IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

MISCELLANEOUS PETITION NO. 86 OF 2010

IN

TESTAMENTARY PETITION NO. 917 OF 2008

Arnold Samson of Sweden, a Jew being the only son and sole heir of the deceased abovenamed residing at Skoldgatan, 4A 21229, Malmo Sweden ..Petitioner

Versus

1. Ramesh Baldev Gwalani
of Mumbai, Adult, Hindu, Indian Inhabitant climaing to be the Sole Executor under the Will of the Deceased abovenamed residing at 132/A, Jolly Maker Apartment No.1, Cuffe Parade Road, Mumbai 400 005.

2. **Vimla Rama Rao**
having her address at Flat No. 6 Bueno Vista, 2nd Floor, Windy Hall Lane, Near Colaba Post Office, Colaba, Mumbai 400 005. (Deleted as per order dated 5th June 2023 and 31st March 2023.

2A. Rama Rao
2B. Rohini Rama Rao
2C. Uma Rama Rao
2D. Ravi Rama Rao
All of Mumbai Indian Inhabitants legal representatives of the late Vimla Rama Rao, Original Respondent No. 2 residing at Flat No. 6, Bueno Vista, 2nd Floor, Windy Hall Lane, Near Colaba Post Office, Colaba, Mumbai 400 005.

3. Rahim Jawat Mohammed,
having his address at Flat No. 6,
Bueno Vista, 2nd Floor, Windy Hall
Lane, Near Colaba Post Office,
Colaba, Mumbai 400 005. …Respondents

Mr. Shailesh Shah, Senior Advocate, with Shanay Shah, Jonathan Soloman, Soniya Putta, Karan Mehta, Souparnika S and Priyanka Singh, i/b M/s Solomon And Co, for the Petitioner.

Mr. Tushad Kakaliya, with Kayomars Kerawalla and Kumar Kothari, i/b Vohuman Legal, for Respondent No. 2A and 2D and 3.

CORAM: N. J. JAMADAR, J.
RESERVED ON : 21st JANUARY 2026
PRONOUNCED ON : 8th JUNE 2026

JUDGMENT:

1. This Miscellaneous Petition is for revocation of Probate dated 10th July 2009 in respect of the purported last Will and Testament dated 6th February 2008 of late Rosalind Samson ("the deceased") gratned in favour of Ramesh Baldev Gwalani, Respondent No.1, the Executor, in Testamentary Petition No. 917 of 2008, under Section 263 of the Indian Succession Act, 1925 ("the Succession Act").

2. Shorn of superfluities, the background facts can be stated as under:

2.1 Late Rosalind Samson passed away on 22nd February 2008. At the time of her death the deceased had a fixed place of abode at Flat No. 6, 2nd Floor, Bueno Vista, Windy Hall Lane, Near Colaba Post Office,

Colaba, Mumbai – 400 005 ("the subject flat"). Respondent No.1 claimed that the deceased has left behind her last Will and Testament dated 6th February 2008. Respondent No.1 was named the sole Executor in the said Will. Under the said Will, the deceased had bequeathed her immovable and movable properties including the subject flat to Vimla Rama Rao, the deceased-Respondent No.2, her caretaker, and Rahim the son of Jawat Mohammed, Respondent No.3, whom the deceased considered her foster-son.

2.2 Respondent No.1 thus filed Petition No. 917 of 2008 for grant of probate in respect of the aforesaid last Will and Testament of the deceased. It was averred, the deceased had left behind no surviving heir and next of kin.

2.3 As there was no contest, the Petition came to be allowed and the probate came to be granted in favour of Respondent No.1 on 10th July 2009.

3. The Petitioner claims to be the son and sole heir of the deceased. The Petitioner has instituted the instant Petition seeking revocation of the Probate on the ground that the Probate was obtained by *suppressio veri and suggestio falsi.* No citation was issued to the Petitioner though the Respondents were fully cognizant that the Petitioner was the son of the deceased. A deliberate false statement was

made that the deceased had not left behind any heir. The prayer for revocation of the probate is premised on the following facts:

3.1 The deceased, a Jew by religion, was married to Mr Hari M Kapur. The Petitioner was born out of the said wedlock. However, in the year 1956, the parents of the Petitioner got divorced. Till the year 1962, the Petitioner was in the custody of the deceased, his mother. In 1962, the Petitioner initially went to Israel and, thereafter, travelled to, and settled in, Sweden since the year 1970.

3.2 The deceased, the Petitioner contends, died intestate without leaving any testamentary instrument. After the demise of the deceased, the Petitioner became solely entitled to the estate left behind by the deceased. Hence, on 12th February 2009, the Petitioner called upon the Secretary of the Buena vista Cooperative Housing Society Ltd, wherein the subject flat is situated, to transfer the said flat and the shares in favour of the Petitioner. Thereupon, it transpired that the deceased had purportedly effected a nomination of 50% undivided share in the said flat each in favour of Vimla Rama Rao (R2) and Rahim Jawat Mohammed (R3). Thus, the Petitioner addressed communication to Respondent Nos. 2 and 3 asserting the sole and exclusive right of the Petitioner over the property left behind by the deceased. However, there was no response from Respondent Nos. 2 and 3.

3.3 The Petitioner was thus constrained to institute Suit No. 1175 of 2010 against Respondent Nos. 2 and 3 and the Secretary of the Bueno Vista, *inter alia,* for a declaration that the Petitioner was the sole heir of the deceased and thus entitled to the subject flat and other property left behind by the deceased.

3.4 In the Affidavit in Reply filed to the Notice of Motion taken out by the Petitioner in the said suit, Vimla Rama Rao (R2) contended that the deceased died as a spinster and the deceased had bequeathed her property including the subject flat under the Will dated 6th February 2008 in favour of Respondent Nos. 2 and 3 in equal share, and the said Will was probated pursuant to the order of this Court dated 10th July 2009, in Testamentary Petition No. 917 of 2008.

3.5 Thus the Petitioner became aware of the purported Will set up by Respondent Nos. 2 and 3. Thereupon, inspection of the documents was taken and enquires were made. It transpired that the probate had been granted without service of citation on the Petitioner. The fact that the Petitioner was the son of the deceased was deliberately suppressed and a false statement was made in the Petition that the deceased died as a spinster. Despite being aware of the fact that the Petitioner was the son of the deceased, Respondent Nos. 2 and 3, the beneficiaries under the said Will, feigned ignorance of the said fact.

3.6 The Petitioner has also contested the due execution and attestation of the purported Will and the genuineness thereof. It was, *inter alia,* asserted that the probate was surreptitiously obtained in respect of the Will which was purportedly executed while the deceased was admitted to Saifee Hospital and was not in a fit state of mind to know the nature and consequences of the purported disposition made thereunder. The Will was stated to be not validly executed and attested.

3.7 In substance, the Petitioner claimed that the proceedings to obtain the probate in respect of the purported Will of the deceased were defective in substance and the grant was obtained fraudulently by resorting to *suppressio veri and suggestio falsi.*

4. Ramesh Baldev Gwalani, the Executor (R1), contested the Petition for revocation by filing an Affidavit in Reply.

4.1 At the outset, it was contended that the Petition was filed with an oblique motive to grab the property of the deceased by falsely claiming that the Petitioner is the son of the deceased. Emphasis was laid on the fact that the Petitioner had not produced any cogent evidence to prove that the Petitioner was the son of the deceased. By making reference to the documents, including the Passports of the Petitioner and the deceased, an endeavour was made to draw home the point that there is no clinching material to demonstrate that the Petitioner is the son of the deceased. Nor did the Petitioner succeed in

demonstrating that the deceased was married to Mr. Hari Kapur. The documents, like the photographs and the school leaving certificate, sought to be pressed into service on behalf of the Petitioner, were stated to be bereft of any evidentiary value to substantiate the claim of the Petitioner that he was the son of the deceased.

4.2 On the contrary, the contemporaneous conduct militates against the claim of the Petitioner as the Petitioner did not attend to the deceased, while she was admitted to Saifee Hospital, nor participated in the last rites and obsequies despite claiming that the Petitioner was in India when the deceased passed away.

4.3 Respondent No.1 asserted that Respondent No.1 had made diligent enquiries with the beneficiaries under the Will and the friends of the deceased about the heirs and next of kin of the deceased. But none of the persons gave the information regarding the heirs and next of kin of the deceased. Therefore, Respondent No.1 had sworn an Affidavit that to his knowledge there was no surviving heir of the deceased.

4.4 Respondent No.1 refuted assertions of the Petitioner that the said Will was not duly executed and attested. An endeavour was made to show that the deceased had executed the said Will out of her own volition and in a sound disposing state of mind in the presence of

the attesting witnesses, who had also signed the Will in the presence of the deceased.

5. Respondent Nos. 2 and 3, the beneficiaries under the Will, also contested the Petition by filing Affidavit in Reply. It was categorically denied that the Petitioner was the son of the deceased. It was contended that the deceased throughout her life had represented that she was never married. The deceased always described her status as a spinster. Initially, Rama Rao, Respondent No.2's husband lived with the deceased as her caretaker since 1950. Since the marriage of Respondent No.2 with Rama Rao on 29th May 1967, Respondent No.2 had been staying in the subject flat with the deceased. Respondent No. 3 was treated as a son by the deceased. The name of the deceased was shown as the parent/guardian in the school record of Respondent No.3.

5.1 Respondent Nos. 2 and 3 contended, Respondent No.2 looked after the deceased as her elder sister. Respondent No.2 nursed the deceased. Respondent No. 2 admitted the deceased in Saifee Hospital and incurred expenses of her treatment. Even the expenses of the funeral of the deceased were borne by Respondent No.2. The Respondents contend that, when the deceased fell sick and was hospitalized, though the Petitioner happened to be in India, yet, the Petitioner went to Goa for a Holiday. The Petitioner even did not attend

the funeral of the deceased though he claimed to be the son of the deceased.

5.2 Respondent Nos. 2 and 3 have made an effort to demonstrate that the claim of the Petitioner that he was born to the deceased on 19th February 1947 was improbable as the deceased was born on 2nd February 1934 and it was inconceivable that at the age of 13 years the deceased could give birth to the Petitioner. There was no material to prove the alleged relationship between the Petitioner and the deceased. On the basis of the fictitious documents, the Petitioner made an endeavour to lay claim over the properties left behind by the deceased by falsely claiming that he is the son of the deceased. The Respondents denied that the proceedings to obtain probate were defective in substance and that a case for revocation of the probate was made out.

6. In the wake of the aforesaid pleadings, issues were settled. The issues are reproduced below with my findings thereon for the reasons to follow:

	ISSUES	FINDINGS
1	Whether the Petitioner is the biological son of the deceased Rosalind Samson?	In the affirmative to the extent of making out a *prima facie* case for revocation of probate.
2	What relief, if any, the Petitioner is entitled to?	Petition stands allowed.

REASONS:

7. In order to substantiate the averments in the Petition, the Petitioner has examined himself and a witness Aaron Daniel Benjamin (PW2). Vimla Rama Rao (RW1) adduced evidence in rebuttal. The parties have tendered in evidence a number of documents in support of their respective cases.

8. At the conclusion of trial, I have heard Mr. Shailesh Shah, the learned Senior Advocate for the Petitioner, and Mr. Tushad Kakalia, the learned Counsel for Respondent Nos. 2A to 2D and 3, at length. The contesting parties have also tendered written submissions in elaboration of the submissions canvassed across the Bar.

9. At the outset, Mr. Shailesh Shah, the learned Senior Advocate for the Petitioner, submitted that in a Petition for revocation of the grant of probate, the standard is that of existence of a *prima facie* case. If the Court upon appraisal of the material is satisfied that there are reasons to believe that it was necessary to have the Will proved afresh in the presence of the parties who appear to have a caveatable interest, the grant can be lawfully revoked. To buttress this submission in regard to the scope of the enquiry under Section 263 of the Succession Act, 1925 ("the Succession Act"), Mr Shah placed a very strong reliance on the

judgment of the Supreme Court in the case of **Anil Behari Ghosh Vs Latika Bala Dassi and Ors.**[1]

10. In the case at hand, Mr. Shah would urge, there is overwhelming material to indicate that the probate was obtained by the Respondents by suppressing the fact that the Petitioner is the son of the deceased, though the Respondents were fully cognizant of the said fact. A subterfuge was thus adopted by the Respondents by making a guarded statement in the Affidavit that to the best of the knowledge of Respondent No.1, the deceased had not left behind any heir in India. This very statement implies that the Respondents were aware that the deceased had heirs who were based outside India. Such suppression of facts and the resultant non service of the citation on the Petitioner, who is the son and sole heir of the deceased, constitutes a fundamental defect in procedure and warrants the revocation of the grant.

11. Amplifying the submission, Mr. Shah urged that the Petitioner has placed on record material of unimpeachable quality to show that he is the son of the deceased. Firstly, the birth certificate of the Petitioner issued by the Municipal Corporation of Greater Mumbai on 7th July 2011 (Exhibit "P6") clearly records that Mrs Rosalind, the deceased, was the mother and Mr. Hari Madanchand Kapur was the father of the Petitioner, who was born on 20th February 1946. The said birth certificate (Exhibit "P6") was admitted in evidence as its existence was

1 AIR 1955 SC 566.

not disputed. No material has been placed on record, nor have Respondents have adduced evidence to question the correctness of the entries in the said birth certificate.

12. Mr. Shah submitted that the entries in the Register maintained by the local authority in accordance with the provisions contained in the Registration of Births and Deaths Act, 1969 ("the Act of 1969"), which have presumptive value, cannot be lightly brushed aside. The presumption of the correctness of the entries therein could have been refuted by seeking the production of the original birth register. Since the Respondents failed to adduce such evidence, the birth certificate commands primacy. To this end, Mr. Shah placed reliance on a Division Bench judgment of this Court in the case of **Vasudha Gorakhnath Mandvilkar Vs City and Industrial Development Corporation of Maharashtra Ltd.**[2]

13. Mr. Shah further submitted that it was not obligatory for the Petitioner to call for the birth register and examine the concerned officials. To lend support to this submission, reliance was placed on the judgment of the Supreme Court in the case of **Harpal Singh And Anr Vs State of Himachal Pradesh**[3] and the judgments of this Court in the cases of **Sameer Shashikant Jadhav Vs State of Maharashtra and Anr,**[4]

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2 2008 SCC OnLine Bom 400.

3 (1981) 1 SCC 560.

4 2023 SCC OnLine Bom 84.

Mahiboob Alias Tanya Peerahamad Shabhai Vs The State of Maharashtra & Anr[5] and **Sachin Vs State of Maharashtra through Police Station Officer.**[6]

14. Secondly, Mr. Shah would urge, the deceased had addressed more than 40 letters/aerograms to the Petitioner, repeatedly addressing and acknowledging the Petitioner as the son of the deceased. In addition, Mr. Hari Kapur, the Petitioner's father, has also addressed letters to the Petitioner. These letters cumulatively establish the relationship between the Petitioner and the deceased. It was submitted that the Respondents baldly claimed that those letters were false and forged without making any effort to substantiate the said defence. The technical defences like, the fact that there was no seal of the postal authority on few of the letters, do not detract materially from the claim of the Petitioner, urged Mr. Shah.

15. Thirdly, the communication dated 27th March 2014 from the United State Office of Personnel Management to the Petitioner thereby remitting final lump sum death benefit payment of the former employee, establishes the fact that the Petitioner was nominated by the deceased as the next of kin to whom the said payment was to be made. Mr. Shah urged that incontrovertibly the deceased was employed in the American Consulate and, therefore, the death benefit became

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5 2019 (3) ABR (Cri) 890.

6 2025 SCC OnLine Bom 844.

admissible. The said payment was made to the Petitioner being the son of the deceased. Mr. Shah also placed reliance on the said document in support of the submission that the correct date of birth of the deceased was 2nd February 1928. The proof of the fact that the deceased was born on 2nd February 1928 takes the wind out of the sail of the Respondents regarding the contention that the Petitioner could not have been born to the deceased, while she was 13 years of age, on the basis of the date of birth recorded in the Passport.

16. Mr. Shah further submitted that the evidence of the Petitioner in relation to the said financial statement of the lump sum death benefit payment issued by the US Office of the Personnel Management, has gone virtually unimpeached.

17. In addition to the aforesaid documents, taking the Court through the manner in which the Petitioner, Arnold Samson (PW1) and Vimla Rama Rao (RW1) stood the test of cross-examination, Mr. Shah would urge that the fact that the deceased had relatives outside India is clearly admitted by Vimla Rama Rao(RW1). Moreover, Vimla (RW1) has conceded in the cross-examination that the Petitioner used to visit the deceased every year since 1979. These admissions coupled with the aforesaid documents make out a strong *prima facie* case warranting an opportunity for the Petitioner to contest the Petition for the grant of probate.

18. Support was also sought to be drawn by Mr. Shah from the contemporaneous conduct of the Petitioner. It was urged that the Petitioner had addressed communication to the society asserting his claim to the subject flat; the Petitioner addressed communications to the alleged beneficiaries under the Will and even instituted the suit for administration of the estate of the deceased, within one year of the death of the deceased.

19. The aforesaid contemporaneous and consistent stand of the Petitioner, if considered in the light of the aforesaid material, makes out a 'just cause' for revocation of the Probate, and grant of an opportunity to the Petitioner to contest the prayer for grant of Probate on merits. To lend support to the aforesaid submission, Mr. Shah placed reliance on the decisions in the cases of **Lata Rajesh Shetty Alias Latha Rajesh Shetty Vs Satish Surappa Poojari**[7] and **S.A. Modi Vs T. A. Rana and Ors.**[8]

20. In opposition to this, Mr. Tushad Kakalia, the learned Counsel for Respondent Nos. 2A to 2D and 3, strenuously urged that the Petitioner's claim of being a son of the deceased is fraught with insuperable infirmities. First and foremost, the very fact that the Petitioner did not attend the funeral and perform the last rites of the deceased, though the Petitioner claimed to be in India during the relevant period, bears out the falsity of the claim of the Petitioner. What

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7 Misc Petition (L) No. 34745 of 2023, dated 21st February 2024.

8 2004(3) MhLJ 821.

exacerbates the situation, according to Mr. Kakalia, was the fact that when confronted with the fact that the Petitioner did not attend, and bear the expenses in connection with the funeral and other rituals, the Petitioner had the audacity to depose falsely on oath. Such demonstrably incorrect statements on oath render the Petitioner completely unworthy of credence.

21. Mr. Kakalia further submitted that, the material placed on record by the Petitioner betrays an attempt to progressively bolster up the Petitioner's case by placing on record documents of doubtful credibility. An endeavour was made by Mr. Kakalia to demolish each of the four sets of documents/material sought to be pressed into service on behalf of the Petitioner.

22. Assailing the veracity and reliability of the birth certificate (Exhibit “P6”), Mr Kakalia would urge that the said birth certificate was not produced along with the Petition. It was procured after one year, and produced after three years of the institution of the Petition. At any rate, Mr. Kakalia would urge the birth certificate does not prove that the deceased was the Petitioner's mother. Taking the Court through the provisions contained in Sections 12 and 17 of the Act of 1969, Mr. Kakalia would urge at the highest the birth certificate may establish the date and time of birth of a person but certainly not his parentage. The

date and time of the birth is the only "relevant fact" under Section 35 of the Indian Evidence Act, 1872.

23. Mr. Kakalia advanced a serious criticism on account of the non-examination of the person who made the entries in the birth register on the basis of which the birth certificate has been issued. Nor any effort was made by the Petitioner to have the original Register produced before the Court. Laying emphasis on the fact that on the own showing of the Petitioner there was a discrepancy in the date of birth of the Petitioner, Mr. Kakalia submitted that the Petitioner has singularly failed to discharge the burden to establish the correctness of the information in the Birth Register much less the fact that the deceased was the mother of the Petitioner. For this purpose, Mr. Kakalia placed reliance on the decision of the Supreme Court in the case of **Alamelu and Anr Vs State Represented by Inspector of Police**[9] and the judgments of this Court in the cases of **Gulabrao Tuljaram Mandge Vs The Additional Commissioner, Nashik Division, Nashik**[10] and **Sayyed Zafaroddin S/o Afzalodin Vs The State of Maharashtra & Ors**[11]

24. Mr Kakalia would urge, the School Leaving Certificates (Exhibit "P7" and "P65") stand on an even weaker foundation. Both the documents were obtained after the dispute arose between the parties.

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9 (2011) 2 SCC 385.

10 Aurangabad Bench Writ Petition No. 14440 of 2017, decided on 6th April 2021.

11 Aurangabad Bench Writ Petition No. 4939 of 2020, decided on 7th May 2021.

No attempt was made to prove the correctness of entries therein by examining the person who had made those entries. In the absence of such evidence, the mere production of the school leaving certificates (Exhibit "P7" and "P65") is of no avail, submitted Mr. Kakalia. To buttress this submission, Mr. Kakalia placed reliance on a judgment of the Madras High Court in the case of **K Jayakumar (Died) and Ors Vs Koteeswaran and Anr.**[12]

25. A strenuous effort was made by Mr. Kakalia to drag home the point that the letters purportedly addressed by the deceased to the Petitioner did not come from the proper custody. Those letters were produced by the Petitioner in installments and that too after a long interval. Even otherwise, Mr. Kakalia would urge, the letters are extremely suspicious and appear to be fabricated, and brought into the existence to bolster up of the case of the Petitioner. The absence of the rubber stamp of the receiving post office on some of the letters, the absence of an inward stamp on the aerograms in the Sweden and the failure on the part of the Petitioner to offer plausible explanation of all the infirmities were pressed into service to demonstrate that the letters were not genuine and reliable.

26. Mr. Kakalia further submitted that the contents of the few letters militate against the relationship between the Petitioner and the deceased, sought to be propounded by the Petitioner. Taking the Court

12 2008(5) CTC 695.

through the portions of the letters at Exhibit “P13”, “P37”, “P39” and “P45”, Mr. Kakalia submitted that the tenor of those letters did not reflect the typical communication between the mother and son. It was urged that when the Petitioner was confronted with the apparent infirmities during his cross-examination, the Petitioner could not offer any justifiable explanation. Thus, the letters and aerograms do not advance the case of the Petitioner any further.

27. As a second limb of the submission, Mr. Kakalia would urge that, no mileage can be drawn from the fact that in those letters the Petitioner has been addressed as, “Son”. It was submitted that the word, “Son” is frequently used as a term of endearment and that cannot, by itself, establish that the Petitioner was the biological son of the deceased.

28. With regard to the communication allegedly received from the United States Office of Personnel Management (Exhibit “P58”), Mr. Kakalia submitted that firstly the said document does not indicate that the payment of the lump sum amount was being made to the Petitioner for the reason that the Petitioner is the Son of the deceased. Secondly, the said letter was issued after six years of the death of the deceased and, thirdly, the Petitioner failed to divulge the information as regards the circumstances in which the said communication came to be addressed to the Petitioner, though the Petitioner admitted that he had

entered into correspondence with the US Office of Personnel Management. This steadfast refusal warrants the drawing of an adverse inference against the Petitioner.

29. Lastly, Mr. Kakalia was very critical of the non-existence of the photographs of the Petitioner and the deceased, except the three photographs (Exhibit "P61"). The absence of photographs, according to Mr. Kakalia, itself demonstrates the falsity of the Petitioner's case as there ought to have been numerous photographs if the Petitioner was the son of the deceased. Even those three photographs do not depict the bond of the mother and son between the deceased and the Petitioner. Mr. Kakalia, would thus submit that, viewed from any perspective none of the documents relied upon by the Petitioner substantiates Petitioner's claim of being the son of the deceased.

30. Mr. Kakalia would urge that, the case of suppression of material facts for the grant of probate sought to be attributed to the Respondents was completely misconceived. There are clear and categorical averments in the Affidavit dated 21st January 2015 affirmed by Respondent No.2 to the effect that the deceased had all along represented that she was a spinster and had no relatives or next of kin. Mr. Kakalia would urge that, the Petitioner had sought to misread the asseveration in para 3 of the of the Affidavit that the deceased had no relatives in India. If the assertions in para 3 of the Affidavit are read as a

whole, it becomes abundantly clear that there was no guarded statement much less the suppression of facts. No case for revocation of Probate on the ground of suppression of material facts is thus made out.

31. Before adverting to appreciate the aforesaid submissions in the light of the evidence adduced by the parties, it may be apposite to note a few uncontroverted facts.

32. Firstly, the fact that the deceased was a Jew by religion is not in dispute. Secondly, the factum of the death of the deceased on 22nd February 2008 while she was admitted to Saifee Hospital in Mumbai is also not in contest. Thirdly, the fact that the deceased was initially the licence and later on became the owner of the subject flat is not in dispute. Fourthly, the fact that Respondent No.2 had been residing with the deceased since 1970 is rather indisputable. Fifthly, the parties are not at issue over the fact that the deceased was employed with the American Consulate. Lastly, the grant of probate in an uncontested proceeding without issuing citation to the Petitioner or any other relative is the fulcrum of the case for revocation.

33. The controversy essentially boils down to the question whether the Petitioner is son of the deceased and, if yes, whether a case for revocation of the Probate granted without issuing a citation to the Petitioner, is made out? In effect, whether a case for revocation of the grant is made out is at the heart of the controversy.

34. Chapter III of Part- 9 of the Succession Act deals with the revocation of a grant. Section 263 of the Indian Succession Act, 1925 which predominantly bears upon the determination of the controversy at hand, reads as under:-

> "**263. Revocation or annulment for just cause—** The grant of probate or letters of administration may be revoked or annulled for just cause.
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> Explanation : —Just cause shall be deemed to exist where—
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> (a) the proceedings to obtain the grant were defective in substance; or
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> (b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or
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> (c) 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; or
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> (d) the grant has become useless and inoperative through circumstances; or
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> (e) the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

35. From the phraseology of section 263, it becomes evident that the grant of probate or Letters of Administration may be revoked if the proceedings to obtain the grant were defective in substance or the grant being obtained fraudulently by making a false suggestion or suppressing from the Court certain material in the case or if the grant is obtained by

untrue allegation or that the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of Part 9. The main part of section 263 provides that the grant of Probate or Letters of Administration may be revoked for "just cause". The Explanation appended to section 263 enumerates the circumstances in which the 'just cause' shall be deemed to exist. There are eight illustrations of the grounds on which the grant of Probate may be revoked.

36. It is plain, the Succession Act vests discretion in the Court to revoke the grant for a just cause. As in the case of exercise of discretion under any jurisdiction, the testamentary Court is expected to exercise discretion to revoke the grant, in a judicious manner. A grant lawfully made cannot be revoked for the reason that apparently the case may fall within any of the five Explanations or the illustrations. At the same time, the term, "just cause" is elastic enough to cover a situation which may not be explicitly covered by the Explanation or illustration.

37. A profitable reference in this context can be made to a three Judge Bench decision of the Supreme Court in the case of **Anil Behari Ghosh (Supra),** on which reliance was placed by Mr. Shah, and, wherein the import of the term "proceedings defective in substance" covered by

Clause (a) of the Explanation to section 263 was illuminatingly postulated, inter alia, as under:-

> “15] It was further argued on behalf of the appellant that the appeal should be allowed and the grant revoked on the simple ground, apart from any other considerations, that there had been no citation issued to Girish. In our opinion, this proposition also is ,much too widely stated. Section 263 of the Act vests a judicial discretion in the court to revoke or annul a grant for just cause. The explanation has indicated the circumstances in which the court can come to the conclusion that "just cause" had been made out. In this connection the appellant relied upon clause (a) quoted above which requires that the proceedings resulting in the grant sought to be revoked should have been "defective in substance". We are not inclined to hold that they were "defective in substance". "Defective in substance" must mean that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings. If there were any suggestions in the present proceedings or any circumstances were pointed out to show that if Girish had been cited he would have been able to enter a caveat, the absence of citation would have rendered those proceedings "defective in substance". It may be that Girish having been found to have been the next reversioner to the testator's estate in case of intestacy and on the assumption that Charu had murdered the testator, Girish might have been entitled to a revocation of the grant if he had moved shortly after the grant of the probate on the simple ground that no citation had been issued to him. The omission to issue citations to persons who should have been apprised of the probate proceedings may well be in a normal case a ground by itself for revocation of the grant. But this is

> not an absolute right irrespective of other considerations arising from the proved facts of a case. The law has vested a judicial discretion in the Court to revoke a grant where the court may have prima facie reasons to believe that it was necessary to have the will proved afresh in the presence of interested parties. But in the present case we are not satisfied in all the circumstances of the case that just cause within the meaning of section 263 had been made out. We cannot ignore the facts that about 27 years had elapsed after the grant of probate in 1921, that Girish in spite of the knowledge of the grant at the latest in 1933 did not take any steps in his lifetime to have the grant revoked, that there was no suggestion that the will was a forgery or was otherwise invalid and that the will was a registered one and had been executed eight years before the testator's unnatural death. Hence the omission of citations to Girish which ordinarily may have been sufficient for a revocation of the grant was not in the special circumstances of this case sufficient to justify the court to revoke the grant.
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> (emphasis supplied)

38. In the case of **Manibhai Amaidas Patel and Anr. vs. Dayabhai Amaidas,**[13] after adverting to the explanation (a), (b) and (c) to Section 263, and illustration (ii) and (iii) thereto, the Supreme Court enunciated the law as under:-

> 9] This would clearly show that it is necessary to cite parties who would otherwise have an interest in the succession to the estate of the deceased. That would naturally include all the heirs of the deceased. Besides, section 283 gives power to the

13 (2005) 12 SCC 154.

> District Judge as regards the issue of citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate. Necessarily therefore the facts on the basis of which the District Judge is required to exercise his discretion must be fairly placed before him. In this case the respondent had done nothing of the sort as we have already noticed.
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> 10] The Courts below also overlooked the fact that in their application for revocation the appellants had clearly stated that in other proceedings between the members of the family of Amaidas and the respondent the Will had been successfully disputed. In the circumstances, for the respondent to say that the grant was being opposed by "nobody" was misleading. The grant was obtained by concealing from the Court something which was very material to the case. The appellants were entitled to be heard and doubtless the District Judge would have directed to issue of citations to each of Amaidas's heirs on intestacy under Section 283(1)(c) of the Act had the true facts been revealed by the respondent in his application for grant of probate. The advertisement in this case was wholly insufficient to patch up the gross lacuna.
>
> (emphasis supplied)

39. The legal position which thus emerges is that, the failure to serve the citation on the person who is otherwise entitled to be heard under section 283 of the Succession Act before the grant of Probate or Letters of Administration may ordinarily render the proceedings defective in substance. That brings to the fore the question as to who

can be said to be the person claiming to have any interest in the estate of the deceased, referred to in section 283 of the Indian Succession Act, 1925.

40. A profitable reference in this context can be made to a decision of the Supreme Court in the case of **Krishna Kumar Birla vs. Rajendra Singh Lodha and Ors,**[14] wherein the Supreme Court, after an elaborate consideration of the provisions and precedents culled out the propositions as under:-

> " 58. A person to whom a citation is to be issued or a caveator, must have some interest in the estate of the testator. Any person claiming any interest adverse to the testator or his estate cannot maintain any application before the Probate Court. His remedy would be elsewhere. The question with regard to the degree of interest or the right which a caveator must show to establish his or her caveatable interest before the
> Probate Court should be considered having regard to the aforementioned legal propositions.
> … … ...
> 84. Section 283 of the 1925 Act confers a discretion upon the court to invite some persons to watch the proceedings. Who are they? They must have an interest in the estate of the deceased. Those who pray for joining the proceeding cannot do so despite saying that they had no interest in the estate of the deceased. They must be persons who have an interest in the estate left by the deceased. An interest may be a wide one but such an interest must not be one which would not (sic) have the effect of destroying the estate of the testator itself. Filing of a suit is

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14 (2008) 4 SCC 300.

contemplated inter alia in a case where a question relating to the succession of an estate arises.

… … ...

86. The propositions of law which in our considered view may be applied in a case of this nature are :

(i) To sustain a caveat, a caveatable interest must be shown.

(ii) The test required to be applied is: does the claim of grant of probate prejudice his right because it defeats some other line of succession in terms whereof the caveator asserted his right.

(iii) It is a fundamental nature of a probate proceeding that whatever would be the interest of the testator, the same must be accepted and the rules laid down therein must be followed.

The logical corollary whereof would be that any person questioning the existence of title in respect of the estate or capacity of the testator to dispose of the property by Will on ground outside the law of succession would be a stranger to the probate proceeding inasmuch as none of such rights can effectively be adjudicated therein.

… … …

89. While determining the said question, the law governing the intestate succession must also be kept in mind. The right of the reversioner or even the doctrine of “spes successionis” will have no application for determining the issue in a case of this nature.

… … …

103. What would be caveatable interest would, thus, depend upon the fact situation obtaining in each case. No hard and fast rule, as such, can be laid down. We have merely made attempts to lay down certain broad legal principles.

… … …

135. It is too far fetched a submission that a person having a remote family connection or as an agnate is entitled to file a caveat. A reversioner or an agnate or a family member can maintain a caveat only when there is a possibility of his inheritance of the property in the event the probate of the Will is not granted. If there are heirs of intestate who are alive, entertaining of a caveat on the part of another family member or a reversioner or an agnate or cognate would never arise."

(emphasis supplied)"

41. A conjoint reading of the propositions culled out in clauses (ii) and (iii) of paragraph 86, spells out the test which is to be applied to ascertain the existence of a caveatable interest, namely, "the Caveator ought to be in a position to show that if the grant of Probate or Letters of Administration is made it will defeat his claim of succession or inheritance to the estate of the deceased for the reason that it defeats some other line of succession". If the Caveator is likely to inherit a very small part of the estate of the deceased in the event the Probate or Letters of Administration, as the case may be, is not granted, it can be said that the Caveator has a caveatable interest. Conversely, if the Caveator questions the existence of title in respect of the estate or capacity of the testator to dispose of the property by Will on a ground outside the law of succession, ordinarily, he can be termed as a stranger to the Probate proceeding.

42. Following the pronouncement in the case of **Anil Behari Ghosh (Supra)** the Division Bench of this Court in the case of **S. A. Modi (Supra)** enunciated that, the ordinary rule is that the omission to issue citation to the person who ought to have been apprised of the probate proceedings may provide for a ground by itself for revocation of the grant of probate. The existence of special circumstances, however, may justify departure from the ordinary rule. As held by the Supreme Court, revocation of the grant on the ground of the omission to issue citations to person who should have been apprised of the probate proceedings, is not the absolute right. The special circumstances obtaining in a given case may justify refusal to revoke the grant of probate even where there is omission to issue citation to the necessary party. Whether the special circumstances justifying the denial of revocation of grant exist or not would depend on the facts of each case. The refusal to revoke the grant may be justified in the case where though there is an omission to issue citation to a necessary party but there is no possibility of proof being offered due to the death of the witnesses and executors and there is no challenge to the genuineness of the Will.

43. In the light of the aforesaid enunciation of law, readverting to the facts of the case, the thrust of the case of the Petitioner is that the Respondents resorted to the suppression of facts and made positive false statements that the deceased had not left behind any heir and next of

kin, though the the alleged beneficiaries under the Will fully knew that the Petitioner was the biological son of the deceased. Undoubtedly, the issue No.1 casts the burden on the Petitioner to establish that he is the biological son of the deceased. However, the Court cannot loose sight of the nature of the proceedings. The scope of enquiry in a revocation petition has been adverted to above. Thus, the Petitioner may not be required to establish the issue to the hilt that he is the son of the deceased. A definitive finding in the sense of a declaration *in rem* that the Petitioner is the son of the deceased does not seem to be peremptory for the determination of this Petition. It would suffice, if upon consideration of the evidence and material, the Court forms an opinion that there are reasonable grounds to believe that the Petitioner is the son of the deceased and, thus, a citation ought to have been issued to the Petitioner before the grant of probate. On this touchstone, this Court considers it appropriate to evaluate the evidence and material.

44. In a case of the present nature, where one party asserts a relationship with the deceased and the other party controverts the same and the contest takes the shape of an oath against oath, the documents which bear upon the probabilities of the case assume significance. The trump card of the Petitioner was the birth certificate issued by the Municipal Corporation (Exhibit "P6") certifying that the Petitioner was born on 20th February 1946. It is true the birth certificate came to be

issued on 7th July 2011, after the institution of the Petition, However, that, by itself, cannot be a ground to jettison away the birth certificate (Exhibit "P6").

45. It would be contextually relevant to note that, during the course of cross-examination of Arnold Samson (PW1) it was suggested on behalf of the Respondents that the fact relating to the birth of the Petitioner was reported to the Municipal Corporation on 28th February 1946. The Petitioner also positively asserted in the cross-examination that his place of birth was Khar, Bombay and he lived in Santacruz. In the birth certificate, the name of Mrs. Rosalind finds mention as the mother of child, "Arnold Kapur", and Mr. Hari Madanchand Kapur is shown as the father of the said child . The entries in the birth certificate (Exhibit "P6") thus seems to lend support to the claim of the Petitioner that he was born out of the wedlock between the deceased and Mr. Hari Kapur.

46. In contrast, the substance of the resistance on behalf of the Respondents was that the entries in the birth certificate (Exhibit "P6") are not correct or at any rate have not been proved to be correct on account of the non-production of the original Birth Register and examination of the concerned officials. In any event, the entries, in the birth certificate cannot prove the parentage of the Petitioner. This brings

to the fore the question of the evidentiary value of the entries in the birth certificate.

47. Section 35 of the Indian Evidence Act provides that an entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

48. The certificate in question (Exhibit "P6") seems to have been issued in accordance with the provisions contained in Sections 12/17 of the Act of 1969 and Rule 8/13 of the Rules, 2000. It certifies that the information enumerated therein has been taken from the original record of birth which is registered for Municipal Corporation of Greater Mumbai of Ward HW, District Mumbai of Maharashtra State.

49. Section 7 of the Act of 1969, casts duty on the Registrar to make entries in the register maintained for the purpose of registration of births and deaths. Section 8 of the Act of 1969, enlists the persons who are enjoined to give information of birth and deaths. Under Section 10 of the Act, 1969 duties are also cast on certain persons to notify births and deaths and to certify cause of death. Section 11 of the Act of 1969 makes it obligatory upon a person who has orally given information to the Registrar to sign the register. Under Section 12 of

the said Act, the Registrar is required to issue extracts of registration entries. Section 17(2) of the Act of 1969, *inter alia,* provides that all extracts given under Section 17 shall be certified by the Registrar or any other officer authorised by the State Government to give such extract as provided in Section 76 of the Indian Evidence Act, and shall be admissible in evidence for the purpose of proving the birth or death to which the entry relates. Section 30 of the Act of 1969 empowers the State Government to make rules to carry out the purposes of the said Act. In exercise of the said power, the Government of Maharashtra has framed the rules, the Maharashtra Registration of Birth and Death Rules 2000 ("the Rules, 2000").

50. A profitable reference, in this context, can be made to a judgment of the Supreme Court in the case of **Birad Mal Singhvi vs Anand Purohit**[15], wherein the election petition arose on account of alleged improper rejection of the nomination paper for the election to the Legislative Assembly as the candidates were held to be below 25 years of age. The entries made in the school register were pressed into service to demonstrate the improper rejection of the nomination papers.

51. In the backdrop of the aforesaid fact situation, the Supreme Court enunciated the legal position in the following words :

> "15……..Section 35 of the Indian Evidence Act lays down that entry in any public, official book, register, record stating a fact in

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15 AIR 1988 SC 1797.

> issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding to the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded.
>
> … … …
>
> 17. … … … The entries regarding dates of birth contained in the scholar's register and the secondary school examination have no probative value, as no person on whose information the dates of birth of the aforesaid candidates was mentioned in the school record was examined. In the absence of the connecting evidence the documents produced by the respondent, to prove the age of the aforesaid two candidates have no evidentiary value.

52. A useful reference can also be made to a judgment of Supreme Court in the case of **Madan Mohan Singh vs Rajni Kant**,[16] wherein the Supreme Court underscored the proposition that the authenticity of the entries would depend upon whose information such entries stood recorded. The Supreme Court held as under :

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16 (2010) 9 SCC 209.

"20. So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entry in School Register/School Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.

21. For determining the age of a person, the best evidence is of his/her parents, if it is supported by un-impeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the un-impeachcable evidence of reliable persons and on temporaneous documents like the date of birth register of the Municipal Corporation, Government Hospital/Nursing Home etc, the entry in the school register is to be discarded. (Vide: Brij Mohan Singh Vs. Priya Brat Narain Sinha & Ors. AIR 1965 SC 282; Birad Mal Singhvi Vs. Anand Purohit AIR 1988 SC 1796; Vishnu Vs. State of Maharashtra (2006) 1 SCC 283; and Satpal Singh Vs. State of Haryana JT 2010 (7) SC 500).

22. If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) or Sections 50, 51, 59, 60 & 61 etc. of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time etc. mentioned therein".

(emphasis supplied)

53. In the case of **Vasudha Gorakhnath Mandlvilkar (Supra)** where the Petitioner's date of birth was an issue in relation to his employment with the Respondent, it was enunciated that the presumption of the correctness in the entries in the public record cannot be rebutted on the basis of mere conjectures. When the matter went in appeal before the Supreme Court in the case of **CIDCO Vs Vasudha Gorakhnath Mandevlekar,**[17] the Supreme Court enunciated that deaths and births register maintained by the statutory authorities raises a presumption of correctness. Such entries made in the statutory registers are admissible in evidence in terms of Section 35 of the Evidence Act. It would prevail over an entry made in the school register, particularly, in absence of any proof that same was recorded at the instance of the guardian of the respondent.

54. The crucial question that comes to the fore is whether the entries in the birth certificate are of assistance in establishing the parentage of the child. The thrust of the submission of Mr. Kakalia was that, the entries in the birth certificate cannot prove the parentage of the Petitioner. Reliance was placed on the judgment of the Madras High Court in the case of **Rajambal & Ors Vs Veeramuthu Udayar & Ors**[18] to show the evidentiary value of the birth extract. Special emphasis was

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17 (2009) 7 SCC 283.

18 Madras High Court A.S. No. 763 of 1978, decided on 14th December 1984.

laid on the following observations in paragraph 39 and 40 of the said judgment.

> "39. … … … The evidentiary value of the birth extract has come to be laid down in Mahadeva Rao Vs Yasoda Bai (1962 MLJ (Cri) 427:75 LW 17). Ananthanarayanan, J. as he then was, has held as follows:
>
> > "Unless it could be established by evidence that the father of the child is himself the informant, on the basis of which information the paternity of the child is entered in the Birth Register of the Local Body an extract of such birth register where the name of the informant is not filled up, cannot give rise to any presumption as to the paternity of the child in a proceeding for maintenance under Section 488 of the Criminal Procedure Code...."
>
> 40. Again in Narayanaswami Naidu v. Kochadai Naidu (ILR 1969-1 Madras 459 at 460: 81 LW 436) the head note reads:
>
> > "Under Section 35 of the Evidence Act (I of 1872), it is only the entry made by a public servant in the discharge of his official duties that is admissible as a relevant fact. Other particulars not strictly covered by the entries are not admissible under Section 35 of the Evidence Act. The name of the child recorded in the birth registration extract was inadmissible under Section 35 of the Evidence Act. The entries do not require the officer to record the name of the child. If there is other independent evidence connecting the entries, the entries and the independent evidence may supplement one another."

> "If somebody who gave the information had given evidence about his knowledge of the relationship, the entry would be corroborative evidence of the evidence of that witness under Section 157 of the Evidence Act, but not the entries themselves."

> Therefore, these by themselves do not prove the paternity. That apart, there is no birth extract either for the 4th plaintiff or the 7th plaintiff. Why they have not been filed is not explained."

55. The aforesaid decision, on its correct reading, seems to proceed on the premise that the particulars not strictly covered by the entries in the Birth Register are not admissible under Section 35 of the Evidence Act. The entries in the register, the Madras High Court found, did not require the registering officer to record the name of the child. Thus, the name of the child recorded in the Birth Register extract, where the name of the informant was not filled up, cannot give rise to presumption as to the paternity of the child, held the Madras High Court.

56. The evidentiary value of the entries in the Register maintained under the Registration of Births and Deaths Act, 1969, is required to be determined in the light of the provisions contained in the Act of 1969, the rules framed by the respective State Governments and in particular the form in which the information is required to be furnished and also maintained in such registers.

57. Chapter IV of the Act of 1969, contains provisions under the heading Maintenance of Records and Statistics. Section 16(1), subsumed thereunder, enjoins every Registrar to keep in the prescribed form a register of birth and deaths for the registration area or any part thereof in relation to which he exercises jurisdiction. As noted above, under Section 30 the State Government is empowered to make rules to carry out the purposes of the said Act, 1969. Under Section 30(2), in particular, such rules may provide for (a) the forms of register of birth and death required to be kept under that Act.

58. It would be contextually relevant to note that Section 8 of the Act, 1969, cast duty on the specified persons to give information to the Registrar of the several particulars required to be entered in the forms prescribed by the State Government under sub-Section (1) of Section 16. Thus, the forms of registers are to be prescribed by the State Government concerned by rules.

59. Rule 5 of the Rules, 2000, *inter alia,* provides that the information required to be given to the Registrar under Section 8 or Section 9, as the case may be, shall be in Form Nos. 1, 2 and 3 for the registration of a live birth, death and still birth respectively. Form No.1, *inter alia,* containts the entries regarding the name of the child, if any; name of the father; and name of the mother (entry 3, 4 and 5).

60. Since the birth certificate is in relation to the birth dated 20th February 1946 and date of registration is of 28th February 1946, the provisions contained in Sections 29 and 31 of the Act of 1969, deserve to be noted.

61. Section 29 declares that nothing in the Act of 1969, shall be construed to be in derogation of the provisions of the Births, Deaths and Marriages Registration Act, 1886.

62. Section 31 of the Act of 1969, incorporates repeal and saving clauses. Sub-Section (1) of Section 31, provides that subject to the provisions of Section 29, as from the coming into force of this Act in any State or part thereof, so much of any law in force therein as relates to the matters covered by the Act of 1969, shall stand repealed in such State or part, as the case may be. Sub-Section (2) of Section 31 provides that, notwithstanding such repeal, anything done or any action taken (including any instruction or direction issued, any regulation or rule or order made) under any such law shall, insofar as such thing or action is not inconsistent with the provisions of the Act of 1969, be deemed to have been done or taken under the provisions of the Act of 1969, as if they were in force when such thing was done or such action was taken, and shall continue in force accordingly until superseded by anything done or any action taken under that the Act of 1969.

63. It would be contextually relevant to note that under the Births, Deaths and Marriages Registration Act, 1886 ("the Act of 1886"), the Registrar of births and deaths was enjoined to make an entry of birth or death in the proper register, if the notice was given within the prescribed time and in the prescribed mode by the authorised person.

64. Section 22(1) of the Act of 1886, made it obligatory on the person giving notice of birth or death to sign the entry in the register in the presence of the Registrar. Section 25(2) provided for issuance of certified copy of an entry in the register and made such copy of entry admissible in evidence for the purposes of proving of birth and death to which the entry relates. Section 36 of the Act of 1886, also empowered the State Government to make rules including to prescribe the forms required for the purposes of the Act of 1886.

65. In the light of the aforesaid regime which prevailed before the enactment of the Act of 1969 and post the enactment thereof, I find it rather difficult to accede to the submission on behalf of the Respondents that the entries of the name of the mother and father of the child were not required to be made and, even if such entries were made, those are wholly immaterial and inconsequential.

66. In view of the provisions contained in Section 31 of the Act of 1969, the issue of a birth certificate even in respect of the birth, which has taken place prior to 1969, where the entries in respect of such birth

are made in the register maintained by the Registrar under Act of 1886 and the rules framed thereunder, cannot be said to be without a legal mandate if the forms prescribed by the State Government contain the particulars of the mother and father of the child and such entries were made in the register maintained by the Registrar, then it cannot be laid down as an immutable rule of law that the evidentiary value of a birth certificate is restricted to the factum of birth only and the names of the parents of the child mentioned therein are of no consequence.

67. It is true, in the case at hand, the Petitioner did not examine the concerned official in proof of the correctness of the entries in the birth certificate. At this juncture the nature of the objection raised on behalf of the Respondents to the marking of the birth certificate in evidence assumes importance. In the order dated 4th April 2004 this Court recorded that the Counsel for Respondent No.2 did not dispute the existence of the birth certificate but disputed the contents thereof. Thus, the birth certificate being a public document was admitted in evidence and marked Exhibit "P6".

68. Having disputed the contents of the birth certificate and the correctness thereof, in the face of the presumptive value attached to the entries in the birth certificate, it was for the Respondents to seek the production of the original register and examine the concerned official if they intended to establish that the contents of the birth certificate were

not correct or for that matter the entries were not made on the basis of the information furnished by a person who could vouch for the correctness of those entries.

69. Reliance placed by Mr. Shah on the judgments of the **Harpal Singh And Anr (Supra)** appears to be well founded. In the said case also, the correctness of the entries in the birth certificate was sought to be contested on the ground that in the absence of the examination of the officer who made the entry, it was inadmissible in evidence. The Supreme Court did not accede to the submission observing that, the entry was made by the concerned official in the discharge of his official duties, and, therefore, it was clearly admissible in view of Section 35 of the Evidence Act and it was not necessary for the prosecution to examine its author.

70. The reliance on the decision of the Supreme Court in the case of **Alamelu and Anr (Supra),** and of this Court in the cases of **Gulabrao Tuljaram Mandge (Supra)** and **Sayyed Zafaroddin S/o Afzalodin (Supra)** does not appear to advance the cause of Respondent Nos. 2 and 3.

71. In the case of **Alamelu and Anr (Supra)** the age of the victim was sought to be established on the basis of the entry in the transfer certificate. In that context, the Supreme held that there was no reliable

evidence to vouchsafe the correctness of the date of birth as recorded in the transfer certificate.

72. In the case of **Gulabrao Tuljaram Mandge (Supra),** this Court in terms observed that once it was found that the admissibility and reliability of the birth certificate issued by the Competent Authority, on the basis of the entries made in the births and deaths register in conformity with the provisions of the Act and the Rules, was not in doubt, then the authorities could not have lightly brushed aside the said birth certificate.

73. The decision in **Sayyed Zafaroddin S/o Afzalodin (Supra)** turned on the peculiar facts of the said case that necessitated the remand of the matter to the Collector for afresh decision on the question as to whether a third child was born to the Petitioner therein.

74. In the light of the aforesaid position in law, I am impelled to hold that the entries in the birth certificate which record the first name of the Petitioner as the child born to Ms. Rosalind, the deceased, and Mr Hari Kapur, lend credence to the claim of the Petitioner and those entries in the birth certificate cannot be lightly brushed aside.

75. Mr. Kakalia was, however, justified in canvassing the submission that the mere production of the School Leaving Certificate (Exhibit “P7” and “P65”) is of no avail to the Petitioner to establish either the date of birth or the relationship with the deceased.

76. The upshot of the aforesaid consideration is that the entries in the birth certificate (Exhibit "P6") *prima facie,* substantiate the claim of the Petitioner that the deceased was his mother and he was born out of the wedlock of the deceased with Mr. Hari Kapur.

77. The letters/aerograms addressed by the deceased to the Petitioner addressing the Petitioner as her son were heavily banked upon by the Petitioner to establish the relationship between the parties. As many as 41 letters/aerograms were pressed into service and proved in evidence. Five of those letters are not accompanied by the envelopes. Ten letters are with envelopes. Around 30 aerograms were purportedly received by the Petitioner at Sweden from the deceased. Broadly, the tenor of the letters and aerograms gives an impression that the deceased consistently addressed the Petitioner as her son.

78. Mr. Shah placed reliance on the particular portions of those letters/aerograms, especially those at Exhibits "P48", "P49", "P50", "P13", "P26", "P32", "P28", "P39", "P42", "P55" and "P56", to show that the deceased not only referred to the Petitioner as her son but also reflected upon her status as the mother of the Petitioner. Indeed such portions are indicative of the purported mother/son relationship between the parties, interspersed with myriad topics to which the deceased purportedly adverted to in those letters and aerograms.

Nonetheless, the broad feature of those communications indicates that they were addressed to the Petitioner as the son of the deceased.

79. Mr. Kakalia would urge that, on the one hand, the piecemeal manner in which those letters were produced and the intrinsic evidence thereof, especially the absence of the stamp of the receiving postal authority, in the majority of aerograms; the absence of stamp of both the dispatching and receiving postal authorities in respect of few letters and the absence of the envelope in a few other cases indicates that the letters are forged and fabricated. On the other hand, the correctness of the contents of the letters cannot be said to have been proved even if it is assumed that those letters were indeed addressed by the deceased to the Petitioner.

80. On the first count, Mr Kakalia would urge, the explanation sought to be offered by the Petitioner in regard to the absence of the stamp and envelope were rather flimsy. Thus, it would be hazardous to place reliance on the testimony of the Petitioner (PW1). It is true the Petitioner feigned ignorance about the absence of the stamp on few of the letters/aerograms and casually stated that it was for the postal authority to explain. However, in this proceeding, a broad view of the matter is required to be taken. This Court finds that a majority of communications were by way of aerograms. Aerogram is a mode of communication which acts both as the letter and the envelope. A

substantial number of those aerograms do bear the outward stamp of India. The absence of inward stamp of Sweden on few of the aerograms by itself, in the considered view of this Court cannot be a ground to discard those aerograms from consideration altogether. The Court cannot loose sight of the fact that those letters and aerograms were addressed since the late 1970s. It would be taking a very rigid view of the matter to insist that the Petitioner must produce envelopes, or for that matter, offer an explanation as to the absence of the inward stamps and envelopes.

81. The second objection as to the absence of proof of correctness of the contents was sought to be urged on the ground that, only the author of those letters could vouch for the correctness of their contents. Thus, the evidence of the Petitioner (PW1) is of no avail to prove the contents of those letters/aerograms.

82. To this end, Mr. Kakalia placed reliance on the judgment of the Supreme Court in the case of **Bishwanath Rai Vs Sachhidanand Singh,**[19] wherein it was enunciated that in the absence of the examination of the author of the letter, the correctness of the statements contained therein cannot be said to have been proved. The evidence of the person who claimed that the contents of the letters were in the handwriting of the author can at best prove the contents of the letters, but not the correctness of those contents.

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19 (1972) 4 SCC 707.

83. The question of admissibility of the said evidence is required to be determined keeping in view the fact that the author of the said letters/aerograms is dead.

84. The provisions contained in Section 32(5) of the Evidence Act governs the situation of the present nature. Statements written or verbal, of relevant facts made by a person who is dead, are themselves relevant facts when the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption, the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

85. In the case of **Dolgobinda Paricha Vs Nimai Charan Misra and Ors,**[20] the Supreme Court enunciated that the four conditions must be fulfilled for the application of sub-Section (5) of Section 35; firstly, the statements, written or verbal, of relevant facts must have been made by a person who is dead; secondly, the statements must relate to the existence of any relationship by blood, marriage or adoption; thirdly, the person making the statement must have special means of knowledge as to the relationship in question; and lastly, the statements must have been made before the question in dispute was raised.

86. Appraising the aforesaid evidence in the case at hand, on the touchstone of the aforesaid conditions, the first condition of the

20 AIR 1959 SC 914.

statement having been made by a person who is dead; the second condition of such statement throwing light on the relationship between the deceased and the Petitioner; the third condition of the deceased having the special knowledge as to the relationship in question and the last condition of the statement having been made before the controversy arose, all stand fulfilled. Thus, the statement contained in the aforesaid letters/aerograms indicating the relationship between the deceased and the Petitioner cannot be eschewed from consideration on the premise that the correctness of the contents has not been proved by examining the author thereof.

87. It is true that the language of few of the letters (Exhibit "P30", "P37" and "P39"), to which reference was made by Mr. Kakalia, may not have the trappings of the typical communication between a mother and son. However, human emotions, personalities and relationships cannot be confined to a straightjacket. A variety of factors influence the nature, intensity and candour of discourse between the parents and children. A fact which is taboo in one society/situation may be openly discussed between the parent and the children in another society/situation. Thus, I am afraid to accede to the submission of Mr. Kakalia that a slightly unusual and awkward discourse in the letters (Exhibit "P30", "P37" and "P39"), erodes the nature of the relationship propounded by the Petitioner.

88. The aerograms (Exhibit "P56" and "P57"), purportedly addressed by late Hari Kapur to the Petitioner, are of immense significance in rendering the case of the Petitioner preponderately probable. The aerograms (Exhibit "P56" and "P57") were addressed on 26th November 1976 and 11th February 1977. Those aerograms bear the seal of the postal authority in India. In the said aerograms, the late Hari Kapur not only refers to the Petitioner as his son but conveys his love and affection to the wife and son of the Petitioner, by addressing them as daughter-in-law and grandson. The other children of late Mr. Hari Kapur are referred to as the siblings of the Petitioner.

89. If the aforesaid communications are considered in juxtaposition with the birth certificate in which late Hari Kapur is shown as the father of the Petitioner, then an inference becomes legitimate that the Petitioner has brought adequate material on record to substantiate the claim that he was born out of the relationship between the deceased and the late Hari Kapur.

90. The third document which was pressed into service on behalf of the Petitioner was the communication dated 27th March 2014 from theUS Office of Personnel Management (Exhibit "P58"). Alongwith the said document a cheque drawn for 117.26 $ was sent to the Petitioner towards lump sum payment because of the death of Samson Rosalin, the former employee. In the said communication, the date of birth of

the employee was shown as 2nd February 1928. The said document, Mr. Kakalia was right in contending that, does not in the strict sense throw light on the relationship between the Petitioner and the deceased. At best, it establishes that the Petitioner was nominated to receive the lump sum payment because of the death of the deceased. The evidence on record does not indicate the circumstance in which the said communication came to be addressed by the US Office of Personnel Management. The Petitioner also failed to make a clean breast of the circumstances in which the said letter came to be addressed.

91. At this stage, the documents relied upon by the Respondents to show that the Petitioner was a spinster and her date of birth was 2nd February 1934 deserve consideration. Incontrovertibly, the Passports of the deceased reveal her date of birth as 2nd February 1934, and also bear an endorsement that she had no children, consistently. The other personal identification documents, like the PAN card, also depicted the same position.

92. At this juncture, the nature of the proceedings for revocation of the grant of Probate, the standard of proof required to sustain a claim for revocation and the element of preponderance of probabilities assume significance. The manner in which the deceased-Respondent No.2 fared in the cross-examine also becomes critical. Respondent No.2-Vimla Rama Rao (RW1), conceded in the cross-examination that the

Petitioner used to visit India and stayed in the subject flat with the deceased very year, since 1979. While denying the suggestion that the Petitioner used to stay with the deceased for a month every year, Vimla Rama Rao (RW1) asserted that the Petitioner used to stay for 5 to 10 days on an average, with the deceased every year. These admissions imply that the visit of the Petitioner to the deceased every year was an annual feature. There was an element of regularity, system and repetition. Duration apart, the Petitioner did stay with the deceased, during those visits.

93. Vimla Rao (RW1) conceded that she has visited Israel alongwith the deceased to attend the marriage ceremony of one of the relatives of the deceased. To a pointed question (Q.179), that she had known the relatives of the deceased, whom she has already met at Mumbai, but she did not know the identity of those relatives, Vimla Rao (RW1) gave an affirmative answer.

94. To a further question, that the deceased has purportedly informed her that she has no relatives in India, "because she had relatives outside India" (Q.204), Vimla Rao (RW1) replied that, it was possible but she did not know for sure. Later on, Vimla Rao (RW1) tried to wriggle out of the situation by asserting that she had not properly understood the questions.

95. It would be contextually relevant to note that Vimla Rao (RW1) also conceded in the cross-examination that she had not made enquires after the demise of the deceased whether the deceased had any relatives and/or heirs. She further stated that she never asked the deceased about the relationship between the deceased and the Petitioner, though the deceased and the Petitioner shared the same surname.

96. The situation which thus obtains is that, Respondent No.2 had visited Israel along with the deceased-testatrix to attend the marriage ceremony of a son of one of the relative of the deceased. The testimony of Aaron Daniel Benjamin (PW2) demonstrates that the deceased had a sister. In the Petition as well, as in response to the query by the Testamentary Department, a statement was made by the Executor that the deceased has orally informed the beneficiaries and friends that she was alone and had no relatives in India.

97. Since the Petitioner has succeeded in bringing on record adequate material to make out a strong *prima facie* case of the existence of relationship between the Petitioner and the deceased as a son and mother, the failure to issue a citation to the Petitioner on the basis of a statement that the Petitioner had no heirs and relatives in India, in the circumstances of the case, constitutes a substantial defect in the proceedings. It appears, the Petitioner was deprived of an opportunity

to appear and contest the proceeding for the grant of Probate in respect of the Will in question on account of the statement made on behalf of the Respondents that the testatrix has no relatives in India.

98. The concomitant circumstances namely the Petitioner asserted his right as the sole heir of the deceased the Petitioner instituted a suit against the Society in which the subject flat is situated and Respondent Nos. 2 and 3, before the grant of probate, and the purported Will was executed while the deceased was admitted in Saifee Hospital and passed away under a fortnight of the execution of the Will, cumulatively indicate that there are no special circumstances which would dissuade the Court from revoking the probate, despite the failure to issue citation to the heirs of the deceased.

99. For the foregoing reasons Issue No.1 is required to be answered in the affirmative to the extent of conferring a right to participate in the proceedings for the grant of probate in respect of the Will of the testatrix.

100. Resultantly, the Petition deserves to be allowed.

101. Hence, the following order:

: O R D E R :

(i) The Petition stands allowed.

(ii) The Probate dated 10th July 2009 in Testamentary Petition No. 917 of 2008 stands revoked.

(iii) Testamentary Petition No. 917 of 2008 stands restored to file for afresh determination in accordance with law.

(iv) The interim injunction granted by the Appellate Court in Appeal No. 990 of 2010 shall continue to operate till the disposal of Testamentary Petition No. 917 of 2008.

(v) In the circumstances, there shall be no order as to costs.

[N. J. JAMADAR, J.]