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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION**

**APPEAL NO.526 OF 2007**

**IN**

**TESTAMENTARY SUIT NO.116 OF 1998**

**IN**

**PETITION NO.275 OF 1998**

Smt. Amita Kulinchandra Motiwala & Anr. ... Appellant

Versus

Rohini Pradyuman Kapadia ... Respondent

Mr. Dinyar Madon, Senior Counsel a/w Mr. H.J. Engineer i/by M/s. Gordhandas & Fozdar for the Appellant.

Mrs. Uma K. Wagle for the Respondent.

**CORAM : A.S. OKA & A.A. SAYED, JJ.**

**DATE ON WHICH SUBMISSIONS WERE HEARD : 21.07.2016**

**DATE ON WHICH JUDGMENT IS PRONOUNCED : 22.12.2016**

**JUDGMENT (PER A.S. OKA, J.)::-**

**FACTS**

1 By this Appeal an exception has been taken to the judgment and order dated 6<sup>th</sup> July, 2007 passed by the learned Single Judge in Testamentary Suit No.116 of 1998 arising out of Testamentary Petition No.275 of 1998. By the impugned judgment and order, the Testamentary Suit has been dismissed. The Appellants are the Plaintiffs

who filed a Testamentary Petition for grant of probate in respect of the last will and Testament of Smt. Hirabai alias Hiraben Parmanand Kapadia, widow of Parmanand Gordhandas. The alleged will was executed on 25<sup>th</sup> September, 1996 (for short “the disputed will”). The Plaintiffs are claiming to be the executors appointed under the disputed will. The Testator Hirabai died on 24<sup>th</sup> October, 1996. The Plaintiffs are the daughters of the deceased. The Defendant is also a daughter of the deceased. Apart from the said three daughters, the deceased has another daughter by the name Bhanubai. It is stated in the Testamentary Petition filed by the Plaintiffs for seeking Probate that the husband of the Testator predeceased her. It is pointed out that the only son of the deceased who was a bachelor died on 13<sup>th</sup> January, 1966 leaving a will dated 23<sup>rd</sup> December, 1965 which has been already probated.

2           A caveat was filed by the Respondent – Defendant. In the affidavit in support of the caveat, the Respondent – Defendant contended that the disputed will was invalid, illegal and was fraudulently prepared by the Plaintiffs. It was stated that on all pages of the will, there are no initials of the deceased Testator. It is pointed out that the Schedules to the will are prepared on letter heads of the deceased Testator and there appears to be a blank space between typed

material and signatures of the deceased Testator on the said letter heads. The allegation is that signatures of the deceased were taken on blank papers and the disputed will was subsequently created by the Plaintiffs by using the said papers. It is stated that deceased was incapable of understanding the contents of the disputed will which is written in English language. It is alleged that the contents of the will were never explained to the deceased Testator and she has not signed the same in presence of the witnesses. It is contended that the fact that Schedules have been typed on letter heads is a suspicious circumstance. In the affidavit in support of the caveat, the Defendant stated that she has already filed a Suit in the City Civil Court in Mumbai. As a result of the filing of the caveat, the Testamentary Petition filed by the Plaintiffs was numbered as a Suit.

### ISSUES

3           The following issues were framed in the Suit :-

- “1. Whether the Plaintiffs prove the due execution of the last will dated 25<sup>th</sup> September, 1996, by the deceased Hirabai Permanand Kapadia in sound health and with sound disposing mind?
2. Whether the Defendant proves that the will dated 25<sup>th</sup> September, 1996 of the deceased is invalid, illegal, fraudulently prepared as stated in para 3 of the Affidavit

in support of the Caveat?

3. Whether the Defendant proves that the signatures of the deceased was taken on blank papers and the will has been subsequently typed on the same as stated in para 3 of the Affidavit in support of the Caveat?
4. Whether the Defendant proves that the will has not been signed in the presence of the Witnesses as stated in para 3 of the Affidavit in support of the Caveat?
5. Do the Plaintiffs prove that the Defendant by her conduct has accepted the will and therefore she is estopped from challenging the validity of the will?
6. Whether the Defendant proves that the Plaintiffs have undervalued the estate left by the deceased?
7. What reliefs and order?"

#### IMPUGNED JUDGMENT

4           The first Plaintiff examined herself. She also examined Shri Virendra G. Trivedi, Advocate who was the alleged attesting witness to the disputed will. The Plaintiffs also produced documentary evidence. The Defendant examined herself. The learned Single Judge amended the settled issues and came to the conclusion that only following two issues arose for consideration:-

- “1. Whether the Plaintiffs prove that the deceased signed the will in presence of the Witnesses after having understood the contents of the will?
2. Whether the Defendant is estopped from challenging the validity of the will because of her conduct of receiving benefits and properties under the will?”

The learned Single Judge in the impugned judgment held that the Plaintiffs have not discharged the burden of proving that deceased Testator has signed the disputed will in presence of the two witnesses. He held that the evidence of Shri Trivedi needed corroboration from the other attesting witness. The learned Single Judge proceeded to dismiss the Suit.

### SUBMISSIONS

5           The learned Senior Counsel appearing for the Appellant has taken us through the pleadings and notes of evidence. He invited our attention to the law laid down by the Apex Court in the case of *H. Venkatachala Iyengar vs B. N. Thimmajamma & Others*<sup>1</sup>.

6           Inviting our attention to the seven issues settled earlier, he submitted that the learned Judge ought not to have re-casted the issues while delivering the impugned Judgment.

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1 AIR 1959 SC443

7           He urged that in the facts of the case, the Plaintiffs have discharged the burden on them by proving the execution of the disputed will by the deceased Testator. He urged that there was no reason for the learned Single Judge to have deleted settled issues which had put burden on the Defendant. Inviting our attention to the evidence of PW2 - Shri Trivedi, he urged that the said witness who was an Advocate was an independent witness who had drafted the will and had attested will. By pointing out his evidence, he urged that there is no suspicious circumstances associated with the Schedules merely because the same are typed on the letter head of the Testator. He urged that the Schedules were in existence when PW2 – Shri Trivedi met the deceased Testator on the first occasion. He urged that the learned Judge should not have been influenced by some minor discrepancies in his evidence. He pointed out from the testimony of the witness – Shri Trivedi that the contents of the disputed will had been explained to the deceased in Gujarati language and were understood by her. He submitted that instructions were given to Shri Trivedi in Gujarati language to draft the will. He submitted that there is nothing wrong if Shri Trivedi drafted the will in English language as per the instructions of the deceased Testator. He urged that there was contemporaneous evidence which clearly shows that deceased has been signing on the documents in English and in fact on letters of consent for undergoing surgery, she had

signed in English. He submitted that the Defendant in the affidavit in support of Caveat had not disputed signatures of the deceased on the disputed will and her contention was that on blank papers, signatures of the deceased were obtained by the Plaintiffs on which the will was typed subsequently. He urged that the said contention has not been proved by the Defendant though the burden was on her to prove the said contention. He submitted that as the Plaintiffs have established that will was drafted as per the instructions of the deceased Testator, the execution of the will has been proved and that the Defendant has not discharged the burden put on her under the issues earlier framed by the Court. The learned counsel also pointed out that the Defendant accepted certain movable property in terms of the will. He pointed out that even her husband accepted legacy under the said will. He invited our attention to the finding recorded by the learned Single Judge on the re-casted issue No.2. He submitted that the learned Judge could not have brushed aside the fact that the Defendant's husband who also has signed a document after accepting the gold coins and an amount as a legacy has not challenged the will. He invited our attention to the various portions of the evidence of the witnesses. He urged that evidence of the witness Trivedi examined by the Plaintiffs inspires confidence. He urged that the impugned judgment is completely erroneous. The learned counsel submitted that findings recorded by the

learned Single Judge will have to be set aside and probate will have to be granted.

8           The learned counsel appearing for the Defendant submitted that the Plaintiffs have not discharged the burden to remove all the doubts and to explain all the suspicious circumstances associated with the disputed will. She invited our attention to the cross-examination of both the witnesses examined by the Plaintiffs. She pointed out various suspicious circumstances associated with the execution of the alleged will and urged that the Plaintiffs have not explained these circumstances. She also pointed out that the schedules to the disputed will have been typed on letter-heads of the deceased Testator and bare look at it will show that the signatures of the deceased appearing on the blank letter heads have been used to create the schedules. She pointed out that on the documents marked as Exhibits B and C, the reference to the will has been added by the first Plaintiff after the documents were signed by the Defendant. Moreover, the said documents do not show that the articles as per the disputed will were given to the Defendant. She urged that Defendant was even otherwise entitled to a share in the estate of the deceased and therefore, there is nothing wrong if she received gold and silver ornaments of her share. She pointed out that in Exhibits D and E, there is no reference to the disputed will. She urged

that the entire case of the Plaintiffs is suspicious. She pointed out several discrepancies in the evidence of both the witnesses examined by the Plaintiffs. She urged that no interference can be made with the impugned Judgment.

### CONSIDERATION OF SUBMISSIONS

9 We have given careful consideration to the submissions. It will be necessary at this stage to make a reference to the assertions in the affidavit in support of the Caveat filed by the Defendant. Paragraph 3 of the affidavit in support is the relevant paragraph which reads thus:-

“3. I say that the will dated 25<sup>th</sup> September, 1996 in respect of which the Probate is applied for under the aforesaid Petition is invalid, illegal, fraudulently prepared and not enforceable in law and the same was prepared by my sisters being the Petitioners abovenamed. I say that I have taken search of the original will lodged in the Testamentary Department on 14<sup>th</sup> October, 1998 in the presence of the Advocates for the Petitioners. **It was found that on all the pages of the will are not initialled by the Deceased. Its is also found that the Schedules are prepared on letter heads in the name of the deceased and the signature is right at the bottom of each page of the Schedule. Blank space appears between the typed material and the signature. It appears that the signatures of my mother was taken on blank papers and the will has been subsequently prepared and typed on the said**

**paper. I say that the deceased was incapable in understanding the contents of the said will which is written in English language since the deceased was not educated to the extent of understanding English language fully. In the circumstances, I say that the will is not a genuine will and the same is subsequently prepared by my sisters without the contents of the said will being explained to the deceased. I say that the will is not signed in the presence of the Witnesses.**

It is very unnatural that the Schedule was prepared on letter heads and one cannot believe the same to be correct. It is absolutely clear that the typing is done subsequently on the paper already signed by the deceased.”

(emphasis added)

10           In paragraph 6 of the affidavit in support of the Caveat, the Defendant contended that the deceased Testator was suffering from Cancer which was detected on 18<sup>th</sup> September, 1996. She stated that when the alleged will was executed on 25<sup>th</sup> September, 1996 the deceased Testator was seriously ill and was under stress due to detection of Cancer. It is the case made out in the affidavit in support of the Caveat that by using blank papers and blank letter-heads signed by the deceased Testator, the will was subsequently created. We have already quoted the issues which were framed earlier and the issues re-caste at the time of delivering the impugned Judgment.

11           It will be necessary to consider the oral evidence. The first Plaintiff filed her affidavit in lieu of examination-in-Chief. In paragraph 2 of her affidavit-in-lieu of examination-in-Chief, she stated that in September, 1996 her mother (the deceased Testator) had been diagnosed with lump in the breast which was suspected to be malignant. She was advised to undergo various tests. She stated that her age at the time was 84 years. She further stated that on or about 14<sup>th</sup> September, 1996 her mother (the deceased Testator) requested her to contact a lawyer for preparation of the will. As she knew Shri V.G. Trivedi, Advocate, she contacted Shri Trivedi, who had attended to some matters of her husband. It is stated that on 15<sup>th</sup> September, 1996 Shri Trivedi met deceased Testator at her residence when she gave instructions to Shri Trivedi for drafting the will. In paragraph 6, it is stated that on or before 18<sup>th</sup> September, 1996, the medical examination reports confirmed that she was suffering from Cancer. It is alleged that notwithstanding the disease, she was carrying on all her routine activities as set out in paragraph 6 of the affidavit. She further stated in paragraph 7 of the affidavit that she used to visit her mother practically everyday in the evening to help her in her financial matters. She stated that her mother's premises was on the third floor and the deceased Testator used to climb staircase everyday. It is further stated that the deceased Testator had employed a driver and she used to visit many

places as per her own wishes. Paragraph 8 of the affidavit discloses that the first Plaintiff was not present at the time of execution of the disputed will. She further stated that on 7<sup>th</sup> October, 1996 the deceased Testator was admitted to Breach Candy Hospital for surgery. She underwent a surgery on 8<sup>th</sup> October, 1996. Thereafter, she remained in hospital till her death on 24<sup>th</sup> October, 1996.

12 Further case is made out in affidavit-in-lieu of examination-in-chief is that on 25<sup>th</sup> December, 1996 the Defendant inquired with her as to whether there was any will left behind by the deceased mother. The first Plaintiff stated that she informed the Defendant about the disputed will and stated that the will was kept in the safe at Govardhan Bhavan, which was the residence of the deceased Testator. She further stated that as the Defendant insisted upon looking at the will, on the next date, she along with the Defendant and Defendant's husband Pradyumna went to Govardhan Bhavan. The witness stated that she opened the safe and showed the disputed will to both of them. Her further case is that few days thereafter the Defendant and her husband demanded that the ornaments, articles and money of the deceased Testator should be distributed as per the said will. Though the Appellant stated that the same can be done after Probate was obtained, the Defendant and her husband informed the first Plaintiff that there was

no necessity of obtaining Probate for distribution of the articles. Therefore, the first Plaintiff stated that she decided to distribute the ornaments, articles, etc. In what manner the distribution took place is stated by her in paragraph 10 of her affidavit-in-lieu of examination-in-chief. The relevant portion reads thus :-

“10. The distribution took place over a period of 3 days. On 12<sup>th</sup> January 1997 the gold ornaments were distributed. On 5<sup>th</sup> February 1997 the diamond and pearl ornaments were distributed. On 4<sup>th</sup> March 1997 silver utensils were distributed. At the time of distribution of the said ornaments and silver articles I obtained the signature of my sister Rohini. Since I did not think that the matter would go to the Court distribution was done among the family members I obtained the signatures of my sisters in an old diary of 1992-93. In the said diary on the page bearing printed dates of July 9 to July 12 I took my sister Rohini's signature on the writings being list of ornaments handed over to my sister. I produce the said writings with my sister's signature and I tender the same in evidence as Exhibit “A”. I say that the first two lines appearing on the top of the said page is in Jyotsana's, my sister's handwriting. I identify her handwriting. The rest of the writing appearing on the said pages is in my handwriting. The signature appearing on the bottom of the said page is that of my sister Rohini. Similarly, in the diary on pages bearing printed dates of August 27 to August 30, I took Rohini's signature at the end of the writings being list of

diamond and pearl ornaments handed over to her. I produce the said writings with my sister's signature and I tender the same in evidence as Exhibit "B". I say that the writing appearing on the said pages is in my handwriting. The signature appearing on the bottom of the said page is that of my sister Rohini. Similarly, in the diary on pages bearing printed dates of February 1 to February 3 I took Rohini's signature on the writings being list of silver utensils handed over to my sister. I produce the said writings with my sister's signature and I tender the same in evidence as Exhibit "C". I say that the writing appearing on the said pages is in my handwriting. The signature appearing on the bottom of the said page is that of my sister Rohini. The said signatures though different in form are in the handwriting of my said sister Rohini and the said signatures were made in the presence of me and my other sisters namely, Jyotsna, Bhanuben and niece Hemantini. I identify the same. After distributing the ornaments, utensils etc. as per my mother's will, I gave a sum of Rs.25,000/- and ten gold sovereigns (coins) as stated in the will to Mr. Pradyuman, Rohini's husband and also to my husband Mr. Kulinchandra Motiwala. On 5<sup>th</sup> March 1997 I handed over a cheque of Rs.25,000/- to the said Pradyuman and my husband acknowledged receipt of Rs.25,000/- and ten gold sovereigns (coins). I obtained the signature of Pradyuman in writing on the letterhead of the deceased. I say that the said writing is of Pradyuman and the signature is that of Pradyuman

and I identify the same. The signature was put by the said Pradyuman in my, Jyotsna's, Bhanuben's and Hemantini's presence. I tender the said document at the time of evidence as Exhibit "D". Both, my sister and the said Pradyuman have taken benefit of what was left by my mother to them under the said will. At that time neither my sister nor her husband raised any dispute or objection to the said will. They accepted the will and have taken benefits under the same."

13 In the further examination-in-chief of the first Plaintiff, the relevant pages of the diary relied upon by the first Plaintiff were marked as Exhibits – A, B and C subject to the proof of the contents. The receipts dated 5<sup>th</sup> March, 1997 signed by the husband of the Defendant were marked as Exhibit – 'D-1', 'D-2' subject to proof of contents. Certain other documents were marked as Exhibits in the examination-in-chief. She stated that Shri V.G. Trivedi, solved some property matter of her husband in the year 1995 or 1996. She stated that she contacted Shri Trivedi on 14<sup>th</sup> September, 1996 on phone. She stated that in the afternoon of 15<sup>th</sup> September, 1996 she received a telephone call from the deceased Testator informing her that Shri Trivedi, Advocate had met the deceased Testator. She stated that on 25<sup>th</sup> September, 1996 when she visited house of the deceased Testator, she was informed by the deceased Testator about execution of the will. She was also questioned whether she knew Dr. Shukla who is the second

attesting witness. She stated that she knew Dr. Shukla since her mother started taking treatment from him. She stated that she had no occasion to personally meet Dr. Shukla. She stated that her mother contacted Dr. Shukla requesting him to become an attesting witness. She stated that her mother had informed her that she would be visiting dispensary of Dr. Shukla for signing the will. The witness was thereafter cross-examined on various documents. She was cross-examined on Exhibit – B which is a receipt admittedly signed by the Defendant on 5<sup>th</sup> February, 1997 acknowledging receipt of various ornaments. We may note that the list is in Gujarati language. On the top of the list, the name Rohini appears in English language. Immediately above the name, following portion has been handwritten “distributed as per clause 10 of the will by mutual consent”. The first Plaintiff admitted that the Gujarati portion was in her own handwriting and the name Rohini has been written by her. She was asked a specific question as to when it did occur to her to write the aforesaid line starting from “distributed .....", her answer was she does not remember. When she was asked whether a similar line is written in case of receipt signed by other two legatees, she stated that “yes I think so”.

14           The only other witness examined by the Plaintiffs is Shri V.G. Trivedi, Advocate. In his affidavit-in-lieu of examination-in-chief, he

stated that on or about 14<sup>th</sup> September, 1996 he received a call from the first Plaintiff who inquired whether he will be in a position to make a will of her mother. He stated that the first Plaintiff requested him to visit her mother's residence as she was 84 years old. He stated that he contacted the deceased Testator on the telephone number provided by the first Plaintiff. At that time, the deceased Testator informed him that she had made an earlier will which she was intending to revoke. He stated that on the same day in the afternoon, he visited the place of residence of the deceased Testator. He stated that he jotted down the instructions for preparation of will which were given by the deceased Testator. He stated that the deceased Testator informed him that there should be a reference to four schedules in the body of the will for indicating the manner in which the ornaments and utensils were to be distributed between her daughters and grand daughters. He stated that the deceased Testator showed four schedules typed in English on her letter heads. He stated that deceased Testator informed him that the schedules were already ready and therefore, she wanted a reference to be added in the will to the schedules. About her condition at the relevant time, he stated thus:-

“4. ....

**However, for the sake of her understanding and convenience she requested me to prepare the draft of the will in Gujarati language. Throughout the**

period of my visit, she was clear about the instructions that she gave me and was in full control over her mental faculties. During my visit she even offered me some tea. In the course of our conversation she told me that she was not dependent on any of her daughters in going around her day to day affairs and that she had a car and a driver at her disposal and visited the temple on her own by the said car and also visited other relatives by the said car without needing help from any servant or helper.

5. I advised her that though she was physically and mentally active and alert, since she was of advanced age, it would be advisable if one of the attesting witnesses to the will could be a doctor. I also told her that she would need to sign her will in the presence of atleast two witnesses. She told me that she would request her family doctor to be one of the attesting witnesses. She also requested me if I could be present at the time of the said attestation of the will and be one of the witnesses so that the formalities of attestation take place under the supervision of a lawyer.”

15           In paragraph 7 he stated that he prepared a draft of the will as per the instructions of the deceased Testator in Gujarati language. He stated that it took him three to four days to prepare the draft. He stated that the draft was got collected by the deceased

Testator from him through a servant. He stated that after one or two days, he received a call from deceased Testator stating that the draft was prepared as per her instructions. She provided address of the clinic of Dr. Shukla and requested him to remain present in the clinic of Dr. Shukla at 11.00 am on 25<sup>th</sup> September, 1996 for execution of the will. According to the witness, the deceased Testator instructed him to prepare the final will in English language exactly as per the Gujarati draft approved by her. He stated that accordingly, he prepared the final engrossment of the will in English in terms of the draft prepared by him in Gujarati. He described as to how he visited the clinic of Dr. Shukla at about 11.00 am on 25<sup>th</sup> September, 1996 and as to how the will was executed. About the exact execution of the will, in paragraphs 9 and 10, he stated thus :-

“9. On 25<sup>th</sup> September 1996 I reached the clinic of Dr. Shukla at about 11.00 a.m. with the engrossed Will and the draft which had been prepared by me and approved by her. **I found that Hiraben had already reached the clinic. I thereafter read over and explained to her in Gujarati the contents of the final Will to confirm that the final Will was as per the approved draft. She handed over to me the four Schedules typed on her letterheads and requested me to attach them to the Will. The Schedules had already been signed by her. I accordingly attached the said Schedules to the Will.**

10. Hiraben thereafter introduced me to Dr. Shukla. She informed Dr. Shukla that I was a lawyer and that I had prepared her will as per her instructions. **Dr. Shukla informed me that he had been the family doctor of Hiraben for many years and that she had kept good health all her life until recently when she had been diagnosed with breast cancer. He further informed me that inspite of her ill health she was mentally alert and was well informed.** Thereafter I handed over the final will which I had prepared alongwith the annexures to Hiraben and showed her the place where she should put her signature and execute the will. The said Hiraben signed the said will and put the date “25.9.96” in her own hand in the presence of Dr. Shukla and myself. Thereafter, Dr. Dilip Shukla put his name and signature below the signature of Hiraben as an attesting witness in the presence of Hiraben and myself. Thereafter, I put my signature and rubber stamp below the signature of Dr. Dilip Shukla as an attesting witness in the presence of Hiraben and Dr. Shukla. I left the clinic of Dr. Shukla thereafter.”

(emphasis added)

16 In the cross-examination, he stated that he was not aware as to who had provided four schedules and who had got it typed. He accepted that the four schedules were not signed by the deceased Testator in his presence. In the cross-examination, he claimed that the deceased Testator's daughter was present when he went to take

instructions from the deceased Testator. This statement is not consistent with the case of the Plaintiffs. In response to the question of language of the will, he stated that previous will executed by the deceased Testator was also in English. We may note here that in the cross-examination, there is no serious challenge to that part of the examination-in-chief wherein he has deposed about sound mental and physical condition of the deceased at the time when she gave instructions to him to draft the will and at the time of the execution of the will. There is no serious challenge in the cross-examination to the case made out by the Plaintiff that the deceased Testator visited the clinic of Dr. Shukla and executed the will.

17           The Defendant examined herself by filing her affidavit-in-lieu of examination-in-chief. She claimed that signatures of the deceased Testator on blank papers and blank letter-heads were obtained and subsequently the disputed will has been created. She stated that there are no signatures of the deceased Testator on each page of the will. She has stated that her mother i.e. deceased Testator was not able to understand English except for making signatures in English. In paragraph 3, she stated that her mother was suffering from Cancer and Dr. Praful Desai was consulted. As per Dr.Desai's advise, a surgery was agreed to be performed in Breach Candy Hospital. The Defendant

claimed that the deceased Testator had stopped visiting market or temples last few months prior to her death. She claimed that her mother was not looking after the affairs of Govardhan building where she was residing and everything was handled by the first Plaintiff. She stated that her mother used to spend most of her time in doing Pooja in the house and she was unable to climb staircase without help. In paragraph 6, it is claimed that after repeated requests, the first Plaintiff showed the disputed will. She stated that she could only glance through the will. She demanded a copy of the will from the first Plaintiff. According to the Defendant, the first Plaintiff informed her that there is no need to go as per the will and she would distribute the assets of the mother equally amongst the four sisters. She stated that on 12<sup>th</sup> January, 1997 in the house of the mother Gold Jewellery was handed over to her by the first Plaintiff. She stated that on one of the pages in her diary, the first Plaintiff had written the description of the items of Gold Jewellery. Accordingly, she put her signature below the same. She stated that on 5<sup>th</sup> February, 1997 she received diamond and pearl items. She stated that a list thereof was prepared by the first Plaintiff on a page in her diary on which she signed. She claimed that the words “distributed as per clause 10 of the will by mutual consent” were not written when she signed the page in the diary. She further stated that on 4<sup>th</sup> March, 1997, she received Silver Items from the first Plaintiff. She

signed a list of Silver articles written by the first Plaintiff in her diary. She stated that the words “distributed as per clause 10 of the will by mutual consent” were not written when she signed the page. The Defendant further stated that on 4<sup>th</sup> March, 1997 her husband Pradyumna received a cheque in the sum of Rs.25,000/-. She stated that the first Plaintiff dictated the form of the receipt to her husband which was written by him on a letter-head of the deceased Testator. She stated that on 4<sup>th</sup> March, 1997 her husband received 10 gold coins and as per the dictation of the first Plaintiff, her husband wrote a receipt on the letter-head of the deceased. Further case made out by the Defendant is that the jewellery and other items were not distributed as per wishes of the mother. She stated that on 25<sup>th</sup> September, 1996 the deceased Testator was not in a position to understand contents of the will and that she was not in disposing state of mind.

18           The Defendant was extensively cross-examined by the learned Counsel for the Plaintiffs. She stated that her husband was B.Com. She stated that on various dates between 24<sup>th</sup> January, 2007 and 21<sup>st</sup> February, 2007, when the cross-examination of the first Plaintiff was going on, she was not present before the Commissioner appointed for recording evidence. However, she accepted that her husband was present at each of the meetings before the Commissioner along with her

Advocate. She accepted that the will shown to her by the first Plaintiff was also seen by her husband. In response to question No.47, the reply of the Defendant is material. Question No.47 and answer read thus :-

“47. Q Can you tell us what part of the estate of you mother was distributed after you and your husband were shown the will?

A Jewellery, silver utensils and Rs.25,000/- was given to my husband alongwith gold coins.”

19 In response to specific question No.52 as to who are the legal heirs of her mother (deceased Testator) on her death as per the Law of Succession, her answer was she along with her sisters and her legal heirs were the the legal heirs of the deceased Testator. In response to a further question, she stated that her legal heirs were her husband and daughter. She was confronted with a statement made in the affidavit dated 13<sup>th</sup> April, 1998 filed by her in the proceedings of her suit filed in the City Civil Court in which she has stated that the Plaintiffs and Defendants therein were the only legal heirs and legal representatives of the deceased Testator. She stated that she was the Plaintiff in the said Suit and the Defendants were her three sisters. In answer to another question, she claimed that her opinion that her husband and daughter were also legal heirs of her deceased mother is based on her knowledge. She was asked questions on the issue whether

she or her husband had noticed from the will the bequest made to her husband, her answer was that she hurriedly glanced at the will without going into the details.

20 In response to a question, she stated that she was not aware of the name of the family doctor of her mother. In the cross-examination, a specific question was asked to her whether she was relying upon any medical record except the documents of Breach Candy Hospital which were on record to show that her mother was not in sound state of mind on the date of the execution of the disputed will. Her answer was “no”. After referring to the documents of the Breach Candy Hospital, she stated that her mother was admitted to the hospital on 7<sup>th</sup> October, 1997.

21 Thereafter, she was questioned on receipts at Exhibits – D and E executed by her husband acknowledging the receipt of a cheque in the sum of Rs.25,000/- and 10 gold coins. She stated that she was present when the receipts were signed by her husband. She admitted that she did not object to the act of giving the cheque and gold coins to her husband. She accepted that it was correct that whilst signing the receipts, her husband stated that he has received Rs.25,000/- and 10 gold coins as a legacy from her mother. Her explanation was that the

contents of the receipt were dictated by the first Plaintiff. She accepted that she did not protest about the contents of the receipts which were written and executed by her husband. She denied the correctness of the suggestion that her husband accepted the legacy under the will of the mother because she herself and her husband had accepted the disputed will. In response to Question No.217, she accepted that as per the disputed will, her husband was given bequest of Rs.25,000/- and 10 gold coins. She accepted that the said amount and gold coins were given to the husband as a legacy of her mother. The attention of the Defendant was invited to pages 54 and 55 of the Breach Candy Hospital record. She stated that she has signed the said two documents. The said documents are of the consent given by the deceased Testator. She stated that her mother had put her signature before she put her signature. She accepted that she had explained to her mother the contents of the said documents before she signed it. She accepted that she herself and her mother knew the contents of the said two documents. The said two documents were marked as J-1, J-2. The said documents in English are in relation to grant of consent for surgery and blood transfusion.

22           It will be necessary to briefly refer to the findings recorded by the learned Single Judge. While referring to the evidence of witness Shri Trivedi, the learned Judge observed that there were discrepancies

in the deposition of the witness about the time he received instructions from the deceased and about the execution of the will. The learned Judge has not completely discarded the version of Shri Trivedi. He observed that considering the contradictions in his evidence, without corroboration, his evidence cannot be accepted. The learned Judge referred to the affidavit of Dr. Shukla filed along with Probate Petition in which he stated that the deceased Testator signed at the bottom of each page of the disputed will. He observed that the said statement was factually incorrect. About the documents executed by the husband and the receipt of sum of Rs.25,000/- and 10 gold coins, the learned Single Judge observed that had the husband of the Defendant challenged the will, estoppel would have operated against him. The learned Judge observed that estoppel cannot operate against the Defendant because of the conduct of her husband. The learned Judge observed that the Defendant was entitled to receive ornaments of her mother as per her share even without a will and therefore, no significance can be attached to receipts at Exhibits – A, B and C especially when the portion on the top of Exhibits - B and C which mentions that the articles mentioned therein were distributed as per the will was not written by the Defendant.

23           Now, coming to the execution of the will, we have minutely perused the evidence of witness Mr. Trivedi. Firstly, we must note that he is not an interested witness. It is not the case of the Defendant that either the witness was interested in favouring the Plaintiffs or he had a specific reason to depose against the interest of the Defendant. There may be some discrepancy in his evidence as regards the time at which he received instructions from the deceased. We have already quoted the material portion of the affidavit-in-lieu of examination-in-chief of the witness Shri Trivedi. Going by his case, the draft of the will was prepared in Gujarati language in September, 1996. Probate Petition was filed in the year 1998. He deposed in the year 2007. Therefore, there are bound to be some discrepancies in the evidence recorded after the span of 11 years from the date of the execution of the disputed will. As an Advocate, he was not under an obligation to preserve the draft prepared in Gujarati language. Shri Trivedi was 72 years old when he first deposed on 7<sup>th</sup> March, 2007. By that time, he had put in 43 years in legal profession. When the alleged will was executed, he had already put in 31 years of practice. He has stated that as per the instructions of the deceased Testator, he made a draft of the will in Gujarati which was approved by the Testator and thereafter, as per the instructions of the Testator that he prepared final will in English language. He stated that her first will was also in English. He deposed that the deceased was

present in the clinic of Dr. Shukla. Thus, the disputed will was not executed in the house of the Testator or in the house of the plaintiffs but at an independent place. In fact, the material portion of his examination-in-chief which we have quoted above has virtually gone unchallenged in the cross-examination. He accepted that Dr. Shukla told him that the deceased was suffering from Cancer but she was well, mentally and in all other respects. He reiterated in the cross-examination that the deceased was in full control at the time of execution of the will. The case of the Defendant is that the deceased was not in disposing state of mind on 25<sup>th</sup> September, 1996 when the will was executed. We have perused the will. The deceased Testator appears to have signed in English on the will and schedules. She has put the date below her signature on the will. It is true that four schedules to the will are on letter-heads of the deceased Testator. However, we find nothing wrong or suspicious merely because the schedules were typed on the letter-head of the deceased Testator. In fact Shri Trivedi stated that when he met the deceased Testator for taking instructions from the deceased Testator, the schedules were already ready. It is true that there is a gap between the last typed line on the pages in the schedule and the signature of the deceased Testator. That by itself does not become suspicious in the light of the testimony of Shri Trivedi, who is not at all an interested witness. After having carefully perused the evidence of

Shri Trivedi, we do not find any material discrepancies and contradictions in his evidence which is sufficient to discard or discredit his testimony. As stated earlier, a senior member of the Bar who had put in more than 40 years in the profession had no reason to depose falsely. The learned Single Judge has found fault with his evidence by observing that in the affidavit of Dr. Shukla filed along with Probate Petition, Dr. Shukla has stated that the deceased signed at the foot of every page of the will. The original will does not bear her signature on every page. We find that the said affidavit of Dr. Shukla is filed along with the Probate Petition is exactly in terms of Form No.102 provided in the Bombay High Court Original Side Rules. The paragraph No.4 of the Form contains the statement regarding signatures on every page which is exactly reproduced in the affidavit of Dr. Shukla. The affidavit is exactly in terms of Form No.4. Therefore, the said affidavit of Dr. Shukla cannot affect the veracity of the version of the evidence of Shri Trivedi.

24           As regards the disposing state of mind and the physical and mental condition of the deceased, the Defendant in the her deposition has stated that the deceased was diagnosed with Cancer on 18<sup>th</sup> September, 1996. She stated that her mother used to spend most of her time in doing Pooja in the house and she did not go out alone. It is not stated in the examination-in-chief that in September 1996, the deceased

Testator was bedridden. It is not the case that the deceased Testator was not in her senses or was not in position to look after herself. In fact on 25<sup>th</sup> September, 1996, the will was executed not at her place of residence, but at the clinic of her family doctor. The only thing stated by the Defendant in the evidence is that though her mother used to sign in English, she was not in a position to read or write English. In the cross-examination, she accepted that on 7<sup>th</sup> October, 1996 her mother was admitted in the hospital. She also stated that she explained the contents of the consent forms in English to her mother and after understanding the same, her mother signed the same. This was admittedly the state of mind of the deceased Testator few days after the execution of the disputed will. This statement shows that the deceased Testator was in a position to understand the contents of the consent form of surgery after she was admitted to the hospital for undergoing a surgery. This is the version of the Defendant herself. On the other hand, there is evidence of Shri Trivedi who has stated that after meeting the deceased Testator, he prepared the draft of the will in Gujarati as per her instructions. After the said draft was approved, he made final engrossment in English as per the instructions of the deceased Testator. Thus, it is impossible to come to a conclusion that the deceased was not at all in disposing state of mind when the will was executed. Moreover, in the affidavit in support of the Caveat, the Defendant has not disputed

that there are signatures of the deceased mother appearing on the will and on its annexures. The case is that on blank papers the signatures of the deceased were taken and thereafter, the disputed will was prepared. The contention cannot be accepted as the evidence of Shri Trivedi inspires confidence.

25        There is another aspect of the matter. The Defendant accepted that her husband under the separate receipts dated 5<sup>th</sup> March, 1997 written in his own handwriting on the letter-heads of the deceased, received a cheque in the sum of Rs.25,000/- and 10 gold coins. Both the receipts specifically record that the husband of the Defendant received the same as a legacy from the deceased Testator. The Defendant in her testimony accepted that on the dates fixed for cross-examination of the first Plaintiff before the Court Commissioner, her husband was always present along with her Advocate. Thus, her husband was taking part in the probate proceedings by remaining present on behalf of the Defendant. Thus, the husband was aware of the fact that the Plaintiffs were relying upon the receipts signed by him. He was aware of the contents of the disputed will under which a bequest was made by the deceased Testator of a sum of Rs.25,000/- and 10 gold coins to him. The Defendant accepted that she was present when the said receipts were signed by her husband. She claimed that the draft of the receipts

was dictated by the first Plaintiff to her husband. However, she admitted that neither her husband nor she herself made any protest about the contents of the receipts while accepting the cheque and 10 gold coins.

26           Thus, the husband of the Defendant was attending the proceedings on her behalf and that is why his non-examination becomes vital especially when the Defendant accepted that her husband signed the receipts which are written in his own handwriting and received a cheque of Rs.25,000/- and 10 gold coins as a legacy. Both the receipts specifically mention that the amount and gold coins were received as a legacy from the deceased Testator. Therefore, an adverse inference will have to be drawn against the Defendant for non examination of her husband as a witness though he was very much available for giving evidence. Only he could have explained as to why he signed the receipts.

27           Though the Defendant admittedly claimed in her cross-examination that her husband is also a legal heir of the deceased mother, the deceased Testator was Hindu and therefore, as per the Hindu Succession Act, 1956 the husband of the Defendant cannot be a legal representative of the Defendant's mother. Thus, all along, her

husband was aware that he has received the amount of Rs.25,000/- and 10 gold coins only on the basis of bequest made in the will. The husband was attending the proceedings. It is not the case of the Defendant that the husband returned the cheque/ amount and 10 gold coins to the first Plaintiff even after noticing that the wife had taken a stand that the will was not executed by the deceased Testator.

28               It is not the case of the Defendant that she and her husband are not residing together. Her husband regularly attended the proceedings on her behalf. There may not be any question of applying estoppel against husband. But what is material and vital is the non-examination of the Defendant's husband.

29               As far as the law on proof of wills is concerned, the same is very clear. There are various leading decisions on the said issue starting from *H. Venkatachala Iyengar*. The tests laid down has been repeatedly approved by several other decisions. In paragraph 9 of the decision of the Apex Court in the case of *Ramabai Padmakar Patil (D) and Ors. vs. Rukminibai Vishnu Vekhande And Ors*<sup>2</sup>, the Apex Court observed that the fact that by excluding other daughters the property was given only one daughter could not be a ground to cast any doubt regarding the authenticity of the will.

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2 (2003) 8 SCC 537

30 Even if one of the two attesting witnesses proves the execution of the disputed will, the examination of the other attesting witness is not necessary. The finding of the learned Single Judge that corroboration to the evidence of Shri Trivedi was necessary is erroneous as we have accepted that the evidence of Shri Trivedi is reliable. In our view, the findings recorded by the learned Single Judge are completely erroneous. The execution of the will was duly proved by the Plaintiffs. The Defendant failed to discharge the burden on her. Therefore, the Appeal must succeed and accordingly, we pass the following order :-

ORDER

- (i) The judgment and order dated 6<sup>th</sup> July, 2007 passed by the learned Single Judge is hereby set aside. Testamentary Suit No.116 of 1998 (Testamentary Petition No.275 of 1998) is hereby decreed;
- (ii) Accordingly, the Prothonotary and Senior Master is directed to issue Probate to the Plaintiffs as prayed for;
- (iii) This Judgment and order shall not be acted upon and the probate shall not be issued for the period of two months from today;
- (iv) There will be no order as to costs.

(A.A. SAYED, J )

(A.S. OKA, J )