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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**APPEAL NO.67 OF 2014  
IN  
TESTAMENTARY SUIT NO.14 OF 2003  
IN  
TESTAMENTARY PETITION NO.654 OF 2002**

1. Ashok Kumar Khetan ... Appellant/Caveator  
/Defendant No.2

Versus

1. Rajkumar Bhagwati Prasad Khetan ... Respondents No.1/  
Petitioner (Plaintiff)

2. Rajkumari Ramnath Harlalka ... Respondent No.2/  
Caveator/ Defendant No.1

The Appellant in person  
Mr. Sharan Jagtiani , Amicus Curiae

Mr. J.P. Sen, Senior Counsel with Mr. P. Colabawalla with Mr. Sachin Kudulkar i/by Madekar and Company for the Respondents.

**CORAM : A.S. OKA & ANUJA PRABHUDESSAI, JJ.**

**DATE ON WHICH SUBMISSIONS WERE HEARD : 16<sup>th</sup> NOVEMBER, 2016**

**DATE ON WHICH JUDGMENT IS PRONOUNCED : 31<sup>st</sup> JANUARY, 2017**

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

1 The Appellant appearing in person has taken an exception to the judgment and decree dated 29<sup>th</sup> November, 2013 passed by the learned Single Judge in Testamentary Suit No.14 of 2003 arising out of Testamentary Petition No.654 of 2002.

2           The first Respondent (hereinafter referred to as “the Plaintiff”) filed Testamentary Petition No.654 of 2002. The said Petition was filed under the provisions of the Indian Succession Act, 1925 (for short “the said Act”) for grant of Probate in respect of the alleged last will and testament dated 27<sup>th</sup> August, 2001 (for short “the said will”) of Smt. Bhagwatibai Khetan (“the Testator”). The Testator died on 30<sup>th</sup> January, 2002. The Plaintiff claimed that under the said will he has been appointed as the sole executor and trustee. As per the said will, the deceased purported to make a bequest of the property known as Khetan Kutir to the Plaintiff and property known as Khetan Ki Haveli to one Ravindra Prasad Bhagwati Prasad Khetan. A row house allegedly owned by the Testator and tenancy rights in respect of a bungalow were also bequeathed to the Plaintiff. Bequests in respect of the movable properties were purportedly made under the said will to the Plaintiff's son and to the daughter of the Testator. We may note here that the Testator was survived by three sons – Ravindra Prasad, the Plaintiff – Rajkumar, the second Defendant - Ashok Kumar (Appellant) as well as daughters Rajkumari – first Defendant and Asha. The Testator was also survived by two sons and unmarried daughter of her deceased daughter Smt. Kumud. We may note here that the husband of the Testator and her daughter Smt. Kumud predeceased the Testator. A caveat was filed by the second Defendant (Appellant) as well as by the second

respondent who is the first Defendant. Affidavit in support of the respective caveats were filed by the first as well as second Defendant. In the affidavit in support filed by the second Defendant, it was contended that there are false statements made in the testamentary petition filed by the Plaintiff. It was contended by him that the second attesting witness to the said will has not filed his affidavit in support of the testamentary petition. In paragraph 3 of the affidavit in support, the second Defendant stated thus :-

“3. That the deceased Smt. Bhagwatibai B. Khetan who died at the age of 87 years was under the control of the executor Rajkumar Khetan and had no free will of her own. **This will was caused by fraud and coercion. The will is prepared, executed and in favour of the executor himself.** As such under section 61 of the Indian Succession Act, 1925 the will is void. Therefore the probate should not be granted on this will.”

(emphasis added)

3           The first Defendant also filed an affidavit in support of the caveat. In paragraph 2, she contended that the said will has been got executed though the Testator was not able to understand the contents of the same. It was alleged that probably signatures of the Testator were taken on blank papers which have been used for the preparation of the will which is a got up document. In paragraph 2 of her affidavit in support, she stated thus :-

“2. I further say that I have every reason to believe that the Petitioner – Propounder of the Will has got the said alleged Will executed from my deceased mother without she being able to understand any such document which she is putting her signatures or her initials. It is all probable that the propounder of the Will, the Petitioner hereinabove might have taken the so called signatures of my deceased mother on blank piece of papers and thereafter prepared the said document purporting to be the Will of my deceased mother and had set up the said document for the purposes of unlawful gains and set up himself as so called Trustee of the various Charitable registered Trusts which have been formed and registered by my deceased father Shri Bhagwati Prasad Khetan. It is thus clear that the Propounder of the Will is trying to impose himself on the said Trust and trust's properties in order to gain undue advantage and usurp the powers of the trustees so that he can mismanage and manipulate the Trusts and the said properties.”

4 In paragraph 4, she contended thus :-

“4. It is also interesting to note at this juncture that our mother was not aware of a word of English language nor could she with affluence and ease, write, read or understand the English language. According to my personal knowledge, our mother had studied only upto 4<sup>th</sup> Sd. that too in Hindi Medium. It is only after her

great deal of efforts that she could put her signature in English as has been taught to her by our late father. I, therefore, say that it is not at all likely that our mother could put her signature on any such document or writing without knowing the same to be her last Will and testament as propounded by the Petitioner.”

5           The first Defendant did not press her caveat. Certain issues were raised by her as regards title of the Testator to the properties mentioned in the will. However, we are not concerned with the issue of title in this Appeal arising out of Probate proceedings. The other factual aspect which needs to be noted is that the will is registered on 4<sup>th</sup> September, 2001 in the office of Sub-Registrar of Assurances at Mumbai.

6           As a caveat was filed by the second Defendant in accordance with Bombay High Court Original Side Rules, Testamentary Petition No.654 of 2002 was numbered as Testamentary Suit No.14 of 2003. As per the said Rules, the affidavit in support of caveat was treated as a written statement of the second Defendant.

7           On the basis of the pleadings, the learned Judge framed the following issues :-

| <u>ISSUES</u>                                                                                                              | <u>FINDINGS</u>    |
|----------------------------------------------------------------------------------------------------------------------------|--------------------|
| 1 Whether the last will and testament of Smt. Bhagwatibai Khetan dated 27 <sup>th</sup> August, 2001 was validly executed. | Yes                |
| 2 Whether the said will was executed by fraud or any coercion                                                              | No                 |
| 3 What relief, if any, the Plaintiff is entitled to?                                                                       | As per final order |

8 The Plaintiff examined himself by filing his affidavit-in-lieu of evidence dated 11<sup>th</sup> January, 2012. The Plaintiff was cross-examined before the Court Commissioner. The Plaintiff examined Shri R.D. Suvarna, Advocate who was an attesting witness to the will. Shri R. D. Suvarna filed his affidavit-in-lieu of examination-in-chief dated 21<sup>st</sup> April, 2011. He was also cross-examined before the Court. Both the Defendants did not adduce evidence. In the impugned judgment, the learned Single Judge by relying upon evidence of Shri Suvarna, who was the attesting witness to the said will, held that execution of the will has been duly proved. The learned Single Judge held that though issue of coercion or fraud was framed, both the Defendants failed to adduce any evidence to prove the same. That is the reason why the learned Single Judge proceeded to pass the impugned decree and directed that a Probate be issued to the Plaintiff as prayed. We may note here that the first Defendant did not challenge the impugned judgment.

9           This Court had appointed the learned counsel Shri Sharan Jagtiani to espouse the cause of the Appellant. However, as the Appellant does not want Shri Jagtiani to appear, he has applied for discharge. Accordingly, we have discharged Shri Jagtiani. The Appellant appearing in person submitted that there are many suspicious circumstances associated with the will. He submitted that the age of the deceased at the time of execution of the will was 87 years. There is no endorsement on the will that the contents thereof were explained to her in Hindi language. He pointed out that the will was executed on stamp paper of Rs.100 denomination dated 28<sup>th</sup> February, 2001. He pointed out that it is claimed that the will was actually executed on the last day of validity of the stamp paper. He submitted that another suspicious circumstance is that the purported will does not bear the signature of the Testator against or below the execution clause but the signature appears above the execution clause. He pointed out that in the affidavit filed by the witness Shri R.D. Suvarna along with the Petition for Probate it was stated that the date 27<sup>th</sup> was put by the Testator but in the affidavit-in-lieu of evidence he stated that the date was put by him. He pointed out that there are no initials of the Testator appearing against the handwritten date. He pointed out that the Plaintiff himself is the legatee and the attesting witnesses are his people. He submitted that the execution of the will has not been proved. He relied upon

extract of the book on the Theobald on Wills on the issue of the position of signature on a will. The learned counsel appearing for the Plaintiff supported the impugned judgment and order.

10           We have given careful consideration to the submissions. We have perused the pleadings, the documents on record and notes of evidence. The first issue is regarding the proof of execution of the will by the Testator. Naturally, the burden to prove the said issue was on the Plaintiff. As stated earlier, the Plaintiff examined himself. He examined Shri R.D. Suvarna, Advocate as a witness. It is not the case of the Plaintiff that he was present at the time of execution of the will. Therefore, it is necessary to firstly peruse the evidence of Shri R.D. Suvarna, Advocate. In the affidavit-in-lieu of examination-in-chief, he stated that he was enrolled as an Advocate in July, 1972. Thus, on the date of filing the affidavit-in-lieu of examination-in-chief on 21<sup>st</sup> April, 2011, he had put in more than 39 years of practice in legal profession. In paragraph 2, he stated that he knew the Testator from 1973. He stated that he has been attending to various commercial matters pertaining to her companies and other legal matters. He claimed that he knew the Testator very well and she reposed great faith in him. As regards drafting of the will in paragraph 3, he stated thus :-

**“3. I say that sometime in the month of July 2001 Smt. Bhagwatibai B. Khetan attended my office at 109/B, Esplanade Mansion, 1<sup>st</sup> Floor, East Wing, Kala Ghoda, M.G. Road, Fort, Mumbai – 400 023 and gave me oral instructions to prepare and draw her Will. I say that accordingly I prepared the Will of the deceased as per her instructions and got the same engrossed for execution.”**

**(emphasis added)**

11 As regards the actual execution of the will, in paragraphs 4 to 8, he stated thus :-

**“4. I say that on 27<sup>th</sup> August 2001 the deceased along with one Mr. P.R. Dalmia, the Accountant of Khetan Industries Pvt. Ltd. Attended my office at 109/B, Esplanade Mansion, 1<sup>st</sup> Floor, East Wing, Kala Ghoda, M.G. Road, Fort, Mumbai – 400 023 for the purpose of execution of the Will of the deceased.**

**5. I say that the Will dated 27<sup>th</sup> August 2001 of the deceased was executed by her in my presence and in the presence of Mr. P.R. Dalmia. I say that the deceased executed the Will dated 27<sup>th</sup> August 2001 of her own free will and not under any coercion or undue influence. I say that at the time of execution of the said Will dated 27<sup>th</sup> August 2001, the deceased was of sound disposing mind and understanding. I say that the signature appearing on right hand side of the Will and above the signature clause is that of the deceased Smt. Bhagwatibai B. Khetan. She put her signature on the Will in my presence and in presence of Mr. P.R. Dalmia. I say that I saw the deceased Smt. Bhagwatibai B. Khetan setting and subscribing her signature at the foot of the Will in English language and character in my presence as well as in the presence of the other witness Mr. P.R. Dalmia. I say that the initials “B.B.K.” on each page of the Will were put by the deceased in her own handwriting in my presence and in the present of Mr. R.P. Dalmia.**

6. **After I witnessed the execution of the Will by the deceased, Mr. P.R. Dalmia and myself did at the request of deceased and in her presence and in the presence of each other, both being present at that time, set and subscribed our respective names and signatures at the foot of the Will as attesting witnesses thereto.**
7. **I say that I also saw Mr. P.R. Dalmia putting his signature as attesting witness and address A-506, Mansarovar, Near Chinchholi Phatak, Malad (W), Mumbai 400 064 in his own handwriting as witness No.1 at the foot of the Will. I say that the signature, name and address "R.D. Suvarna, Advocate, 109-B, Esplanade Mansion, First Floor, East Wing, Kala Ghoda, M.G. Road, Fort, Mumbai - 400 023" written as witness No.2 at the foot of the said Will is my own handwriting, I say that I put the date 27<sup>th</sup> on the 5<sup>th</sup> page of the Will.**
8. I say that at the time when the deceased so subscribed her name and signature to the last Will and Testament as aforesaid she was of sound and disposing mind, memory and published the same of her free will and pleasure."

(emphasis added)

12 We have carefully perused his cross-examination made by the Advocate for the second Defendant. In the cross-examination, it is noted that the first Defendant had withdrawn her caveat. There is no challenge to the statement of the witness in paragraph 2 of his affidavit-in-lieu of examination-in-chief that the witness knew the Testator since 1973-74 as he has been attending to various commercial matters and other legal matters of Testator's companies. There is no challenge to the statement that the deceased attended his office at Esplanade Mansion in

Fort, Mumbai for giving instructions to prepare the will. Only cross-examination is about the exact date on which the Testator attended his office for giving instructions. As far as the statement in paragraph 4 of the affidavit-in-lieu of examination-in-chief is concerned, the same is not challenged which specifically brings on record that on 27<sup>th</sup> August, 2001 the deceased again attended his office in Fort, Mumbai along with other attesting witness Mr. P.R. Dalmia, for the purposes of execution of will. The only cross-examination on this paragraph is about the exact time at which the Testator visited his office. Shri Suvarna stated that though he did not recollect the exact time, the Testator attended in the afternoon on that day. The witness was shown will marked as Exhibit 'P-1'. The first question asked on the will was about name of the person who purchased the stamp paper. The witness stated that he was unable to recall the name of the person who purchased the stamp paper. The witness denied the correctness of the suggestion that the Testator did not sign the execution clause of the will which is marked as 'A' and 'B'. He stated that the handwriting of the figure and letters "27th" was his. The only relevant suggestion given is that the deceased was not present before him when he attested the will. A suggestion was also given that the will has been procured by fraud and is forged. The correctness of the suggestions was denied by the witness. Thereafter, the witness disclosed to the Court that he must have drafted atleast 15-20 wills. He

stated that a will is not required to be written or engrossed on a stamp paper but in the present case, the will was typed on a stamp paper as the Testator wanted to get the will registered. He stated that the will was engrossed on stamp paper in his office.

13           Thus, there is no serious challenge to the version of Shri Suvarna that in July, 2001 the deceased herself attended his office in Fort area in Mumbai for giving him instructions to draft the will. The signature and initials of the deceased Testator appearing on the will have not been challenged. The only suggestion as regards signature is that the same does not appear against the execution clause. There is no suggestion given to Shri Suvarna that the deceased was not in disposing state of mind. Thus, from his evidence it is brought on record that the deceased attended the office of the witness for giving him instructions in July, 2001 and again on the date of execution of the will she attended his office. It is proved that even on 4<sup>th</sup> September 2001 she was in a position to visit the office of the Sub-Registrar for registration of the will. There is much capital made of the discrepancy about the handwriting of the date “27<sup>th</sup>” on the will. In the affidavit in support of the Probate Petition filed by Shri Suvarna on 28<sup>th</sup> August 2002, he stated that the date was written by the Testator. But in the affidavit-in-lieu of examination in chief filed on 21<sup>st</sup> April 2011, he stated that he

himself had put the date. According to us, this discrepancy is not sufficient to affect the truthfulness of the version of the witness.

14           The Plaintiff filed his affidavit-in-lieu of examination-in-chief. He stated that the original will was received by him from the office of the Sub-Registrar of Assurances, Old Custom House, Mumbai in September, 2001. We may note here that according to the case of the Plaintiff, the date of execution of the will is 27<sup>th</sup> August, 2001 which was registered in the office of the Sub-Registrar of Assurances, Old Custom House, Mumbai on 4<sup>th</sup> September, 2001. He stated that the deceased Testator was residing in Flat No.4, 6<sup>th</sup> Floor, Khetan Bhavan, Jamshedji Tata Road, Mumbai along with the first Defendant till about 23<sup>rd</sup> June, 1995. In paragraphs 4 and 5 of the affidavit-in-lieu of examination-in-chief, the Plaintiff has stated thus :-

**“4. I say that on 18.03.1995 the Defendant and his wife, Mrs. Vinita A. Khetan picked up a quarrel with my mother at Khetan Bhavan and started demanding that she should pay to the Defendant Rs.5.00 Crores immediately towards his share in the assets and properties of the company viz. Khetan Industries Private Ltd. and threatened that if she failed to pay the said amount, she would have to face dire consequences. My mother refused to concede to the demands of the Defendant and his wife. The Defendant and his wife abused my mother in most filthy language. After the quarrel, the Defendant, his wife and son packed their bags, left the Khetan Bhavan premises with their bag and baggages and went to Bangalore by Car. After reaching Bangalore, the**

Defendant again telephoned to my mother and demanded money and my mother refused to concede to the said demand. I say that the Defendant returned to Mumbai on 20<sup>th</sup> June 1995 and his wife and son, Harsh A. Khean returned to Mumbai on or about 23<sup>rd</sup> June 1995. I say when the Defendant's wife and son returned at about 3.30 p.m on 23<sup>rd</sup> June 1995, they were accompanied by Mr. Radha Kishan Agarwal, the brother-in-law and his wife Mrs. Agarwal who were residing at New Delhi.

5. **I say that my sister, Mrs. Asha Agarwal residing at Flat No. R-1, Palm Spring, Colaba, Mumbai – 400 005 had come to our flat at Khetan Bhawan at about 1 p.m. on 23.06.1995 to meet our mother. I say that immediately after the arrival of the Defendant, his wife, Mrs. Vinita A. Khetan and their son Mr. Harsh A. Khetan they again picked up a quarrel with my mother. I say that the Defendant, his wife and son started abusing our mother in most filthy language and assaulted her with the result she was seriously injured and started bleeding from her nose. I further say that the Defendant, his wife and son also threatened to throw me down from the sixth floor of the Building. I say that the Defendant assaulted me and my wife with kicks. I say that Defendant's son assaulted me on my face with fist blows. I say that Defendant's son kicked me on my private part. I say that the Defendant, his wife and his son assaulted our accountant, typist and peons and threatened our staff with dire consequences if they attended the office from the next day onwards. I say that within a few minutes thereafter the Police Officers from Cuffe Parade Police station came to our flat at Khetan Bhavan and took the Defendant his wife, his son and my mother to the Cuffe Parade Police Station. I say that I also accompanied my mother to the Police Station. I say that after reprimanding and warning the Defendant, his wife and son the Police asked all of us to leave the Police Station. I say that in view of the assault on my mother by the Defendant and his family, my mother left the flat at Khetan Bhawan and went to Mrs. Asha Agarwal at Palm Spring, Colaba, Mumbai on the night of 23<sup>rd</sup> June 1995**

itself.”

15           The reference to the Defendant is to the second Defendant as the first Defendant had withdrawn her caveat. In paragraph 6, the Plaintiff stated that on 24<sup>th</sup> June 1995 the Testator informed him about threat given by the second Defendant to her for forcing her to sign 20 cheques in the cheque book of the account of Khetan Industries Private Ltd. He stated that the said incident had been recorded in the minutes of the meeting of the Board of Directors of the said Company held on 27<sup>th</sup> June 1995. In paragraph 8, he deposed that his mother filed two private complaints against the second Defendant and he filed another private complaint against the second Defendant. Copies of the said complaints filed in the Court of Metropolitan Magistrate are on record.

16           On 16<sup>th</sup> September, 1995 the Testator addressed a letter to the Central Bank of India informing that the second Defendant had forced her to sign 20 cheques of the account of the said company and requested the Bank not to honour the said cheques. Similar letter was addressed by her on 18<sup>th</sup> September, 1995 to the same Bank in relation to 10 other cheques. In paragraph 12, he stated that considering the incidents, the Plaintiff along with his wife wer forced to leave the flat at Khetan Bhavan and he shifted to another flat.

17           The Plaintiff stated that the Testator attended meetings of the Board of Directors of the said company held on 6<sup>th</sup> September, 2001, 1<sup>st</sup> December, 2001, 27<sup>th</sup> December, 2001 and 8<sup>th</sup> January, 2002. He relied upon relevant extract of the attendance register of the Board meetings. Various steps taken by the deceased Testator in September, 2001 of donating certain amounts to a Charitable Trust on 5<sup>th</sup> and 6<sup>th</sup> September, 2001 have been set out in paragraph 16. Reliance is placed on receipts signed by the deceased Testator on 12<sup>th</sup> January, 2002 and 24<sup>th</sup> January, 2002. Various documents bearing signatures of the mother were produced by the Plaintiff. He stated that till the date of her death when she suffered heart stroke, she used to manage her routine activities without any support or assistance. He further stated that at about 5.30 pm on 30<sup>th</sup> January, 2002, his mother complained of chest pain and immediately thereafter she was taken to Bombay Hospital. On the same day, she died.

18           The Plaintiff was subjected to detailed cross-examination. Before we refer to the said cross-examination, it will be necessary to make a reference to the will as well as other documents produced by the Plaintiff. The will does not state any reasons as to why the second Defendant was disinherited. However, the conduct of the second Defendant is brought on record in the affidavit-in-lieu of examination-

in-chief to which we have made a reference. On 10<sup>th</sup> July, 1995, the Testator filed a private complaint in the Court of Additional Chief Metropolitan Magistrate, 37<sup>th</sup> Court, Esplanade, Mumbai against the second Defendant, his wife, his son and two others. She has referred to the incident of 18<sup>th</sup> March, 1995 in the said complaint. She pointed out that on that day, the second Defendant and his wife picked up a quarrel with her on flimsy ground and demanded a sum of Rs.5 Crores by way of their share in the assets and properties of the family and the company. In paragraph 7 of the complaint, she has stated that on 20<sup>th</sup> June, 1995 the second Defendant filed a police complaint against her at Cuffe Parade Police Station. On the very day, the second Defendant threatened her. Therefore, on 24<sup>th</sup> June, 1995 the Testator filed a complaint in writing to the Cuffe Parade Police Station. In paragraph 8, she has described the incident of 23<sup>rd</sup> June, 1995 when it is alleged that the second Defendant, his wife and son along with other two accused named in the complaint entered her residence at Khetan Bhavan at about 3.30 pm and started abusing her in most filthy language. It is alleged that the son of the second Defendant gave her fist blows and she started bleeding from her nose. She alleged that the second Defendant and his son threatened to throw the Plaintiff down from the sixth floor where her residential premises was situated. The Testator stated that the son of the second Defendant not only assaulted the

Appellant but also her staff such as assistant, accountant, typist, clerk and a peon. She further alleged that on 24<sup>th</sup> June 1995 at about 6.30 pm, the second Defendant forced her to sign 20 blank cheques of Central Bank of India. The account was of her company - Khetan Industries Private Limited. She alleged that the second Defendant took away the cheques. She has also referred to the threat given by the second Defendant, his wife and son of finishing her other son Rajiv kumar and her family members. We may note here that about the incident of 20<sup>th</sup> June 1995, even the Plaintiff filed a private complaint on 2<sup>nd</sup> July, 1995 in the same Court.

19           On 24<sup>th</sup> July, 1995 the Testator filed one more private complaint in the same Court against the second Defendant. In the said complaint she pointed out as to how some of that 20 cheques have been used by the second Defendant.

20           There is no cross-examination of the Plaintiff made on the said three complaints and, therefore, the said three complaints can be read in evidence. In this appeal, we cannot go into the correctness or otherwise of the allegations made in the two complaints filed by the Testator against the second Defendant. Nevertheless these complaints were filed few months before the execution of the will. The complaints

indicate the frame of mind of the deceased in the context of her action of not making any bequest to the second Defendant or his family. These complaints bring on record reasons as to why the Testator disinherited the second Defendant while executing the will.

21 In the cross-examination, the Plaintiff admitted that the second attesting witness Shri Dalmia was an accountant of Bhagwati Prasad Khetan Trust of which the Testator was a Trustee. In the further cross-examination, he stated that the shareholding of his mother in Khetan Industries Private Limited was more than 55%. He accepted that he did not accompany his mother at the time of execution of the will. He reiterated that the Testator had instructed Shri R.D. Suvarna, Advocate to draft the will. The Plaintiff did not accept that Shri R.D. Suvarna was his family lawyer but stated that he was the lawyer of the company. In the cross-examination, the Plaintiff claimed that he was not aware of a financial transactions of the Testator. He stated that he was not looking after the financial transactions of the mother. Certain discrepancies about the time at which the second Defendant visited the Testator on 24<sup>th</sup> June 1995 for obtaining her signatures on the cheques have been brought on record.

22 A suggestion was given in the cross-examination that the

Plaintiff along with Shri R.D. Suvarna took initials of the Testator on blank pages and typed the will at Exhibit 'P-1'. The Plaintiff denied the suggestion. The Plaintiff denied the correctness of the suggestion that the said will has not been signed by the deceased mother. He stated that the will has been signed by his mother.

23 Even in the cross-examination of the Plaintiff, there is no serious challenge to the case of the Plaintiff that the Testator was in disposing state of mind on the date of execution of the will. It is not even the suggestion given by the second Defendant to the Plaintiff as well as Shri Suvarna that the deceased was not in a position to visit the office of Shri Suvarna on the date of execution of the will.

24 Shri Suvarna is a practising Advocate of a considerable long standing. There is nothing brought on record in his cross-examination to show that he had any reason to depose in favour of the Plaintiff and to depose against the second Defendant. His evidence inspires confidence.

25 Therefore, we concur with the view taken by the learned Single Judge that the Plaintiff proved the execution of the will.

26 Now, coming back to the affidavit in support of the caveat filed by the second Defendant, one of the contentions is that the signature of the Testator appearing on the will is not against or below the execution clause but above the execution clause. We have perused the same. Firstly, we find that on each page, the Testator has put her initials as “BBK” which are proved by the witness Shri suvarna. The signature of the Testator is just below the following portion of the will which reads thus :-

“IN WITNESS WHEREOF I, the said Smt. Bhagwatbai Khetan, Widow of Shri Bhagwati Prasad Khetan have signed this will at Mumbai this 27<sup>th</sup> day of August, 2001.”

27 Portions marked 'A' and 'B' on the will read thus :-

“Signed and acknowledged by the withinnamed )  
 Testatrix Smt. Bhagwatibai Khetan, Widow of )  
 Shri Bhagwati Prasad Khetan as her last Will )  
 and Testament in the joint presence of herself )  
 and us who at her request and in her presence )  
 and in the presence of each other have hereunto )  
 set and subscribed our names as Witnesses: )”

28 Thus, in our view, the Testator has signed at the wrong place. Witnesses have signed below the portion marked 'A' and 'B'. The portion marked 'A' and 'B' is in fact the attestation clause. Moreover, even if the signature is not against portion marked 'A' and 'B', it is below the execution clause. Merely because of the place of signature, the execution of the will is not vitiated.

29           As stated earlier, the fact that the Testator visited office of Shri Suvarna for giving instructions to draft the will and the fact that she visited his office for execution has been proved. There is no evidence adduced by the second Defendant to show that she was not in disposing state of mind when the will was executed. As narrated earlier, in the affidavit in support of the caveat, it is contended that when the will was got executed from the Testator she was not able to understand the contents of the document. We may note here that the will was lodged for registration on 29<sup>th</sup> August, 2001 before the Sub-Registrar of Assurances, Mumbai. Two witnesses who signed the registered document identified the Testator and the will was ordered to be registered on 4<sup>th</sup> September, 2001. In absence of any evidence adduced by the second Defendant it is not possible to accept the contention that she was not in a position to understand the contents of the will. In the face of fact that the second Defendant adduced no evidence, it is not possible for us to accept that initials and signatures on the blank paper were obtained of the Testator which has been used to create the will. As narrated earlier, evidence of Shri Suvarna inspires confidence and there is no reason to disbelieve his version. There was no reason for him to come with a false case.

30           We have already pointed out the line of cross-examination adopted by the second Defendant. No attempt was made by the second Defendant to adduce evidence. Hence, the second Defendant has not discharged the burden on him. The caveat was not pressed by the first Defendant.

31           We, therefore, find no error in the impugned decree by which Probate was ordered to be granted to the Plaintiff.

32           Accordingly, we pass the following order :-

**ORDER**

- (i)   Appeal is dismissed with no order as to costs.

(ANUJA PRABHUDESSAI, J )

(A.S. OKA, J )