

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
TESTAMENTARY SUIT NO.57 OF 1998
IN
TESTAMENTARY PETITION NO.404 OF 1998

Hilda D'souza	...Plaintiff
V/s.	
Mrs. Teresa D'souza & Ors.	...Defendants

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Mr. Denzil D'Mello a/w Lendl Coutinho & Ms. Geeta Sonawane for the Plaintiff.
Mr. Clive D'souza for Defendant no.1.
Mr. Vaibhav Sugdhare a/w Ms. Ketki Gadkari i/b. M/s. Jayakar & Partner for Defendant no.2.

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CORAM : A. K. MENON, J.

DATE : 14TH JANUARY, 2016.

P.C.:

1. On or about 17th April, 1998 Testamentary Petition no.404 of 1998 came to be filed seeking letters of attestation with Will annexed to the property and credits of one Rozario D'souza Indian Christian. The original petitioner was Hilda D'souza daughter-in-law of the deceased. Hilda D'souza died on or about 21st August, 2010 thereupon her husband the son of the deceased Mr. Joseph Peter D'souza was brought on record as petitioner. The deceased was survived by his son (1) Joseph Peter D'souza (2) Mrs.Teresa John D'souza-daughter, (3) Sr. Geraldine D'souza-daughter, (4) Mrs.

Christabella D'souza-daughter and (5) Miss Justina D'souza-daughter. When the Petition was filed by the aforesaid Hilda D'souza affidavits of consent of the present petitioner Joseph and his sister Justina D'souza were filed. After citation was served three other sisters Teresa, Christabella and Justina filed Caveats.

2. Although they were shown as Caveators. In the Caveat filed on 25th June, 1998 only one of them filed an affidavit in support of the Caveat namely Teresa D'souza. This affidavit is dated 2nd July, 1998. Teresa D'souza opposed the grant of probate on the ground that her father the deceased Rozario D'souza was a member of the St. Anthony's Homes Co-operative Society Limited, as a result she is entitled to the lease in respect of a plot of land admeasuring about 5700 sq. ft. upon which he constructed a house on an area of 1083.5 sq. ft. consisting of ground which was named Teresa Cottage. According to the Caveatrix it was a mutual desire of the Caveators including the other sisters and the present petitioner that they would to reside close to the parents and to look after them in their old age and were therefore desirous of putting up their own structures on the vacant land adjacent to the said Teresa Cottage. It is her case that she along with her two sisters Christabella and Justina and the present petitioner requested the deceased's permission to build an "Annexe" on an area of about 650.41 sq. ft. At that time Christabella

expressed her inability to build any structure immediately but the deceased had allowed Joseph, Justina, and Teresa to construct a structure on condition that Christabella would be allowed to build over the Annexe as and when she so desire.

3. In 1963 Justina, the present petitioner put up a ground floor structure on an area of 650.41 sq. ft. The deponent Teresa and her husband then constructed a structure above one built by Justina, Joseph & Hilda. Christabella had the option of constructing a structure of above the one constructed by Teresa. According to the deponent the deceased had made a Declaration dated 23rd November, 1967 which is registered with the Sub-Registrar of Assurances, Bandra recording how the "Annexe" came to be built, who had built the same and also recording the fact that Christabella could build the above structure as and when she desired. Teresa has further deposed that her brother Joseph, his wife Hilda and the deponent's sister Justina had 1/3rd share each in the structure constructed on the ground floor and the deponent Teresa and her husband had an exclusive right to the structure to the above it.

4. According to the defendants the present petition came to be filed seeking Letters of Administration only after 11 years of the demise of the deceased and with malafide intention. According to her the Will is

not genuine inter alia because it does not deal with the other immovable property in Monte-Giri Goa consisting of an ancestral home and fields. Further more according to Teresa the deceased was almost 96 years old when the alleged Will is purported to be executed. He was hard of hearing and had lost his vision. The Will according to her “seems to be an after thought and made with ulterior motive”. According to her the Petition is expected to disclose all the property and credits of the deceased. The Schedule does not describe the property correctly and the petitioner has suppressed other assets such as furniture fixture, gadgets, gold, jewellery etc. What is admitted however is that names of all the next of kin have been correctly mentioned. It is her case that the alleged Will purportedly executed on 26th November, 1986 and the deceased died on 20th November, 1987 the Petition thus were filed in May 1988, 11 years after the demise and they came to know of the same only in April 1998 when a copy of the Petition was provided to the deponent and the other heirs to seek their consent. Since they refused to give their consent they served with citation. The petitioner had craved leave to file additional affidavit after taking inspection of the Petition the Will etc. However, no such additional affidavit appears to have been filed.

5. On 3rd July, 2014 this Court framed the following issues on the

basis of the aforesaid pleadings :-

“(i) Does the plaintiff prove that the Will of the deceased dated 26th November, 1986 was duly executed and attested?

(ii) Do the defendants prove that the deceased on account of his old age, being extremely feeble, hard of hearing and having lost of his vision was incapable of making any testamentary dispositions?

(iii) What order?”

6. It is upon these set of issues that the parties have chosen to lead evidence. An affidavit in lieu of examination-in-chief has been filed by Mrs. Teresa D’souza dated 26th November, 2014. In the said affidavit she has deposed to the aforesaid set of facts and in addition it is stated that she lives in the accommodation alone and she has been paying property taxes and assessments in respect of the land till today, initially to her father and after the demise of her father to Mrs. Hilda and after her death, to her brother who is the present petitioner. According to Teresa she has paid 50% of the total property tax and seeks to rely upon receipts issued therefor. She also claims to pay water bills for water and electricity bills and the telephone bills. The Will according to her is inter alia false and fabricated, on the

following grounds;

(i) that the date of demise is incorrectly mentioned in the Petition itself. The deceased died in the year 1987 and the Will was executed in the year 1986 in which his age has been wrongly shown as 92 years.

(ii) She has deposed to the fact that the deceased was detected with tuberculosis at the age of 89 to 90 and since then his health started deteriorated and by age of 94 he would not eat food and was to be reminded to eat. At times he had to be pinched to bring him to back to his senses. He could not eat himself and other family have to feed him. At the age of 94-95 he was very weak he could not stand or walk. At times he would crawl he also would fall from the bed and therefore he was made to sleep on the mattress on the floor. Furthermore no medical reports have been produced to show the state of health of the deceased.

(iii) The deceased had lost eye sight in one eye and even at age of 70 he use magnifying glass to read the newspaper. By the age of 94-95 he was visually impaired and could not read or write. At the age of 94-96 he would shiver and was forgetful and he would not do the daily routines by himself. Since Justina was in the same house she would feed him and when Justina was not available then the original petitioner Hilda D'souza would do so.

(iv) the deceased was "under the control" of the brother Joseph and

she was not allowed to speak to her father without Joseph or Hilda being present.

(v) he was very forgettable and could not identify the family members. She was never informed that her father was making a Will nor was Will shown to her till the Petition was filed to avoid the continuing conflicts after 11 years within the family.

(vi) The attesting witnesses are not alive. Both of them were relatives of Joseph D'souza. The signature of the Will does not match that of the Declaration which is made in 1967. She disbelieves the deceased's declaration as to his good health.

(vii) Various provisions of Will have been made without any meaning such as the Will provides for revoking earlier Wills and Codicils. The fact that he had not made any other Will or Codicil indicates loss of memory or imbalance.

(viii) the contents of the Declaration dated 23rd November, 1967 is at variance with the Will and the very fact that the Will does not provide for the property at Goa being Bungalow and plantation of Coconut and Mango and rice fields indicating obvious incapacity to deal with and dispose of his property.

(ix) Christabella was the favourite children and was very dutiful towards her father yet no provision was made for Christabella.

7. On this basis, the petitioner has questioned the validity of the

Will. The witness has been cross examined extensively before the Commissioner running into 104 questions as seen from the report filed by the Commissioner on 28th December, 2010. The witness has tendered in evidence, copies of the Declaration dated 23rd November, 1967. This is an admitted document and marked as Exhibit D-1. The other documents annexed as Bank Account Statements, electricity bill etc. have not been marked in the evidence since they have not been admitted or proved. In the cross examination she admitted that she did not have authority to represent the other two sisters namely Christabella and Justina. No affidavits have been filed by the said sisters. Therefore, this Court recorded that defendant nos.2 and 3 will not be entitled to cross examine the defendant no.1. Defendants 2 and 3 have conceded this position.

8. In addition to the evidence of the first defendant the defendant led the evidence of one Lavina Fernandes, retired teacher and colleague of Justina. Lavina Fernandes and Justina were teachers of Our Lady of Perpetual Succour High School at Chembur. It is necessary to briefly advert to the evidence of the said witness Fernandes who has deposed that she was a colleague of Justina and used to visit the deceased's house occasionally. According to Fernandes the deceased loved all his children equally and he never spoke ill of any of his children and in 1986 when she visited him he

was lying on the floor and could barely speak. He had stopped going to Church and suffered from severe cough and he passed away at the age of 97. Lavina Fernandes has been extensively cross-examined on behalf of the plaintiffs and her cross-examination runs into 103 questions as reflected in the Commissioner's report dated 7th May, 2015.

9. Thereafter the plaintiff has led evidence wherein he has deposed that he has been transpired as plaintiff after the demise of the original petitioner his wife Hilda. He has deposed that the original Will is kept in the custody of the Prothonotary and it was duly executed at the residence of the deceased on 26th November, 1986. Since the deceased had not appointed an executor and since his late wife Hilda, his sister Justina and himself are the only beneficiaries, Hilda applied for grant of Letters of Administration. According to him all the properties and credits of the deceased have been set out all next of kin has been disclosed and on 26th November, 1986 when the deceased executed the Will he was present along with Mr. Antony D'ouza and Mr. Jane Anthony and his wife Hilda D'souza and he saw the deceased set and prescribe his name at the foot of the Will in the English language. He further deposed to the effect that the deceased execute the will in his presence. According to the Plaintiff, the signature of the testator is in the proper handwriting of the deceased

so also attesting witnesses have signed in his presence. He has deposed that the testator was of sound and disposing mind and memory. That Mrs. Jane Almeida attesting witness no.2 died in Mumbai on 18.1.2004 and Mr. Anthony Dennis the other attesting witness died on 28.7.2013. The copies of their death certificates have been produced along with the affidavit of documents. The fact that Jane Almeida and Dennis have expired is not in dispute.

Submissions of Counsel

10. Mr. Clive D'Souza the learned Advocate appearing on behalf of the Caveator No.1 submitted that the deceased was not capable of executing the Will. According to him, even the age of the deceased has not been set out properly by the Plaintiff and at the time of executing the will, the deceased was at-least of 97 years of age. Mr. D'Souza relied upon the evidence of Teresa D'Souza in which the witness had clearly stated that the deceased was not in proper physical or mental condition to manage day-to-day routines let alone execute the Will. According to Mr. D'Souza at the age of 89-90, the deceased was suffering from Tuberculosis and was not eating. He was forgetful and he had to be reminded and pinched to bring him back to his senses and to eat his meals. He could not even bring hand to his mouth to feed himself and that due to his weakness, family members were feeding him. In this state of body and mind, Mr. D'Souza

submitted that it was not possible for the deceased to execute the Will especially since his eye sight was very poor and even at the age of 70, he needed a magnifying glass to read. Twenty-seven years later at the age of 97, it had become virtually impossible for him to read and, therefore, the Will could not have been executed in that condition. Mr. D'Souza stressed upon the fact that witness Teresa D'Souza had deposed that her father did not even inform her that he was making a will. Given the past conduct in making the declaration providing for the children, it was inconceivable that the deceased would not inform his children that the Will had been made, especially in view of the fact that evidence shows that he loved all his children equally and that Christabella was his favourite daughter and he would definitely have provided for Christabella. However, the Will does not make any bequest to Christabella and for this reason also, the Will is highly suspect and cannot be accepted.

11. Mr. D'Souza further submitted that contents of the Will was at variance with the Declaration (**Exhibit "D-1"**) executed on 23.11.1967. In that Declaration, Mr. D'Souza pointed out that all his children were desirous of taking care of him and for the purposes ensuring that they reside close by, he had allowed Joseph, Justina and Teresa to construct a structure adjacent to his cottage and on condition that they allow Christabella to put up a structure above the

one being built by Teresa and others and it is inconceivable that Christabella would be left out of the Will. On this basis, Mr. D'Souza submitted that the letters of administration cannot be issued. Mr. D'Souza also relied upon the notes of cross-examination of Teresa D'Souza and submitted that the cross-examiner could not successfully challenge the veracity of the deposition. Mr. D'Souza further referred to the Affidavit of Lavina Fernandes which in no uncertain terms states that when she visited the deceased in 1986, he was lying on the floor and he could barely speak and that according to Mrs. Fernandes, the deceased loved all his children equally. Even in the cross-examination of the said Mrs. Fernandes what had been brought out is that Mrs. Fernandes had clearly established that she had personal knowledge of the condition of the deceased and his inability to go to the church. This was clearly described by the said witness Mrs. Fernandes in answer to Question No.72. He also referred to Question No.73 in answer to which Mrs. Fernandes described the conversation that she had with the deceased when she visited him in 1986. Mr. D'Souza also pointed out that the witness Fernandes had correctly stated in her affidavit that the deceased was about 97 years of age since she had seen the age of the deceased written on his tombstone.

12. Mr. D'Souza then relied upon the judgment of the Supreme

Court in **H. Venkatachala Iyengar v. B.N.Thimmajamma and Others**¹ which was quoted with the approval in **Malli Bewa v. Natabar Naik & Ors.**² He submitted that the onus of proving the Will is admittedly on the propounder and in this case, there were several suspicious circumstances which entail that the onus was very heavily on the Plaintiff and in the present case, the Plaintiff had not satisfactorily discharged this burden. He referred to the observations of the Supreme Court in the said judgment of **H. Venkatachala Iyengar (Supra)**. Mr. D'Souza pointed out that in yet another case of **Smt. Jaswant Kaur v. Smt. Amrit Kaur**³, the learned Chief Justice had summarised the propositions of Gajendragadkar, J. in the case of **H. Venkatachala Iyengar (Supra)** inter-alia listing the circumstances which appear to be suspicious and in those at Items (xii) and (xiii), He inter alia pointed out that the judgment had set out various suspicious circumstances in paragraph 8 of the judgment. Mr. D'Souza then relied upon the judgment of the Supreme Court in **Gurdial Kaur & Ors. v. Kartar Kaur & Ors.**⁴ which once again relied upon the observations in **H. Venkatachala Iyengar (Supra)**.

13. Mr. D'Souza submitted that the Petition is barred by the law of limitation and since it is filed 11 years after execution of the alleged

¹ AIR 1959 SC 443

² AIR 1980 Orissa 34

³ AIR 1977 SC 74

⁴ (1998) 4 Supreme Court Cases 384

will, the same is liable to be rejected under Rule 382 of the High Court (Original Side) Rules. He further submitted that the will does not provide for reasons for excluding daughters. The scribe of the Will an Advocate had not been examined. Both attesting witnesses are related to the Petitioner, one being the brother of his late wife and the other sister of his late wife Hilda. He then submitted that no medical reports were provided to establish that the deceased was of sound mind and lastly that Christabella had not been examined.

14. On behalf of the second Defendant, Mr. Vaibhav Sugdhare the learned counsel adopted arguments of Mr. D'Souza and in addition, he submitted that in the case of **Daniel Premacey Ramball v. Joseph Charles Salvi and Ors.**¹, a learned Single Judge of this Court held that where the Will on the face of it does not disclose that it has not read to the testator or read over to the testator and if so by whom, it was primarily for the propounder to establish that the Will was read by the testator and or was read over to the testator and once on the face of it if the Will does not disclose whether it had been read by the person executing it or had been read over to him, then the Will must be examined by the Court and the suspicions relating to the execution of the Will must be removed to the satisfaction of the Court by the Propounder. This judgment also relied upon the principles in **H.**

1 2002(4) Mh.L.J.133

Venkatachala Iyengar (Supra). Mr. Sugdhare then relied upon the judgment of the Supreme Court in **Balathandayutham and Another v. Ezhilarasan**¹ and relied upon the observations in paragraph 14 of the said judgment. He submitted that when the execution of the Will is surrounded by suspicious circumstances, the person propounding it has a very heavy burden to discharge and H. **Venkatachala Iyengar (Supra)** held that where the testator's mind is feeble and he is debilitated and there is not enough evidence as to the mental capacity of the testator or where the disposition of the will is unnatural, improbable or unfair, the Court may consider that the will is encircled by suspicious circumstances.

15. Mr. Sugdhare further submitted that the signature of the deceased differs in the Declaration and in the Will whereas there is also discrepancy in the age of the testator as propounded by the Plaintiff and thus it is seen from the evidence on record. Apart from the discrepancy in the age and in the signature, the testator was obviously not in good health as evident from the deposition. In view of the signature being at variance, the Plaintiff should have examined the Advocate who drafted the Will. However, this has not been done. Thus, Mr. Sugdhare supported the case of the Defendant No.1 to the effect that the execution of the Will has not been proved and the

1 (2010) 5 SCC 770

suspicious circumstances continue to operate and hence, the Petition must be dismissed.

16. Mr. D'Mello the learned Advocate for the Plaintiff submitted that the Defendants' case is unsustainable and is misconceived. According to him, no case whatsoever has been made out by the Defendants. He submitted that the Will has been assailed on the following principal grounds:

- (1) That there is evidence on record to show that the testator loved all his children equally;
- (2) That Christabella was his favourite child and nothing whatsoever bequeathed to her.
- (3) That the Will does not disclose property in Goa, which is substantially included rice fields and mango orchards.
- (4) That the deceased was very old, weak and could not see and had no mental capacity and, therefore, could not have executed the will.
- (5) Will was at variance with the Declaration executed in the year 1967.

17. Mr. D'Mello submits that each of these contentions were misconceived. According to Mr. D'Mello, the contents of the Will are not at variance from the declaration. Mr. D'Mello further submitted that the deceased had one son and four daughters of which Sr. Geraldine and Joseph had consented to the grant in favour of the

Hilda daughter-in-law. Caveats were filed by Teresa, Christabella and Justina. However, since only Teresa has filed affidavit in support of caveat, Christabella and Justina were deleted as Defendant Nos.2 and 3. They also, therefore, did not lead any evidence. Although the counsel for the Defendant No.2 was present, the Defendant No.2 did not cross-examine the Plaintiff. Mr. D'Mello submitted that the Will provides for all children. It specifically protects rights of spinster daughters while Sister Geraldine had joined a convent. He referred to Clause (1) of the Will and submitted that it made provisions for daughter-in-law Hilda, his daughter Justina and his son Joseph jointly membership rights and the lease hold rights of the property in Saint Anthony's Co-operative Housing Society including cottage and after the demise, he had specifically provided that Justina, who was unmarried would use part of the cottage during her lifetime. It was also provided in the will that his daughter Teresa and her husband had built a structure from their own funds. Likewise part of the structure was built by son Joseph and his wife Hilda along with Teresa and her husband who would be entitled to use the terrace jointly with Joseph D'Souza. Thus he submitted the Will provided for the children read with the fact that Christabella already had right to construct a structure above the structure put up by others and thus provided in the Declaration. He submitted that nothing in the Declaration has been compromised in the Will and, therefore, there was no substance

in the contention of the Defendants.

18. Mr. D'souza referred to the answers given by the Plaintiff in the cross-examination question Nos.7 and 8 to 10, which are reproduced below:

"Q.7 : Do you know who drafted this Will ?

Ans. An Advocate had drafted this Will. I know this personally. I had gone to the Advocate.

Q.8 : (Shown the original Will, Exhibit "P2".)

Who gave instructions to the Advocate for preparing this Will ?

Ans. My father.

Q.9 : Did your father go personally to the office of the Advocate at Fort ?

Ans. No. The Advocate resided in Chembur where we also lived. My father went to the Advocate's residence at Chembur. I took my father to the residence of Mr. Harold D'Souza, Advocate.

Q.10 : Did anybody read the Will over to your father before he signed it ?

Ans. He read it himself with a magnifying glass."

19. Mr. D'Mello then referred to the notes of cross-examination of Teresa and in particular answers to Question No.13 where the witness admitted that the deceased was looked after by Justina, Joseph and Hilda daughter-in-law, who was the original Petitioner. He then

referred to the answer to Question No.27 whereby Teresa deposed that by the age of 94-95, the deceased had become visually impaired and could not read or write, the witness was called upon to produce documentary proof in support of this deposition to which she answered that she had seen the deceased using a magnifying glass thus, admitting the fact that the deceased could read and see with the help of magnifying glass.

20. Mr. D'Mello's submission is corroborated by the evidence of the Plaintiff, who has confirmed in the cross-examination that the deceased used to read with the help of magnifying glass. In answer to Question No.35, Mr. D'Mello pointed out that the witness had admitted that the deceased was under the care of the Plaintiff and his wife Hilda along with his sister Justina to which the witness answered in affirmative. He submitted that the deceased was upset and heard that the witness had abandoned the Roman Catholic Church and chosen to be a Born Again Christian and when the witness was asked a question whether the father was very upset of having left the Catholic Church and having joined the Born Again Christian movement, she answered "I do not know". Mr. D'Mello further submitted that the Defendants have failed to establish that the will was in any manner unfair or that it favoured propounder. In support of his contention, he relied upon the answer to Question No.91 where it

was suggested to the witness that the deceased was most attached to his daughter-in-law Hilda and the witness Teresa answered in the affirmative.

21. D'Mello then referred to the evidence of Lavina Fernandes and cross-examination of the said witness in which Mrs. Fernandes has deposed of her visit to the house of the deceased in the year 1986. She submitted that the deceased was lying on the floor and could barely speak that he had stopped going to the church since he could not walk but what is important to note is that the deceased remembered the witness Fernandes indicating that he had a good memory.

22. D'Mello then relied upon the judgment of **A.K.Sabharwal v. State & Ors.**¹ and submitted that no evidence had been led by the Respondents to show that the deceased was not in a sound and disposing state of mind at the time of executing the will nor did they bring out any suspicious circumstances and in such situation, the Court had proceeded to grant probate. In yet another judgment relied upon by Mr. D'Mello in **Krishan Kumar Sharma v. Rajesh Kumar Sharma**², it was held that Limitation Act was not applicable to probate proceedings. He relied upon paragraph 6 in which reference

1 188 (2012) Delhi Law Times 789

2 (2009) 11 SCC 537

was made to the judgment of the Supreme Court in **S. Krishnaswami**¹ wherein it was held that in a proceedings for grant of probate or letters of administration, no right is asserted by the applicant who only seeks recognition of the Court to perform a duty. That probate or letters of administration when issued by the competent Court is conclusive proof of the legal character of the testamentary disposition and there is no law which compels the applicant to file the proceedings then it would be difficult to construe such proceedings as coming within the ambit of Article 137 of the Limitation Act, 1963.

23. Mr. D'Mello then relied upon the judgment of **Babu Singh and Others v. Ram Sahai alias Ram Singh**² and submitted that once free will of the testator is questioned, no doubt it is the duty of the propounder to discharge the burden. However, in the absence of attesting witnesses, the will can be proved in the manner indicated in Section 69 of the Indian Succession Act, 1925 and it is not a case where attesting witnesses are available but were not examined since in the present case both attesting witnesses had expired.

24. Mr. Sugdhare had also relied upon this judgment in particular paragraphs 16 to 18 and submitted that burden continues to be that

¹ AIR 1991 Madras 214

² (2008) 14 Supreme Court Cases 754

on the propounder in view of the fact that the Plaintiff had not examined witnesses, who are able to prove handwriting of the testator and only such handwriting was proved would the burden shift to others and ordinarily a will must be proved in accordance with the provisions of Sections 63 and 68 of the Indian Succession Act, 1925 and only if ingredients of Sections 3 and 68 are noticed, strict proof of execution and attestation stand relaxed. In that case, one of the attesting witnesses had died and the other did not appear despite service of summons, it was held that although the second witness may have won over by the other side as contended there must be evidence brought on record in that behalf before proceeding to adopt alternate methods of proving will.

25. In the present case, there is no such impediment inasmuch as it is an admitted position that both the attesting witnesses have died. In the circumstances, having considered all these aspects, I am of the view that the Defendants have failed to make out any case in support of suspicious circumstances enumerated by the defendants. The evidence led by the Defendants' witness Teresa clearly admits in the examination-in-chief in paragraph 11 that the Original Petitioner Hilda would feed the deceased when the Defendant's sister Justina was not available. In her affidavit, Teresa had stated that her father was all time under the control of the Original Petitioner Hilda and the

present Petitioner Joseph and that whenever she visited father either Joseph or Hilda would be present and would not allow her to speak to her father. This in my view is far fetched. The defendants have failed to prove that the deceased was under the “control” of Joseph and Hilda. It is interesting to note that in paragraph 15 although the witness contends that she was not informed of her father making a will or that the will was never shown to her, she deposed that the probate petition has been filed after eleven years to avoid **“continuing the conflict within the family”**. In my view, this is clearly indicative of the fact that the witness Teresa was aware of the will and the Petition was filed in order to give legal sanctity to this Will especially since all the parties concerned appear to have acted in accordance with the Will. Mere absence to reference to the property at Goa is not reason enough to challenge the will successfully. In the cross-examination of Teresa also what has been brought out is that the witness admitted that she did not have any documentary proof of the deceased suffering from tuberculosis. (See answer to Question No.17). On the other hand, the witness admits that the Original Petitioner Hilda, the present Petitioner Joseph and the sister Justina were looking after her father (see answer to Question no.7). Justina has not deposed and controverted this. Neither Justina nor any of the other witnesses have stated that the deceased was always under the control of Joseph and Hilda. Justina also resided in the same premises.

If Teresa was prevented from speaking to her father, surely some other witness could have deposed to this fact.

26. In answer to Question No.27, the witness confirms that she has seen her father using a magnifying glass for reading. This is also deposed to by the present Petitioner in his cross-examination. Meanwhile, Teresa's answer to Question No.91 is revealing. It reads as follows:

"91. I put it to you that your father was most attached to his daughter-in-law Hilda ?

Ans. Yes."

This answer clearly shows that the original petitioner Hilda who was looking after the deceased was extremely attached to her father-in-law. There is nothing averse to the deceased having made a bequest in her favour along with his son. In addition, the attempt of the Defendant to show that the deceased was too old to look after himself could barely speak or remember things right from the year 1986 is unbelievable since in the affidavit Lavina Fernandes she has categorically deposed that when she last visited the deceased in 1986, he was lying on the floor and could barely speak, but in the cross-examination of the said witness, she admits that in 1986 when she visited the deceased and met him, no one else was present (Question Nos.67 to 69) and although the meeting lasted for ten minutes, the witness interacted with her alone. When the witness was

asked about the conversation she had with the deceased, she stated as follows in answer to Q.73:

"I wished him and he replied to me but, he was not talking very freely. I waited for a while and I asked him how he was. He asked me, who I was and when, I told him my name, he asked me if I was from Kurla. Then he waited for a while then he said Macfarlane and I said you remember me well. (This is what we spoke)."

The cross-examiner then asked Question No.74. The same is reproduced below:

"Q.74 : What is the word you mention "Macfarlane".

What does it mean ?

Ans : It is my maiden name."

Thus Lavina Fernandes in cross-examination in answer to Question No.73 had given her version of the conversation she had with the deceased and during the conversation, the deceased asked her whether she was Macfarlane and he remembered her very well. In Question No.74, I have noticed that Mr. D'Mello had asked the witness relevance of the name Macfarlane to which witness Fernandes stated that it was her maiden name. This undoubtedly indicates that although the witness has deposed that the deceased was weak, he had a sharp memory and he remembered the maiden name of the witness even in the year 1986 i.e. one year prior to his demise. This

given the fact that witness Fernandes was colleague of Justina at school in Chembur and for 34 years had been visiting the house of the deceased occasionally while she was teaching in Chembur is clearly a factor that dispels allegations of the inability of the witness to understand things.

27. Thus, even as late in 1986, the deceased could remember that maiden name of Lavina Fernandes was Lavina Macfarlane. This clearly indicates that even in 1986 when the deceased was reported to be very weak not able to move or walk, he was extremely alert inasmuch as the deceased realised that Lavina Fernandes maiden name was Lavina Macfarlane. The deceased knew her prior to 1971 since she was teaching at the school in Chembur along with the deceased's daughter Justina. The maiden name of the witness Macfarlane would have been known to the deceased only if he knew her before her marriage since the witness admitted in answer to Question No.76 that she married in the year 1971, it becomes obvious that the deceased could in the year 1986 remember that the witness's maiden name was Lavina Macfarlane. This in my view clearly establishes that the deceased was of sound mind, alert and had a sharp memory and the evidence of Teresa or Lavina do not in any manner support Defendant's contention of the testator's inability despite his ripe old age, whether he was 92 or 97, he had signed the

Will in the year 1986. Even assuming in favour of the Defendant that he was 97 years old when he died, one year before his demise, he could remember maiden name of Lavina Fernandes. The Defendants' own witness' deposition supports the case of the Plaintiff. In the circumstances, the fact that the witness could have validly executed the Will with full knowledge of what he was doing, cannot be doubted. The issues must be answered against the Defendants and in favour of the Plaintiff. There are in my view no separate contents that have been established and the petitioner has discharged his burden as a propounder of the Will is required to. In the result, I am of the view that caveat is liable to be dismissed. The Testamentary Petition must proceed to grant. I, therefore, pass following order:

- (i) The Caveat is dismissed.
- (ii) The Petition shall proceed to grant to be issued as prayed subject to compliance with other requisitions.
- (iii) There will be no orders as to costs.

After this judgement was pronounced, Mr.D'Souza applies for stay of its operation. The request is declined.

(A. K. MENON, J.)