

Surendra T. Malik ... Plaintiff
Vs.
Neha V. Malik and others ... Defendants

CORAM : R. G. KETKAR, J.
Reserved on : SEPTEMBER 15, 2017
Pronounced on: SEPTEMBER 26, 2017

Heard Ms Sarkhot, learned Counsel for the plaintiff and Mr. Bhat, learned Counsel for defendants at length.

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Schedule I annexed to the petition. The deceased had left her surviving as her only heirs and next-of-kins according to Hindu Succession Act, 1956, the following persons, who are residing at the addresses set out against their respective names:

	Name of the heirs	Relationship with the deceased	Addresses
1	Surendra Tukaram Malik	Son (petitioner)	Sainath Vijay Nagar, 1 st Floor, 91, R.H.B.Road, Mulund (West), Mumbai 400 080.
2	Prakash Tukaram Malik	Son	-do-
3	Neelam Arun Narvekar	Daughter	Garden View Bldg., 4 th floor, Thakur Complex, Kandivli (E), Mumbai 67.
4	Shradha Ulhas Sirsat	Daughter	Sneha Bungalow, Shanti Niketan Road, Opp. Vasant Dada Patil Sugar Factory, Sangli, Maharashtra.
5	Neha Vijay Malik	Daughter-in-law (widow of the deceased son of the deceased)	Sainath Surendra Niwas, 3 rd floor, 91, R.H.B. Road, Mulund (West), Mumbai 400 080.

3. Plaintiff, therefore, prayed for issuing Letters of Administration with the said Will annexed to him having effect throughout Maharashtra State. Along with the Petition, plaintiff annexed supporting affidavit of Sakharam Mhatarba Shelke, one of the attesting witnesses dated 02.02.1999. In paragraph 1 of the affidavit, it is stated that he knew and was well acquainted with the deceased. On 28.08.1998, he was present along with Y. G. Chaudhari (another attesting witness) at the place of the deceased and they did then and there see the deceased set and subscribe her thumb impression at the foot of the testamentary paper in Marathi language and character. Thereupon, he and Y. G. Chaudhari did, at the request of the deceased and in her presence and in the presence of each

other all being present at the same time, set and subscribe their respective names and signatures at the foot of the said testamentary paper as witnesses thereto. In paragraph 5, it is stated that thumb impression of the deceased appearing at the foot of pages 1 and 2 of the Will did exist before the execution of the Will.

4. Defendant filed Caveat on 12.10.2000 and also filed affidavit in support thereof on 19.10.2000. Defendant inter alia contended that the Will of the deceased is totally false, manipulated and fabricated. The deceased always used to sign in vernacular on all the papers and rent receipts issued by her to the tenants of her property, whereas her thumb impression has been got affixed at the foot of her alleged Will. This very fact indicates that the alleged Will is a fabricated one as there is no explanation in the alleged Will as to why she is affixing her thumb impression and not her signature thereto. Defendant further contended that the deceased and the plaintiff were not on good terms since about 1993 and on many occasions, petitioner used to beat the deceased, used to assault her and cause her physical injuries. The deceased had lodged a number of police complaints against the plaintiff at Mulund Police Station upto October 1997. It was therefore, submitted that in the aforesaid circumstances, it is not at all believable that the deceased would bequeath all her property to the plaintiff.

5. Defendant further contended that deceased stayed at Sangli upto May, 1998 when she had to be brought back to Mumbai as she showed symptoms of loss of memory. As the deceased showed no improvement in her mental condition, petitioner got her admitted in a hospital at Jogeshwari in or about October, 1998. No relatives of the parties stay at Jogeshwari and all are staying at Mulund. There are many good hospitals at Mulund and yet with mala fide intention plaintiff got the

deceased admitted in a hospital at Jogeshwari without any intimation to her or to other near relatives. The behaviour of the plaintiff showed that he wanted all of them to be kept away from the deceased till she died in the said hospital on 02.11.1998.

6. Defendant contended that deceased was an old lady of more than 65 years of age and staying under the roof of the plaintiff. Deceased under undue influence and pressure from the plaintiff had bequeathed her property to the plaintiff and that she has not done so out of her free will. Defendant further contended that in view of the loss of memory, deceased was not in a mentally fit condition to execute the alleged Will. The Will alleged is said to have been executed on 28.08.1998 and the deceased died in the hospital on 02.11.1998. She, therefore, prayed that Letters of Administration as prayed for by the plaintiff should not be granted to him on the basis of the alleged Will.

7. On the basis of the pleadings of the parties, issues were framed on 03.02.2011 and the parties adduced evidence in respect of their respective case. In support of his case, plaintiff examined himself as P.W.1 by filing affidavit of examination-in-chief in lieu of evidence dated 17.02.2011. He also examined Yashwant G. Chaudhari, attesting witness as P.W.2. Both the witnesses were cross-examined at length by the learned Advocate for the defendant. Defendant filed affidavit of evidence in lieu of examination-in-chief dated 26.03.2015 and she was cross-examined at length by the learned Counsel for the plaintiff.

8. Ms Sarkhot submitted that the deceased was unable to sign because of her age and therefore, put her thumb impression on each page. P.W.2 Y. G. Chaudhari has stated in paragraph 5 of his affidavit in lieu of examination-in-chief that the deceased told them that her hands

were shaking and hence she could not sign. He and other attesting witness Sakharam Mhatarba Shelke then and there saw the deceased set and subscribe / emboss her thumb impressions at the foot of the testamentary paper written in Marathi language and character, which is her last Will and Testament. The said Will was typed in Marathi. She submitted that defendant had not adduced evidence to prove that the Will was executed in the presence of the plaintiff. Defendant has also not led evidence to prove that the Will is a fabricated document. Though the defendant has raised a plea of undue influence and coercion, defendant has not adduced any evidence to substantiate the said plea. Defendant has also not adduced evidence to establish that plaintiff was harassing the deceased or that he was beating or assaulting the deceased. Defendant has also not adduced any evidence to prove that deceased was meted out cruelty by the plaintiff. She submitted that property belongs to the deceased and the said fact is admitted by the defendant. Plaintiff has adduced evidence to establish that the Will is duly executed and attested and thus, complied Section 63 of the Indian Succession Act, 1925 (for short 'Act').

9. Ms Sarkhot submitted that plaintiff was taking care of the deceased as also Prakash, her physically handicapped son, till his death. Prakash expired on 01.05.2017. She submitted that defendant had not pleaded and proved that the Will is surrounded by the suspicious circumstances. The deceased was in a sound state of mind and was capable of disposing of her property by Will. The fact that deceased was in a mentally fit condition is also established as she was issuing rent receipts to the tenants. Ms Sarkhot has taken me through the evidence of P.W.1 – plaintiff, P.W.2 – Y. G. Chaudhari as also of the defendant. Mr. Sarkhot relied upon the following decisions:

a. Decision of Calcutta High Court in ***Sushila Bala Saha Vs.***

Saraswati Mondal, AIR 1991 Cal 166, and in particular paragraphs 18, 19, 23 and 24 thereof to contend that plaintiff being the propounder of the Will has discharged the onus of proving due execution, attestation and also possession of testamentary capacity by the testator. Section 63(a) of the Succession Act provides that the testator can sign or affix his mark. Even if the testator is capable of writing but on account of weakness he is unable to put his signature, he can execute the Will by affixing a mark. Such thumb impression is held to be good. Ms Sarkhot further contended that defendant did not adduce any contrary evidence as to the testamentary capacity of the testatrix. The person, who has alleged that there is no necessary testamentary capacity, has also to establish that case. Defendant has also failed to lead any evidence on undue influence. Defendant has also not adduced any evidence to establish that the deceased was physically and mentally unfit as also that the plaintiff has exercised undue influence on the testatrix.

b. Decision of Allahabad High Court in **Manorama Srivastava Vs. Smt. Saroj Srivastava, AIR 1989 All 17**, and in particular paragraphs 20, 21 and 24 to contend that plaintiff has established that Will in question was properly executed by the testatrix and all the formalities of law were complied with. There is no evidence to show that the plaintiff was in any way in dominating position to obtain the said Will and in the absence of any evidence of undue influence, it cannot be said either that the Will was not executed or if executed was obtained by undue influence. In paragraph 21, the decision of the Apex Court in **Surendra Pal Vs. Dr. Saraswati Arora, AIR 1974 SC 1999** was referred to. In that case, the Apex Court held that the propounder has to show that the will was signed by the testator, that he was at the relevant time in a sound disposing state of mind, that he understood the nature and effect of the dispositions, that he put his signature to the testament of his own

free will and that he has signed it in the presence of the two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus will be on the propounder to explain them to the satisfaction of the Court before the Will could be accepted as genuine, and where the caveator allege as undue influence, fraud and coercion, the onus is on him to prove the same. If the caveator does not discharge the burden which rests upon him in establishing the circumstances which show that the will had been obtained by fraud or undue influence a probate of the will must necessarily be granted if it is established that the testator had full testamentary capacity and had in fact executed it validly with a free will and mind.

10. On the other hand, Mr. Bhat submitted that it has come on record that the deceased was mentally depressed. She was bedridden. She was not even able to move away from the bed. He submitted that the Will is also surrounded by following suspicious circumstances:

- a. Under the will, property is bequeathed to the plaintiff alone. Plaintiff has not explained as to why preferential treatment is given to him.
- b. Plaintiff has also not explained as to why defendant who is widow of Vijay, son of the deceased, and her minor children were excluded.
- c. Advocate M. N. Deshmukh and S. V. Pikale & Co., Advocates were not consulted before making the alleged Will.
- d. Though there are several reputed hospitals in Mulund, why the deceased was admitted in a far away hospital at Jogeshwari.
- e. The Will does not bear certification of a medical practitioner that the deceased was in a sound disposing state of mind.
- f. The plaintiff deposed that he did not know the attesting witnesses.

The attesting witnesses are not relatives of the deceased. In other words, the attesting witnesses were strangers.

g. The alleged thumb impressions of the deceased bearing at the foot of pages 1 and 2 of the alleged Will existed before the execution of the Will.

11. Mr. Bhat submitted that plaintiff examined only one of the attesting witnesses namely, Y. G. Chaudhari and did not examine other attesting witness, Sakharam Mhatarba Shelke. He submitted that the attesting witness has not proved that the Will is validly executed and attested. He submitted that in fact, the deceased was well conversant with the legal proceedings. He submitted that after the death of Tukaram Savalaram Malik alias Tukaram Malik alias T. S. Malik, the deceased being his widow had filed Petition No.324 of 1981 in this Court for obtaining Letters of Administration with the Will annexed of the property and credits of Tukaram. On 24.03.1987, this Court granted Letters of Administration. As the dispute arose between the deceased, the plaintiff and the defendant, the matter was referred to arbitration under the Arbitration Act, 1940 and the award was made by the learned Arbitrator on 20.08.1998. In short, he submitted that the deceased would not have executed the Will without consulting Advocates S. V. Pikale and Co. or M. N. Deshmukh. It has come on record that during the arbitration proceedings, she was represented by Advocate. He submitted that Advocate M. N. Deshmukh was looking after the property matters of the family. The relations between the deceased and plaintiff were strained. The plaintiff had issued notice through S. V. Rane, Advocate to S. V. Pikale & Company alleging that the deceased had not given accounts of income and expenses since 01.04.1994 among other things and therefore, called upon them and the deceased to furnish the statement of accounts and income and expenditure of the property of

which she was the Administrator, within 7 days, failing which, he will proceed against the deceased in the Court of Law and proceed for contempt proceedings.

12. Mr. Bhat further submitted that it has come on record that plaintiff had shifted to Goa in the year 1979 and he was there till 1991. He has taken me through the evidence adduced by the parties. In particular, he submitted that in the cross-examination, plaintiff admitted that he was conducting business in Goa from 1979 till 1991-92. That deceased was admitted in Dr. Wagh's Hospital, Jogeshwari, where she ultimately expired. He admitted that attesting witness Sakharam Shelke is not related to him. The other attesting witness Y. G. Chaudhari is also not related to him. He further admitted that mother used to affix her signature on the rent receipts and that 4-5 years before she expired, deceased was mentally upset because of his brother's behaviour. He further admitted that in the year 1995, his sister took the deceased to Sangli and there she stayed for two years. He admitted that deceased was very fond of her grand-children. He further admitted that the relationship between the deceased and her daughters was good and that the sisters never visited him for Bhaubij. He also did not visit sisters on the occasions of Rakshabandhan. Other than Advocate M. N. Deshmukh, the deceased had confidence in S. V. Pikale and Company. Plaintiff had also admitted that he had sent notice dated 19.03.1997 to Advocate S. V. Pikale and Company through Advocate S. V. Rane to the deceased for not administering the property properly. Mr. Bhat submitted that as the said document was confronted to plaintiff P.W.1, the same may be marked as exhibit. In view thereof, it is marked as exhibit 'D-1'. He also admitted that no doctor recommended for shifting the deceased to Dr. Wagh's Hospital in Jogeshwari. The Will does not bear certification of a medical practitioner that the deceased was

mentally fit to execute the deed. P.W.1 further admitted that he does not have any other document to show that the deceased had put thumb impression instead of signature.

13. Mr. Bhat invited my attention to question No.17 posed to the attesting witness Y. G. Chaudhari, P.W.2. While answering this question, he stated that he had given instructions as regards paragraphs 2, 4 and 5 of his affidavit in lieu of examination-in-chief. In other words, he did not give any instructions as regards rest of the paragraphs of the affidavit in lieu of examination-in-chief of P.W.2 attesting witness. He, therefore, submitted that P.W.2 has not proved attestation of the Will in question. In support of his submissions, he relied upon the following decisions:

- a. ***H. Venkatachala Iyengar Vs. B. N. Thimmajamma*, AIR 1959 SC 443;**
- b. ***Jaswant Kaur Vs. Amrit Kaur*, (1977) 1 SCC 369;**
- c. ***Jagdish C. Sharma Vs. Narain Singh Saini*, 2015 (3) Bom.C.R. 481.**

14. In rejoinder, Ms Sarkhot submitted that as the Will is properly executed and attested, this Court will grant Letters of Administration. She submitted that the very purpose of executing the Will by the deceased will be lost if the Letters of Administration is not granted. She, therefore, submitted that Suit may be decreed thereby granting Letters of Administration with the Will annexed to the property and credits of the deceased.

15. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The following points arise for my consideration:

- (1) Whether the plaintiff has established that the last Will and Testament of Smt. Shobhana Tukaram Malik dated 28.08.1998 was validly and duly executed and attested?
- (2) Whether the Will is surrounded by suspicious circumstances?
- (3) Whether the Will was manipulated and fabricated?
- (4) Whether the deceased executed the said Will under undue influence and pressure?
- (5) What reliefs?

16. In the present case, plaintiff who is the sole legatee under the Will is also the propounder of the Will. The plaintiff, therefore, has to lead satisfactory evidence to prove the due execution and attestation of the Will by the deceased. In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple *lis* between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the Will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the Will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the Will. In the case of **R. Venkatachala Iyengar** (*supra*), the Apex Court speaking through Gajendragadkar, J. (as the learned Chief Justice of India then was) laid down the following propositions:

- “1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the ease of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.
2. Since Section 63 of the Succession Act requires a will to be

attested, it cannot be used as evidence until, as required by Section 63 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasizes that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise

a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.”

17. The Will in question runs into 3 pages. It is typed in Marathi language. In the opening paragraph, the testatrix declared that she has revoked all her earlier Wills and Codicils, if any, and the dispositions made thereunder and this Will is her last Will and Testament. In the second unnumbered paragraph, she refers to Letters of Administration dated 24.03.1987 granted by this Court in Petition No.324 of 1981 in respect of the properties and dues of her late husband Tukaram Savalaram Malik. The said Letters of Administration is enclosed with the Will. As there were disputes and differences among the legal heirs of late Tukaram Malik regarding distribution of the property, the matter was referred to arbitration. As per the Award made by the Arbitrator, she was allotted and accordingly became owner of immovable property i.e. Chawl No.B with 7 rooms and building B with 7 shops and 19 room situate at Sainath Vijaynagar, Plot No.91, Survey No.1239 at R.H.B. Road, Mulund. Apart from the immovable property, she also received jewellery, gold ornaments, cash and bank balance. The third unnumbered paragraph recites that she being aged, her elder son Surendra (plaintiff herein) looks after her and she resides with him along with her younger son, Prakash, who is handicap. The fourth unnumbered paragraph recites that she had given sufficient jewellery, cash and other articles to her married daughters, Shraddha Vishram Shirsath and Neelam Arun Narvekar at the time of their marriages. Hence, she is not making any provision for them under the Will. In the fifth unnumbered paragraph, it is recited that she thereby bequeaths the above described immovable property, jewellery, gold ornaments, cash and bank balance, which she possesses at the time of her death to the elder son, Surendra and that during the life time of Prakash, he should

properly look after Prakash. Surendra should also look after and maintain the ancestral property, namely, 'Prakash Niwas' situate at Vengurle, District Sindhudurg for the benefit of handicap son Prakash and after the death of Prakash, it will devolve upon Surendra. The sixth unnumbered paragraph recites that she has made this Will as per her wish and desire and in a sound state of mind.

18. The next unnumbered paragraph recites that in verification thereof, she has affixed her signature below the Will at Mumbai on 28.08.1998 (date is handwritten). The Will is attested by Sakharam Mhatarba Shelke and Y. G. Choudhari. At the bottom of pages 1 and 2, her thumb impression is affixed. On pages 3, on the top left hand side, her thumb impression is affixed and on the right hand side also two thumb impressions are affixed.

19. A perusal of the Will shows that immovable and movable properties are bequeathed to the plaintiff absolutely, save and except, 'Prakash Niwas' situate at Vengurle, District Sindhudurg, which is given to Prakash, during his life time and after his death, it has to go to the plaintiff. A perusal of the Will does not disclose any reason for excluding defendant, who is daughter-in-law of the deceased. Vijay, husband of the defendant predeceased the deceased. Equally, no explanation is given for excluding children of the defendant, namely Chetan Vijay Malik and Mayur Vijay Malik, who at the relevant time, were minors.

Point No.(1)

(1) *Whether the plaintiff has established that the last Will and Testament of Smt. Shobhana Tukaram Malik dated 28.08.1998 was validly and duly executed and attested?*

20. In order to prove due execution and attestation of the Will, plaintiff has examined P.W.2, Y. G. Choudhari, one of the attesting witnesses. He has filed affidavit of evidence in lieu of examination-in-chief dated 23.07.2014. In paragraph 2 thereof, he stated that he retired as a principal. He was conducting tuition classes for the students of V and X standard till the year 2000. In paragraph 3, it is stated that he knew and well acquainted with Smt. Shobhana Tukaram Malik (deceased). In paragraph 5, he stated that he is aware that the said Will dated 28.08.1998 was executed by the deceased. On 28.08.1998, Smt. Shobhana Tukaram Malik called him at her residence where she was residing, viz. Sainath Vijaynagar, 1st floor, 91, R.H.B. Road, Mulund (W), Mumbai 400 080. Upon reaching the said premises, the deceased showed him the typewritten will. He was present with Sakharam Mhatarba Shelke. He read the contents of the Will shown by the deceased. The deceased told them that her hands were shaking and hence she could not sign and they did then and there saw the deceased set and subscribe / emboss her thumb impressions at the foot of the testamentary paper written in Marathi language and character as her last Will and Testament. The said Will was typed in Marathi.

21. In paragraph 6, it is stated that the deceased informed them her desire of bequeathing the property mentioned in the said Will to Surendra Tukaram Malik (plaintiff) as her other two daughters namely, Shraddha Vishram Shirsath and Neelam Arun Narvekar both were happily married and during the lifetime of the deceased, at the time of their marriage, she had given both of them sufficient jewellerys and cash. She also informed him that the award was made by virtue of which, major properties were physically handed over to Naha Malik (defendant) being widow of the deceased Vijay Malik. She further informed him that since Surendra Malimk was looking after the

deceased and her younger son Prakash, she desired to bequeath her properties mentioned in the Will in favour of Surendra Malik, plaintiff. In paragraph 7, it is stated that after being satisfied that the deceased had intentions to bequeath the suit properties to Surendra Malik, he put his signature in English language. In paragraph 8, it is stated that after speaking to the deceased, he found that at the time of putting her thumb impression at the bottom of the Will and on each page the Will, the deceased was of sound mind and good health and had disposing capacity.

22. In paragraphs 5 and 9 to 12, it is stated thus,

“5. I am aware that the said Will dated 28.08.1998 was executed by the deceased. On 28.08.1998, Smt. Shobhana Tukaram Malik called me at her residence where she was residing i.e. Sainath Vijaynagar, 1st Floor, 91, R.H.B. Road, Mulund (W), Mumbai 400 080. Upon reaching the said premises, the deceased showed me the typewritten Will. I was present together with Shri Sakharan Mhatarba Shelke. I read the contents of Will shown by the deceased. The deceased told us that her hands were shaking and hence she could not sign and we did then and there saw the deceased set and subscribed / emboss her thumb impressions at the foot of the testamentary paper written in Marathi language and character which is referred to in the Petition herein and marked Exhibit “A” and declared and published the same as her last Will and Testamentary. The said Will was typed in Marathi.

9. That thereupon I and the said Shri Sakharan Mhatarba Shelke did at the request of the said deceased and in her presence and in the presence of each other, all being present together at the same time set and subscribed our respective signatures at the foot of the said Testamentary paper as witnesses thereto.

10. That the name and thumb impression at the foot of the Testamentary paper is of the party executing the same i.e. of the said deceased, Smt. Shobhana Tukaram Malik. The names added and signatures of Shri Sakharan Mhatarba Shelke and Shri Yashwant Girdhar Chaudhari i.e. myself subscribed and written at the foot of the said testamentary paper as the parties attesting execution of the same are proper and in the respective handwriting of Shri Shelke and myself.

11. I say that on each page of the Testamentary paper, the

deceased had put her thumb impression. The thumb impressions are put in my presence and hence I recognize the same.

12. That at the time when the said deceased embossed her thumb impression on the said Will dated 28.08.1998 as aforesaid, she was of sound and disposing mind, memory and understanding and to the best of my belief made and published the same of her own free will and without any coercion and undue influence.”

23. In the cross-examination conducted on 25.07.2014, he was asked questions as regards preparation of the affidavit in lieu of examination-in-chief. The questions and answers are as under:

“Q.3: Did you receive the witness summons from the Court?

A: No, I have not received.

Q.4: Who requested to remain present today as witness?

A: I was requested by the Advocate for the plaintiff.

Q.5: When did you receive the phone?

A: On 23rd July 2014.

Q.6: At what time did you receive the phone call?

A: Afternoon 4.00 p.m.

Q.7: When did you meet the Advocate for the plaintiff?

A: On Thursday, 24th July 2014.

Q.8: At what time did you meet the Advocate for the plaintiff?

A: At 1.30 p.m. on 24th July, 2014.

Q.9: On 24th July 2014, the Advocate for the plaintiff had prepared the Affidavit in lieu of evidence and you put your signature on it?

A: Yes.

Q.10: At what time, did you go to the Notary?

A: Around 3.30 p.m.

Q.14: Was the plaintiff with you when you met the Advocate on the 24th July 2014?

A: Yes.

Q.15: For how long were you with the Advocate on 24th July

2014?

A: For about an hour.

Q.16: I put it to you that the plaintiff Mr. Surendra Malik has instructed the Advocate for the plaintiff the contents of your Affidavit in lieu of Evidence?

A: The draft of the Affidavit was ready upon certain instructions given by me.

(The original affidavit is shown to the witness.)

Q.17 The Witness is requested to point out the paragraphs contained in the affidavit which were prepared on the basis of instructions given by him.

A: I have given her my address, contents of para nos. 2, 4, 5. In para no.5, the Advocate for the plaintiff questioned me about the situation at the house of the deceased when I went to put my signature on the said Will as a witness. The Advocate for the plaintiff objects to the questions as these are internal instructions given by the witness which cannot be disclosed. In para no.8, the contents that after speaking to the deceased Smt. Shobhana Tukaram Malik and after reading the contents of the Will, the said deceased put her thumb impression at the bottom of the Will and on each page of the Will.”

24. A perusal of the above extracted portion shows that at 4.00 p.m. on 23.07.2014, he received a phone call for preparing affidavit in lieu of examination-in-chief. He met plaintiff's Advocate on 24.07.2014 at 1.30 p.m. On 24.07.2014, Advocate for the plaintiff had prepared affidavit in lieu of evidence and he put signature on it at 3.30 p.m. before Notary. As against this, the affidavit in examination-in-chief is dated 23.07.2014.

25. It is material to note that the cross-examination was conducted on 25.07.2014 i.e. hardly after 2 days and still, he did not remember making of the affidavit on 23.07.2014.

26. A perusal of answer given to question No.17 shows that the contents of paragraphs 2, 4 and 5 of the affidavit in lieu of examination-

in-chief were prepared on the basis of the instructions given by P.W.2 to the plaintiff's Advocate. In paragraph 5, the Advocate for the plaintiff questioned him about the situation at the house of the deceased when he went to put up his signature on the said Will as a witness. At that time, plaintiff's Advocate objected to the question as these were internal instructions given by the witness which cannot be disclosed. Witness stated that in paragraph 8, the contents that after speaking to the deceased, Smt. Shobhana Tukaram Malik and after reading the contents of the Will, the said deceased put her thumb impression at the bottom of the Will and on each page of the Will. Ms Sarkhot submitted that contents of paragraph 8 of the affidavit in lieu of examination-in-chief is also as per the instructions given by P.W.2 to the plaintiff's Advocate. On the other hand, Mr. Bhat submits that only paragraphs 2, 4 and 5 of the affidavit in lieu of examination-in-chief are based on the instructions given by P.W.2. In other words, Mr. Bhat contends that the contents of paragraphs, other than paragraphs 2, 4 and 5, are not on the basis of the instructions given by P.W.2, Y. G. Chaudhari to the plaintiff's Advocate.

27. I have already extracted question No.17 and answer given by P.W.2. A perusal of paragraph 8 of the affidavit in lieu of examination-in-chief shows that it dealt with sound mind and good health and disposing capacity of the deceased. P.W. 2 does not state that the contents of paragraph 8 were also prepared on the basis of the instructions given by him to the plaintiff's Advocate. Even if for the time being I accept submission of Ms Sarkhot that contents of paragraph 8 are also based upon the instructions given by P.W.2, nonetheless, it is evident that the contents of paragraphs 9 to 12 of the affidavit in lieu of examination-in-chief of P.W.2 are not based upon the instructions given by him to the plaintiff's Advocate. Ms Sarkhot submitted that contents of paragraph 5 of the affidavit in lieu of examination-in-chief meet the

requirements of Section 63 of the Act. I have also extracted paragraph 5 of the affidavit in lieu of examination in chief of Y. G. Chaudhari. All that it says that the deceased told the attesting witnesses that her hands were shaking and hence she could not sign and the attesting witnesses then and there saw the deceased set and subscribe / emboss her thumb impressions at the foot of the testamentary paper written in Marathi language and character which is her last Will and Testament. The said Will is typed in Marathi. As far as the attestation is concerned, attesting witness Sakharam Shelke and P.W.2 setting and subscribing their respective signatures at the foot of the said testamentary paper as witnesses thereto in her presence and in the presence of each other, all being together present at the same time is stated in paragraph 9. The contents of paragraph 9 are not on the basis of the instructions given by P.W.2. In other words, P.W.2 did not depose about attestation by two witnesses as per Section 63(c) of the Act. In view thereof, I find substance in the submission of Mr. Bhat that due attestation by the attesting witnesses is not proved in the present case. The contents of paragraphs 9 to 12 are prepared by the Advocates not on the basis of the instructions given by P.W.2.

28. One more aspect which requires to be dealt with is as regards the affidavit made by the other attesting witness namely, Sakharam Shelke dated 02.02.1999 in support of the Testamentary Petition. In paragraph 5, Shelke stated that the thumb impression of Smt. Shobhana Tukaram Malik, appearing at the foot of pages 1 and 2 did exist before execution of the said Will. Plaintiff, however, did not examine Sakharam Shelke. That apart, plaintiff also did not obtain clarification as regards giving instructions by P.W.2 before preparing his affidavit in lieu of examination-in-chief by putting questions in re-examination. In view thereof, I have no hesitation to conclude that the plaintiff has failed to

prove due attestation of the Will. Point No.1 is accordingly answered in the negative.

29. In view of the above finding, really speaking, it is not necessary to record any findings on rest of the points. However, if it is held that my finding against point No.1 is not correct, I am dealing with the other points.

Point No.(2)

(2) *Whether the Will is surrounded by suspicious circumstances?*

30. Mr. Bhat submitted that plaintiff has not explained as to why he was given preferential treatment. Though the Will recited that daughters, Shraddha Vishram Shirsath and Neelam Arun Narvekar were given sufficient jewellery, cash and other articles at the time of their marriages, and therefore, she has not bequeathed any property to them, still, considering the financial position of the deceased, it is highly improbable that she will exclude the married daughters. This is more so when for more than two years i.e. between 1995 and 1997, the deceased was residing at Sangli with one of her daughters, Shraddha Shirsath. He submitted that during the course of evidence, no explanation is given by the plaintiff as regards this circumstance. Mr. Bhat submitted that in the cross-examination, P.W.1 plaintiff admitted that during the period of 1998, there were many good hospitals in Mulund. However, no explanation is forth coming as to why plaintiff admitted deceased in hospital at Jogeshwari, which is far away from Mulund. He further admitted that the attesting witnesses were strangers to the deceased. They are also not related to the deceased. In the cross-examination, plaintiff admitted that Sakham Shelke, one of the attesting witnesses is not related to him. He further admitted that Shelke never visited his

residence and that he was not a family friend.

31. As far as the other attesting witness Y. G. Chaudhari, P.W.2, he admitted that he is also not related to him. He was put to the question that “Did he ever visit his (plaintiff's) residence?” To that also , he answered in the negative. He also admitted that he had no relationship with the deceased. As regards his meeting the deceased, following are the questions put to and answers given by P.W.2:

“Q.34:I put it to you that prior to 1998, you had not met the deceased?

A: After 1997, I used to enquire about her health.

Q.35: How many times did you meet her after 1997?

A: Two to three times a week.

Q.36: When did you start the class?

A: May 1997.

Q.37: Did you meet the deceased in May or June 1997?

A: No.

Q.38 When did you first meet her?

A: In July 1997.

Q.39 I put it to you that the deceased was not in Bombay from October 1997 to April 1998, she was in Sangli.

A: I do not remember.”

32. A perusal of answers given by P.W.2 to questions No.35 and 39 clearly shows inconsistency. Whereas while answering question No.35, P.W.2 stated that he used to meet the deceased two to three times a week after 1997, while answering question No.39, as to deceased was not in Bombay from October 1997 to April 1998 and she was in Sangli, he answered that he did not remember. A perusal of the testimony of P.W.2, as a whole, shows that he was not related to the plaintiff as also the deceased. In this state of affairs, it is inconceivable that deceased will choose him as attesting witness to a very solemn and important

document. The contents of paragraphs 2, 4 and 5 were on the basis of instructions given by him to plaintiff's Advocate. The contents of the rest of the paragraphs are not based on his instructions.

33. In the case of **Jaswant Kaur** (*supra*), The Will was attested by two persons called Dinshaw H.M. Framjee and Pali Ram. In paragraph 17, Apex Court observed that “It is intriguing that a person in the position of Sardar Gobinder Singh should choose these two strangers as attesting witnesses to a very solemn and important document. Dinshaw Framjee was a trader in Simla and Pali Ram was his servant. Framjee has stated in his evidence that he did not remember where Gobinder Singh used to stay in Simla, that he did not know for how long he was staying in Simla before the attestation of the will, that he was unable to state whether he had met Gobinder Singh after the attestation of the will and that he was unable to give the approximate time of the day when the will was attested - forenoon, afternoon or evening. Pali Ram, the other attesting witness, did not remember the date or the year of the execution. In paragraph 19, the Apex Court observed thus,

“19. The utter improbability of the testator accosting these two strangers for getting his will attested and the fundamental contradictions in their evidence render it impossible to hold that they attested the will at the instance of the testator as alleged. A man of importance that the testator was, he could not ever have left the validity of his will to depend on the unpredictable attitude of unknown elements like Framjee and Pali Ram. Pali Ram claims to have read the will before attesting it. It is not known why, if he knew that the property was bequeathed to the defendant, he did not, at least after the testator's death, inform the defendant of the existence of the will.”

34. In my opinion, the said decision applies on all fours to the facts of the present case. In my opinion, this is one of the suspicious circumstances surrounding the Will, which is also not explained by the plaintiff. The plaintiff has also not explained as to why the deceased

was shifted from Mulund to Jogeshari in Dr. Wagh's Hospital when he himself admitted that during the period of 1998, there were good hospitals in Mulund. The plaintiff has also not explained as to why the defendant, who is a widow of the predeceased son Vijay and her grand children Mayur and Chetan were excluded.

35. It has come on record that during her lifetime, deceased was signing on rent receipts issued to the tenants occupying the premises. There is no explanation as to why Will does not bear her signature and bears her thumb impressions. There is no explanation as regards paragraph 5 of the affidavit of Sakharam Shelke where he stated that the thumb impression of the deceased appearing at the foot of pages 1 and 2 existed before execution of the Will.

36. Mr. Sarkhot submitted that defendant has not pleaded and proved the suspicious circumstances. I do not find any merit in this submission. In the case of **H. Venkatachala Iyengar** (*supra*), in paragraph 31, decision of Privy Council in Sarat Kumari Bibi Vs. Sakhi Chand, (1929) 31 BOM.L.R. 270, wherein it was made clear that "the principle which requires the propounder to remove suspicions from the mind of the Court is not confined only to cases where the propounder takes part in the execution of the will and receives benefit under it. There may be other suspicious circumstances attending on the execution of the will and even in such cases it is the duty of the propounder to remove all clouds and. satisfy the conscience of the court that the instrument propounded is the last will of the testator." This view is supported by the observations made by Lindley and Davey, L. JJ., in *Tyrrell v. Painton*, 1990 AC 1742. The rule in *Barry v. Butlin*, 1964 SC 529, *Fulton v. Andrew*, 1971 SC 2236, and *Brown v. Fisher*, 1977 SC 63, said Lindley, L. J., "is not in my mind confined to the single case in which the will is

prepared by or on the instructions of the person taking large benefits under it but extends to all cases in which circumstances exist which excite the suspicions of the court."

37. It is material to note that the deceased had filed Testamentary Petition No.324 of 1981 in this Court for grant of Letters of Administration with Will annexed of the property and credits of the late Tukaram S. Malik. This Court granted Letters of Administration on 24.03.1987. As there were differences and disputes among the deceased, plaintiff and the defendant, the matter was referred to arbitration under the Arbitration Act, 1940. The Award was made on 20.08.1998 by the learned Arbitrator. It has also come in evidence of the plaintiff that Mr. M. N. Deshmukh was family Advocate and he was looking after family property matters and tenancy matters. The plaintiff also admitted in cross-examination that other than Advocate M. N. Deshmukh, deceased had confidence in S. V. Pikale and Company, Advocates. He also admitted that neither Advocate Pikale nor Advocate Deshmukh made the Will. It is inconceivable that the deceased, who has obtained the Letters of Administration from this Court and also participated in the arbitration proceedings will not consult Advocate of confidence in preparing the Will. The plaintiff has also not explained this circumstance. The plaintiff also admitted that he was conducting the business in Goa from 1979 till 1991-1992. Shraddha Shirsath took deceased with her to Sangli from 1995 to 1997. Plaintiff brought deceased back from Sangli in March / April 1998. The deceased executed Will on 28.08.1998 and died at Mumbai on 02.11.1998. She was with the plaintiff hardly for 3 ½ years. It has also come on record that on 19.03.1997, plaintiff had issued notice through Advocate S. V. Rane to S. V. Pikale and company alleging the mismanagement by the deceased and not rendering account of income and expenses of the

property in which she was the administrator. By that notice, plaintiff even threatened that if the deceased does not furnish the statement of account of income and expenditure of the property within the period of 7 days from the receipt of the notice, he will proceed against her for initiating contempt proceedings.

38. The plaintiff has not adduced any evidence to clear cloud as to why under such state of affairs, entire property would be bequeathed to him to the exclusion of others. In the light of the aforesaid discussion, it has to be concluded that the Will is also surrounded from suspicion and the plaintiff has not adduced any evidence to clear the suspicious circumstances. Point No.2 is answered accordingly.

Points No.(3) and (4)

- (3) *Whether the Will was manipulated and fabricated? and*
- (4) *Whether the deceased executed the said Will under undue influence and pressure?*

39. These two issues can be clubbed together. Ms Sarkhot submitted that burden is on the defendant to establish that the Will propounded by the plaintiff is manipulated and fabricated and that plaintiff exercised undue influence and pressure on the deceased to execute the Will in his favour. Defendant has not adduced any evidence for substantiating these pleas. I find merit in this submission. As held by the Apex Court in **H. Venkatachala Iyengar** (*supra*), if a Caveator alleges fraud, undue influence, coercion, etc. in regard to execution of the Will, such plea has to be proved by him. In the present case, defendant has not adduced any evidence to substantiate these pleas. Issues No.(3) and (4) are answered in the negative.

40. In the light of the aforesaid discussion, plaintiff must fail. The Suit is accordingly dismissed. In the circumstances of the case, there shall be no order as to costs.

(R. G. KETKAR, J.)

Minal Parab