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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
TESTAMENTARY AND INTESTATE JURISDICTION
TESTAMENTARY SUIT NO. 39 OF 1995
IN
TESTAMENTARY PETITION NO. 107 OF 1991

Colette M. Louis & Anr.

... Plaintiffs

Versus

Junita A. Ubale & Anr

... Defendants

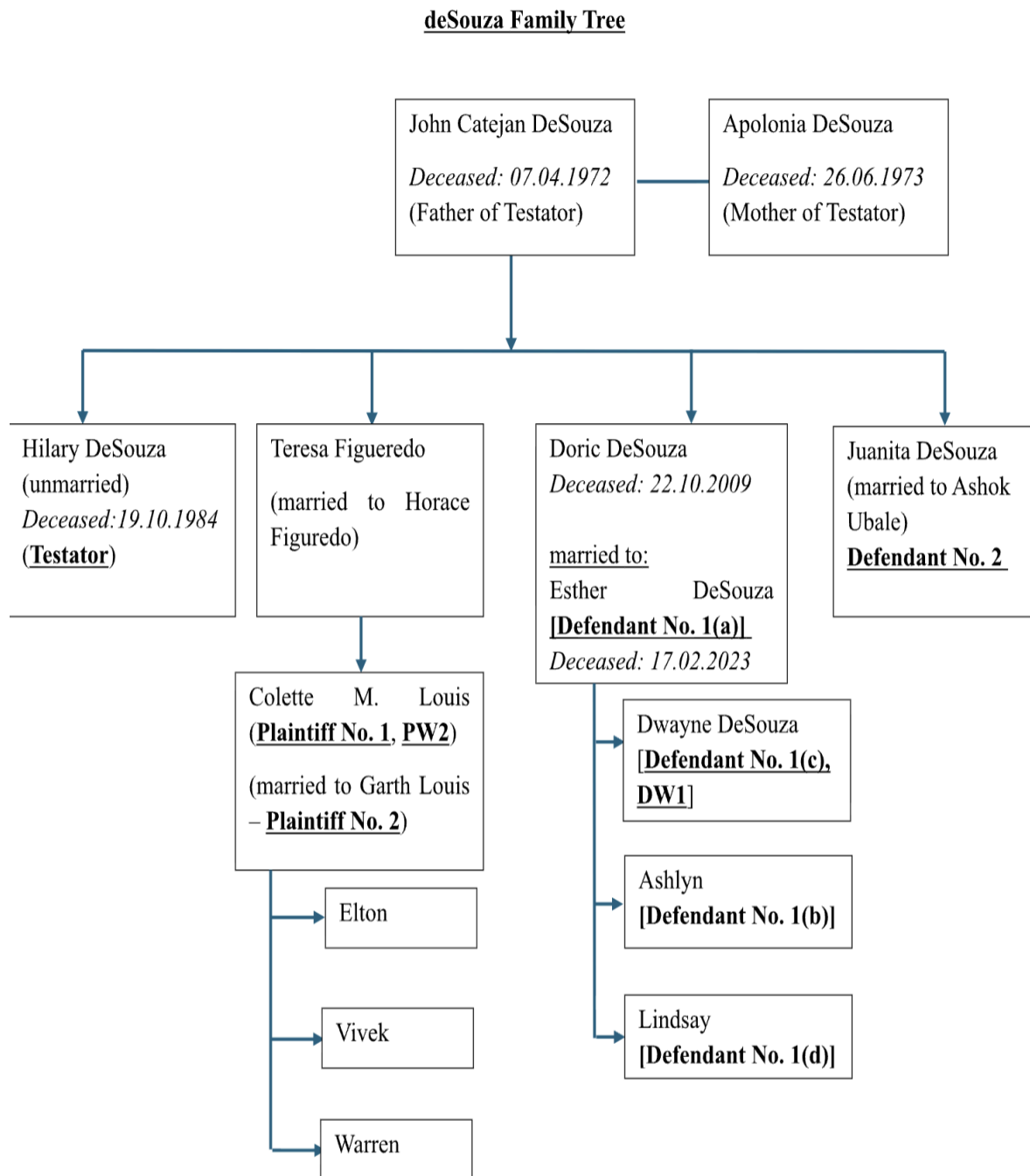
Mr. Karl Tamboly with Mr. Malcolm Siganporia and Mr. Arup Pereira i/b.
Nimesh Bhatt for the Plaintiffs.

CORAM : ARIF S. DOCTOR J.
RESERVED ON : 17th AUGUST 2026
PRONOUNCED ON : 22nd SEPTEMBER 2026

JUDGMENT:

1. The Plaintiffs have, by way of the present Testamentary Suit, sought Probate of a Will dated 20th April 1983 (“**the Will**”), which is stated to be the Last Will and Testament of one Hilary Joseph DeSouza (“**the Testator**”), who passed away in Bombay on 19th October 1984.

2. The family tree of the Testator, at the time of his death, is as follows, viz.



3. Plaintiff No. 1 is the Testator's niece, being the daughter of the Testator's sister, i.e., Theresa Helen Figueredo ("**Theresa**"), and resided with the Testator at "**Patronage**", Santa Cruz, Mumbai. Plaintiff No. 1 is named as both an executor and a beneficiary under the Will, while Plaintiff No. 2, husband of Plaintiff No. 1, is the other executor named under the Will.
4. The Will bears the signatures of two attesting witnesses, i.e., Francis Joseph Athaide, Advocate ("**PW-1**"), and Owen D'Souza, Advocate. The Will was also registered before the Sub-Registrar of Assurances, Bandra (East), on 22nd April 1983.
5. By the said Will, the Testator revoked all his earlier Wills and testamentary dispositions and appointed Theresa, Plaintiff No. 1 and Plaintiff No. 2, as his Executors and Trustees. The Testator devised and bequeathed to Plaintiff No. 1 the property and building known as Patronage, bearing Suburban Survey No. H/483 (Old SS XXIV), which he stated was inherited by him solely and absolutely, together with his holdings in the specified companies and the telephone connection installed at the said premises.

6. The grant of Probate is opposed by Defendant No. 1, Doric Peter DeSouza (“**Doric**”), who was the brother of the Testator, and by Defendant No. 2, Juanita A. Ubale (“**Juanita**”), who was the sister of the Testator. Both Doric and Juanita filed their respective Caveats and Affidavit in Support opposing the grant of Probate in favour of the Plaintiffs. During the pendency of the Suit, Doric passed away, and his legal heirs were impleaded Defendant Nos. 1(a) to 1(d).

7. This Court, vide an Order dated 13th December 2011, framed the following Issues for determination, viz.

- 1. Do the Plaintiffs prove that the writing dated 20th April 1983 executed by the deceased Hilary Joseph D’Souza was his last Will and Testament and the same has been executed and attested in accordance with law?*
- 2. Do the Plaintiffs prove that the Will dated 20th April 1983 was made by the deceased while he was in sound disposing state of mind?*
- 3. Do the Plaintiffs prove that the Defendant has no caveatable interest and is not entitled to contest the proceeding?*
- 4. Does the Defendant prove that the Will of the deceased is bogus and fabricated and/or is otherwise invalid as alleged in the Affidavit in Support of the caveat filed by the Defendant?*

5. *Whether the plaintiffs are entitled to the probate of the Will?*

6. *What order?*

8. The Parties examined the following witnesses, viz.

Plaintiff's Witnesses	Defendants' Witnesses
PW-1: Mr. Francis Athaide (Advocate and Attesting Witness)	DW-1: Mr. Dwayne DeSouza (the son of Original Defendant No. 1, i.e., Doric)
PW-2: Ms. Colette M. Louis (Plaintiff No. 1)	

9. After the Defendants' evidence was closed on 2nd March 2017, Defendant Nos. 1(a) to 1(d) sought to lead additional evidence by Notice of Motion No. 3 of 2020. However, despite repeated opportunities recorded in the Orders of this Court dated 12th September 2025, 16th September 2025, 20th January 2026, and 21st January 2026, the Defendants repeatedly failed to appear, and the Notice of Motion was dismissed by Order dated 9th March 2026.

10. The Suit was thus taken up for final hearing.

Submissions on behalf of the Plaintiffs:

11. Mr. Tamboly, learned counsel appearing on behalf of the Plaintiffs, at the outset submitted that the Testator was one of four children born to Mr. John Catejan DeSouza and Mrs. Apolonia DeSouza, the others being Theresa (Plaintiff No. 1's mother), Doric and Juanita, and that the Testator never married. He submitted that Plaintiff No. 1 came to reside at Patronage with the Testator and her grandparents in 1969 and continued to do so with Plaintiff No. 2 and her children after her marriage in 1973. He further submitted that the Will, by its own terms, revoked all prior testamentary dispositions of the Testator, and that Theresa had affirmed an Affidavit dated 1st November 1990 stating that she had no objection to the grant of Probate.

I. On Execution and Attestation in Accordance with Law

12. Mr. Tamboly submitted that Section 63 of the Indian Succession Act, 1925 ("Succession Act"), required a party who seeks Probate to establish the following (i) signing or affixing of a mark by the testator, or by another

person in his presence and by his direction; (ii) that such signature or mark be placed so as to give effect to the writing as a Will; and (iii) attestation by two or more witnesses, each of whom has seen the testator sign or affix his mark. In support of his contention, he placed reliance upon the decision in ***Meena Pradhan v. Kamla Pradhan***,¹ where the Hon'ble Supreme Court held that a Will must fulfil all the formalities under Section 63, and that for proving execution, at least one attesting witness who is alive, subject to the process of Court, and capable of giving evidence must be examined.

13.Mr. Tamboly submitted that PW-1 furnished direct and unimpeachable testimony that he witnessed the Testator sign the Will and that PW-1 and Mr. Owen D'souza attested it. This, he submitted, was a position taken by PW-1 in its response to the cross-examination:

Q.106 I put it to you that the question of attestation of signature of alleged Will of Hilary did not arise. Ans. That is not correct. The deceased did put his signature and initials on the Will at Exhibit "P-26" and therefore Advocate Mr. Owen D'Souza and

¹ (2023) 9 SCC 734.

myself did attest the Will and the execution and did out our signatures on the Will as attesting witnesses.

14. Mr. Tamboly then submitted that this testimony, read with PW-1's account of accompanying the Testator to the Sub-Registrar's office for registration on 22nd April 1983, satisfied the requirements of Section 63, and that in any event, reliance on a single attesting witness was permissible. In support of this contention, he placed reliance upon the decisions of ***Janki Narayan Bhoir v. Narayan Namdeo Kadam***,² and ***Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao***³, wherein it was held that where one attesting witness proves execution under Section 63(c), examination of the other attesting witness may be dispensed with.

15. He further submitted that the identity of the Will itself was not in dispute, as the Defendants had not set up the existence of any later testamentary writing, and the Will itself recorded the revocation of all prior Wills, and Plaintiff

² (2003) 2 SCC 91.

³ (2006) 13 SCC 433.

No. 1 had confirmed Exhibit P-26 to be the Testator's last Will in her Affidavit dated 6th March 2012, a fact that still remained unchallenged.

16. Mr. Tamboly pointed out that PW-1's Affidavits dated 12th November 1990 and 21st February 2015 both recorded that the Testator, at the time of executing the Will, was "*of sound and disposable mind memory and understanding*" and acted "*of his free will and pleasure*". He submitted that this was corroborated by the Testator having personally attended before the Sub-Registrar of Assurances for registration on 22nd April 1983, where he was independently examined, and by his continued dealings with the Society and Mr. Owen D'Souza's office through July 1984, over a year after the execution of the Will.

17. In support of this contention, Mr. Tamboly placed reliance on PW-2's testimony that the Testator travelled to London unaccompanied between October 1982 and January 1983, only months before executing the Will, and continued to correspond with the Society and third parties in his own hand through mid-1984. He submitted that the Testator's partial paralytic stroke

occurred only in May 1984, which was clearly over a year after the Will was signed, and that PW-2, under cross-examination, repeatedly and consistently rejected the suggestion of any stroke in March 1983, confirming that the Testator's speech was affected only towards the end of August/early September 1984. In support of this, he relied upon the following questions put to PW-2 in cross-examination of PW-2 viz.

Q314. I put it to you that your statement in paragraph 20 of your affidavit of evidence in chief about Hilary suffering from paralysis stroke in May 1984 is false.

Ans. It is not a false statement.

Q341 During his period of illness, did Hilary correspond with any of the local authorities?

Ans. Yes, he did.

Q342 Which are these authorities?

Ans. I remember Hilary going to the Catholic Society and to the City Survey Office

.

Q343 Did you accompany Hilary on these occasions?

Ans. No.

Q344 Who accompanied Hilary?

Ans. He used to leave home on his own.

Q345 Would it be correct to say that on account of the stroke, Hilary's one side of the body was affected and therefore, he was neither in a position to walk or to speak as his speech was also affected?

Ans. Initially it was a mild stroke and he was able to speak and move around.

Q346 During which month and year was his speech affected?

Ans. Probably, at the end of August, early September 1984.

Q347 Did Hilary execute any writing during this period?

Ans. I do not know.

Q348 Would it therefore be correct to say that during this period mentioned in the above two answers, Hilary was not in a position either to write, to instruct any other third person for the purpose of preparation and / or execution of any documents?

Ans. He was able to request someone to help him out. He was not able to write but he could ask someone for help to executed whatever he needed it.

In light of the cross-examination, Mr. Tamboly pointed out that even thereafter the Testator remained capable of asking others to help him execute what he needed.

18.Mr. Tamboly submitted that this candid evidence, which was volunteered by the Plaintiffs' own witness rather than concealed, had discharged the Plaintiffs' burden of proving sound and disposing mind at the time of execution, and that the Defendants had not dislodged it in any manner.

II. On the Defendants' failure to lead evidence and adverse inference

19.Mr. Tamboly then submitted that neither Doric nor Juanita, who are the original Caveators, gave any evidence to substantiate the grounds set out in their own Caveats and Affidavits in Support, despite those Affidavits alleging that the Testator was an alcoholic and had suffered strokes affecting his faculties well before April 1983. He submitted that Section 114(g) of the Evidence Act, 1872, entitles the Court to draw an adverse inference against a party who withholds evidence within its knowledge and power. In support of

this contention, he placed reliance on ***Gopal Krishnaji Khetkar v. Mohamed***

Haji Latif⁴, which held:

5. Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue.

20. He submitted that this was particularly apposite to Juanita, who, in the Plaintiffs' case, used to accompany the Testator for physiotherapy at the Ramakrishna Mission and was thus best placed to speak to his physical and mental condition, yet chose not to testify in the matter at hand. As to DW-1's evidence, Mr. Tamboly submitted that his testimony was founded on assumption rather than knowledge, for which he placed reliance upon the decision of ***Kalyan Kumar Gogoi v. Ashutosh Agnihotri***,⁵ which held the following:

35. ...The sayings and doings of the third person are, as a rule, irrelevant, so that no proof of them can be admitted. Every act done or spoken which is relevant on any ground must be proved

⁴ AIR 1968 SC 1413.

⁵ (2011) 2 SCC 532.

by someone who saw it with his own eyes and heard it with his own ears.

21. He then submitted that DW-1 admitted, under cross-examination, that his statement regarding the Plaintiffs not spending on the Testator's comfort was "only an assumption" based on the absence of a wheelchair or handrails at Patronage, and that his belief that the Testator was incapacitated prior to his visit on 25th January 1984 was similarly an assumption drawn from a singular overnight visit. He pointed out that DW-1 further admitted he was not personally familiar with the family's handwriting, had not been in regular touch with Doric since 1976, and was unaware of the relationship between the Testator and Doric. Mr. Tamboly submitted that such testimony, being hearsay and conjecture, ought to be disregarded in its entirety.

22. Mr. Tamboly then submitted that on the Defendants' plea that the Petition was barred by a delay of eight years was entirely misplaced. In support of this, he placed reliance upon the decision of the Hon'ble Supreme Court in

Sanjay Sharma v. Krishnadhan Khaware⁶, where the Hon'ble Supreme

Court held:

4...The probate of a Will has three-fold purposes – (a) It is a judicial stamp of approval on the genuineness of the Will; (b) It acknowledges the appointment of an executor of the Will; (c) It grants the executor to act for the purposes of the Will. Keeping this in view, the specific view that the period of limitation for probate commences from the death of the testator has been rejected. 6...It is, therefore, a continuous right that can be exercised at any time so long as the object of the Will survives. The right to apply would therefore accrue from the date that it becomes necessary to apply.

23. He thus submitted that the right to apply for Probate was a continuous one and that the Plaintiffs had in fact lodged Probate Petition (L) No. 16 of 1986 within two years of the Testator's death, but it was only the untraceability of those papers on the record of this Court and not any fault of the Plaintiffs that necessitated the fresh Petition filed on 27th September 1990.

⁶ 2026 SCC OnLine SC 1337.

III. On the executor-cum-beneficiary objection

24. Mr. Tamboly, then on the objection that Plaintiff No. 1, being a beneficiary, could not also apply as executor, submitted that Section 141 of the ISA provided that “*if a legacy is bequeathed to a person who is named an executor of the Will, he shall not take the legacy, unless he proves the will or otherwise manifests an intention to act as executor.*” He submitted that by applying for Probate, Plaintiff No. 1 had manifested precisely such an intention, and that there was no bar in law to an executor and beneficiary being the same person, provided the beneficiary is not an attesting witness. In support of this contention, he placed reliance on a Division Bench decision of this Court in ***John Francis Anthony Gonsalves v. Agnes Mary Conception Rebello***⁷, where it was held:

8. On careful perusal of the section, it appears that he has either to prove the Will or otherwise to manifest the intention to act as executor. In the present case, evidence on record reveals that the petitioners came to know about the existence of Will only in April, 1990 and shortly thereafter they filed the petition

⁷ (2008) 3 Mah LJ 804.

for probate and as per the evidence on record as well as findings of the trial Court, they have also proved the Will. Therefore, there could be no difficulty in granting probate to them. In fact by immediately applying for probate, they have also manifested their intention to act as an executors. The learned trial Court wrongly came to conclusion that the petitioners had not manifested their intention to act as executors for long period of twenty-one years and are not entitled to probate under section 141 of the Indian Succession Act. Section 222 of the Indian Succession Act provides that probate shall be granted only to an executor appointed by the Will and under section 224 probate may be granted to several executors simultaneously. Under section 223 probate can be refused to a person, who is minor or is of unsound mind or is an association of individuals unless it is a company. In the present case, none of the circumstances are present under which probate could be refused under section 223 of the Indian Succession Act.

IV. On the Defendants' caveatable interest

25. Mr. Tamboly then submitted that a person claiming a caveatable interest must lead evidence to establish such interest. In support of this submission, he placed reliance upon the following decisions of ***Jehangir Tehmas Patel v.***

*Fateh Singh Cheema*⁸, and *Raj Kumar Mittal v. Rajesh Venkateshwar Somani*⁹, which further held that a caveator must indicate some ground bearing on the admissibility of the Will to Probate, and that valid execution turns on three aspects (i) the testator being of disposing state of mind, (ii) the execution being voluntary and free of fraud, coercion, undue influence or misrepresentation, and (iii) compliance with the formalities of signature and attestation by two witnesses.

26. Mr. Tamboly took pains to point out that Doric in fact left Patronage in 1962 and did not maintain relations with the family thereafter, which was a fact recorded contemporaneously in the family register maintained by John deSouza and that Doric did not reside at the Property for decades preceding the Testator's death, a fact DW-1 himself admitted. He then submitted that with regard to Juanita, she left Patronage permanently in February 1975 upon marrying against the family's wishes, without either the Testator or the Plaintiffs being invited to the wedding. In support of this, Mr. Tamboly

⁸ Testamentary Suit No. 65 of 2012.

⁹ (2017) 10 BOM CK 0068.

placed reliance on Juanita's own letter to the Testator dated 6th December 1975, annexed as Exhibit P-2, in which she admitted having had "absolutely no contact" with the Testator, and stated she "cannot face" him "after all the hurt I have caused you", and signed off as "your sister who betrayed your love". Mr. Tamboly submitted that the Testator nonetheless forwarded her six national savings certificates aggregating Rs. 10,800 on 22nd February 1977, annexed at Exhibit P-3 as "Patrimony", which Juanita accepted and acknowledged by signed receipt. He submitted that Juanita further admitted, in a January 1988 interview published in 'Savvy' magazine, that the Testator had objected to her marriage and that she had left the Property on that account. He further submitted that Juanita raised no objection when, after the Testator's death, she received copies of the Deed of Assignment and the Will in April 1985 and accepted the same through her conduct.

27. Mr. Tamboly then pointed out that Doric and Juanita, having been represented by the same Advocate, adopted contrary and inconsistent versions of the Testator's state of health, yet neither led any evidence of their

own, choosing instead to rely entirely on DW-1. He pointed out that DW-1's own testimony, as set out above, was founded on assumption and conjecture and lacked personal knowledge even of the relationship between the Testator and his own father, Doric. Mr. Tamboly submitted that DW-1 became involved in the proceedings only after Doric's death in 2003 and that his cross-examination, in which he admitted, question after question, that his allegations regarding the Testator's health and the Plaintiffs' conduct were speculative, clearly demonstrated that the opposition to Probate was devoid of factual foundation.

28. Basis this, Mr. Tamboly submitted that the Defendants had failed to establish any caveatable interest and were not entitled to contest the grant of Probate and that the Plaintiffs were, in consequence, entitled to Probate of the Will as prayed.

Reasons and Conclusions:

29. After having considered the pleadings, the evidence before the Court and the case law upon which reliance has been placed, I find as follows, viz.

A. The Original Defendants, i.e., Doric and Juanita, though having filed their respective Caveats and Affidavits in Support thereof, have not led any evidence. Defendant No. 1, Doric, having died during the pendency of the Suit, his legal heirs were brought on record thereof. Defendant No. 2, Juanita, has also not entered the witness box. The only evidence led on behalf of the Defendants is that of DW-1, Mr. Dwayne DeSouza, the son of Doric. Thus, the Defendants have led no satisfactory evidence at all to prove Issue No. 4, the burden of which lay squarely upon them.

B. The question which then falls for consideration is whether the Plaintiffs have proved that the writing dated 20th April 1983 is the last Will and Testament of the Testator and that it was duly executed and attested in accordance with law. The Plaintiffs have, in order to prove due execution of the said Will, examined PW-1, Mr. Francis Joseph Athaide, one of the attesting witnesses to the Will. PW-1 has deposed to the execution of the Will by the Testator in his Affidavit of Evidence. PW-1 has also, in answer to Question No. 106 in cross-examination, specifically stated that the

deceased had put his signature and initials on the Will and that both he, i.e., PW-1, and Mr. Owen D'Souza had attested the said Will as attesting witnesses thereafter.

C. There is nothing in the cross-examination of PW-1 which, in my view, would discredit the evidence of PW-1. Crucially, the Defendants did not appear despite ample opportunity or pointed out to the Court why the evidence of PW-1 ought not to be considered or even doubted. PW-1 was an Advocate who was deposed to the factum of due execution of the said Will by the Testator. Thus, there is no basis or reason for this Court to doubt, in the facts of the present case, the veracity of the evidence of PW-1 in any manner. It is also not in dispute that the Will bears the signatures of both attesting witnesses. In essence, the Plaintiffs' reliance upon the decisions of *Meena Pradhan*, *Janki Bhoir*, and *Niranjan Joshi* is apposite, as these decisions specifically dispense with the second attesting witness. Hence, given that PW-1 has led evidence to prove due execution of the said Will, which evidence is unshaken, the need to have examined

the second attesting witness, i.e., Mr. Owen D'Souza, did not arise. I am therefore satisfied that the evidence of PW-1 has established the requirements of Section 63(c) of the Succession Act.

D. Additionally, the said Will was also registered before the Sub-Registrar of Assurances, Bandra (East), on 22nd April 1983. PW-1 has also deposed to accompany the Testator to the office of the Sub-Registrar in connection with the registration. Though it is also well settled that registration by itself does not dispense with the statutory requirement of proving execution and attestation, in the present case, the factum of registration of the said Will when viewed in the context of the other facts, constitutes a circumstance which is a factor which would support the validity of the said Will and its making and due execution by the Testator.

E. The next question concerns the testamentary capacity of the Testator. The Defendants have alleged that the Testator was suffering from ill health and that he had suffered strokes affecting his faculties. However, PW-1, in his Affidavits dated 12th November 1990 and 21st February 2015, stated that at

the time of execution of the Will the Testator was of sound mind, memory and understanding and that he executed the Will of his own free will and pleasure. Equally, PW-2 has deposed that the Testator travelled to London unaccompanied between October 1982 and January 1983. PW-2 has further deposed regarding the dealings and correspondence between the Testator and the Catholic Society, the City Survey Office, and other authorities. More importantly, the evidence of PW-2 sets out and clarifies that the Testator suffered a partial paralytic stroke in May 1984, i.e., more than a year after the execution of the Will.

- F. The cross-examination of PW-2 does not establish that the Testator suffered a stroke in or about March 1983, as alleged in DW-1's Affidavit of Evidence in Lieu of Examination-in-Chief dated 5th October 2016. On the contrary, PW-2 had expressly denied that proposition and clarified that initially the stroke suffered by the Testator in May 1984 was mild and that the Testator was rather able to speak and move around. The evidence shows that the speech of the Testator was affected only towards the end of

August or early September 1984, which is well after the execution of the said Will, i.e., 20th April 1983. There is nothing in the Defendants' evidence or in the cross-examination of PW-2 that unsettles the evidence led by PW-2 that, when the Testator executed the said Will, the Testator was in a sound and disposing state of mind. The subsequent illness of the Testator in May 1984 cannot, without more, establish the mental incapacity of the Testator more than a year earlier. There is no medical evidence before me demonstrating that the Testator was of unsound mind or otherwise incapable of understanding the nature and consequences of the Will when it was executed.

G. Also, the evidence led by the Defendants does not establish that the Will was the product of fraud, coercion, undue influence, or misrepresentation. The mere fact that the Plaintiffs are beneficiaries under the Will does not, by itself, establish undue influence. It is well settled there must be evidence connecting the alleged fraud or undue influence with the making and execution of the Will in question. In the present case, I find that the

Defendants have not led any evidence to establish a case of fraud, coercion, undue influence, or misrepresentation.

H. It is also a material and crucial fact that the Defendants, who were the original Caveators, did not enter the witness box to substantiate the allegations contained in their respective Caveats and Affidavits in Support. The allegations concerning the Testator's alleged alcoholism, his alleged prior strokes and the alleged impairment of his faculties were matters which, if relied upon to defeat the Will, required proof by cogent evidence. The absence of such evidence from the original Caveators therefore speaks volumes in the present case. Section 114(g) of the Evidence Act permits this Court to draw an adverse inference against a party who withholds evidence within its power to produce. The Plaintiffs' reliance upon the decision of ***Gopal Krishnaji Khetkar*** wherein it was held that "even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts on issue", is squarely applicable to the facts of the

present case. In particular, Defendant No. 2, Juanita, claimed to have accompanied the Testator for physiotherapy and, on the Defendants' own case, had an opportunity to speak to the Testator's condition but failed to enter the witness box to do so.

- I. Furthermore, DW-1's evidence, on material aspects concerning the Testator's physical condition and the alleged conduct of the Plaintiffs, is substantially based on inferences and assumptions. DW-1 has admitted that his statement concerning the Plaintiffs' expenditure on the Testator's comfort was only an assumption drawn from the absence of a wheelchair or handrails at Patronage. DW-1 has also acknowledged that his belief that the Testator had suffered some form of physical disability prior to his visit on 25th January 1984 was based upon his limited personal observations. DW-1 further admitted that he was not personally familiar with the handwriting of his grandmother i.e., Mrs. Apolonia DeSouza, but is only familiar with the Testator's handwriting and signature from the evidence presented in Court, had not been in regular contact with Original

Defendant No. 1, i.e., Doric, since 1976, and was unaware of the relationship between Doric and the Testator. The evidence of DW-1, therefore, does not, in my view, provide a satisfactory evidentiary foundation for the serious allegations in the Caveats that oppose the grant of Probate to the Plaintiffs in respect of the said Will. In light of this hearsay evidence, the Plaintiffs' reliance upon the decision of ***Kalyan Kumar Gogoi*** is apposite.

- J. The Defendants have also, in my unhesitating view, failed to establish that the said Will is either a bogus or fabricated document. There is no evidence led by the Defendants to prove that the signatures of the Testator or the attesting witnesses appearing on the said Will are forged. As already noted in (C) above, PW-1 has identified the execution and attestation of the Will and thereafter its registration. I must note that the Defendants have not pleaded, produced, or even identified any Will subsequent to Exhibit P-26.
- K. The circumstances surrounding Defendant No. 2's relationship with the Testator are relevant, as they demonstrate that a substantial estrangement

existed between the Testator and Defendant No. 2, i.e., Juanita. Defendant No. 2's letter dated 6th December 1975 records that Defendant No. 2 had had "*absolutely no contact*" with the Testator and refers to herself as the sister who had "*betrayed your love*". Also, the subsequent communication from the Testator forwarding National Savings Certificates in 1977 demonstrates that the Testator continued to deal with Defendant No. 2 notwithstanding the earlier estrangement. While these circumstances do not determine the validity of the Will, what is, in my view, material is that they would rather support the case that the said Will was not an unnatural Will only because it excluded the Original Defendants i.e., Doric and Juanita, and more importantly, the testamentary dispositions contained in the Will were not as a result of any coercion, undue influence or fraud.

- L. I also find no substance in the contention that the proceedings for Probate are liable to fail merely on the ground of delay. The Plaintiffs have sufficiently explained the reasons for the delay. Also, the earlier Probate Petition had been lodged within two years of the Testator's death, and the

present proceedings became necessary because the earlier papers were not traceable. In any event, the right to seek Probate is not to be treated as extinguished merely by the passage of time in the absence of circumstances rendering the claim otherwise legally untenable. Accordingly, the decision of *Sanjay Sharma* is applicable to demonstrate that the right is a continuous right.

M. Also, in my view, the objection based on Section 141 of the Succession Act cannot defeat the present Petition. Firstly, Plaintiff No. 1 is named as an executor and is also a beneficiary under the Will. Secondly, Section 141 contemplates precisely such a situation and provides that where a legacy is bequeathed to a person named as executor, such person shall not take the legacy unless he proves the Will or otherwise manifests an intention to act as executor. Thirdly, the filing and prosecution of the present proceedings for Probate constitute conduct manifesting an intention to act as an executor. Finally, the Defendants have not shown any statutory prohibition against a person being both executor and beneficiary under a Will.

Therefore, the reliance placed on the case of *John Francis Anthony Gonsalves*, since it holds that there is no bar in law to an executor also being a beneficiary under a Will.

N. On the aspect of whether the Original Defendants had a caveatable interest, I find that this issue is now, in light of the findings rendered in (B) to (M) above, largely academic. As held in *Jehangir Tehmas Patel* and *Raj Kumar Mittal*, a caveator must establish a ground bearing upon the admissibility of the Will to Probate. The evidence led by the Defendants does not establish invalid execution, want of testamentary capacity, fraud, coercion, undue influence, fabrication or any other circumstance rendering the Will invalid. The allegations contained in the Caveats and Affidavits in Support have remained unproved. Once PW-1, an attesting witness, gave direct evidence proving execution and attestation, the burden shifted to the Defendants to establish the circumstances upon which they relied to impeach the Will. That burden has not been discharged.

30. Accordingly, the Issues are answered as follows

1. For the reasons set out in **(B)** to **(D)** and **(J)** above, Issue No. 1 is answered in the affirmative.
2. For the reasons set out in **(E)** to **(F)** above, Issue No. 2 is answered in the affirmative.
3. For the reasons set out in **(B)** to **(M)** above, Issue No. 3 does not survive for independent consideration in view of the findings on Issues 1, 2, 4 and 5; in any event, it is answered in the affirmative in favour of the Plaintiffs for the reasons set out in paragraph **(N)** above.
4. For the reasons set out in **(A)** and **(G)** to **(J)** above, Issue No. 4 is answered in the negative.
5. For the reasons set out in **(B)** to **(M)** above, Issue No. 5 is answered in the affirmative.
6. In view of the answers to Issues Nos. 1 to 5 and for the reasons set out above, in terms of Issue No. 6, Probate of the Will dated 20th April 1983 shall be granted to the Plaintiffs

31.Hence I pass the following Order:

ORDER

- i. Testamentary Suit No. 39 of 1995 is decreed.
- ii. The Prothonotary and Senior Master is directed to issue Probate of the last Will and Testament dated 20th April 1983 of Mr. Hilary Joseph DeSouza, in favour of the Plaintiffs, upon compliance with the requisite formalities.
- iii. The grant shall be issued expeditiously.
- iv. There shall be no orders as to costs.
- v. Pending Applications, if any, are accordingly disposed of.
- vi. Drawn up decree is dispensed with.

[ARIF S. DOCTOR, J.]