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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

TESTAMENTARY SUIT NO. 16 OF 1992

IN

TESTAMENTARY PETITION NO. 400 OF 1988

Sumit Devidas Nandurkar

... Plaintiff

Versus

Gulabbhai Sitaram Bairagi & Ors.

... Defendants

WITH

CHAMBER ORDER (L) NO. 7877 OF 2026

IN

TESTAMENTARY SUIT NO. 16 OF 1992

Mr. Rakesh Kumar a/w. Mr. Raju Gupta, Mr. Pranay Singh, Mr. Aryan Tiwari
and Ms. Neelam Yadav, for the Plaintiffs.

Mr. Ashish Verma, for Defendant No. 2.

Mr. R. M. Haridas, for Defendant No. 3.

CORAM : ARIF S. DOCTOR, J.

RESERVED ON : 14th JULY, 2026

PRONOUNCED ON : 8th SEPTEMBER 2026

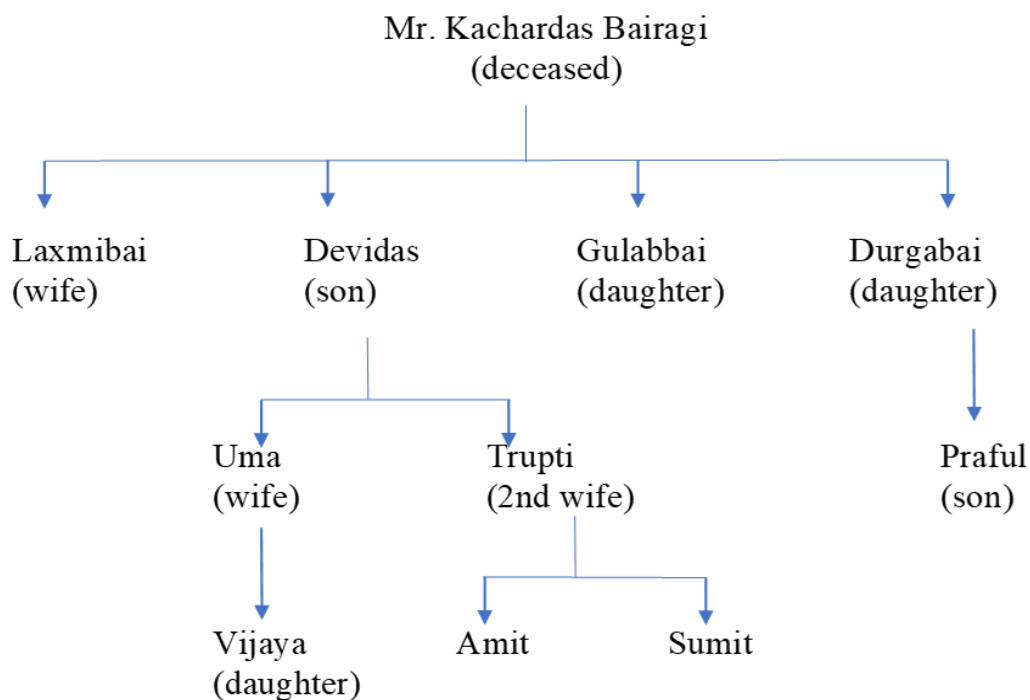
JUDGEMENT:

1. The present Suit seeks Letters of Administration in respect of the estate of

Mr. Kachardas Balkrishna Bairagi (“the deceased/testator”), on the basis of
a Will dated 28th April 1984 (“the said Will”), which is said to have been
executed by the deceased. The captioned Testamentary Petition was

originally filed for probate; however, the same was subsequently converted into the captioned Testamentary Suit for the reasons set out hereinafter.

2. The deceased passed away on 10th September 1984, leaving behind the following legal heirs (i) his widow, **Laxmibai** A. Bairagi (“Laxmibai”); (ii) his son, **Devidas** Kachardas Nandurkar (“Devidas”); (iii) his two daughters, **Durgabai** Ramkrishna Vaishnav (“Durgabai”) and **Gulabbai** Sitaram Bairagi (“Gulabbai”) and (iv) his granddaughter and two grandsons from the branch of Devidas, viz., **Vaijyantha** (from Devidas’s first wife, Uma), **Amit** and **Sumit** (from Devidas’s second wife, Trupti). For convenience, the family tree of the deceased is reproduced below:



3. The said Will named Laxmibai (wife) and Devidas (son) as its executors.

Devidas, however, passed away on 22nd December 1987. Thereafter, on 28th March 1988, Laxmibai filed the captioned Testamentary Petition for Probate of the said Will.

4. The original Will was deposited with this Court as Will No. 134 of 1998.

The said Will named (i) Mr. Vidyadhar Vinayak Joshi, Advocate and Solicitor; and (ii) Dr. V.P. Advirkar as the attesting witnesses. In support of the Testamentary Petition, Mr. Vidyadhar Vinayak Joshi filed an Affidavit dated 3rd May 1988.

5. Upon service of citations, Gulabbai, (one of the daughters of the deceased)

opposed the grant by filing a Caveat dated 27th March 1991, followed by an Affidavit in Support of the Caveat dated 22nd April 1991. Thereafter, Uma Devidas Kachardas Nandurkar Bairagi (first wife of Devidas) also opposed the grant by filing a Caveat dated 22nd March 1991 and an Affidavit in Support thereof dated 3rd April 1991. The Testamentary Petition was thus converted into the captioned Testamentary Suit.

6. Durgabai, the other daughter of the deceased, addressed a Letter dated 16th April 1991 to the Prothonotary and Senior Master of this Court, giving her consent to the grant of Letters of Administration to the Petitioners.
7. Laxmibai then passed away on 20th February 1997. Since the other named executor, i.e., Devidas, had also passed away, this Court by an Order dated 2nd July 1998, permitted the sons of Devidas, i.e., Mr. Sumit Devidas Nandurkar and Mr. Amit Devidas Nandurkar, who are also the residuary legatees under the said Will to prosecute the Suit as Plaintiffs.
8. Uma passed away on 16th January 2006, after which her daughter, i.e., Vaijayantha Mundhe, was impleaded as Defendant No. 2.
9. This Court by an Order dated 7th January 2008, framed the following Issues for determination:

ISSUES

1. *Do the petitioners prove due execution of the will dated 28th April, 1984 of the deceased Kachardas Balkrishna Bairagi?*
2. *Whether the petitioners are entitled to Letters of Administration with Will annexed of the Property and Credits of the deceased Kachardas Balkrishna Bairagi?*

3. *Whether the petitioners are entitled to prosecute the present suit originally filed by the Executrix for grant of Probate?*
4. *Whether the Defendants/Caveators have any caveatable interest and/or locus to oppose the grant of Letters of Administration as prayed for?*
5. *What order and decree?”*

10. Thereafter, by an Order dated 28th April 2008, this Court recorded that Mr.

Amit Devidas Nandurkar, Plaintiff No. 1, did not desire to prosecute the Suit and had no objection to its dismissal insofar as he was concerned. The Suit, however, continued at the instance of Plaintiff No. 2, i.e., Mr. Sumit Devidas Nandurkar (“the Plaintiff”).

11. Durgabai, then, despite the letter dated 16th April 1991 addressed to the Prothonotary and Senior Master of this Court, in which she had consented to the grant of probate, sought to contest the said Will by filing Chamber Summons No. 111 of 2010. By an Order dated 28th September 2010, this Court permitted Durgabai to contest the said Will and directed that the Affidavit in Support of Chamber Summons No. 111 of 2010 be treated as an Affidavit in Support of Caveat/Written Statement. Durgabai was accordingly impleaded as Defendant No. 3 to the Suit. Durgabai thereafter

also passed away, and her son, i.e. Mr. Praful Vaishnav Ramkrishna Das, was impleaded in her place as Defendant No. 3.

12. On 20th February 2017, a statement was made through Counsel before the Commissioner recording evidence that Defendant No. 2 i.e. Vaijyantha Mundhe did not wish to cross-examine the Plaintiff.

13. The parties thereafter led the following evidence, viz.

Plaintiff's Witnesses	Defendant's Witnesses
Sumit Devidas Nandurkar (PW-1)	Gulabbai Sitaram Bairagi (DW-1)
Dr. V.P. Advirkar (PW-2)	Praful Vaishnav Ramkrishna Das (DW-2)

14. It is pertinent to note that Defendant No. 1, i.e., Gulabbai, thereafter remained absent on several occasions. Consequently, by a conditional Order dated 16th February 2026, this Court directed all the Defendants to remain present on the next date of hearing and made it clear that, in the event of their failure to do so, the Court would proceed to decide the matter. Despite the said direction, Defendant No. 1 did not appear. Thereafter, by an Order dated 30th March 2026 passed by the Prothonotary and Senior Master, the Advocates for Defendant No. 1 were discharged. In view of Defendant No.

1's continued absence and failure to comply with the aforesaid directions, this Court proceeded ex-parte against Defendant No. 1.

Submissions on behalf of the Plaintiff:

15. At the outset, Mr. Kumar, learned Counsel appearing on behalf of the Plaintiff, submitted that Defendant No. 1 had, not in the Affidavit in Support, disputed the existence or genuineness of the said Will or its execution. He submitted that the only contention raised by Defendant No. 1 in the Affidavit in Support of the Caveat was that the deceased had no right to dispose of the properties bequeathed under the said Will.

16. Mr. Kumar then pointed out that Defendant No. 1 had not specifically disputed the signature of the deceased on the said Will, nor had Defendant No. 1 pleaded that the deceased at the time when the said Will was made lacked the testamentary capacity to make the said Will. He further submitted that Defendant No. 1 had neither disputed the signatures of the attesting witnesses appearing on the said Will nor had pleaded any illegality or irregularity in the execution or attestation of the said Will.

17. Mr. Kumar submitted that original Defendant No. 3, i.e., Durgabai, had, in the year 1991, expressly affirmed the said Will. In support of his contention, he invited my attention to a Letter dated 16th April 1991 addressed by Durgabai to the Prothonotary and Senior Master, to point out that Defendant No. 3 had expressly stated that the properties of the deceased could be divided in accordance with the said Will.

18. He submitted that Durgabai subsequently sought to withdraw her consent and contest the Will on the ground that her earlier consent had been obtained by fraud. In this connection, Mr. Kumar invited my attention to the Affidavit filed by Durgabai in support of Chamber Summons No. 111 of 2010, which he pointed out was directed to be treated as an Affidavit in Support of the Caveat/Written Statement. Mr. Kumar then invited my attention to paragraph 7 of the said Affidavit to point out that Durgabai had merely stated as follows, viz.

“7. I say that my signature was obtained fraudulently as the said document was not explained to me. I have a share of the properties mentioned in the present suit and therefore I am necessary party to the suit. I say that I could not file my caveat in the probate petition because of the said fraudulent consent which was obtained by the Original

Petitioner. I say that I have share in the properties of my father and he never intended to give all the properties to the Petitioner as there were family disputes between them. I say that the Will-Deed seems to be a fraudulent document and therefore the Petitioners are not entitled for any relief. ...” (emphasis supplied)

19. Mr. Kumar submitted that, apart from the aforesaid bald allegation, Durgabai had not specifically challenged either the execution or the validity of the said Will nor had she disputed the signature of the deceased appearing on the said Will or alleged that the deceased lacked the testamentary capacity to make the said Will.
20. Mr. Kumar then placed reliance upon the Caveat and Affidavit in Support filed by the original Defendant No. 2, i.e., Uma Devidas Kachardas Nandurkar, the first wife of Devidas, along with her daughter, i.e., Vaijayanta Mundhe, to point out that in paragraph 3 of the Affidavit in Support of the Caveat, it was stated, *inter alia*, as follows:

“3. I say that the said alleged Will of deceased Kachardas being Exh A to the Petition is a got up. As stated in the Complaint none of the said Will of the deceased Kachardas. All the said assets were mentioned at the behest and at the instance of husband Devidas and only with a view to harass me and my said daughter deprive us of our legitimate shares therein. It is pertinent to note my husband died on 22.12.87. The alleged Will of the said Kachardas was alleged to have been executed on 28.4.84 and the

said Kachardas died on 10.09.84. No probate of Will was applied for earlier than March 1988. The present Petition was filed only after the said Suit No. 769 of 1988 was filed inter alia by myself. I therefore say and submit that the said Will was and is bogus, got up and false and made with a dishonest intention on the part of Devidas and his father Kachardas and in at the instance of Trupti the alleged wife of Devidas and in collusion with each other and to deprive myself and my said daughter's right to inherit the assets of the said deceased Devidas"
(emphasis supplied)

21. Mr. Kumar also drew my attention to paragraph 9 of the said Affidavit, to point out that original Defendant No. 2, i.e., Uma, had stated as follows, viz.

"at the time of his death the said Kachardas was very old and was not keeping good health. He was residing with said Devidas, and depended upon and influenced by said Devidas to inturn influenced by the said Trupti. I therefore say and submit that Devidas persuaded the said Kachardas to execute the alleged Will. I therefore say that the alleged Will of Kachardas was executed without the knowledge and consent of the said Kachardas and/or against his own Will and/or the same was executed by Kachardas without knowing its contents and effects and implications. Had the true facts were disclosed to the said Kachardas, the said Kachardas would have refused to execute the alleged Will."
(emphasis supplied)

22. Mr. Kumar submitted that Uma Devidas Nandurkar passed away during the pendency of the Suit without entering the witness box or leading any evidence in support of the aforesaid allegations. He also pointed out that her

daughter, i.e., Vaijayanta Mundhe, continued as Defendant No. 2 but did not lead any evidence in support of the case as pleaded in the Caveat and Affidavit in Support. Mr. Kumar, therefore, submitted that the allegations of undue influence and want of knowledge or consent on the part of the deceased remained wholly unproved. He further pointed out that Vaijayanta Mundhe neither presented herself for cross-examination nor cross-examined the Plaintiff.

23. Turning to the Plaintiff's evidence, Mr. Kumar submitted that the Plaintiff had filed his own Affidavit in lieu of Examination-in-Chief (PW-1) along with the relevant documents, including the death certificate of the deceased, a copy of the said Will, the death certificate of Vidyadhar Vinayak Joshi, and the death certificate of Devidas. He pointed out that these documents were marked in evidence and further pointed out that, during the further examination-in-chief, PW-1 identified the signature of the deceased appearing on the said Will.

24. Mr. Kumar then referred to the cross-examination of PW-1 and pointed out that, in answer to Question No. 103, PW-1 had specifically stated that "*the*

will was executed by grandfather Mr. Kachardas Bairagi”, and no further case disputing the execution of the Will was thereafter put to PW-1. He also relied upon the following questions put to PW-1 and the answers given thereto in cross-examination, viz.

“Q.No. 106- What was your age when the Will was executed by the deceased ?

A.- Since the will was executed in the year 1984, I was then 12 years old.

...

Q.No. 117- You had just told that you do not know the exact date of the will. Can you tell the court how many witnesses signed that will?

A.-As per my knowledge it was signed by two witnesses.

...

Q.No. 120- that as you do not remember what happened 6 months back I put it to you, you do not know anything about the execution of the will and the said will is of the year 1984. What you want to say?

A.- I disagree regarding the rest. However, I say that the will was executed in 1984.

Q.No. 122- I put it to you that you do not know anything about will as the will states that he was 80 years when he executed the will.

A.- it is possible for me to forget few things.

Q. No. 124 – Can you please tell the Court where the deceased was staying when he executed the said will?

A.- The deceased was then residing at Hazi Aishabai Manjil, Dongri, Sandhurst Road, Mumbai.

Q.No. 125- Can you give full address of the deceased when he executed the will?

A. -I do not remember the room number but he was residing at the above address.” (emphasis supplied)

25. Mr. Kumar submitted that the tenor of the aforesaid cross-examination proceeded on the basis that a Will had in fact been executed by the deceased in 1984. He, however, pointed out that no specific case was put to PW-1 on behalf of Defendant No. 3 denying that the deceased had executed the said Will.

26. Mr. Kumar then also invited my attention to Question No. 156 put to PW-1 in cross-examination, viz.

“Q.No. 156 - The properties which are mentioned in so called will were belonging to grand-father as his properties.

A.- Yes”

Placing reliance upon the aforesaid answer, Mr. Kumar submitted that the case put to PW-1 itself proceeded on the footing that the properties referred to in the Will belonged to the deceased. He therefore submitted that the subsequent contention of Defendant No. 3 that the properties were ancestral properties was unsupported by the case put to the Plaintiff in cross-examination.

27. Mr Jagdale, then from the evidence of PW-2, Dr. Vijay P. Advirkar, the surviving attesting witness to the said Will, pointed out that PW-2 specifically deposed as follows, viz.

“Q.No.55- Please explain how you have deposed that Advocate V. V. Joshi came from Vile Parle, Mumbai?

A.- Advocate Joshi accompanied with Kachardas Bairagi and his wife came to my dispensary. He then told me and requested to proceed for examination of deceased Kachardas Bairagi.

Q.No. 56- Do you want to suggest that Advocate V. V. Joshi accompanied with Kachardas Bairagi and his wife came to your dispensary?

A.- Yes

Q.No. 76- I put it to you that the will was not signed by the deceased, Kachardas Bairagi at your dispensary?

A.- it is not true. It was signed in my dispensary.

Q.No. 83- Do you have any personal knowledge whether will was prepared as per the instruction of Kachardas Bairagi?

A.- Yes

Q.No. 87- Whether you have signed for certifying the correctness of this endorsement?

A.- Yes

Q.No. 88- Whether your signature above the rubber stamp of your dispensary is in a capacity as medical practitioner?

A.- yes

Q.No. 89- I put it to you that you have not signed on the Will in the capacity as attesting witness.

A.- No. It is not true.

Q.No. 90- I put it to you that Kachardas Bairagi has not signed the Will No. 134 of 1988 in your presence.

A.- it is not true

Q.No. 91- *I put it to you that Advocate Joshi has not signed the Will No. 134 of 1988 in your presence.*

A.- No, it is not true.

Q.No. 92- *I put it to you that you have not signed the Will No. 134 of 1988 in presence of Kachardas Bairagi or Advocate Joshi.*

A.- it is not true.”

28. Mr. Kumar submitted that the aforesaid evidence remained entirely unshaken in cross-examination. He submitted that nothing was elicited from PW-2 in cross-examination that either discredited his testimony or cast any doubt on the due execution and attestation of the Will.

29. He then also pointed out that it was never the pleaded case of Defendant No. 1, either in her Affidavit in Support of the Caveat or otherwise, that the deceased had not signed the Will in the presence of PW-2. He submitted that the suggestions to that effect were introduced only during the cross-examination of PW-2, without any foundation in the pleadings. He submitted that such suggestions could not displace PW-2's positive and categorical evidence regarding the execution and attestation of the Will.

30. Mr. Kumar further submitted that PW-2 was cross-examined at length by the advocate on behalf of Defendant No. 3 regarding certain minor

corrections in the Will and the initials appearing alongside those corrections despite the fact that Defendant No. 3 had never pleaded any case concerning such corrections in her Affidavit in Support of the Caveat/Written Statement. He submitted that, even so, PW-2 had satisfactorily explained that the corrections were in the handwriting of the deceased and made in his presence.

31. Mr. Kumar then submitted that PW-2 was also cross-examined on behalf of Defendant No. 3 and invited my attention to the following answer given in cross-examination by PW-2 to Question No. 122:

“Q.No. 122- Can you tell the Court on what basis you have given a fitness certificate to the deceased Kachardas Bairagi?”

A.- After examining him and interviewing him I gave medical certificate.”

32. Mr. Kumar then dealt with the evidence of Defendant No. 1, i.e., Gulabbai, and submitted that Defendant No. 1 had, in her Affidavit in lieu of Examination-in-Chief, sought to introduce an entirely new case which did not find place in her Affidavit in Support of the Caveat dated 22nd April 1991. He pointed out that Defendant No. 1 had not originally pleaded that the Will was fabricated or that it did not bear the signature of the deceased.

He also submitted that Defendant No. 1 had not pleaded that the Plaintiffs had influenced the deceased to execute the Will, that the Will had not been duly attested, or that the attesting witnesses had not seen the deceased sign it. All these allegations, he submitted, were sought to be introduced for the first time in the Affidavit of Evidence. Mr. Kumar submitted that it was well settled that a party cannot be permitted to set up through evidence a case which has not been pleaded.

33. He further pointed out that DW-1, i.e., Gulabbai, was cross-examined on behalf of the Plaintiff and, in answer to Question Nos. 8, 9 and 10, had specifically admitted that the case set out in her Affidavit of Evidence had been raised for the first time therein and did not form part of her Affidavit in Support of the Caveat dated 22nd April 1991.

34. Mr. Kumar submitted that even the Affidavit of Durgabai nowhere stated that the said Will did not bear the signature of the deceased. He pointed out that the case of Durgabai was limited to the allegation that the Will was fraudulent and that the Petitioners were therefore not entitled to relief. He submitted that despite this, Durgaibai, in her Affidavit in lieu of

Examination-in-Chief dated 12th February 2019, sought to introduce a case that the said Will did not bear the signature of the deceased. Mr. Kumar submitted that such an attempt to introduce a new case at the stage of evidence was impermissible.

35. Mr. Kumar then placed reliance upon the cross-examination of DW-2, i.e., Prafullachandra Ramkrushnadas Vaishnav, who entered the witness box on behalf of Defendant No. 3. He then invited my attention to the following answers given by DW-2 in cross-examination, viz.

“Question No. 24- Who has given you the information about the facts of the present case?

Answer- My mother informed me the facts of this case.

Question No. 29- Who informed you the facts as mentioned in the said paragraph of your Affidavit?

Answer- My mother informed me the same. (DW-3 was shown the document dated 16/04/1991 bearing Inward No. 2598 by office of Prothonotary, High Court, Bombay on 19/04/1991). This document was signed and forwarded by the mother of DW-3 the original Defendant No.3 to the office of Prothonotary.

Question No. 30- is this the same document which you have referred in paragraph 6 of your Affidavit of Evidence?

Answer- I do not know whether the document is same or not but the signature on the said document is of my mother.”

36. Mr. Kumar submitted that the aforesaid admission duly established the authenticity of Durgabai's letter dated 19th April 1991. He further submitted that the answers given by DW-2 to Question Nos. 31 to 35 demonstrated that several statements contained in his Affidavit of Evidence were based only upon what had allegedly been told to him by his mother and were therefore hearsay.

37. Mr. Kumar then also dealt with the contention that the properties mentioned in the said Will were ancestral properties. He submitted that Defendant No. 3 had adduced no documentary or oral evidence to establish either that the properties were ancestral or that there had been no partition between the deceased and his brother. He submitted that the Defendants had therefore failed to establish any factual basis for this contention.

38. Mr. Kumar submitted that the Plaintiff had duly proved the execution and attestation of the said Will on the strength of the evidence led by the Plaintiff. He submitted that the Defendants had failed to establish any suspicious circumstances surrounding the execution of the said Will and had led no evidence to show that the deceased had executed the Will under any undue

influence or coercion or that the deceased lacked testamentary capacity to make the said Will. He therefore submitted that the Plaintiff had discharged the burden cast upon him as the propounder of the Will. In support of his contention, he placed reliance upon the decision of the Hon'ble Supreme Court in the case of *Indu Bala Bose and Ors. v. Mahindra Chandra Bose and Ors*¹.

39. He then also placed reliance upon the decision of this Court in *Bandopant Sitaram Bapat and Ors. v. Sankar Sitaram Bapat and Ors.*², to submit that the evidence of one attesting witness was adequate to prove due execution of the said Will and the Plaintiff was not compulsorily required to lead the evidence of both attesting witnesses when the evidence of one attesting witness was sufficient to prove due execution. He then, from the decision of the Patna High Court in *Harihar Prasad Sao v. Bhagwan Das and Ors.*³, pointed out that once due execution was established by the propounder of a Will, the burden of proving an allegation of undue influence lies upon the person who asserts it.

¹ (1982) 1 SCC 20.

² 1996(1) Mh.L.J.

³ 1970 SCC Online Pat 103.

40. Mr. Kumar therefore submitted that the Plaintiff had adequately proved due execution of the said Will and consequently prayed that Letters of Administration with the Will annexed be granted in favour of the Plaintiff.
41. Mr. Verma, learned Counsel appearing on behalf of Defendant No. 2, submitted that Defendant No. 2 accepted and adopted the submissions advanced on behalf of the Plaintiff as recorded in the Order dated 14th July 2026.

Submissions on behalf of Defendant No. 3:

42. Mr. Haridas, learned Counsel appearing on behalf of Defendant No. 3, submitted that the burden of proving due execution of the said Will and the burden of dispelling the suspicious circumstances was upon the Plaintiff as the propounder of the said Will.
43. Mr. Haridas then pointed out that the deceased had, under the said Will, appointed Laxmibai, i.e., his wife, and Devidas, his son, as executors. He then invited my attention to Clause (VII) of the said Will to point out that the same bequeathed the entire estate to Laxmibai and, upon her death, to

his grandsons, i.e., Amit and Sumit. Clause (VII), he pointed out, was worded thus, viz.

“As to whatever property, both moveable and immoveable, that I might have possessed in addition to the above and which I might not have mentioned herein and which may remain over after my death, it is my desire that the same should belong absolutely to my said wife Laxmibai and after her death to my said grand sons Amit and Sumit in equal proportions. However, if by misfortune, my wife predeceases me then in that event the same should go to said grand sons Amit and Sumit in equal proportions absolutely and during their age of minority, my son Devidas should hold the same property in trust only. He (Devidas) will not have any right, title or interest in the said property that may come to my said grand sons” (emphasis supplied)

44. Mr. Haridas, therefore, submitted that the effect of Clause (VII) was that the deceased had intended to confer his property upon Laxmibai in the first instance and, upon her death, upon his grandsons. He submitted that such a disposition amounted to the creation of successive legatees under the same bequest and was impermissible in law. In support of his contention, he placed reliance upon the decision of the Hon’ble Supreme Court in ***Mauleshwar Mani & Ors. v. Jagdish Prasad & Ors.***⁴

⁴ 2002 SCC OnLine SC 113.

45. Mr. Haridas then also submitted that the said Will disclosed no reason for excluding the sons and daughters of the deceased from his estate. He submitted that this exclusion also constituted a suspicious circumstance that required a satisfactory explanation from the Plaintiff, but none was provided. He also submitted that the principal beneficiaries under the said Will were the sons of Devidas, who was the principal architect of the said Will. He therefore submitted that the fact that the sons of Devidas were the main beneficiaries was also a suspicious circumstance that remained entirely unexplained by the Plaintiff.
46. He then placed reliance upon the decision of the Hon'ble Supreme Court in *H. Venkatachala Iyengar v. B.N. Thimmajamma & Ors.*⁵, to point out that where the propounder takes a prominent part in the preparation or execution of a Will and, at the same time, derives a substantial benefit thereunder, such a circumstance may give rise to suspicion and casts upon the propounder a corresponding burden to remove the same by cogent and satisfactory evidence. Mr. Haridas submitted that the Plaintiff had failed to adduce any,

⁵ 1958 SCC OnLine SC 31.

let alone sufficient, evidence to dispel the suspicious circumstances surrounding the execution of the said Will.

47. He then also placed reliance upon the decision of the Hon'ble Supreme Court in *Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao*⁶ to submit that, while a distinction must be maintained between a well-founded suspicion and mere conjecture, an unnatural or unfair disposition, particularly when coupled with the active participation of a principal beneficiary or a person closely connected with such beneficiary in procuring the execution of the Will, may place a heavier burden upon the propounder to dispel the resulting suspicion.

48. Mr. Haridas submitted that, in the present case, Laxmibai and Devidas were appointed executors under the said Will, while Laxmibai and the sons of Devidas were the principal beneficiaries thereunder. He reiterated that Devidas had played a prominent role in the execution of the said Will, and that his sons ultimately stood to benefit from the testamentary disposition. He submitted that these circumstances, taken together, gave rise to a serious

⁶ (2006) 13 SCC 433.

and grave suspicion as to the genuineness of the said Will. The burden of satisfactorily explaining those circumstances, according to him, lay upon the Plaintiff which had not been discharged by the Plaintiff.

49. Mr. Haridas then submitted that PW-2, i.e., Dr V.P. Advirkar, in his cross-examination, particularly the answers to Question Nos. 82 to 175, admitted that PW-2 had no prior personal knowledge regarding the health or medical condition of the deceased. He also was at pains to point out that PW-2 was not the family doctor of the deceased, had not known the deceased prior to the date on which the said Will was allegedly executed, and had no prior knowledge of the draft Will or of the deceased's intention to execute the same, as was evident from the following answers given by PW-2 in cross-examination, viz.

“Q.82. Do you have any personal knowledge whether Kachardas Bairagi is aware of contents of the Will?”

Ans. No.

Q. 119. Is it correct to say that before giving a fitness certificate to any person you must know about the background of that person?”

Ans. Yes.

Attention of the Witness is drawn to Q.41 and his answer thereto.

[Q.41: Do you agree that Kachardas Bairagi was not your patient ?

Ans: That is correct.]

Q. 120. Do you agree that you were not knowing Kachardas Bairagi since last two year before 1984?

Ans. Yes.

Q. 121. I put it to you that you were not knowing anything about the medical background of Kachardas Bairagi prior to the alleged date of execution of his Will executed in 1984.

Ans. That is correct.

Q. 122. Can you tell the Court on what basis you have given a fitness certificate to deceased Kachardas Bairagi?

Ans. After examining him and interviewing him I gave medical certificate." (emphasis supplied)

50. Basis the above, Mr. Haridas submitted that the Plaintiff had failed to prove, by satisfactory evidence, the due execution and genuineness of the said Will or to dispel the suspicious circumstances surrounding it. He therefore submitted that the Plaintiff was not entitled to a grant of Letters of Administration with the said Will annexed.

Reasons and Conclusion:

51. Before proceeding to consider the rival contentions and the evidence, it is useful to make reference to the decision of the Hon'ble Supreme Court in ***H. Venkatachala Iyengar v. B.N. Thimmajamma & Ors.***, which *inter alia* held as follows, viz.

“18. What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose.... These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression “a person of sound mind” in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided

in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the Matter.

21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the

propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word “conscience” in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence....” (emphasis supplied)

Having considered the facts of the present case and the evidence which has been led by the Parties, I find that the same does not adequately satisfy the judicial conscience of the Court so as to grant the Plaintiff letters of administration as prayed for. I say so for the following reasons, viz.

- A. *First*, the said Will was executed on 28th April 1984, when the testator was at the advanced age of 80 years. The testator passed away shortly thereafter, i.e., on 10th September 1984. While the advanced age of the Testator is not by itself a suspicious circumstance sufficient to invalidate a Will, however, when considered along with the other circumstances surrounding both the execution and the contents of the Will, in the facts of the present case, it would certainly constitute a suspicious circumstance.
- B. *Second*, the circumstances relating to the attestation and the witnesses examined to prove the due execution of the said Will would also qualify as suspicious. PW-1, who has deposed to the execution of the said Will, was only twelve years old when the said Will was executed and was admittedly not present at the time when the said Will was stated to have been executed. Moreover, and crucially, PW-2, i.e., Dr A.P. Advirkar, the only surviving attesting witness to the said Will, has, in answer to Question Nos. 82 to 175, admitted that he (i) was not the regular medical practitioner

attending to or treating the deceased, (ii) had no prior medical history of the deceased, and (iii) had met the deceased for the first time only when the said Will came to be executed.

C. *Third*, the said Will itself is also highly suspect because it admittedly excludes all the other legal heirs of the Testator, save and except Laxmibai (wife), Sumit, and Amit (grandsons). It is not even the Plaintiff's case that the Testator had strained relations with his other family members, i.e., his daughters and granddaughter. The said Will apart from entirely disinheriting, without the semblance of any explanation, much less any cogent explanation, does not even make a reference to them. I must, however, hasten to add that the mere exclusion of a legal heir from a Will would not, *ipso facto*, be a suspicious circumstance. In the present case, however, the exclusion assumes significance because there is no suggestion, much less any evidence, that the Testator had strained relations with any of the excluded legal heirs. Yet, they have been excluded without even the semblance of an explanation or, indeed, any reference to them in the

said Will. This, when considered with what has been noted in (A) and (B) above, would, in my view, render the exclusion of the said legal heirs a further suspicious circumstance surrounding the said Will.

- D. *Fourth*, the said Will appoints Laxmibai and Devidas as executors, and the only beneficiaries under the said Will are Laxmibai and the sons of Devidas. Thus, the role of Devidas, who is the father of the Plaintiff, is pivotal. Also, it cannot be overlooked that the ultimate beneficiaries under the said Will are the sons of Devidas, and it is Devidas who, under the said Will, is responsible for executing the said Will. In these facts the Plaintiff's reliance upon the decision of the Hon'ble Supreme Court in *H. Venkatachala Iyengar v. B.N. Thimmajamma & Ors.* is apposite since it lays down that where suspicious circumstances surround the execution of a Will, and particularly where a person who is closely connected with the beneficiaries has taken a prominent part in its preparation or execution, the propounder must remove such suspicion by clear and

satisfactory evidence. In the present case, the Plaintiff has entirely failed to do so.

E. *Fifth*, and in my view crucially, Clause (VII) of the said Will would also become invalid, as it appoints subsequent legatees. A plain reading of the said Clause (VII) makes it apparent that the testator had first declared that his entire property shall “belong absolutely” to his wife, Laxmibai, and thereafter, upon her death, the very same property shall devolve upon his grandsons, Amit and Sumit. Clause (VII), therefore, plainly creates a successive disposition in respect of the same property. Also and equally crucial is the fact that this was not even disputed much less explained by the Plaintiff.

F. In the context of the aforesaid admitted facts, the reliance placed by Defendant No. 3 on the decision of the Hon’ble Supreme Court in *Mauleshwar Mani & Ors. v. Jagdish Prasad & Ors.* is apposite. The said decision lays down that where a testator confers an absolute interest in a property upon a legatee, any subsequent bequest of the same property in favour of another person cannot take effect, since

upon the vesting of an absolute interest in the first legatee, the testator's power to make any further testamentary disposition in respect of that property stands exhausted. Applying this principle to the present case, once the Testator had absolutely bequeathed his estate to Laxmibai under the said Will, he was thereafter denuded of the power to make any further effective testamentary disposition of the same property. Consequently, the subsequent bequest, which is to take effect upon the death of Laxmibai in favour of Amit and Sumit, is invalid. Crucially, the Plaintiff has failed to, in any manner address or deal with this aspect of the matter altogether.

- G. In my view, the aforesaid circumstances cannot be viewed in isolation and must be considered cumulatively. On such a cumulative assessment of the facts and evidence which is before me, what emerges is that (i) the Testator executed the said Will when he was of advanced age and passed away shortly thereafter; (ii) the evidence of the sole attesting witness reveals that he met the Testator for the first time when the said Will was executed and was not the

regular doctor of the Testator; (iii) despite there being no pleaded case, much less any evidence, that the Testator had strained relations with Gulabbai, Durga and Uma, all of them don't find so much as a mention in the said Will, much less any cogent explanation for their exclusion from the said Will; (iii) Devidas, who was both appointed as an executor and whose sons were among the ultimate beneficiaries under the Will, has played a prominent role in the making of the said Will and then in ultimately ensuring that the bequest made in favour of his sons is given effect to; and (iv) the creation of successive legacies in respect of the same property, so as to ensure that the sons of Devidas ultimately get the property.

H. Furthermore, there are two additional factors that merit consideration. First, Plaintiff No. 2's unexplained stand not to prosecute the Suit. Second, the marked change in the stand taken by Defendant No. 3. Although the Plaintiff has contended that Durgabai had consented to the grant of Probate to Laxmibai by her letter dated 19th April 1991 and subsequently adopted a contrary position by

filing the Chamber Summons claiming a share in the deceased's property, Durgabai has explained, in her Affidavit in Support of the Chamber Summons, that her earlier consent had been obtained by fraud.

- I. As already noted above, although the Plaintiff has established the formal execution of the Will, he has failed to furnish satisfactory evidence sufficient to remove these suspicious circumstances and satisfy the conscience of the Court that the Will represents the free, genuine and voluntary testamentary intention of the deceased.
- J. In view of the aforesaid reasons, I am unable to accept that the Plaintiff has discharged the burden cast upon him as the propounder of the Will. **I therefore answer Issue Nos. 1 and 2 in the negative. Since I have answered Issues No. 1 and 2 in the negative, Issue No. 3 would not survive and is rendered academic.**
- K. As regards Issue No. 4, there is no dispute that all the Defendants are the legal heirs of the deceased as per the provisions of the Hindu Succession Act, 1956. The Defendants would therefore be entitled

to oppose the grant of either Probate or Letters of Administration.

Issue No. 4 is therefore accordingly answered in the affirmative.

52. In view of the reasons mentioned hereinabove, I pass the following Order:

ORDER

- (i) The captioned Testamentary Petition is dismissed for the reasons mentioned hereinabove.
- (ii) There shall be no orders as to costs.
- (iii) The office shall return the original documents to the Advocate for the Plaintiff, upon the Advocate for the Plaintiff making the necessary application for the same, complying the requisite procedure.
- (iv) The Suit is disposed of in the aforesaid terms.
- (v) All the pending Applications are dismissed accordingly.

[ARIF S. DOCTOR, J.]