferred an appeal bearing No.1 of 2014

impugning the said order dated 13th February 2014 passed by the learned

District Collector, Pune. The Local Stage Committee, Pune arrived at a finding that in view of the petitioner being a major and of sound mind, the order dated 13th February 2014 was liable to be set aside. It was further observed in the said order that the petitioner was capable of taking her independent decision and recorded that the petitioner had expressed her desire to reside with the said Jyoti Patil and not with the respondent no.1.

17. The respondent no.1 accordingly did not serve any citation upon the petitioner and obtained a probate on 14th March 2014 from this Court as an uncontested matter. It is the case of the petitioner that the respondent nos.1 to 3 thereafter constituted a Trust on 22nd May 2014 in respect of the properties and estate of the said deceased. Under the said trust deed, the respondent no.1 had reserved with herself very wide and sweeping powers to deal with assets, movable and immovable properties of the said deceased to the exclusion and without having to answer to the petitioner in any manner whatsoever about the affairs of the said Trust. The respondent no. 1 also sought to forward a cheque of a miniscule amount of Rs.20,000/- per month to the petitioner in purported compliance of her obligations under the said trust deed. It is the case of the petitioner that during the period between 1st March 2012 and 30th November 2014, the petitioner was working with the Indira National School run by Shri Chanakya Education Society. She also was in full time employment of Rizvi College of Management at Bandra.

18. On 31st July 2014, the said Jyoti Patil through her advocate's letter called upon the respondents to furnish details of bank account that belonged to the deceased and to account for all the monies received in cash or otherwise by the respondents from the property situated at Ravindra Mansion, Churchgate belonging to the Patil Family in which the petitioner had a share. On 15th September 2014, the respondents through their advocate's letter replied to the said notice dated 31st July

2014 alleging that the said Jyoti Patil had never bothered to look after the petitioner and that the petitioner was a mentally retarded person. It was further contended that in view of the probate having been granted, the mother of the petitioner had no right to seek any information in respect of the

estate of the deceased and the respondents were not duty bound to disclose any information with respect to the estate of the deceased to the mother of the petitioner.

19. On 9th January 2015, the respondents through their advocates issued a public notice to the effect that the respondents had proposed to sell a property bearing Survey No.3772/1 to 3772/13 admeasuring 19831 sq.mtrs. situate at Faizppor, Jalgaon without intimation to the petitioner. In response to the said public notice, the said Jyoti Patil through her advocate's letter dated 18th January 2015 raised objections to the said sale proposed by the respondents in the said public notice.

20. The respondents filed a suit against the petitioner before the learned Joint Civil Judge, Raver, Pune inter alia praying for injunction against the petitioner from operating her own bank account and other incidental reliefs. On 3rd May 2016, the learned Joint Civil Judge rejected the said application filed by the respondents. The learned trial Court placed reliance on the medical report issued by the Medical Board of the Government of Maharashtra stating that the petitioner had an IQ of 72.92 and she was in fact normal. The said order further recorded that the purpose of the trust for the benefit of the petitioner who was not only a major but had also been declared to be of sufficient intelligence and of sound mind, had ceased to exist. The trial Court allowed the petitioner to operate her own bank account and stated that the monies belongs to the petitioner alone.

21. On 13th January 2016, the petitioner addressed a letter to the respondents and applied for information regarding (i) the alleged Will of the deceased; (ii) copy of the purported Trust Deed; (iii) papers and proceedings arising out of the probate petition filed by the respondent no.1; (iv) accounts and dealing with the trust with respect to the share belonging to the petitioner.

22. On 8th March 2016, the petitioner addressed a letter to the respondents and requested to furnish details of any appeal/writ petition filed by the respondents against the order dated 11th December 2015 passed by the Local Stage Committee of Pune through its President/District Collector. It is the case of the petitioner that the said order dated 11th December 2015 passed by the Local Stage Committee of Pune has not been impugned by the

respondents and the said order has attained finality and is binding on the parties.

23. On 18th June 2016, the respondents in their purported capacity as trustees addressed a letter to the said Mrs. Jyoti Patil and alleged that since

monies had been illegally withdrawn from the bank account, the trust would stop sending maintenance to the petitioner.

24. On 28th July 2016, the petitioner filed this petition under Section 263 of the Indian Succession Act, 1925 inter alia praying for revocation and/or

for annulment of the grant of probate dated 14th March 2014 passed by this Court in Testamentary Petition No.294 of 2012 in favour of the

respondent no.1 and also prayed for recall of the order dated 7th August 2013 passed by this Court in the said Testamentary Petition No.294 of 2012.

25. Dr. Saraf, learned counsel for the petitioner invited my attention to the order dated 7th August 2013 passed by this Court and also various

correspondence and documents annexed to this petition, the pleadings filed by both the parties, the averments made by the respondent no.1 in

Testamentary Petition No.294 of 2012 and the objections raised by the office of the Prothonotary and Senior Master in the said testamentary petition.

It is submitted by the learned counsel that admittedly the petitioner was only the legal heir and representative of her father Late Mr. Deepak V. Patil.

He placed reliance on Rule 397 of the Bombay High Court (Original Side) Rules, 1980 and would submit that under Rule 397 (1), notice of the

application for probate has to be given to all the heirs and next-of-kin of the deceased mentioned in the petition except to those whose

consent has been filed in the proceedings. He submits that under Rule 397(4), this Court cannot grant probate, letters of administration or succession

certificate until after the expiry of 14 clear days from the date of the service of the citation or notice and from the publication thereof in newspapers, if

any, and from the date of affixing thereof on the Court house and in the Collector's office, as the case may be, unless the Judge in Chambers

otherwise directs.

26. It is submitted that admittedly in this case, no notice of the application for probate in respect of the alleged Will of the deceased father of the

petitioner was given to the petitioner. He submits that compliance of Rule 397 was mandatory and could not have been dispensed with by this Court

unless the petitioner herself would have given her consent and such consent

would have been filed in the said petition for probate filed by the respondent no.1. He submits that though the Judge in Chambers is empowered to shorten the period of 14 days prescribed under Rule 397(4), the said notice cannot be dispensed with except where the consent of such heirs and next-of-kin of the deceased are filed in the probate proceedings. In support of this submission, learned counsel for the petitioner placed reliance on the following judgments :-

(i)Â Captain Makhan Lal Barua alias M.L.Barua (deceased) Sunita Barua Vs. Miss Mihika Barua & Anr., 2014 (2) Mh.L.J. 194 (paragraphs 9 and

10);

(ii)Â Ganesh Ramchandra Kadam Vs. Vijay Chandrakant Kadam, 2017 SCC OnLine Bom 6417 (paragraph 6).

27.Â It is submitted by the learned counsel that there was no application filed by the respondent no.1 for dispensation of consent. There was no

provision in law permitting the dispensation of consent of the heirs and next-of-in of the deceased under Rule 397 of the Bombay High Court (Original

Side) Rules, 1980. The dispensation contemplated under Section 397(4) of the Bombay High Court (Original Side) Rules, 1980 is only for the period of

14 days from the date of service of Citation or notice and nothing beyond that. He submits that the respondent no.1 appears to have filed a praecipe in

the testamentary petition filed by her to consider the two requisitions of the department for explaining the locus of the respondent no.1. In that context,

the respondent no.1 applied for directions and obtained an order for dispensation of consent. He submits that neither such dispensation of consent

could be applied by the respondent no.1 nor the same could be granted by this Court under any of the provisions of law including the provisions of the

Indian Succession Act, 1925 or the Bombay High Court (Original Side) Rules, 1980.

28.Â It is submitted by theÂ learned counsel thatÂ under Section 222Â of the Indian Succession Act, 1925, an application for probate can be filed

only by an executor. The office had subsequently raised objections and called upon the respondent no.1 to explain her capacity in which she had filed

the testamentary petition. He submits that it was not the case of the respondent no.1 even at that stage that she was the executrix under the Will. The

only case of the respondent no.1 was that she being a proposed trustee of a

trust under the alleged Will, she had locus to file the petition. It is submitted that an application for probate filed by the respondent no.1 is contrary to the provision of Section 222 of the Indian Succession Act, 1925.

The respondent no.1 thus having no locus to file the said testamentary petition, the said petition was not maintainable.

29. It is submitted by the learned counsel that it was the case of the respondent no.1 that the petitioner was mentally challenged and not in a position to give her consent. In such circumstances, the respondent no.1 was required to follow the mandatory requirements of Order XXXII Rules 1 to 14 of

the Code of Civil Procedure, 1908. He submits that without following the procedure prescribed under Order XXXII Rules 1 to 14 of the Code of Civil

Procedure, 1908, the respondent no.1 could not have proceeded with the testamentary petition and could not have obtained probate in the testamentary

petition. The respondent no.1 ought to have applied for appointment of a guardian of the petitioner since even according to the respondent no.1, the

petitioner was mentally challenged or was incapable due to mental infirmity. He submits that the order of granting probate itself is thus void in view of

non-compliance of the provisions of Order XXXII Rules 1 to 14 of the Code of Civil Procedure, 1908.

30. Learned counsel for the petitioner submits that for appointment of guardian of minor in the suit, an application has to be made before the Court.

The Court will then scrutinize such application and the relevant facts and more particularly the fact that the proposed guardian has no

interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed. Under Order XXXII

Rule 3 of the Code of Civil Procedures, 1908, the Court is not empowered to pass an order of appointment of guardian on any application except

upon notice to any guardian appointed or declared by an authority competent in that behalf or where there is no such guardian upon notice to the

father or where there is no father, to the mother, or where there is no father or mother, to other natural guardian.

31. It is submitted that if an application for appointment of guardian would have been filed by the respondent no.1, the mother of the petitioner being

alive, notice upon the mother of the petitioner was required to be served in the said application for appointment of guardian for probate petition filed by

the respondent no.1. He submits that since the respondent no.1 did not file any such application for appointment of guardian, this Court could not have

dispensed with the consent of the petitioner on praecipe filed by the respondent no.1 in view of the objections raised by the department.

32. It is submitted that the provisions of Order XXXII Rules 1 to 14 were mandatory and were to be complied with even in the testamentary

petition. He submits that the respondent no.1 was fully aware that the mother of the petitioner is alive and if an application would have been made by

the respondent no.1 for appointment of guardian or the next friend, this Court would have insisted for issuing a notice of such application for

appointment of guardian for representing the petitioner in the testamentary petition filed by the respondent no.1.

33. It is submitted by the learned counsel for the petitioner that under Order XXXII Rule 3-A of the Code of Civil Procedure, 1908, next friend or

guardian of such minor person having mental incapacity has to be neutral and impartial having no interest in the subject matter of the suit adverse to

that of the minor. It is submitted that in this case, the respondent no.1 who is the Aunt (father's sister) had an adverse interest to that of the petitioner

claiming the alleged rights in the joint properties of the deceased father of the petitioner to some extent.

34. Learned counsel for the petitioner placed reliance on Section 2(I) of the Mental Health Act, 1987 which defines "mentally

ill person" means a person who is in need of treatment by reason of any mental disorder other than mental retardation. He also placed

reliance on Section 3 which provides that the Central Government shall establish an Authority for mental health with such designation as it may deem

fit. Reliance is placed on Sections 52, 53 and 54 of the Mental Health Act, 1987. Section 52 provides that where the District Court records a finding

that the alleged mentally ill person is in fact mentally ill and is incapable of taking care of himself and of managing his property, it shall make an order

for the appointment of a guardian under Section 53 to take care of his persons and of a manager under Section 54 for the management of his property.

He submits that under Section 53, the Collector of the District is empowered to appoint any suitable person to be a guardian of such mentally ill person

and as a manager of his property.

35.Â Learned counsel for the petitioner placed reliance on Sections 2(g) and 2(j) of the said Act of 1999 which defines â??mental retardationâ? and

â??person with disabilityâ? respectively. He also placed reliance on Sections 3, 10 (f), 14, 15 and 17 of the said Act of 1999. It is submitted that the

Lunacy Act came to be repealed by the provisions of the Mental Health Act, 1987. The respondent no.1 did not follow the other provisions of the

Mental Health Act, 1987 or the provisions of the said Act of 1999.

36.Â It is submitted by the learned counsel that during the period between 1st March 2012 and 30th November 2014, the petitioner was working with

the Indira National School run by Shri Chanakya Education Society and also was in full time employment of Rizvi College of Management at Bandra.

He placed reliance on a Certificate dated 6th November 2015 issued by the Government of Maharashtra stating that it was not possible to issue a

disability certificate in favour of the petitioner and certifying that B.K.T. Test was administered. The said certificate indicated that IQ report was

72.92. There was a borderline intellectual functioning. By the said certificate, the application filed by the mother of the petitioner for issuance of

disability certificate was rejected on the aforesaid grounds.

37.Â Learned counsel for the petitioner strongly placed reliance on an order dated 11th December, 2015 passed by the Local Stage Committee and

District Collector, Pune under the provisions of the Act of 1999 in an Application No.01 of 2014 filed by the respondent no.1 against Smt.Jyoti Deepak

Patil & Ors. The respondent no.1 had filed the said application raising an objection to the order dated 13th February, 2014 passed by the said Local

Stage Committee appointing Smt.Jyoti Deepak Patil as the legal guardian of the petitioner herein. It is submitted by the learned counsel that by the said

order dated 11th December, 2015, the Local Stage Committee after considering various facts and after having interviewed and having spoken to the

petitioner directly found that the petitioner was normal. Her intellectual was 72.92.

38.Â The said Local Stage Committee also considered the intellectual test of the petitioner carried out at General Hospital, Aundh, Pune. The said

authority rejected the application for seeking disability certificate for the petitioner. The said Local Stage Committee accordingly rejected the

application for appointment of Smt.Jyoti Deepak Patil as legal guardian of the

petitioner. The said Local Stage Committee also recorded the statement made by the petitioner that she wanted to live with her mother Smt.Jyoti Deepak Patil and handed over all the responsibilities of the petitioner to the said Smt.Jyoti Deepak Patil. It is submitted that the said order was passed after hearing the parties including the respondent no.1. The respondent no.1 did not challenge the said order passed by the Local Stage Committee.

39.Â Learned counsel for the petitioner placed reliance on the order passed by the learned Joint Civil Judge, Junior Division, Raver on 3rd May, 2016

below Exhibit-6 in Regular Civil Suit No.37 of 2016, which suit was filed by the respondent no.1 against the petitioner seeking an injunction from

transferring her bank account from the State Bank of India, Branch Savda to the State Bank of India, Pune. He submits that in the said order passed

by the learned Joint Civil Judge, Junior Division, it was noticed that the petitioner herein was staying with her mother. Learned Judge also considered

the medical reports of the petitioner issued by the Medical Board of Government of Maharashtra and observed that the petitioner was not a dumb

fellow and had intellectual quotient of 73%. Learned Judge also considered the order passed by the District Stage Committee forming an opinion on

the basis of the medical report that the petitioner was a normal person.

40.Â Learned Civil Judge also rejected the contention of the respondent no.1 that the petitioner was not mentally competent. The Civil Court

observed that the very basis ground for creating a trust to manage the properties had been the low intellectual quotient of the petitioner and the entire

properties had been bequeathed in favour of the petitioner. It was further observed that the petitioner was a normal person having an intelligent

quotient of 73% as declared by the Competent Government Authority, she could on her own manage the properties left for her by her father.

41.Â Learned Civil Judge also came to a conclusion that creation of the trust to manage the properties was visualized by the father of the petitioner

because then the petitioner was having low intellectual and she was minor and incapable to take her own decision but now the situation has changed.

The petitioner has been a major person and has enough intelligent quotient to take her decision weighing the pros and cons thereof. It is held that the

creation of a trust would not be an obstacle for the petitioner to take the charge of the properties. Learned Civil Judge accordingly rejected the said

application for interim relief sought by the respondent no.1 against the petitioner from operating the bank account standing in the name of the petitioner. It is accordingly held that the petitioner being a major and sound mind person, is entitled to operate the disputed bank account as it stood in her name and the amount lying therein belonged to her. The said application for interim relief was accordingly rejected. In the said order passed by the learned Joint Civil Judge, Junior Division recorded various prima-facie findings in favour of the petitioner and rejected the application for interim relief filed by the respondent no.1. The said order has been admittedly not challenged by the respondent no.1.

42.Â It is submitted by the learned counsel for the petitioner that the petitioner has been thus declared as of sound mind repeatedly by various Authorities and the Courts and having been also allowed to operate her bank account independently. The respondent no.1 has stopped making payment of even paltry sum of maintenance what was paid for the short period by the respondent no.1 falsely contending that the petitioner had withdrawn substantial amount from her bank account without the consent of the respondent no.1.

43.Â Insofar as the alleged Will left by the deceased father of the petitioner is concerned, it is submitted by the learned counsel for the petitioner that the said alleged Will also does not state that the petitioner was mentally challenged person. The said alleged Will at the most indicates that the petitioner was a slow learner. The mother of the petitioner had taken divorce from her husband.

44.Â Insofar as the probate petition which was filed by the respondent no.1 is concerned, learned counsel for the petitioner placed reliance on section 227 of the Indian Succession Act, 1925 in support of the submission that even under the said Will executed by the father of the petitioner, no executor was appointed under the said Will. He submits that it was also not the case of the respondent no.1 that she was appointed as an executrix under the said Will. The right of the alleged trustee under the said alleged Will can be enforced only if the said alleged Will was probated. He invited my attention to the order dated 7th August, 2013 passed by this Court in the Testamentary Petition No.294 of 2012 and would submit that this Court at the direction stage when the said petition was placed on board in view of the praecipe filed by the respondent no.1 through her advocate for dispensing

with one of the requisition issued by by the office had dispensed with requisition nos.5 and 8 and simultaneously dispensed with the consent of the petitioner.

45.Â It is submitted that when the petitioner was alive on the date of filing of the said testamentary petition filed by the respondent no.1 seeking probate of the alleged Will of the father of the petitioner and the petitioner being the only legal heir of the said deceased had locus to file the probate petition and not the respondent no.1. He submits that neither any application was made by the respondent no.1 for dispensing with the consent, if any, of the petitioner nor there is any provision for seeking dispensation of the consent of legal heir. The service of citation on the petitioner was mandatory being in the nature of writ of summons. It is submitted by the learned counsel that the respondent no.1 has committed a fraud upon the Court and made the Court to believe that the petitioner was mentally retarded person and was not in a position to give her consent for filing the said testamentary petition and by committing such fraud upon the Court, obtained such an order of dispensation of the consent of the petitioner. He submits that since the said orders dated 7th August, 2013 and 14th March, 2014 passed by this Court are procedural orders, the same can be recalled by this Court.

46.Â Learned counsel for the petitioner invited my attention to certain allegations made by the respondent no.1 in the affidavit in reply filed before this Court and also invited my attention to the certificate of â??Mental Retardation for the Government Benefitsâ? dated 3rd January, 2014. He submits that it is the case of the respondent no.1 that the said certificate annexed at page no.188 of the affidavit in reply and the certificate annexed at page no.38 of the petition rejecting the application for disability on 6th November, 2015 was signed by Dr.H.S. Gosavi and Dr.B.N. Kakne being common signatory in both the certificates and being inconsistent, no reliance could be placed on the certificate dated 6th November, 2015. He submits that the certificates dated 6th November, 2015 certified that the IQ report of the petitioner was 72.92. The said certificate has not been challenged by the respondent no.1.

47.Â It is submitted by the learned counsel for the petitioner that even this Court while having interaction with the petitioner in my Chamber after the advance notice to both the parties, had clearly observed that the petitioner was

not mentally retarded and was able to reply to all the questions raised by this Court during such interview as indicated by this Court.

48.Â It is submitted by the learned counsel that if the respondent no.1 even otherwise would have applied for appointment of the guardian in the said testamentary petition, this Court would have come to the conclusion that the petitioner being not mentally retarded person, no guardian was required to be appointed. He submits that if this Court would have come to the conclusion that there was a need for appointment of the guardian to represent the petitioner in any of the legal proceedings, this Court could have appointed the mother of the petitioner as her guardian with whom the petitioner had been staying even after the demise of her father.

49.Â It is submitted that it is thus not open to the respondent no.1 to challenge the alleged mental retardness of the petitioner. He submits that the respondent no.1 did not make any application for the appointment of any guardian to defend the case of the petitioner. Learned counsel for the petitioner invited my attention to the Mental Health Petition No.4 of 2012 filed by Smt.Jyoti @ Sunita Patil, mother of the petitioner before the Bombay City Civil Court inter-alia praying for her appointment as a guardian of the petitioner and to manage of her property and to look after her for rest of her life. He submits that in the said petition, the respondent no.1 had applied for intervention. The knowledge of the mother of the petitioner, if any, about the testamentary petition filed by the respondent no.1 could not be attributed to the petitioner. He invited my attention to the order dated 10th July, 2013 passed by the learned Principal Judge in the said Mental Health Petition allowing the intervention application filed by the respondent no.1 and recording the statement made by the respondent that the father of the petitioner had executed a Will in respect of the property and had appointed her as the main trustee.

50.Â Learned counsel for the petitioner invited my attention to the order dated 4th April, 2014 passed by the learned Additional Sessions Judge, City Civil Sessions Court, Bombay in Mental Health Petition No.4 of 2012 below Exhibit 10 i.e. the application for rectification on 25th February, 2014 rejecting the said application filed by the mother of the petitioner. It is submitted by the learned counsel that on the one hand the respondent no.1 has been contending that the mother of the petitioner was brain washing her and on

the contrary has been contending that under such alleged Will, the respondent no.1 has been issuing the cheques towards monthly expenses for Rs.20,000/- upon the mother of the petitioner in her personal name and not in the name of the petitioner. He submits that till date the respondent no.1 has not furnished any documents or accounts relating to the estate of the late deceased father of the petitioner to the petitioner.

51.Â Learned counsel appearing for the petitioner invited my attention to the letter dated 18th June, 2016 issued by Deepak Vasantrao Patil Family

Trust to the mother of the petitioner alleging that she had illegally withdrawn an amount of Rs.26,76,299/- from the bank account of the petitioner with the State Bank of India, Savda Branch and that neither the petitioner nor her mother was entitled to the said amount. He submits that the respondent no.1 illegally sought to adjust the said amount of Rs.26,76,299/- from the monthly maintenance of the petitioner. He submits that this act on the part of the respondent no.1 and others would clearly indicate high handedness on their part and in depriving the petitioner to enjoy the estate of her father though even according to the respondent no.1, the petitioner was the sole beneficiary under the said alleged Will and being the only legal heir of the said deceased Mr.Deepak Vasantrao Patil. He submits that since June 2016, the respondent no.1 has not paid any amount to the petitioner out of the estate of her deceased father.

52.Â Learned counsel for the petitioner placed reliance on the judgment of this court in case of Jerbanoo Rustomji Jamasji Garda vs. Pootlamai

Manecksha Mehta and others, ILR 1955 Bom. 821 and more particularly relevant paragraphs at pages 823, 824 in support of the submission that the

probate court must apply its own mind and must satisfy its own conscience that the will or the codicil put forward as the last Will or codicil of the

deceased is his last Will and codicil or not. The court must be satisfied as to the execution of the document, as to the testamentary capacity of the

deceased, and that satisfaction cannot be influenced or affected by any decision given by any civil Court although the issue raised was identical. He

submits that several crucial facts were suppressed by the respondent no.1 in the said testamentary petition and were not brought to the notice of this

court before obtaining an ex-parte grant of Letters of Administration.

53.Â Learned counsel for the petitioner placed reliance on the judgment of

Supreme Court in case of Kasturibai and Ors. vs. Anguri Chaudhary, (2003) 3 SCC 225 and in particular paragraphs 11 to 13, judgment of Supreme Court in case of Ram Chandra Arya vs. Man Singh and another, AIR 1968 SC 954 and in particular paragraphs 1 to 4, judgment of Delhi High Court in case of Oriental Bank of Commerce vs. M.K.Gupta & Co.(P) Ltd. & Ors., (1993) 49 DLT 603 and in particular paragraphs 3, 4, 5, 9, 13 to 17 and judgment of Delhi High Court in case of B.K.Khanna vs. K.N.Khanna & Ors., AIR 1978 Del.48 and more particularly paragraphs 10, 12 to 14 on the issue of appointment of guardian under Order 32 Rule 15 of the Code of Civil Procedure.

54. It is submitted by the learned counsel that since the petitioner had not been served with any citation in the testamentary petition filed by the respondent no.1, though the petitioner was the only legal heir of her deceased father, the petitioner is entitled to seek revocation of such Letters of Administration. It was the false case of the respondent no.1 that the mother of the petitioner never took care of the petitioner though the mother of the petitioner had all throughout taken care of the petitioner. He submits that the alleged knowledge of the mother of the petitioner thus could not be attributed to the petitioner on that ground itself. In support of the submission that the petitioner is entitled to apply for revocation of Letters of Administration, learned counsel for the petitioner placed reliance on the following judgments :-

(a) The judgment of Patna High Court in case of Mt.Ramanandi Kuer vs. Mt.Kalawati Kuer, 1928 PC The Law Weekly Vol.XXVII 728 and in particular pages 785, 787 and 788

(b) The judgment of Calcutta High Court in case of Walter Rebells and another vs. Maria Rebells and others, 1897 SCC OnLine Cal. 110, and in particular page nos. 101, 102, 103 and 105.

(c) The judgment of Madhya Pradesh High Court in case of Banwarilal Shrinivas vs. Kumari Kusum Bai and others, AIR 1973 MP 69 and in particular paragraphs 6, 7, 8, 12 and 16.

55. Learned counsel appearing for the petitioner invited my attention to the paragraph (8) of the affidavit in reply filed by the respondent no.1 in this petition alleging that the mother of the petitioner had knowledge of the respondent no.1 having filed a testamentary petition as far back as on 1st

February, 2012 and thus she ought to have raised an objection of grant of Letters of Administration or appointment as the legal guardian of the

petitioner. It is submitted by the learned counsel that if the mother of the petitioner would have been issued any notice or for appointment of a guardian

under Order 32 Rule 15, she could have definitely taken appropriate steps. The said petition was not even numbered at that time. No objection was

raised by the office for dispensation of the citation by the petitioner.

56. It is submitted that on the one hand, the respondent no.1 has alleged that the mother of the petitioner was only interested in the properties of the

petitioner and on the other hand has imputed alleged knowledge of the mother of the petitioner as knowledge of the petitioner. He invited my attention

to some of the allegations made in the affidavit in reply making serious allegations against the mother of the petitioner. He submits that the fact

remains that the respondent no.1 did not apply for appointment of any legal guardian of the petitioner. If any application would have been made by the

respondent no.1 for seeking appointment of legal guardian, this court would have given notice to the mother of the petitioner.

57. It is submitted that since the respondent no.1 has conflict of interest with the interest of the petitioner as is demonstrated in this petition, the

order of Letters of Administration obtained by the respondent no.1 fraudulently by suppressing various true and correct facts shall be revoked by this

court.

58. Learned counsel for the petitioner invited my attention to Form No.115 under the Bombay High Court (Original Side) Rules which provides for

format of citation and would submit that the said citation is in the nature of the writ of summons and thus was required to be served upon the petitioner

mandatorily. Mere alleged knowledge of filing of the testamentary petition was not sufficient. Learned counsel for the petitioner distinguished the

unreported judgment of this court in case of Adil Phiroz Makhania vs. Dilip Gordhandas Gondalia & Anr., in Misc.Petition No.29 of 2014 dated 29th

April, 2014 and in particular paragraphs 3, 7, 28 to 30 and would submit that the facts before this court in the said judgment were totally different.

There were no allegation of mental retardation of any of the party by the contesting respondents. The said judgment would not assist the case of the

respondent no.1. He submits that the Will has to be proved in the presence of

the party entitled to be served with citation.

59. It is submitted by the learned counsel for the petitioner that the entire testamentary proceedings filed by the respondent no.1 and the defence

raised by the respondent no.1 in this petition filed by the petitioner would clearly indicate that the respondent no.1 has been prosecuting these

proceedings in an adversarial manner and not in the interest of the petitioner. Learned counsel for the petitioner placed reliance on the explanation (a, b

and c) to section 263 of Indian Succession Act, 1925 and would submit that the conditions mentioned in those three provisions clearly are attracted to

the facts of this case and thus the order of Letters of Administration granted in favour of the respondent no.1 deserves to be revoked.

60. Mr.Rajesh Shah, learned counsel for the respondents on the other hand invited my attention to various paragraphs of the testamentary petition

and would submit that it was clearly brought on record by the respondent no.1 in the said testamentary petition that the deceased father of the

petitioner had left a Will and that the petitioner was the only legal heir of the said Mr.Deepak Vasantrao Patil. In the said probate petition, the

respondent no.1 had also given the details of the mother of the petitioner, about her divorce with the father of the petitioner etc. He submits that the

respondent no.1 had obtained a certified copy of the certificate from J.J.Hospital pursuant to an order passed by the City Civil Court, Bombay in

Mental Health Petition. The respondent no.1 had not suppressed any material facts or had committed any fraud upon the court or upon the petitioner

regarding pendency of such petition under Mental Health Act before the City Civil Court, Bombay.

61. It is submitted by the learned counsel that the testamentary petition filed by the respondent no.1 had appeared before this court on 7th

August,2013 under the caption of directions. This court had been shown a copy of the Will left by the deceased father of the petitioner and had

brought relevant facts to the notice of this court. He submits that all the objections raised by the office had been removed by the respondent no.1

before numbering the petition. Several notices are issued by the office in the testamentary proceedings.

62. Learned counsel for the respondents placed reliance on the letter dated 15th September, 2014 from the advocate of the respondents to the

advocate of the petitioner alleging that the respondent no.1 always used to look after the petitioner and not the mother of the petitioner and was fully aware of the mental condition of the petitioner when the said testamentary petition was filed by the respondent no.1. He placed reliance on the report dated 7th October, 1996 issued by K.E.M.Hospital, T.D.H.Rehabilitation Centre, Child Development Centre showing the status of the mental condition of the petitioner as on the date of the said report. He submits that even according to the said report dated 7th October,1996, the petitioner was suffering from mild mental retardation. Â

63.Â Learned counsel placed reliance on the report dated 25th June, 2011 issued by Sir Hurkisonadas Nurrotumdas Hospital & Research Centre when the petitioner was 25 years old. He submits that the said report would also indicate that on the date of the said report, IQ of the petitioner was only at 53 and was suffering from mild mental retardation. He placed reliance on the averments made in the Mental Health Petition No.4 of 2012 filed by the mother of the petitioner before the Bombay City Civil Court and more particularly paragraph (14) thereof alleging that the petitioner was slow learner with an IQ of only 69 which would indicate border line intelligence due to which she was unable to use her cognitive and intelligible faculties to the fullest which a person of normal IQ level does and thus she had been rendered incapable of taking any reasoned, logical and/or responsible decisions and/or managing her affairs independently.

64.Â Learned counsel for the respondents placed reliance on the letter dated 8th July, 2011 from the advocate representing the mother of the petitioner addressed to the respondents alleging that the petitioner was a slow learner and has not been able to learn normal education. The petitioner was unable to look after her own affairs. The mother of the petitioner requested to various details of the accounts and the assets and liabilities left by the deceased father of the petitioner.

65.Â Learned counsel relied upon a copy of the alleged Will of the deceased father of the petitioner annexed to the petition and would submit that even the father of the petitioner during his lifetime had admitted in the said Will that the petitioner was mentally retarded and had accordingly desired creation of a trust for the benefit of the petitioner.

66.Â Learned counsel for the respondents invited my attention to an order in the

Roznama in the Mental Health Petition No.4 of 2012 thereby

referring the petitioner to psychiatric Department of the J.J.Hospital and to submit a report in respect of the IQ of the petitioner and whether the

petitioner was mentally ill. He submits that the petitioner had obtained the said report issued by the Grant Medical College & Sir J.J.Group of

Hospitals, Department of Psychiatry Report by Mental Health Experts dated 26th March,2012 showing that IQ of the petitioner was 58 and was

having mild mental retardation. He relied upon the affidavit in reply filed by the respondent no.1 in the Mental Health Petition on 8th October,2013

opposing the said petition filed by the mother of the petitioner praying that the respondent no.1 be appointed as a guardian of the petitioner and her

properties.

67.Â In paragraphs 18 and 19 of the said affidavit, it was contended by the respondent no.1 that she was appointed as trustee under the said Will and

testament of the deceased Mr.Deepak Vasantrao Patil and the respondent no.1 was fit and proper person to be appointed as a guardian of the

petitioner. He submits that the mother of the petitioner withdrew the said Mental Health Petition before the Bombay City Civil Court.

68.Â Insofar as the judgment of this court in case of Peter John D'souza & Ors. vs.Armstrong Joseph D'souza (supra) relied upon by the petitioner is

concerned, it is submitted by the learned counsel for the respondents that in the facts of that case, this court had held that the testamentary court even

can exercise suo-motu power for revocation of probate or Letters of Administration if it is found that any fraud is committed by the petitioner in the

testamentary petition and in obtaining Letters of Administration fraudulently. He submits that the said judgment would not apply to the facts of this

case.

69.Â Learned counsel for the respondents invited my attention to the certificate dated 3rd January,2014 issued by the District Hospital, Pune

certifying that the mild mental retardation of the petitioner as 50. He submits that it was clearly certified that the said condition was permanent, non-

progressive, not likely to improve. The said certificate was obtained in the proceedings filed at Pune.

70.Â Learned counsel submits that the mother of the petitioner was totally careless which was clear from the police complaint filed by her alleging

that the petitioner was missing on 2nd August,2013 and was brought back by the respondent no.1 and others. He relied upon the notice dated 18th

January,2015 addressed by the mother of the petitioner in response to the public notice dated 9th January,2015 issued by the respondents, raising

various objections to the said public notice and would submit that even in the said notice, the mother of the petitioner had admitted that under the last

Will dated 8th August,2009 of late Mr.Deepak Vasantrao Patil a trust in the name of Deepak Vasantrao Patil Family Trust was constituted. It was

alleged that the said Mrs.Jyoti Deepak Patil was appointed as legal guardian and manager of the petitioner. He submits that even in the said reply

addressed by the mother of the petitioner, it was clearly admitted that the petitioner was mentally challenged child.

71.Â LearnedÂ counselÂ appearingÂ forÂ theÂ respondentsÂ placed reliance on the certificate dated 6th November,2015 issued by various

doctors of District Hospital, Pune rejecting the application for disability certificate in favour of the petitioner. He submits that two of the signatories to

the said certificate were the same who were signatories on the certificate relied upon by the respondent no.1 giving inconsistent certificate. He

submits that the said certificate dated 6th November,2015 relied upon by the petitioner is thus a suspicious document and cannot be relied upon by the

petitioner. He submits that the intervention application filed by the respondent no.1 in the proceedings in Pune court were rejected on the ground that

the petitioner was sane. Learned counsel submits that this court shall pass an order for obtaining a fresh report showing the present mental condition

of the petitioner and the petitioner cannot be allowed to continue to pursue this petition.

72.Â Learned counsel for the respondents placed reliance on section 2(1)(c) of the Indian Succession Act, 1925 which defines 'executor' and would

submit that though the respondent no.1 was referred as trustee in the Will left by the father of the petitioner to look after the petitioner, she was in fact

the executor appointed to administer the estate of the said deceased. Learned counsel for the respondents placed reliance on section 60 of the Indian

Succession Act, 1925 and would submit that when the Will was executed by the father of the petitioner, the petitioner was not a minor. In view of the

petitioner being mentally retarded, the father of the petitioner had appointed the respondent no.1 as a trustee and as testamentary guardian of the

petitioner.

73.Â Learned counsel for the respondents invited my attention to the order dated 7th August, 2013 passed by this court in Testamentary Petition

No.294 of 2012 and would submit that the respondent no.1 had produced various documents for consideration of this court and more particularly to

show that the respondent no.1 had applied for Letters of Administration with the Will annexed and was appointed as a trustee by the deceased

testator under the said Will. The respondent no.1 did not play any fraud upon court. This court after considering the medical certificate produced by

the respondent no.1 had dispensed with the requisition nos.5 and 8 and also consent of the petitioner. This court also considered that the mother of the

petitioner was already divorced with the father of the petitioner.

74.Â Learned counsel for the respondents submits that the issue of citation in a testamentary petition is at the discretion of the court. This court after

hearing the respondent no.1 on 7th August, 2013 had dispensed with the consent of the petitioner rightly. He relied upon the preamble to Indian

Succession Act, 1925 and would submit that only if the caveat would have been filed by the petitioner, the question of applicability of Order 32 Rule 9

would arise. He submits that the respondent no.1 herself had been appointed as a guardian of the petitioner under the said Will left by the father of the

petitioner, there was no need to appoint any other guardian to represent the petitioner.

75.Â It is submitted that the mother of the petitioner was not entitled to be served with any citation, she being not the legal heir of the deceased

testator in lieu of her divorce with the deceased testator. In the proceedings filed by the mother of the petitioner under the provisions of the Mental

Health Act before the Bombay City Civil Court, the respondent no.1 had already brought on record the probate proceedings. The mother of the

petitioner with the leave of the court could have applied for permission for filing a caveat in the testamentary petition filed by the respondent no.1.

Since the mother of the petitioner was already appointed as a guardian of the petitioner in the proceedings at Pune, she could have applied for her

appointment as a legal guardian of the petitioner in the testamentary proceedings or for intervention in the said testamentary petition. Â

76.Â The respondent no.1 was sending money to the mother of the petitioner as

she was appointed as a legal guardian of the petitioner by the Pune Court. All the cheques towards the maintenance were accepted by the mother of the petitioner from the respondent no.1 till May 2016. The mother of the petitioner did not address any letter to the respondent no.1 that the said amount of compensation at the rate of Rs.20,000/- was under protest or without prejudice to her rights and contentions.

77.Â Learned counsel for the respondents placed reliance on the letter dated 18th January,2015 from the advocate of the mother of the petitioner raising objection to the sale of the property by the respondents and other members of the family and would submit that the said notice was issued by the larger HUF of the family for sale of some of the properties. The mother of the petitioner had admitted in the said letter that a trust was already created under the Will executed by the father of the petitioner and that the respondent no.1 was appointed as one of the executrix. Though the mother of the petitioner had raised an objection to the sale of the property, she did not raise any objection that the Will relied upon by the respondent no.1 was not a genuine or valid or that the constitution of the trust was illegal. Â

78.Â Learned counsel for the respondents placed reliance on the letter dated 31st July, 2014 from the advocate of the mother of the petitioner seeking various details in respect of the properties of the said deceased Mr.Deepak Vasant Rao Patil. The mother of the petitioner did not ask any details as to whether the deceased father of the petitioner had left any Will.

79.Â Learned counsel for the respondents placed reliance on the letter 10th October,2015 addressed by the learned advocate on behalf of the mother of the petitioner to the managing trustee of the Deepak Vasant Rao Patil Family Trust alleging that the petitioner would be getting engaged on 25th October,2015 and on such ceremony and on the marriage ceremony a sum of Rs.9,25,000/- will have to be spent. The trust was called upon to pay the said amount which was in the custody of the said trust. He submits that the mother of the petitioner had acted dishonestly by calling upon trust to pay the substantial amount by falsely alleging that the petitioner was going to be married.

80.Â It is submitted that in response to the said letter, the mother of the petitioner was clearly informed by letter dated 18th June, 2016 that she had withdrawn the substantial amount from the bank account of the petitioner which

amount belonged to the trust and till such amount was adjusted

towards maintenance amount, no further amount would be paid to the petitioner.

81.Â It is submitted by the learned counsel that no case is made out by the petitioner for revocation of the grant of Letters of Administration under

section 263 of the Indian Succession Act. There is no defect of any nature whatsoever in the proceedings filed by his client. The Letters of

Administration has been granted in accordance with the provisions of law by this court after having satisfied that the respondent no.1 had complied

with all the requirements and had followed due process of law. He submits that none of the provisions of section 263 of the Indian Succession Act

would apply to the facts of this case.

82.Â It is submitted that in view of section 295 of the Indian Succession Act, 1925 the provisions of Code of Civil Procedure, 1908 will not apply till

caveat is filed. None of the judgments thus relied upon by the petitioner would apply to the facts of this case.

83.Â It is submitted by the learned counsel for the respondents that all the immoveable properties are joint family properties. Not even a single

immoveable property is standing in the name of the father of the petitioner. Though there is no cash available with the respondent no.1, the respondent

no.1 had been paid an amount of Rs.20,000/- towards maintenance of the petitioner for last several years. He submits that if the order granting Letters

of Administration is set aside by this court, the desire of the father of the petitioner for creation of a trust for the benefit of the petitioner would not be

fulfilled. The properties of the estate would be intermingled and thus no willful purpose would be served by revoking grant of Letters of

Administration.

84.Â Dr.Saraf, learned counsel for the petitioner in rejoinder would submit that the petitioner has disputed the existence of the Will. Without prejudice

to this contention, he invited my attention to the schedule of the properties annexed to the testamentary petition and would submit that the deceased

father of the petitioner had left a large number of self acquired properties which are possessed by the respondent no.1 prejudicial to the interest of the

petitioner. If according to the respondent no.1, the share of the petitioner in the immoveable properties or other estate of the deceased father of the

petitioner is minuscule, no prejudice would be caused to the respondent no.1 if

the Letters of Administration granted by this court is revoked. He submits that in the said schedule annexed to the testamentary petition, the respondent no.1 had obviously considered the book value of these properties and not the market value. He submits that the interest of the petitioner and the respondent no.1 is in direct conflict with each other and thus the respondent no.1 could not have represented the petitioner in the testamentary proceedings or the interest of the petitioner independently.

85.Â It is submitted by the learned counsel that there is no provision under the Indian Succession Act or under the Bombay High Court (Original Side) Rules for dispensing with the consent of the order was obtained by the petitioner thereby dispensing with the consent of the petitioner is without authority of law and deserves to be recalled.

86.Â Insofar as reliance placed by the learned counsel under section 283 of the Indian Succession Act is concerned, the said provision provides for power of the District Court and not this court exercising the Original Side jurisdiction.

87.Â Learned counsel for the petitioner placed reliance on the judgment of this court in case of Ganesh Ramchandra Kadam vs. Vijay Chandrakant Kadam, 2017 SCC OnLine Bom. 6417 and in particular paragraph (6) in support of the submission that the personal service of the citation under Rule 399 of the Bombay High Court (Original Side) Rules is mandatory. He submits that only if the citation cannot be served personally under Rule 399 of the Bombay High Court (Original Side) Rules, then the Prothonotary and Senior Master may direct publishing the same in such local newspapers as he deems fit. He submits that in this case, the personal service of citation upon the petitioner was mandatory and possible and thus the same could not be dispensed with.

88.Â Learned counsel for the petitioner placed reliance on the judgment of this court in case of Captain Makhan Lal Barua alias M.L.Barua (deceased) Sunita Barua vs. Miss Mihika Barua and others, 2014(2) Mh.L.J. 194 and in particular paragraphs 9 and 10 in support of the submission that the service of the citation personally is mandatory and if the citation is not served in accordance with the High Court (Original Side)Rules, the Letters of Administration can be revoked by this court.

89.Â Learned counsel placed reliance on section 397(4) and 401 and 402 of the

High Court (Original Side) Rules and would submit that under the said Rule 397(4), the court has power to reduce the period for service of citation in a petition for Letters of Administration or probate. No request for dispensing with the citation can be granted. If a party who is entitled to be served with the citation files an affidavit accepting the case of the petitioner in the petition for Letters of Administration or for grant of probate, he can file such consent affidavit alongwith such proceedings.

90.Â It is submitted by the learned counsel for the petitioner that though the respondent no.1 had disclosed in the testamentary petition that the mother of the petitioner had taken divorce from her husband, no orders relied upon by the respondent no.1 takes cognizance of the fact that the mother of the petitioner is still alive and the petitioner is staying with her mother even today.

91.Â Learned counsel for the petitioner placed reliance on the judgment of Supreme Court in case of Mohd.Akram Ansari vs. Chief Election Officer and others, (2008) 2 SCC 95 and in particular paragraph (14) in support of the submission that there is presumption in law that a judge deals with all the points which have been pressed before him in the arguments and it will be presumed that the party gave up other points, otherwise not dealt with in the order. The order passed by this court on 7th August,2013 does not indicate that the respondent no.1 had pointed out that the mother of the petitioner had filed a petition under the provisions of the Mental Health Act, 1987 before the City Civil Court, Bombay and the said proceedings were pending when the said order dated 7th August,2013 was passed by this court. This court thus could not have taken cognizance of various other medical reports certifying that the petitioner was not suffering from the mental retardation and her IQ was much higher than what is considered in the certificate shown to this court and the order passed by the authorities in various proceedings in the civil court rejecting various applications and the contentions raised by the respondent no.1.

92.Â It is submitted that the respondent no.1 thus suppressed various true and correct facts and various crucial documents and orders while obtaining such order dated 7th August,2013. This court only noticed a certificate brought to the notice of this court on 7th August,2013 and not all the certificates and other documents showing contrary position placed on record. Reliance is placed on the judgment of Supreme Court in case of Central

Bank of India vs. Vrajlal Kapurchand Gandhi and another, (2003) 6 SCC 573 and in particular paragraph (12) in support of the submission that what

was orally transpired in the court cannot be recorded and relied upon. Â

93.Â Learned counsel for the petitioner placed reliance on the judgment of Supreme Court in case of M/s.Jaipur Mineral Development Syndicate,

Jaipur, vs. The Commissioner of Income Tax, New Delhi, (1977) 1 SCC 508 and in particular paragraph (5) in support of the submission that the court

has inherent power to recall the order made in the absence of the party and to dispose of the reference on merits and if the applicants seeking recall

of such order shows that there is sufficient reason for non-appearance by such party. He submits that since the petitioner has demonstrated before

this court that the true and correct facts and the documents were not brought to the notice of this court by the respondent no.1 while obtaining the

order dated 7th August, 2013 causing miscarriage of justice to the petitioner, this court has ample power to recall the said order.

94.Â Insofar as alleged conduct of the mother of the petitioner relied upon by the respondents is concerned, it is submitted by the learned counsel that

those letters exchanged between the learned advocate of the mother of the petitioner and the respondents cannot amount to knowledge of the

petitioner. He submits that in any event on one hand, the respondents have alleged various misconduct on the part of the mother of the petitioner and

at the same time, have attributed the alleged knowledge of the mother of the petitioner as knowledge of the petitioner. He submits that the arguments

advanced by the learned counsel for the respondents are self destructive.

95.Â It is submitted by the learned counsel that if this court comes to the conclusion while setting aside the grant of Letters of Administration that an

appointment of legal guardian to represent the petitioner is necessitated, the court can always pass an appropriate order in that regard. He submits that

if this court comes to the conclusion that the petitioner is required to be referred to the psychiatric even at this stage, the petitioner would have no

objection for such examination.

96.Â Insofar as the submission of the learned counsel for the respondents that there are two conflicting certificates insofar as mental capacity of the

petitioner is concerned, it is submitted by the learned counsel for the petitioner though the respondent no.1 has produced one certificate whereas the

other certificates have certified that the petitioner is an insane person. The civil court has also rendered such finding repeatedly in favour of the petitioner.

97.Â Learned counsel for the petitioner invited my attention to the certificate dated 21st April, 1998 and would submit that the said certificate relied upon by the respondents would also indicate that there appeared to be some emotional interference which has lowered her course, her potential might be better. It was opined that the petitioner required parent counselling and was undergoing a mental trauma because of the divorce of the parents.

98.Â Insofar as definition of the 'executor' under the provision of Indian Succession Act relied upon by the learned counsel for the respondents is concerned, Dr.Saraf, learned counsel for the petitioner submits that it was not the case of the respondent no.1 that the probate petition was filed by her as an executrix. He invited my attention to paragraph (9) of the testamentary petition and would submit that it was clearly mentioned therein that the said petition was filed by the respondent no.1 in her capacity as a trustee.

REASONS AND CONCLUSIONS :-

98.Â This Court shall first decide whether service of citations upon heir and next-of-kin was mandatory or directory under Rule 397 read with Rule 399 of the Bombay High Court (Original Side) Rules, 1980 and if the same is mandatory and if such citation is not served, what is the consequences thereof. This Court shall also decide the issue raised by the petitioner whether consent of such heir and next-of-kin could be at all be dispensed with by the Court or not.

99.Â It is not in dispute that the petitioner was the only legal heir and representative of the deceased Mr.Deepak Vasantrao Patil who expired on 26th May 2011. The respondent no.1 has admitted in paragraph 9 of the Testamentary Petition (294 of 2012) filed by her that save and except the petitioner, the said deceased had left no other legal heir or son or daughter at the time of his death. Admittedly the petitioner is the Class I heir and legal representative of the said deceased.

100.Â A perusal of the testamentary petition filed by the respondent no.1 on 25th January 2012 indicates that the respondent no.1 had initially prayed for Letters of Administration with Will dated 8th August 2009 annexed. The respondent no.1 had filed the said Testamentary Petition No.294 of 2012

initially as the sister of the said deceased Mr. Deepak Vasantrao Patil. The respondent no.1 had thereafter carried out the amendment and had

introduced herself as main trustee of the sole beneficiary under the said alleged Will dated 8th August 2009. The respondent no.1 thereafter amended

the said petition and claimed to be an executrix appointed according to the tenor of the said alleged Will.

The second amendment was carried out on 13th March 2014.

101. A perusal of the record further indicates that the office of the Prothonotary and Senior Master of this Court raised various objections in the

said testamentary petition. One of the objections raised by the office was that the respondent no.1 (original petitioner) in the said testamentary petition

shall write her capacity correctly in title and in paragraph 5. Another objection in paragraph 8 was calling upon the respondent no.1 as to explain how

the sister of the deceased could file a petition when the daughter of the said deceased was alive. The said testamentary petition was placed on board

for directions in view of the praecipe filed by the learned Advocate representing the respondent no.1.

102. On 14th December 2012, the respondent no.1 filed a praecipe. In the said praecipe, it was alleged by the respondent no.1 that the petitioner

was mentally retarded and not able to take care of herself and her properties. The respondent no.1 was the main trustee named under the alleged

last Will of the said deceased. The deceased had full faith on the respondent no.1 as she was taking care of the said mentally retarded daughter of the

deceased and so in that capacity, the said testamentary petition was filed by her. Office of the Prothonotary and Senior Master however raised an

objection as to explain the capacity of the respondent no.1 to file the said testamentary petition. The respondent no.1 accordingly prayed that she shall

be allowed to proceed with the testamentary petition and allowed to amend and convert the said petition into Letters of Administration with Will

annexed and for limited grant for the use and benefit of the mentally retarded as per Section 246 of the Indian Succession Act, 1925.

103. The testamentary petition thereafter appeared before this Court for directions on 7th August 2013 on the praecipe filed by the respondent no.1

for dispensing with the requisition nos. 5 and 8 raised by the office of the Prothonotary and Senior Master. Learned counsel appearing for the

respondent no.1 invited the attention of this Court to the Certificate dated 26th March 2012 issued by Grant Medical College and Sir J.J. Group of

Hospitals certifying that the petitioner is having Mild Mental Retardation with IQ -58. The respondent no.1 invited the attention of the Court to the

copy of the alleged Will dated 8th August 2009 left by the father of the petitioner and also disclosed that the respondent no.1 was the sister of the said

deceased. It was disclosed in the said petition that the deceased died leaving behind the petitioner who is the daughter and the only heir and

representative of the said deceased. Based on these documents, the learned counsel for the respondents made a submission that the petitioner was not

in a position to give consent in these proceedings.

104.Â The respondent no.1 also relied upon few clauses of the alleged Will annexed to the petition to demonstrate that the said deceased had directed

to set up a trust for benefit of the petitioner. The respondent no.1 claims to be the trustee under the said Will. This Court accordingly observed that

since there was no other legal heir according to the learned counsel for the respondents herein and she being one of the trustee under the said alleged

Will had locus to file the said Testamentary Petition No.294 of 2012. The requisition Nos.5 and 8 dated 9th November 2012 were accordingly

dispensed with. It was also ordered that the consent of the petitioner was also dispensed with. Learned counsel did not bring to the notice of this Court

there was no provision in the Indian Succession Act, 1925 or in the Bombay High Court (Original Side) Rules, 1980 empowering Court to dispense

with the consent of the heir and next-of-kin for service of citation.

105.Â It is thus clear that on the basis of the Certificate dated 26th March 2012 issued by Grant Medical College and Sir J.J. Group of

Hospitals certifying that the petitioner is having Mild Mental Retardation with IQ -58, this Court had dispensed with the requisition nos.5 and 8 issued

by the office on 9th November 2012 i.e. Requisition No.5 â?" â??Write capacity of the petitioner correctly in title and in paragraph 5â? and

Requisition No.8 â??Explain how sister of deceased can file a petition when the daughter is alive.â? There was no prayer in any of the praecipe filed

by the respondent no.1 for dispensing with the consent of the petitioner. Testamentary petition was admittedly filed on 25th January 2012.

106.Â Rule 397 of the Bombay High Court (Original Side) Rules, 1980 provides

for issuance of notice of that application for probate, letters of administration and succession certificate to all the heirs and next-of-kin of the deceased mentioned in the petition except to those whose consent has been filed in the proceedings. The citation shall be affixed on some conspicuous part of the Court house and also in the office of the Collector of Bombay. Rule 397 (4) clearly provides that no grant of probate, letters of administration or succession certificate shall be made until after the expiry of fourteen clear days from the date of the service of the citation or notice, and from the publication thereof in newspapers, if any, and from the affixing thereof on the Court house and in the Collector's Office, as the case may be, unless the Judge in Chambers otherwise directs.

107.Â Rule 399 provides that citations shall be served personally when possible. Personal service shall be effected by leaving a true copy of the citation with the party cited and taking his acknowledgment on the original. Rule 400 provides that the citations which cannot be personally served as required by the Rule 399 shall be served by publishing the same in such local newspapers as the Prothonotary and Senior Master may direct. Rule 401 provides for filing of the caveat by any person intending to oppose the grant of probate or letter of administration making service of fourteen days from the service of the citation upon him or within such shorter time as the Judge in Chambers may direct in Form No.116. The said caveator has to file an affidavit-in-support within eight days from the date of filing of the caveat under Rule 402.

108.Â If such caveat and affidavit in-support are filed within the time and in the manner prescribed in the aforesaid Rules, the petition shall be numbered as a suit under Rule 403 in which the petitioner shall be the plaintiff and the caveator shall be the defendant. The procedure in such suit shall be according to the procedure applicable to civil suits on the Original Side of the Court.

109.Â A perusal of the Bombay High Court (Original Side) Rules, 1980 and more particularly Chapter XXVI which deals with the Rules relating to the proceedings under the Testamentary and Intestate proceedings does not indicate any provision for dispensing with the consent of any heir and next-of-kin who is entitled to be served with citation.Â Under Rule 397, the notice of application is mandatory to be

issued upon all the heirs and next-of-kin of the deceased mentioned in the petition except those whose consent has been filed

in the proceedings. In this case, the petitioner who was the only heir and next-of-kin of the said deceased Mr. Deepak Vasantrao Patil had

admittedly not filed any consent affidavit in favour of the respondent no.1 (original petitioner) giving her consent for waiver of citation or for grant of

Letters of Administration or probate in favour of the respondent no.1.

110. This Court in the case of Captain Makhan Lal Barua alia M.L. Barua (deceased) Sunita Barua (supra) has dealt with Rules 397, 399, 401

and 402 of the Bombay High Court (Original Side) Rules, 1980 read with Section 148A of the Code of Civil Procedure, 1908 and has held that all

the heirs or next-of-kin of the deceased mentioned in the petition have to be served with the notice as prescribed under Rule 397 of the

Rules. Citation has to be served upon such heirs and next-of-kin mentioned in the petition personally when possible. This Court has held that since the

citation had not been served upon the heirs and next-of-kin mentioned in the petition, time to file caveat under Rule 401 did not commence.

111. This Court in the case of Ganesh Ramchandra Kadam Vs. Vijay Chandrakant Kadam (supra) has held that personal service of citation upon a

party under Rules 399 and 400 of the Bombay High Court (Original Side) Rules, 1980 is mandatory. Only if the citation cannot be served personally

under Rule 399, then the Prothonotary and Senior Master may direct publishing the same in such local newspapers as he deems fit. This Court has

accordingly held that the respondent has in effect misled the Court by playing fraud on the Court and obtained the Letters of Administration. This

Court has accordingly in the said judgment revoked the Letters of Administration granted in favour of the original petitioner. In my view the principles

laid down by this Court in the case of Captain Makhan Lal Barua alia M.L. Barua (deceased) Sunita Barua (supra) and in the case of Ganesh

Ramchandra Kadam Vs. Vijay Chandrakant Kadam (supra) clearly apply to the facts of this case. I am respectfully bound by the said judgments.

112. The Privy Council in the case of Ramanandi Kuer Vs. Kalawati Kuer (supra) has held that if the citations were properly and effectively not

served on the party who was entitled to be served with such citation, such party was entitled to seek recall of grant of probate issued in her absence

and to call upon the alleged executor to prove the alleged Will in her presence. In my view, the principles of law laid down by the Privy Council in the case of Ramanandi Kuer Vs. Kalawati Kuer (supra) squarely apply to the facts of this case. I am respectfully in agreement with the views expressed by the Privy Council in the said judgment. In this case also, citation was admittedly not served on the petitioner though she was admittedly a heir and next-of-kin of the said deceased.

113.Â Calcutta High Court in the case of Walter Rebells and Anr. Vs. Maria Rebells & Ors. (supra) has considered a situation where the minors,

legal heirs and next-of-kin were not served with citation. The executor had contended that he was acting as their quasi guardian of those minors and

had taken care of their interests. Calcutta High Court held that if a WillÂ had affected the interestÂ of a minor and if the probate was issued without

the infant being cited, when he attained majority, he was entitled to require the executor to prove the Will in his presence. The absence of a citation

would be just cause within the meaning of Section 234 of the Indian Succession Act for revoking the probate.

114.Â Calcutta High Court held that such probate should not be granted behind the back of the party who is entitled to be served the citation or notice

or without having an opportunity of contesting its validity. Calcutta High Court held that it may be that on the materials placed before the Court which

granted probate at the time when the application for the probate for the probate was made, the Court did not see any sufficient reason for issuing

citations on particular reasons and yet it may be that upon fuller materials the Court finds reason to think that the applicant for revocation was a party

who ought to have been cited, the Court has ample power to revoke such probate. Calcutta High Court has also considered the fact that those minors

had been living under the guardianship of one of the executors who was the applicant for probate and so it was clearly necessary that the minors

should have represented in the probate proceedings by some one appointed as guardian ad litem whose interests were not adverse, as those of the

applicant for probateÂ were to the interests of the minors. Calcutta High Court ultimately held thatÂ in these circumstances, unlessÂ the proper

guardian ad litem has beenÂ appointedÂ on behalf of such minors, probate could not have beenÂ granted without effecting the service upon Â such

guardian ad litem. A perusal of the record clearly indicates that the interest of the respondents was ex facie adverse to the interest of the

petitioner and that the respondent no.1 has acted all throughout adverse to the interest of the petitioner.

115. In the facts of this case, it was the case of the respondent no.1 herself that the respondent no.1 was mentally retarded and was unable to give

consent to the grant of probate and was staying with her mother. In these circumstances, the respondent no.1 could have made an application before

this Court for appointment of a guardian ad litem in respect of the petitioner to represent her case. The principles of law laid down by the Calcutta

High Court in the case of Walter Rebells and Anr. Vs. Maria Rebells & Ors. (supra) squarely apply to the facts of this case.

116. On the basis of a Medical Certificate relied upon by the respondent no.1 and in view of this Court not having been informed about the other

documents and orders passed by various Courts regarding the appointment of guardian or demonstrating that the petitioner was not mentally retarded,

this Court dispensed with the requisition nos.5 and 8 issued by the office of the Prothonotary and Senior Master and dispensed with the consent of

the petitioner. This Court has thus ample power to revoke such grant of probate granted by this Court in view of the respondent no.1 suppressing the

true and correct facts and the documents from this Court while obtaining such dispensation with the consent of the petitioner and while dispensation

with the requisitions issued by the office of the Prothonotary and Senior Master. I am in respectful agreement with the views expressed by the

Calcutta High Court in the case of Walter Rebells and Anr. Vs. Maria Rebells & Ors. (supra) which squarely apply to the facts of this case.

117. Madhya Pradesh High Court in the case of Banwarilal Shriniwas (supra) has held that any interest, however slight and even the bare

possibility of an interest was sufficient to entitle a party to oppose a testamentary document. In the absence of such citation, the Letters of

Administration with Will annexed which was granted was revoked with a direction that the proceedings for such grant be revived and the Will be

proved in the presence of the appellant who was not served with citation. The principles of law laid down by the Madhya Pradesh High Court in the

case of Banwarilal Shriniwas (supra) squarely apply to the facts of this case. I am in respectful agreement with the views expressed by the Madhya

Pradesh High Court in the said judgment.

118.Â In view of the petitioner being the only legal heir and representative of the deceased Mr. Deepak Vasantrao Patil was thus entitled to be served

with citation of the application filed by the respondent no.1 for Letters of Administration or for probate under Rule 397Â read with Rule 399

personally. Neither the petitioner had given any consent for waiver of such citation nor consent for grant of Letters of Administration or probate in

favour of the respondent no.1. Since the respondent no.1 did not serve the citation upon the petitioner in the said testamentary petition in the mode and

the manner prescribed under Rules 397Â to 399 of the Bombay High Court (Original Side) Rules, 1980 or otherwise, the grant of probate issued in

favour of the respondent no.1 deserves to be set aside on this ground alone. The respondent no.1 could not have obtained grant of probate without

effecting the service of citation upon the petitioner and without proving the alleged Will executed by the father of the petitioner in presence of the

petitioner or at most in absence of a guardian ad litem which could be appointed by this Court on an appropriate application if would have been made

by the respondent no.1 in view of the interest of the petitioner.

119.Â In my view, even otherwise there is no provision in the Bombay High Court (Original Side) Rules, 1980 or in the Indian Succession Act, 1925

for dispensation with the consent of the heirs and representative for service of the citation. Since order passed by this Court being a procedural order

and came to be passed in view of suppression of various true and correct facts and relevant documents even on the subsequent stages of the

proceedings on the part of the respondent no.1 and the respondent no.1 having committed fraud upon the petitioner and this Court, in my view, this

Court has ample power to recall such procedural order on these grounds.

120.Â This Court shall now consider the issue as to whether the respondent no.1 was even otherwise entitled to apply for dispensation with the

requisition nos.5 and 8 issued by the office of the Prothonotary and Senior Master and also for dispensation with the consent of the petitioner on the

ground that the petitioner was allegedly mentally retarded and was incapable of giving consent for grant of probate or Letters of Administration, as the

case may be and whether such case was made out by the respondent no.1 while obtaining the said order dated 7th August 2013 from this Court.

121.Â The entire premise of the respondent no.1 obtaining the said order dated 7th August 2013 from this Court was that in the Will allegedly

executed by the father of the petitioner, father of the petitioner had also disclosed that the petitioner was mentally retarded and based on the said

allegation, father of the petition had directed creation of a trust for benefit and protection of the petitioner. The respondent no.1 had produced before

this Court a copy of a Certificate dated 26th March 2012 issued by Grant Medical College and Sir J.J. Group of Hospitals certifying that the petitioner

is having Mild Mental Retardation with IQ-58.

122.Â A perusal of the alleged Will allegedly executed by the father of the petitioner indicates that it was mentioned in the said alleged Will that the

school education of the petitioner was not much satisfactory and that she was a slow learner. Father of the petitioner was very much worried about

her future and thus directed to form a trust to protect her interest. Under the said alleged Will, father of the petitioner had appointed the respondent

no.1 as a main trustee. It was further stated that the respondent no.1 only had looked after her and understood the feelings and needs of the petitioner.

It was further provided that those three persons including the respondent no.1 shall protect the interest of the petitioner in every manner and shall get

her married at proper time and to incur expenses for her marriage from the income received from the property of the said deceased or from the

amount received by selling the property.

123.Â It is thus clear beyond reasonable doubt that even in the said alleged Will, it was not the statement of the father of the petitioner that the

petitioner was mentally retarded as sought to be canvassed by the respondent no.1 before this Court. In my view, even if a student is a slow learner or

his school education is not much satisfactory, such person cannot be declared as mentally retarded on such ground. The petitioner has brought on

record that due to ill effect of divorce of the mother of the petitioner with her father and tensed atmosphere caused by the divorce of the parents of

the petitioner, it affected academic life of the petitioner and thus she was weak and lagged behind in her academic pursuits. For some time, the

petitioner had a low intelligence quotient (IQ). The petitioner was admitted in special school. The respondents have not disputed the case of the

petitioner that she was in full time employment of the two Educational

Institutions.

124.Â A perusal of the record indicates that the mother of the petitioner had filed a Mental Health Petition bearing No.4 of 2012 in the City Civil

Court at Bombay. In the said petition, the respondent no.1 herein had filed an intervention application. The respondent no.1 was allowed to intervene in

the said proceedings. The then learned Principal Judge of the City Civil Court asked questions to the petitioner. The petitioner stated that she was 25

years old and had left her studies after failing in 10th Standard. She was residing with her father after divorce of her parents. She informed that her

father expired in May 2011 and since then she is residing with her aunt who is a divorcee. The then learned Principal Judge of the City Civil Court

referred the matter to the Psychiatric Department of J.J. Hospital and directed the concerned doctor to report the I.Q. of the petitioner and whether

the petitioner is mentally ill. The mother of the petitioner had attended the said proceedings all throughout.

125.Â On 26th March 2012, after conducting the I.Q. test of the petitioner by the Medical College and Sir JJ group of hospitals, the said hospital

issued a Certificate setting out an analysis of psychiatric report of the petitioner. In the said certificate, it was stated that during mental status

examination, the petitioner was found to be conscious, cooperative, communicative, mood/euthymic affect-appropriate, speech/thought continues,

coherent, relevant no delusion or hallucination, memory intact, intelligence subnormal, judgment intact as well as insight present. The said certificate

indicated that there was an impression that she might have had mild mental retardation. In my view, the said certificate does not conclusively prove

that the petitioner was incapacitated to look after her personal affairs as well as estate of the deceased father. The petitioner had responded to all the

questions asked by the then learned Principal Judge, Bombay City Civil Court properly. The petitioner thereafter shifted her residence to the house of

her mother in Pune and continues to live there till today.

126.Â In the said Mental Health Petition filed by the mother of the petitioner, it appears that the then learned Principal Judge had recorded the

submission made by the respondent no.1 that deceased father of the petitioner had executed a Will and had appointed the respondent no.1 as a main

trustee and his brothers as trustees and formed a Trust for the benefit of the

petitioner. The respondent no.1 had applied for Letters of Administration in this Court. By an order dated 10th July 2013, the then learned Principal Judge of the Bombay City Civil Court allowed the application for intervention filed by the respondent no.1.

127.Â A perusal of the record further indicates that it is the case of the petitioner that during the period between 1st March 2012 and 30th November

2014, the petitioner was working with the Indira National School run by Shri Chanakya Education Society. She also was in full time employment of

Rizvi College of Management at Bandra. The respondents have not disputed this case of the petitioner.

128.Â A perusal of the Certificate dated 6th November 2015 issued by the Government of Maharashtra clearly indicates that it was not possible to

issue a disability certificate in favour of the petitioner and certifying that B.K.T. Test was administered upon her which indicated that IQ report was

72.92. There was a borderline intellectual functioning. The application filed by the mother of the petitioner for issuance of such disability certificate

was rejected on 6th November 2015.

129.Â A perusal of the record further indicates that the mother of the petitioner had filed an application (No.01 of 2014) for appropriate reliefs before

the Local Stage Committee of Pune through its President/ District Collector under the provisions of the Act of 1999. In the said application, Local

Stage Committee had appointed Smt.Jyoti Deepak Patil i.e. the mother of the petitioner by an order dated 13th February 2014 as a legal guardian of

the petitioner herein. The respondent no.1 had filed an application raising an objection to the said order dated 13th February 2014. The Local Stage

Committee passed an order dated 11th December 2015 after considering various facts and after taking interview of the petitioner and found that the

petitioner was normal. Her intellectual was 72.92 and Borderline Intellectual was functioning. The Local Stage Committee also considered the

Intellectual testing of the petitioner carried out at General Hospital, Aundh, Pune. The said General Hospital, Aundh, Pune had rejected the application

for disability certificate for the petitioner. The Local Stage Committee also recorded the statement made by the petitioner that she wanted to live with

her mother i.e.Smt.Jyoti Deepak Patil and hence all the responsibilities of the petitioner were handed over to the said Smt.Jyoti Deepak Patil.

Admittedly the said order was passed by the Local Stage Committee has not been challenged by the respondent no.1 in any of the proceedings.

130.Â A perusal of the record indicates that the learned Joint Civil Judge, Junior Division, Raver had rejected the application filed by the respondent

no.1 by an order dated 3rd May,2016 below Ex.6 in Regular Civil Suit No.37 of 2016 which suit was filed by the respondent no.1 against the petitioner

seeking injunction for transfer of her bank account from the State Bank of India, Branch Savda to State Bank of India, Branch Pune. By the said

order, the learned Civil Judge while rejecting the application filed by the respondent no.1 perused the medical reports of the petitioner issued by the

Medical Board, Government of Maharashtra and rendered a finding that the petitioner was not a dumb and her intelligent quotient was 73%. The said

authority had refused to grant a disability certificate in favour of the petitioner.

131.Â The learned Civil Judge, Junior Division held that the very basic ground for creating a trust to manage the properties had been the low

intelligent quotient of the petitioner, otherwise the entire properties had been bequeathed in favour of the petitioner. It is held that the petitioner was a

normal person having an intelligent quotient of 73% as declared by the competent Government authority and she could manage her own properties left

by her father. It is held that though the creation of the trust was to manage the properties as visualized by the father of the petitioner, because of her

low intelligent quotient at the time when such Will was allegedly executed, the petitioner was incapable of taking her own decision. However, now the

situation has changed. She has enough intelligent quotient to take her decisions weighing the pros and cons thereof. It is held that the creation of the

trust would not be a obstacle for the petitioner to take the charge of the properties. It is held that the petitioner being a major and sound mind person, is

entitled to operate disputed bank account as it stands in her name and the amount therein belongs to her.

132.Â It is not in dispute that the said order passed by the learned Joint Civil Judge, Junior Division, Raver against the respondent no.1 has not been

challenged by the respondent no.1 in any appropriate court of law. In my view, in view of the several such findings in favour of the petitioner and

against the respondent no.1 about the alleged mental retardation of the petitioner rejected the allegations of the mental retardation canvassed by the

respondent no.1, the orders passed by this court granting probate in favour of the respondent no.1 and also dispensing with the consent of the

petitioner from service of the citation deserve to be set aside.

133.Â InsofarÂ asÂ submissionÂ ofÂ theÂ learnedÂ counselÂ forÂ the respondent no.1 that the subsequent certificates relied upon by the

petitioner was signed by the two doctors out of three doctors who had issued earlier certificate certifying that the intelligent quotient of the petitioner

was low, the second certificate could not have relied upon being suspicious is concerned, Dr.Saraf, learned counsel for the petitioner is right in his

submission that if the argument of the respondent no.1 is accepted, the first certificate relied upon by the respondent no.1 could be suspicious being

contrary to several certificates and the orders passed in various proceedings. Be that as it may, the order passed by this court on 7th August,2013

dispensing with the consent of the petitioner was based on the certificate dated 26th March,2012 and not on the basis of several other crucial and

important facts and documents referred in this judgment. This court is thus empowered to recall the earlier order passed by this court in view of this

situation and more particularly when the subsequent events brought on record by the petitioner would indicate that the earlier order passed by this

court was passed in view of the respondent no.1 suppressing all the true and correct facts on record when the said procedural order was passed by

this court dispensing with the requisition nos.5 and 8 and also the consent of the petitioner.

134.Â During the pendency of this petition, after due notice to both the parties this court had interacted with the petitioner in Chamber in presence of

the Associate of this court on 8th January,2018 and had asked several questions about her past, whether she had instructed her advocate to draft the

present petition and other pleadings filed by her and whether she knew the nature of the proceedings filed by her advocate. This court noticed that the

petitioner was able to understand the questions raised by this court and gave all the answers clearly, properly, promptly and without any hesitation. She

also confirmed that she had instructed her advocate to file this petition.

135.Â In my view, there is thus no substance in the submission of the learned counsel for the respondent no.1 that the intelligent quotient of the

petitioner was low or that she was unable to take any decision, to take care of

herself or the properties of the estate of her deceased father. In my view, there is thus no necessity to refer the case of the petitioner again to any medical authority and to submit any report regarding her present status of her state of mind or to verify whether the petitioner is suffering from any mental retardation today. Various authorities including the Civil Court has already rendered several findings in favour of the petitioner certifying that the petitioner being a normal person and is capable of handling her affairs and can control and manage the properties. It is not in dispute that the petitioner has been operating her bank account.

136.Â This court is thus of the view that the petitioner being a normal person and is capable of understanding and not suffering from any mental

retardation as sought to be canvassed by the respondent no.1, was entitled to be served with a citation under rule 397 of the Bombay High Court

(Original Side) Rules and admittedly not having been served with the citation, the entire order of granting of probate in favour of the respondent no.1

without effecting service of citation upon the petitioner thus deserves to be set aside on that ground also.

137.Â A perusal of the testamentary petition filed by the respondent no.1 clearly indicates that initially the respondent no.1 had filed the said petition

being no.294 of 2012 in her capacity as sister of the deceased late Shri Deepak Vasantrao Patil. In view of the objections raised by the office of the

Prothonotary and Senior Master, the respondent no.1 deleted various portion of the testamentary petition and substituted the words 'being sister of the

deceased' by the words 'being the main trustee of the sole beneficiary trust under the Will of the trust'. The respondent no.1 again amended the said

testamentary petition and the sentence 'main trustee of the sole beneficiary trust under the Will' was substituted by the second amendment 'being

executrix appointed on tenor'. The respondent no.1 also converted the petition for Letters of Administration with the Will annexed to the petition into

probate of the last Will and Testament of the property and credit of late Deepak V. Patil'.

138.Â During the course of the arguments, Mr.Shah, learned counsel for the respondent no.1 vehemently urged that though in the alleged Will, the

respondent no.1 was not appointed as an executrix of the Will, in fact she was executrix and was playing the role of the executrix all throughout. In

my view, this submission of the learned counsel for the respondent no.1 is totally untenable. The court has to examine the Will and find out whether

the respondent no.1 was appointed as a executrix of the Will or not and cannot allow the party to act as executrix on the basis of her conduct or

behaviour to determine whether she could file a petition for grant of probate. The respondent no.1 had improved her case by carrying out two

amendments so as to bring her case within the parameters of the provisions of Indian Succession Act, 1925.

139.Â However under section 222 of the Indian Succession Act, 1925, the probate shall be granted only to the executor appointed by the Will. The

appointment may be expressed by or by necessary implication. Mr.Shah, learned counsel for the respondent no.1 could not point out any such

provision in any alleged Will appointing her client as executrix under the said alleged Will. In my view, if the respondent no.1 would have served

citation upon the petitioner, the petitioner could have raised all such objections in the Testamentary Petition No.294 of 2012 at the relevant time. In my

view, since the respondent no.1 was not appointed as an executrix under the said alleged Will left by the father of the petitioner, this court could not

have granted probate in favour of the respondent no.1 in view of the clear mandate of section 222 of the Indian Succession Act, 1925, to grant probate

in favour of an executrix appointed under a Will. Grant of probate in favour of the respondent no.1 deserves to be revoked on this ground alone. The

respondent no.1 did not fall within the definition of 'Executor' under section 2(1) (c) of the Indian Succession Act, 1925.

140.Â During the course of the arguments, Mr.Shah, learned counsel for the respondent no.1 invited my attention to various correspondence

exchanged between the mother of the petitioner and the respondent no.1 through her advocate and also to various pleadings filed by the mother of the

petitioner in various proceedings in support of his submission that the mother of the petitioner was fully aware of the Testamentary Petition No.294 of

2012 filed by the respondent no.1 seeking Letters of Administration with Will annexed and/or thereafter for grant of probate of the alleged Will of the

deceased father of the petitioner. He also urged that she herself could have applied for permission for filing caveat in the testamentary petition or

could have applied for her appointment as guardian ad-litem of the petitioner. It was also vehemently canvassed by the learned counsel for the

respondent no.1 that the mother of the petitioner had herself admitted in some of the correspondence that the father of the petitioner had left the Will

and had created a trust for the benefit of the petitioner and that the mother of the petitioner had also demanded a substantial amount from the said

trust on account of the proposed engagement and and the marriage ceremonies of the petitioner.

141.Â In my view, there is no substance in this submission of the learned counsel for the respondent no.1. On one hand, the respondent no.1 had

alleged various misconduct on the part of the mother of the petitioner and on the other hand has attributed the knowledge of the petitioner through her

mother about the pendency of the testamentary petition filed by the respondent no.1. The submission of the learned counsel is self destructive. The

petitioner being a normal person was entitled to be served with a citation and the alleged knowledge of the mother of the petitioner, if any, about the

pendency of the testamentary petition filed by the respondent no.1 could not be construed as knowledge of the petitioner. In my view, service of the

citation on that ground could not have been considered as waived or dispensed with. The respondent no.1 has admittedly not served the citation upon

the petitioner and has obtained the order of dispensing with the consent of the petitioner fraudulently and thereafter the grant of probate from this

court based on such suppression of material facts and documents. The judgment of Patna High Court in case of Mt.Ramanandi Kuer (supra), the

judgment of Madhya Pradesh High Court in case of Banwarilal Shrinivas (supra) relied upon by Dr.Saraf, learned counsel for the petitioner would

clearly apply to the facts of this case. I am in agreement with the views expressed by those courts.

142.Â In my view, even if for the sake of argument, it is accepted that the petitioner was not in a position to give her consent in view of her alleged

mental retardation for grant of probate or was not in a position to oppose the grant of probate, the question that arises for consideration of this Court is

whether the respondent no.1 ought to have applied for appointment of guardian ad-litem on behalf of the petitioner under the provisions of Order

XXXII Rules 1 to 14 of the Code of Civil Procedure, 1908 or not. The respondents did not apply for appointment of guardian under Sections 53 and 54

of the Mental Health Act, 1987.

143. It was the case of the respondent no.1 herself in the testamentary petition that the petitioner was suffering from mental retardation and was mentally challenged and thus was not in a position to give consent either to waive citation or to give consent for grant of probate and could not have filed caveat. In such a situation, the respondent no.1 at the first instance, ought to have applied for appointment of guardian ad-litem on behalf of the petitioner to represent her case and the respondent no.1 on her own could not have applied for dispensation with the consent of the petitioner which consent even otherwise would not have been granted by this Court for want of provisions under the provisions of Indian Succession Act, 1925 or Bombay High Court (Original Side) Rules, 1980.

144. The respondent no.1 was fully aware that in another proceedings filed at Pune, the mother of the petitioner was already appointed as a guardian ad-litem on behalf of the petitioner. The respondent no.1 was fully aware that the mother of the petitioner was alive and that the petitioner was staying with her. In these circumstances, the respondent no.1 ought to have brought this fact to the notice of this Court while seeking dispensation with the consent relying upon a Certificate issued by the Grant Medical College and Sir J.J. Group of Hospitals certifying that the petitioner is having Mild Mental Retardation with IQ -58. In my view, the respondent no.1 ought to have invoked the relevant provisions under Order XXXII Rules 1 to 14 of the Code of Civil Procedure, 1908. Upon such application for appointment of guardian ad-litem on behalf of the petitioner, if the Court would have been convinced that such appointment was necessary in view of the alleged mental retardation of the petitioner, such guardian ad-litem could have been served with citation and other proceedings to enable the guardian ad-litem to decide whether to file caveat and affidavit in support thereof in the said proceedings or not considering the interest of the petitioner and if necessary, after obtaining further directions from this Court.

145. A perusal of the record further indicates that the conduct of the respondent no.1 in suppressing various true and correct facts and obtaining order of dispensation of the consent without provisions of law and thereafter obtaining grant of probate ex parte without effecting the service of citation upon the petitioner though she is the only legal heir and next-of-kin of

the deceased Mr. Deepak Vasantrao Patil is ex facie fraudulent and without following the provisions of law. In my view, Dr. Saraf, learned counsel appearing for the petitioner is right in his submission that since the petitioner was staying with her mother and she was already appointed as guardian ad litem to represent the petitioner in the proceedings before the Court at Pune, if the application would have been made by the respondent no.1 for appointment of guardian ad litem, this Court could have appointed the mother of the petitioner as guardian ad litem and to oppose the said testamentary petition filed by the respondent no.1. The respondent no.1 has not disputed before this Court that the petitioner has been staying with her mother and had filed various proceedings. The entire proceedings initiated by the respondent no.1 culminating into an ex parte grant of probate in favour of the respondent no.1 by this Court are thus contrary to the provisions of law referred to the aforesaid and on that ground also, the said grant of probate deserves to be revoked by this Court. There is no merit in the submission of the learned counsel for the respondents that the respondent no.1 was already appointed as a guardian in the alleged Will and thus there was no need to appoint a guardian on that ground.

146.Â In so far as the submission of the learned counsel for the respondents that the mother of the petitioner had demanded substantial amount from the trust constituted under the said alleged Will on the ground of alleged engagement of the petitioner and thereafter proposed marriage and thus she was not acting in the interest of the petitioner is concerned, a perusal of the alleged Will also indicates that even father of the petitioner had visualized under the said alleged Will that at some point of time, the petitioner would be getting married and had made a provision for expenses for such marriage of the petitioner under the said alleged Will. The respondent no.1 had already stopped paying even meagre sum of Rs.20,000/- paid towards maintenance charges of the petitioner on the ground that the petitioner had withdrawn substantial amount from her bank account without consent of the respondent no.1. The petitioner was thus maintained by her mother.

147.Â On the other hand, the respondent no.1 had not at all acted in the interest of the petitioner since inception and had acted contrary to the interest of the petitioner as a rival opponent in an adversarial manner. By suppressing various true and correct facts, the respondent no.1 had obtained an

order of dispensation of the consent and thereafter also obtained a grant of probate. In my view, since the petitioner was able to maintain her affairs

and was in a position to manage the properties, the respondent no.1 could not have deprived the petitioner of such properties and estate of the

deceased father of the petitioner though she was the only heir and next-of-kin of her father whether under the said alleged Will or on intestacy.

148.Â A perusal of the schedule appended to the testamentary petition clearly indicates that father of the petitioner had left large number of

properties which are under control of the respondent no.1. Though the learned Civil Judge, Junior Division, Pune had recorded various findings of facts

in favour of the petitioner that she was not insane and was able to manage her affairs and to operate the said bank account, the respondent no.1

though did not challenge the said order passed by the learned Civil Judge, Junior Division has refused to pay even meagre sum of Rs.20,000/- towards

compensation to the petitioner out of the properties forming part of the estate of her father deliberately.

149.Â This Court is of the clear opinion that the manner in which the respondent no.1 had acted in the testamentary petition and opposing this petition

for revocation of grant of probate clearly indicates that she had acted totally prejudicial to the interest of the petitioner and in an adversarial manner

though claiming to be a sole trustee under the said alleged Will and had been allegedly appointed to look after the interest of the petitioner. In my view,

the respondent no.1 had acted totally contrary to the interest of the petitioner in this matter. A trustee allegedly appointed under the said alleged Will

has to look after the beneficiary and to act in the interest of such beneficiary and not against the interest of such beneficiary. The submission of the

respondents that mother of the petitioner could not have been served with citation is self destructive.

150.Â A perusal of the record clearly indicates that there was a clear case of conflict of interest between the petitioner and the respondent no.1

under the alleged Will which cannot be allowed to be continued. I am not inclined to accept the submission of the learned counsel for the respondents

that there was no suppression on the part of the respondent no.1 while obtaining order of dispensation with the consent of the petitioner and/or any

other stage. If the respondent no.1 would have brought to the notice of the Court the true and correct facts and that there was no provision under the

Indian Succession Act, 1925 or the Bombay High Court (Original Side) Rules, 1980 empowering the Court to dispense with the consent of heir and

next-of-kin, this Court would not have passed such order in favour of the respondent no.1.

151.Â The Hon'ble Supreme Court in the case of Central Bank of India Vs. Vrajlal Kapurchand Gandhi & Anr. (supra) has held that statements of

fact as to what transpired at the hearing recorded in the judgment of the Court are conclusive of the facts so stated and no one can contradict such

statements by an affidavit or other evidence. I am thus not inclined to accept the submission of the learned counsel for the respondents that the

counsel of the respondent no.1 had already brought to the notice of this Court all the relevant facts and provisions while obtaining such order of

dispensation with the consent from this Court and also dispensation with the requisitions issued by the office of the Prothonotary and Senior Master

though not reflected in the order. The respondent no.1 cannot be allowed to make such submission contrary to and beyond what is not reflected in the

order dated 7th August 2013 passed by this Court. The principles of law laid down by the Hon'ble Supreme Court in the case of Central Bank of India

Vs. Vrajlal Kapurchand Gandhi & Anr. (supra) would squarely apply to the facts of this case. I am respectfully bound by the said judgment.

152.Â The Hon'ble Supreme Court in the case of Mohd.Akram Ansari Vs. Chief Elections Officer and Ors. (supra) has held that there is a

presumption in law that a judge deals with all the points which have been pressed before him. If a point is not mentioned in the judgment of a Court,

the presumption is that that point was never pressed before the learned Judge and it was given up. However that is a rebuttable presumption. If he

had pressed that point also which has not been dealt with in the impugned judgment, it is open to him to file an application before the same learned

Judge or Bench which delivered the impugned judgment and if he satisfies the Judge or Bench that the other points were in fact pressed, but were not

dealt with in the impugned judgment, it is open to the Court concerned to pass appropriate orders including an order of review.

153.Â It is an admitted position that the respondent no.1 did not seek any such review or for clarification of the said order dated 7th August 2013 on

the ground that several other submissions were urged by the responded no.1 through her counsel, however, this Court had not recorded or dealt with

those submissions in the said order. The principles of law laid down by the Hon'ble Supreme Court in the case of Mohd.Akram Ansari Vs. Chief

Elections Officer and Ors. (supra) would squarely apply to the facts of this case. I am respectfully bound by the said judgment. In my view, the

respondent no.1 thus cannot be allowed to urge that all the documents and the facts were brought to the notice of this Court.Â Â Â

154.Â The question that arises for consideration of this Court is whether the petitioner has made out a case for revocation of grant of probate under

Section 263 of the Indian Succession Act, 1925 or not. Section 263 of the Indian Succession Act, 1925 provides for various situations when grant of

probate or letters of administration can be revoked or annulled for 'just cause'. The explanation to Section 263 of the Indian Succession Act, 1925

clearly provides as to when 'just cause' shall be deemed to exist. Explanation (a) provides that just cause shall be deemed to exist where the

proceedings to obtain the grant were defective in substance. In this case, the respondent no.1 had not served the citation upon the petitioner though

she was the only heir and next-of-kin of deceased Mr.Deepak Vasantrao Patil and obtained dispensation of the consent which was without authority

of law. Neither there is any such provision under the Indian Succession Act, 1925 nor in the Bombay High Court (Original Side) Rules, 1980.

155.Â Explanation (b) provides that if the grant was obtained fraudulently by making a false suggestion or by concealing from the Court something

material to the case, it would fall within the meaning of 'just cause'.Â In this case, in my view,Â the respondent no.1Â had acted fraudulently by

making a false suggestion that the petitioner was mentally retarded and was not in a position to give her consent. The respondent no.1 also suppressed

various true and correct facts even at the stage of obtaining such grant of probate ex parte.

156.Â Explanation (c) provides that if the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant,

though such allegation was made in ignorance or inadvertently, it would be 'just cause' on which the grant of probate or letters of administration can be

revoked or annulled. In this case, the respondent no.1 made an untrue allegation that the petitioner was mentally retarded and was not in a position to

give her consent and obtained firstly the order of dispensation with her consent and thereafter the order of grant of probate fraudulently. In my view,

all these three conditions set out in explanation (a), (b) and (c) have been fully satisfied in the facts of this case and thus a case is made out for

revocation or annulment of such grant of probate obtained by the respondent no.1.

157.Â The illustration (ii) of Section 263 of the Indian Succession Act, 1925 clearly provides that â??the grant was made without citing parties who

ought to have been cited.â? In this case, admittedly the grant of probate was obtained without effecting any citation upon the petitioner and on this

ground also, the grant of probate obtained by the respondent no.1 deserves to be revoked. In my view, there is no substance in the submission of the

learned counsel for the respondents that none of the explanations to Section 263 of the Indian Succession Act, 1925 i.e. 'just cause' has been satisfied

in the facts of this case for revocation of grant of probate. In this case, the petitioner has disputed the alleged Will left by her father.

158.Â This Court in the case of Peter John D'Souza & Ors. Vs. Armstrong Joseph D'Souza (supra) has held that once the allegation of fraud,

fabrication or concealment is brought to the notice of the Court, which is alleged to have been committed by the opposite party for obtaining letters of

administration from a Court, it becomes the duty of the Court to look into the allegation whether any grant of letters of administration is obtained by a

party from the Court by practicing fraud, fabrication or concealment. The Court can take cognizance of such allegation suo moto and if it comes to the

conclusion that the grant is obtained fraudulently or by making false suggestion or by concealment of such fact, it is duty of Court to set aside such

grant. This Court in the said judgment had revoked grant of letters of administration by exercising powers under Section 263 of the Indian Succession

Act, 1925. The principles of law laid down by the Hon'ble Supreme Court in the case of Peter John D'Souza & Ors. Vs. Armstrong Joseph D'Souza (supra) would squarely apply to the facts of this case. I am respectfully bound by the said judgment.

159.Â Since the respondent no.1 had suppressed various true and correct facts and had obtained an order from this Court on 7th August 2013

thereby dispensing with the consent of the petitioner which order could not have been obtained by the respondent no.1. Those facts are now brought

to the notice of this Court by the petitioner and have bearing on the order of grant of probate in Testamentary Petition No.294 of 2012. It is thus duty

of this Court to recall the said order dated 7th August 2013 passed by this Court and also the order dated 14th March 2014 passed by this Court in

Testamentary Petition No.294 of 2012 thereby granting probate in favour of the respondent no.1.

160.Â This Court in the case of Jerbanoo Rustomji Jamasji Garda Vs.Pootlamai Manecksha Mehta & Ors. (supra) has held that the probate Court is

a Court of conscience and it does not decide rights between the parties but it has to deliver a judgment which would become a judgment in rem and

such judgment will bind not only the parties before it but the whole world. Therefore, the approach of a Probate Court to the question before it is

different from the approach of a Civil Court adjudicating upon the rights between the parties and this position is made clear by the provisions of

Section 41 of the Evidence Act. This Court held that the Probate Court must apply its own mind and must satisfy its own conscience that the Will or

the codicil put forward as the last Will or codicil of the deceased is his last Will and codicil. It must be satisfied as to the execution of the document, as

to the testamentary capacity of the deceased and that satisfaction cannot be influenced or affected by any decision given by any civil Court although

the issue raised was identical.

161.Â In my view, since the petitioner was absent before the Testamentary Court in view of the petitioner not having been served with any citation, it

was the duty of the Testamentary Court to satisfy itself as to why the citation was not served upon the petitioner and whether the respondent no.1 had

made out a case for grant of probate ex parte. The principles of law laid down by the Hon'ble Supreme Court in the case of Jerbanoo Rustomji

Jamasji Garda Vs.Pootlamai Manecksha Mehta & Ors. (supra) would squarely apply to the facts of this case. I am respectfully bound by the said

judgment.

162.Â The Hon'ble Supreme CourtÂ in the case of M/s.Jaipur Mineral Development Syndicate, Jaipur Vs. The Commissioner of Income Tax, New

Delhi (supra) has held that the Courts have power, in the absence of any express or implied prohibition, to pass an order as may be necessary for the

ends of justice or to prevent the abuse of process of Court. In my view, in this case, the respondent no.1 has committed a gross abuse of process of

law by obtaining dispensation with the consent of the petitioner which even

otherwise could not have been granted for want of any provisions in the Indian Succession Act, 1925 or under the provisions of Bombay High Court (Original Side) Rules, 1980 or even otherwise in the facts and circumstances of this case. The respondent no.1 thus having obtained ex parte order of grant of probate, such order deserves to be recalled. This Court has ample power to recall its own order if this Court finds that one of the parties committed gross abuse of process of law and obtained ex parte order contrary to law and causing injustice to the other party. The principles of law laid down by the Hon'ble Supreme Court in the case of M/s.Jaipur Mineral Development Syndicate, Jaipur Vs. The Commissioner of Income Tax, New Delhi (supra) would squarely apply to the facts of this case.

I am respectfully bound by the said judgment.

163. In so far as the submission of the learned counsel for the respondents that in view of Section 295 of the Indian Succession Act, 1925, the provisions of Code of Civil Procedure, 1908 would not apply till such stage mentioned in the said provision has reached is concerned, in my view, there is no merit in this submission of the learned counsel for the respondent no.1. The said provision under Section 295 applies to the proceedings before the District Court and not before this Court exercising original jurisdiction and is governed by the provisions of Indian Succession Act, 1925 and the Bombay High Court (Original Side) Rules, 1980.

164. In so far as reliance placed by the learned counsel for the respondents on Section 283 of the Indian Succession Act, 1925 is concerned, in my view, the said provision provides for powers of District Judge and is not applicable to the proceedings filed on the original side of this Court. Reliance placed by the learned counsel for the respondents on the said provision is thus totally misplaced.

165. In so far as the submission of the learned counsel for the respondent no.1 that this Court shall obtain a fresh report showing the mental capacity of the petitioner is concerned, after considering various orders brought on record in this proceeding and various reports and in view of personal interaction of this Court with the petitioner, in my view, no such fresh report is required to be obtained as suggested by the learned counsel for the respondents.

166. For the reasons recorded aforesaid, I am of view that the petitioner has

made out a case for recall of the order dated 7th August 2013 and for revocation of grant of probate granted by this Court by an order dated 14th March 2014.

167. I therefore pass the following order :-

(i) Miscellaneous Petition No.33 of 2017 is allowed in terms of prayer clauses (a) and [a(i)].

(ii) The respondents are directed to return the grant of probate obtained by the respondent no.1 pursuant to the order dated 14th March 2014 passed

by this Court to the office of the Prothonotary and Senior Master within one week from today without fail and shall not act upon the said grant of

probate in any manner whatsoever.

(iii) Testamentary Petition No.294 of 2012 is restored to file and to be heard afresh after effecting the service of citation upon the petitioner under

Rule 397 read with Rule 399 of the Bombay High Court (Original Side) Rules, 1980 and after giving an opportunity to the petitioner to file caveat and

affidavit-in-support thereof within the time contemplated under the Bombay High Court (Original Side) Rules, 1980.

(iv) Hearing of Testamentary Petition No.294 of 2012 is expedited.

(v) The respondent no.1 is directed to pay costs of Rs.1 lakh to the petitioner within two weeks from today from her personal account.

168. Learned counsel for the respondents seeks stay of the order and judgment rendered by this Court today.

169. In so far as payment of costs of Rs.1 lakh is concerned, the respondent no.1 is granted four weeks' time instead of two weeks. Prayer for stay

in respect of rest of the directions issued by this Court is rejected.