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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY & INTESTATE JURISDICTION

TESTAMENTARY SUIT NO.14 OF 2005
IN
TESTAMENTARY PETITION NO.705 OF 2014

Petition for Probate of the Last Will
and Testament dated 22nd March,
2001 read with Codicil dated 16th
April, 2003 of Mrs. Vimlabai @
Kakumo Dattatraya Purohit Indian
Inhabitant of Bombay, Hindu.

Residing at the time of her death at
7, Bhicoba Niwas, Gokhale Road,
North Dadar (West)- 28, House Wife

...Deceased

The Maharashtra Executor And)
Trustees Co. Ltd., A subsidiary Company)
of Bank of Maharashtra a Nationalised)
Bank having its head office at "Lokmangal")
1501, Shivaji Nagar, Pune – 411 005,)
and a Branch Office Inter-alia at)
Gokhale Road, Gokhale Road,)
North Dadar (West) Mumbai – 400 028) ...Plaintiff

Mr.Sharad Purohit,)
residing at Ninad, 87, Shivaji Park,)
Ranade Road, Dadar, Mumbai – 400 028.) ...Caveator

...Defendant

Mr.Nikhil Wadekar with Mr.Chetan Mhatre I/b M/s.Utangale & Co. for the Plaintiff.

Mr.Harihar Bhawe with Ms.Rupa Bhawe I/b M/s.Bhawe & Co. for the Defendant.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 7TH DECEMBER, 2018
PRONOUNCED ON : 16TH JANUARY, 2019

JUDGMENT :-

1. By this suit which is converted as testamentary suit from the Petition No.705 of 2004, the plaintiff (original petitioner) prays for probate of the last Will and Testament of Mrs.Vimalabai Dattatraya Purohit dated 22nd March, 2001 read with Codicil dated 16th April, 2003 (hereinafter referred to as “the said deceased”). Some of the relevant facts for the purpose of deciding this suit are as under :

2. It is the case of the plaintiff that the said deceased had left a Will dated 22nd March, 2001 and Codicil dated 16th April, 2003. According to the plaintiff, the said Will was duly executed at Mumbai. The plaintiff was the sole executor named in the said Will and to administrator the properties of the said deceased.

3. On 26th July, 2004, the plaintiff filed a Testamentary Petition bearing No.705 of 2004 *inter-alia* praying for probate in respect of the last Will and Testament dated 22nd March, 2001 read with Codicil dated 16th April, 2003 of the said deceased.

4. In paragraph 8 of the said testamentary petition, it is

alleged by the plaintiff that the said deceased had left behind her surviving as her only heirs and next of kin according to Hindu Law, the following persons : (1). Mr.Ulhas Waman Solaskar and (2). Mr.Sharad Ramchandra Purohit. The citation was served upon Mr.Ulhas Waman Solaskar and Mr.Sharad Ramchandra Purohit. Mr.Sharad Ramchandra Purohit filed a Caveat dated 16th February, 2005 and an affidavit in support of the Caveat dated 24th March, 2005. In view of the said Mr.Sharad Ramchandra Purohit having filed a Caveat and affidavit in support of the Caveat, the said Testament Petition No.705 of 2004 was converted into Testamentary Suit No.14 of 2005.

5. On 21st November, 2008, this Court framed the following issues, which are answered by this Court in the manner set out hereinafter :-

- (1). Whether the plaintiff has proved the last Will and Testament dated 22nd March, 2001 read with Codicil dated 16th April, 2003 of the deceased Smt.Vimlabai B. Purohit ? **...In the negative.**
- (2). Whether the plaintiff has proved that he have been appointed as executor and entitled to file the present petition ? **...In the negative.**
- (3). Whether the defendant has proved that he is in relation of the deceased Smt.Vimlabai B. Purohit and is entitled to challenge the validity of the Will of the deceased ? **...In the affirmative.**
- (4). Whether the defendant has proved that the Will of the deceased suffers from certain omissions and

deliberate misrepresentation on the material facts touching upon the estate of the deceased ?

...Does not survive.

- (5). Whether the defendant has proved that the said Will was made by the deceased under pressure ?

...In the negative.

- (6). What order ? **...As stated in the operative part of the order.**

6. The plaintiff examined two witnesses viz. Mr.Mahadev Divakar Panshikar, who was one of the alleged attesting witness to the said alleged Will out of two attesting witnesses. The plaintiff also examined Mr.Prasad Vasant Date, Assistant Manager of the plaintiff as one of the witness. The defendant examined himself as the only witness in the aforesaid suit.

7. For the sake of convenience, issue nos.1 and 2 being connected, are discussed and decided together. Mr.Mahadev Divakar Panshikar, who claims to be the attesting witness of the said last Will and Codicil was examined first. He filed his affidavit in lieu of examination in chief dated 7th June, 2011. In paragraph 2 of the said affidavit, the said witness deposed that the said deceased had mentioned to him during his visit to her that due to old age, she was desirous of appointing the plaintiff as an executor to administrator her property as per her Will.

8. On 22nd March, 2001, the said deceased had called him at her residence at Dadar and informed him that she had made her Will through the Branch Manager of the plaintiff Mr.Jagdish Shetty,

wanted to execute the said Will and wanted to attest the said Will as one of the attesting witnesses. Accordingly the said witness visited the residence of the said deceased, when the Branch Manager of the plaintiff was also present and other witnesses Mr.Trambak Gajanan Garde was also present. It is stated that the said Mr.Trambak G. Garde was the family friend of the deceased.

9. There was further examination in chief of the witness by his learned counsel. In question no.2 of his examination in chief, the said witness when asked as to what would he say about the contents of his affidavit in lieu of examination in chief, the said witness deposed that the said affidavit was in English and he did not know the contents of his affidavit. The same was not read over and explained to him in Marathi. However, he had signed the said affidavit in Marathi. The witness deposed that he was acquainted with the said deceased for last 25 to 30 years. The said deceased had no issue.

10. In paragraph 11 of his examination in chief, the said witness deposed in response to question 11 in examination in chief, that one Mr.Ulhas W. Solaskar and other person known as Mr.Govind were working at the place of the said deceased. When the witness was asked to tell the Court as to what exactly happened on 22nd March, 2001, the witness deposed that he did not recollect what had happened on 22nd March, 2001. When the witness was asked whether the said document dated 22nd March,2001 was bearing his signature, the said witness deposed that the signature appearing on the said document was not his signature. He had seen the said document for the first time. The said document dated 22nd March,

2001 is the alleged Will.

11. In reply to question no.15, the witness deposed that pursuant to the discussion, the said witness and the said deceased had over the properties of Mr.Dattataya Janardhan Purohit, no document was prepared in that behalf. In reply to question no.17 of the examination in chief when the witness was asked whether the signature reading "M.D. Panshikar" in Marathi appearing on the Will No.249 of 2004 was of the said witness, the witness deposed that the said signature reading in Marathi "M.D. Panshikar" appearing on the said document was not his signature. In reply to question no.18 of the examination in chief, the witness deposed that the signature as "M.D. Panshikar" in Marathi of the letter dated 16th April, 2003 allegedly addressed to the plaintiff was not his signature. In reply to question no.19 of the examination in chief, when the witness was asked whether any other attesting witnesses were present on 22nd March, 2001, the witness deposed that since he himself was not present, he could not say whether any one else was present on that day to witness the signature of the said deceased.

12. Learned counsel appearing for the defendant had raised an objection that the said Will tendered by the said alleged attesting witness could not be marked as exhibit since the same was not proved as required under sections 65 and 66 of the Indian Evidence Act and since the original also differs from the documents furnished along with the affidavit of documents of the plaintiff. Learned Commissioner for regarding evidence marked the alleged Will dated 22nd March, 2001 and the letter dated 16th April, 2003 as Exhibit P-1 and P-2 for identification respectively subject to the plaintiff furnishing

the official transactions of those documents.

13. In the cross-examination of the said alleged attesting witness, he admitted that he had studied only 8th standard in Marathi medium. He was unable to understand anything in English. He was not attending the English class / period. The witness admitted that he himself did not try to learn English. The person from the Bank had accompanied him at the time of affirmation of his affidavit in lieu of examination in chief. He did not know the name of the said person, who had accompanied with him at the time of affirmation of the said affidavit. In reply to question no.35, the witness admitted that he was not able to subscribe the contents of the affidavit as the same were not read over and explained to him and were not known to him even on the date of his evidence.

14. In reply to question no.38, the witness admitted that Mr.Ulhas Solaskar was not treated as "Manasputra" (foster son) either by Dattatraya Janardhan Purohit and/or by Vimlabai Dattatraya Purohit. He admitted that the said Mr.Ulhas Solaskar was a servant of Mr.Dattatraya Janardhar Purohit and Vimlabai Dattatraya Purohit. The said Ulhas Solaskar used to purchase the vegetables and the milk from the market for the said Mr.Dattatraya Janardhar Purohit or Vimlabai Janardhar Purohit. The said Ulhas Solaskar expired 2-3 months before recording evidence of the said alleged witness. The said witness deposed that he knew the said Ulhas Solaskar only as a servant of Mr.Dattatraya Janardhar Purohit and Vimlabai Janardhar Purohit. The said Ulhas Solaskar had told the said witness that his services were terminated by Camlin Company.

15. The said witness admitted that the said Ulhas Solaskar was working as a servant of the said Mr.Dattatraya Janardhar Purohit and Vimlabai Janardhar Purohit all through out during his stay at the place of those two persons. The witness admitted that one of the legs of Mr.Dattatraya Janardhan Purohit was amputated because of the advance stage of Diabetic and thus all the activities and requirements of Mr.Dattatraya Janardhar Purohit were stopped and he was permanently bed ridden.

16. In reply to question no.74, the said witness deposed that the defendant was taking care and looking after the financial matters and transactions of Mr.Dattatraya Janardhar Purohit. However, since the defendant requested him to attend the financial matters and the transactions of Mr.Dattatraya Janardhar Purohit, the said witness started attending such matters and the activities of the said Mr.Dattatraya Janardhar Purohit regarding his Sweetmeat shop at Girgaon.

17. In reply to question no.95, the witness admitted that after the death of Sitabai Ramchandra Purohit, the relations between the said deceased Vimlabai Janardhar Purohit and the defendant were very cordial, close and there was love, respect and affection between them for each other. He also admitted that the said Ulhas Solaskar had no role or interest to play in the said financial matters taken care by the said witness. In reply to question no.105, the witness deposed that the health of the said deceased started deteriorating since the year 1993. She was suffering from Blood Pressure besides heart problem. She continued with the said state of health till the year 1998 when Mr.Dattatraya Janardhar Purohit expired. After the death of her

husband Mr.Dattatraya Janardhar Purohit in the year 1998, the said deceased Vimlabai Janardhar Purohit was all alone and being uneducated she stopped going out to meet her relations, acquaintances or social functions.

18. In reply to question no.113, the witness deposed that he had suggested to the said deceased that she should make her last Will when the said deceased noticed that her health had further deteriorated. The said deceased however in reply told him that there was no necessity to make any such Will as the 7, Bhikoba Niwas and all her properties / assets would go to the defendant since she had no issue and that she had love and affection towards the defendant as if he is her son. The said deceased however informed the witness that the behavior of Ulhas Waman Solaskar towards her had further deteriorated and he used to be arrogant with the said deceased. He further informed that the said Ulhas Waman Solaskar keeps on writing something and when enquired about it he used to inform her that he was signing like Vimlabai. During the period 2000 to 2003, the deceased was hospitalized for about four times.

19. The said witness was shown the alleged Will and was asked whether the said document was bearing the signature of the said deceased, the said witness admitted that the said alleged Will did not bear the signature of the said deceased Vimlabai Janardhar Purohit. The said witness was shown her Will and the alleged Codicil and was asked whether the said document was bearing the signature of the said deceased, he admitted that the said document also did not bear the signature of the said deceased. He also admitted that the document marked as P-2 for identification was not

in the hands of the said deceased. In reply to question no.120, he admitted that the said deceased had never executed any Will or any letter like the document marked as P-1 for identification or P-2 for identification. The said witness also admitted that the said deceased was literate only up to 1st or 2nd standard and had no knowledge to execute the Will in the manner in which the contents of the said document disclosed.

20. The said witness in response to question no.123 when was shown the said alleged Will and was asked whether the purported signature of M.D. Panshikar in Marathi and the purported signature in Exhibit "B" annexed to the affidavit of documents of the plaintiff whether tallied with each other, the witness deposed that all those signatures did not tally at all with each other. At the time of death of the said Ulhas Waman Solaskar, he was residing at Ashirwad building, M.B.Raut Road, Shivaji Park, Mumbai alone. The said Ulhas Waman Solaskar was not on visiting terms with his brothers and sisters. The last rites of the said deceased were performed by the defendant. All the expenses of performing the last rites were borne by the defendant.

21. In reply to question no.129, the said witness admitted that the document P-1 for identification and P-2 for identification were forged, fabricated and got up documents by Ulhas W. Solaskar and his associates to meet their selfish motives. He also admitted that the documents at Exhibit "B" collectively annexed to the affidavit of documents of the plaintiff were also false, fabricated and got up documents.

22. Insofar as the evidence of Mr.Prasad Date, PW – 2 examined by the plaintiff is concerned, the said witness in his examination in chief deposed that the plaintiff was appointed as the sole executor of the said deceased in her Will and to administrator the properties. The plaintiff is a subsidiary company of Bank of Maharashtra. He deposed in the examination in chief dated 22nd March, 2001 that the deceased had called Mr.Jagdish Shetty through her husband when the attesting witness viz. D.M. Panshikar and Trimbak Gajanan Gadre along with Dr.P.V. Kelkar were also present when the said Will dated 22nd March, 2001 was prepared and drafted by the said witness as per the instructions given by the deceased. He had read over the contents of the said Will duly typed in Marathi to the said deceased. Dr.P.V. Kelkar was also present at that time who had duly examined the deceased and subscribed his signature on the said Will certifying that the deceased was in sound mind and body and good health.

23. It is further deposed that on 16th April, 2003, the said deceased called this witness along with other two witnesses and also Dr.P.V. Kelkar and handed over to him a codicil in the form of a letter addressed to the plaintiff. The said deceased duly signed the said letter written and duly attested by the said two witnesses. Dr.P.V. Kelkar also signed below the said letter. The said witness deposed that the alleged Will and Codicil are with the Registry of this Court. The said deceased died without leaving any issue.

24. In his further examination in chief, this witness when was asked as to what he had to say about the contents of his affidavit in lieu of examination in chief dated 8th June, 2011, he deposed that the

contents of the said affidavit were on the basis of the information he had gathered from his office. He was not personally aware of the contents thereof. He however, admitted that the said affidavit was not prepared on the basis of his instructions.

25. The said witness in his cross-examination admitted that the only information he gathered from the office of the plaintiff was that the said deceased died on 27th August, 2003 leaving behind her Will and codicil and that the plaintiff was appointed by her as an executor and trustees. He was not personally aware of the rest of the averments made by him except that Jagdish was the Branch Manager of the plaintiff. When the testamentary petition was filed in the year 2004, Mr.Prabhakar Parab was alive and was working with the Bank of Maharashtra.

26. In question nos.12 to 16, the witness admitted that he was not aware of the contents of the alleged last Will of the deceased and therefore, could not depose that the contents of the said alleged Will were correct or incorrect. He also admitted that when he had signed the affidavit of evidence, none of the documents were available before him. He also admitted that none of the statements made in paragraph 2 of the affidavit were as per his instructions. He also admitted that no other statements made in paragraph 2 were based on the information and not his personal knowledge or as per his instructions. He joined the plaintiff company in the year 1986. He had not read over the alleged Will to the said deceased nor he had drafted the said Will. He did not visit the residence of the said deceased. In reply to question no.29, he admitted that he did not meet or seen or talk to Mahadev Divakar Panshikar and/or Trimbak

Gajanan Garde and/or Dr.P.V. Kelkar.

27. The said witness also admitted in reply to question no.30 that the said deceased had not signed any alleged Will dated 22nd March, 2001 or the alleged Codicil dated 16th April, 2003 in his presence. He also admitted that the alleged attesting witnesses or Dr.Kelkar had not signed as attesting witnesses on the alleged Will or alleged Codicil in his presence. The said witness admitted that his statement that the deceased had called Jagdish, Manager of the plaintiff to her residence was incorrect. He also admitted that there was no person by name. D.M. Panshikar as the attesting witness and accordingly there was no attesting witness by name Trimbak Gajanan Gadre. He did not know M.D. Panshikar or M.D. Panshikar or Trimbak Gajanan Gadre. The said witness admitted that his statement in paragraph 4 pointed out to him was incorrect. The said witness admitted that Dr.Kelkar had never examined the said deceased in his presence. He also admitted that the said Dr.Kelkar had not certified that the said deceased was of sound mind and body and good health in presence of the said witness.

28. In reply to question no.72, the witness after perusing the documents at Exhibits P-1 and P-2 for identification, admitted that he could not see or name the person who had delivered those documents to the plaintiff.

29. When the witness was shown the alleged signature of M.D. Panshikar on the alleged Will and also the signature at Exhibit P-1, which was produced along with the affidavit of documents, he admitted that the two signatures of M.D. Panshikar on those

documents were not identical and differed. Similar statement was made by him in respect of the signature of Trimbak Gajanan Garde and Dr.P.V. Kelkar. The witness admitted that none of the signatures of the said deceased on the documents marked as Exhibits P-1 and P-2 for identification and on the alleged copy of Will referred in the affidavit of documents annexed to the petition and marked for identification tallied.

30. In reply to question no.121, the said witness deposed that the plaintiff's record does not show that the alleged last Will or the alleged Codicil were lodged in the office of the plaintiff by the said deceased personally. When the witness was shown the original alleged Will of the deceased and was asked whether he would agree that the space between two paragraphs on pages 1 to 3 compared to page no.4 was different, the witness agreed to the said suggestion. He agreed that on page no.4, the space between each of the paragraphs thereon was more. He also agreed that on page 4 that a paragraph was fragmented into small paragraphs of one sentence only.

31. The said witness admitted that there was nothing to show or to suggest that his alleged Will or the alleged Codicil were lodged in the office of the plaintiff before the death of the deceased Vimlabai Purohit. The said witness could not deny that those alleged documents were presented in the office of the plaintiffs by Ulhas Solaskar much after the death of Vimlabai Purohit. When the witness was put a suggestion that the documents at Exhibits P-1 and P-2 for identification were forged, fabricated and got up documents, the witness answered that he could not say.

32. The defendant filed an affidavit of evidence in lieu of examination in chief dated 31st August, 2013. He deposed that he was the nephew of the deceased Vimlabai Dattatraya Purohit. The husband of the said deceased Vimlabai Dattatraya Purohit i.e. Dattatraya Purohit and the father of the defendant viz. Ramchandra Janardan Purohit were real brother. The said Dattatraya Purohit had an issue out of this wedlock with the said deceased Vimlabai Dattatraya Purohit. However the said baby girl died in her early childhood. The said Dattatraya Purohit and the father of the defendant were having sweet shop by name Purohit Brothers at Dahisar since 1934. Some time in the year 1939, the father of the defendant and the husband of the said deceased however, separated from their businesses.

33. The defendant deposed that the said Dattatraya Purohit had got three servants viz. I) Ulhas Solaskar, ii) Govinda and Mrs.Prathibha Rudra. The said Dattatraya Purohit and the said deceased expressed that they did not have any issue and hence they were heavily dependent on the defendant to look after their well being. At that point of time both of them stated eventually that he should succeed and inherit their entire wealth. In his examination in chief, the defendant strongly disputed the alleged signature of the said deceased and the alleged witness on the alleged Will and Codicil . He deposed that the signature of the said deceased and the signature of Dr.P.V. Kelkar were forged by Ulhas Solaskar and his friends and relatives. The regular doctor of the said deceased was S.V. Purandare.

34. The defendant in his cross-examination admitted that the relations of his father with Dattatraya Purohit were good and cordial. He deposed in his cross-examination that the said deceased had studied upto 1st standard in Marathi. In reply to question no.20, when the witness was shown the alleged signature of the said deceased on page 4 of the Will and was asked whether the said signature was of the deceased, the witness deposed that the said signature was not of the deceased. In reply to question no.26 when the witness was asked whether Mahadev Divakar Pansikar was one of the signatory on the Will of the said deceased, the said witness answered in the negative.

35. When the witness was asked as to on what basis, he deposed that his signature on page 5 of the Will was not of that M.D. Pansikar, he deposed that he had stated so because he knew and was familiar with the signature of M.D. Pansikar.

36. Mr.Wadekar, learned counsel for the plaintiff invited my attention to the averments made in the affidavit in support of the caveat filed by the defendant, affidavit of the attesting witness, issues framed by this Court on 21st November, 2008, affidavit of Mr.Prasad Date who was examined as witness on behalf of the plaintiff, Will and Codicil annexed to the testamentary petition and various portions of the deposition of the witnesses examined by both the parties.

37. Insofar as the health or physical ailment of the deceased on the date of death of the deceased is concerned, Mr.Mahadev Divakar Panshikar, PW-1 in reply to the question no.105 admitted that the health of the deceased had started deteriorating since the

year 1993. The deceased was suffering from Blood Pressure besides heart problem which state continued till the year 1998 when the husband of the said deceased expired. In reply to question no. 108, the said witness admitted that because of the deteriorating health of the deceased, her life became dependent.

38. In reply to question no.112 when the said witness examined by the plaintiff was put to a suggestion that after the year 2000, Mr.Ulhas Waman Solaskar used to assault the said deceased Vimalabai, the said witness had deposed that he had heard that from the maid servant working at the residence of the said deceased. The deposition which was relied upon by both the parties have been already summarized in the earlier paragraphs of this judgment.

39. Mr.Wadekar, learned counsel for the plaintiff invited my attention to the paragraphs 2, 3, 5(a), (b), (d), (e), (f) & (g) of the affidavit in support of the caveat and would submit that the defendant caveator has clearly admitted the execution of the Will and Testament dated 22nd March, 2001 and Codicil dated 16th April, 2003 executed by the said Mrs.Vimalabai Dattatraya Purohit and thus the plaintiff had discharged the burden cast on him. The plaintiff was not even required to lead any evidence to discharge the burden cast on the plaintiff insofar as those two issues are concerned.

40. It is submitted that in view of the admission of the Will, the caveator could not have been permitted even to put any case contrary to the admission about the existence of the Will and Codicil made in the affidavit in support of the caveat at the stage of the cross-examination of the witnesses examined by the plaintiff. He

submits that this Court has to discard the admission if any of the witnesses examined by the plaintiff about their respective knowledge or their presence at the time of the execution of the Will and Codicil. He submits that the defendant cannot be permitted by this Court to lead evidence contrary to the pleadings.

41. In support of this submission, learned counsel placed reliance on the judgment of the Hon'ble Supreme Court in case of **Vinod Kumar Arora vs. Surjit Kaur, (1987) 3 SCC 711** and more particularly paragraph (11) thereof. He placed reliance on the judgment of this Court in case of **Haren Krishnakumar Mehta vs. Kamla Pribhdas Nebhanani, (2001) 2 Bom.C.R.678** and in particular paragraph (24) thereof. He also placed reliance on the judgment of Hon'ble Supreme Court in case of **Daulat Ram & Ors. vs. Sodha & Ors., AIR 2005 SC 233** and in particular paragraph 13 in support of the submission that the burden to prove that the Will executed by the deceased was forged or was obtained by the undue influence or by praying a fraud was on the caveator which they had failed to discharge.

42. Insofar as the issue no.3 framed by this Court i.e. 'Whether the defendant has proved that he is in relation of the deceased Smt.Vimlabai B. Purohit and is entitled to challenge the validity of the Will of the deceased or not' is concerned, learned counsel appearing for the plaintiff fairly admits that there is no dispute that the defendant falls in Class II category of the legal heir and had caveatable interest in the matter and is entitled to challenge the validity of the alleged Will and Codicil of the deceased in view of the fact that there is no Class I heir and next of kin left by the said

deceased. Statement is accepted.

43. Mr.Bhave, learned counsel for the defendant on the other hand invited my attention to the issues framed by this Court, various portion of the deposition of the witnesses examined by both the parties including the cross-examination thereof.

44. Insofar as issue no.1 is concerned, learned counsel appearing for the defendant strongly placed reliance on the answers given by PW-1 i.e. Mr.Mahadev Divakar Panshikar to question nos.14, 17, 117, 118, 119, 120 and 121. He also placed reliance on the deposition of Mr.Prasad Vasant Date and particularly paragraphs 2, 4 and 9 of the affidavit of the evidence filed by Mr.Date and reply to question nos. 5, 12 to 14, 18, 19, 22 to 40 in the cross-examination. He also placed reliance on the paragraphs 25, 37 and 38 of the affidavit in lieu of examination in chief filed by the defendant on this issue.

45. Insofar as issue no.2 is concerned, learned counsel appearing for the defendant invited my attention to the paragraphs 2 and 3 of the affidavit in lieu of examination in chief filed by PW-1, paragraphs 2, 3, 4,10 and 11 of the affidavit in lieu of examination in chief filed by PW-2 Mr.Date. The relevant part of evidence referred to and relied upon by the defendant are already summarized in the earlier paragraphs of this judgment.

46. Insofar as issue no.3 is concerned, learned counsel appearing for the defendant invited my attention to the reply given by the PW-1 to question nos.79, 95, 126 and 127 and the answers given

by the PW-2 to question nos. 109 and 110. He also invited my attention to the paragraphs 2, 6, 7, 10, 14, 16 and 21 of the affidavit in lieu of examination in chief filed by the defendant and the reply given by the defendant to the question nos.12, 13 and 28 in the cross-examination.

47. It is submitted by the learned counsel for the defendant that to prove the alleged signature of the deceased on the Will and Codicil, the plaintiff had examined only one witness who clearly admitted that the deceased had not signed the Will or the Codicil. The plaintiff however did not examine other attesting witnesses though the plaintiff had addresses of both the alleged attesting witnesses. The primary burden to prove that the deceased had executed the Will and Codicil was on the plaintiff which burden the plaintiff fail to discharge. He submits that the witness Mr.Mahadev Divakar Panshikar had admitted in reply to question nos.74 to 76 that the signature of the deceased has differed in different documents.

48. Insofar as the judgment of the Hon'ble Supreme Court in case of **Vinod Kumar Arora** (supra) and judgment of this Court in case of **Haren Krishnakumar Mehta** (supra) relied upon by the learned counsel for the plaintiff is concerned, it is submitted by the learned counsel that the Court has to read all the objections raised by the defendant in the affidavit in support of the caveat in toto and not any particular paragraphs in isolation. He submits that in any event, the judicial conscience of the Court has to be satisfied before granting any probate or Letters of Administration in favour of any party applying for such probate or Letters of Administration. In support of this submission, learned counsel placed reliance on the

judgment of Hon'ble Supreme Court in case of **H.Venkatachala Iyengar vs. B.N. Thimmajamma and Ors., AIR 1959 SC 443** and in particular paragraphs 22 and 23.

49. It is submitted that even if this Court comes to the conclusion that there was any alleged admission of the Will and Codicil in the affidavit in support of the caveat filed by the defendant, in view of this substantial evidence laid by the witnesses examined by the plaintiff clearly admitting that the Will or Codicil was not having been executed or attested and was forged and fabricated, this Court cannot ignore the deposition of the witnesses of the plaintiff in the examination in chief and cross-examination and thus cannot grant probate of the alleged Will and Codicil ignoring such material evidence on record.

50. Insofar as issue no.4 is concerned, learned counsel appearing for the defendant invited my attention to the reply given by the PW-1 to question nos.62, 74, 93, 113, 115, 116, 117, 118, 121, 129, 130 and 132. He invited my attention to the answers given by PW-2 to question nos. 22 to 40, 66, 67, 74 to 87, 122 to 124, 126 and 128. He invited my attention to the paragraphs 17 to 19, 23, 24, 26 and 27 of the affidavit in lieu of examination in chief filed by the defendant and the cross-examination of the said witness in question nos.20, 27, 30 and 32.

51. Insofar as issue no.5 is concerned, learned counsel for the defendant invited my attention to the reply given by the PW-1 to the question nos. 38, 39, 42, 47, 49, 55, 98, 99 and 113. It is submitted by the learned counsel that the defendant has discharged the burden

cast on the defendant insofar as issue nos. 3, 4 and 5 are concerned. The defendant has also by the cross-examination of the witness of the plaintiff has proved that the alleged Will and Codicil dated 22nd March, 2001 and 16th April, 2003 respectively of the deceased Mrs.Vimalabai Dattatraya Purohit were not proved and that the plaintiff was not entitled to file the testamentary petition.

52. Mr.Wadekar, learned counsel for the plaintiff in rejoinder reiterated the submission that the defendant having admitted the execution of the Will and Codicil in the affidavit in support of the caveat cannot be allowed by this Court to rely upon the evidence of the witness examined by the plaintiff or the defendant which is contrary to the admissions of the defendant in the affidavit in reply of the caveat.

REASONS AND CONCLUSION

53. This Court shall consider the issue nos. 1 and 2 together being interconnected and can be conveniently dealt with based on the common evidence led on these two issues.

54. The plaintiff had examined two witnesses i.e. Mr.Mahadev Divakar Panshikar who was one of the alleged attesting witness to the alleged Will out of the two alleged attesting witnesses. The plaintiff also examined Mr.Prasad Vasant Date, Assistant Manager of the plaintiff as one of the witness. The defendant examined himself as the only witness in this suit.

55. A perusal of the paragraph (2) of the affidavit in lieu of examination in chief of the PW-1 shows that he deposed that the

deceased had mentioned to him during his visit to her that out of her old age, she was desirous of appointing the plaintiff to be the executor to administer her property as per her Will. In paragraph (3) of the said affidavit, the said witness deposed that on 22nd March, 2001, the deceased had called him at her residence and informed him that she had made her Will through the Branch Manager Mr.Jagdish Shetty who wanted him to execute the said Will and wanted to attest the said Will as one of the attesting witnesses.

56. A perusal of the said affidavit of the witness clearly indicates that he had not deposed even in the affidavit in lieu of examination in chief itself that the said deceased had signed the said Will in his presence or that the said witness had attested the said Will in presence of the said deceased. Even if there would have been no cross-examination of this witness, in my view this part of the evidence led by the PW-1 who claims to be the one of the attesting witness cannot prove the requirement of the proof of execution and attestation of the Will at all. Mr.Jagdish Shetty was not examined by the plaintiff as a witness.

57. A perusal of the further examination in chief of the PW-1 and more particularly in paragraph (2) indicates that the said witness admitted that he did not know the contents of the said affidavit as the same was in English. The said affidavit was not read over and explained to him in Marathi. However, he has signed the said affidavit in Marathi. In reply to question no.19, the said witness admitted that he was not present on 22nd March, 2001 and thus he could not say whether anyone else was present on that day to witness the signature of the deceased. The witness admitted that he

did not know even the English alphabets till 7th Standard or thereafter.

58. The witness admitted in reply to question no.35 that he would not be able to subscribe to the contents of the affidavit as the same were not read over and explained to him and were not known to him even on the date of his cross-examination. When the witness was shown the Will and Codicil, the PW-1 admitted that no such documents were ever executed. The witness had seen these documents for the first time. The said Will was not signed in his presence by the deceased. Similarly the alleged Codicil was also seen by the said witness for the first time. The witness admitted in reply to question nos.129, 130 and 132 that the documents P-1 and P-2 and Exhibit - B were forged, fabricated and got up documents. He also admitted that those documents were forged and fabricated by Mr.Ulhas Waman Solaskar and his associates.

59. Insofar as the evidence of Mr.Prasad Vasant Date (PW-2) is concerned, in his examination in chief he deposed that the contents of his affidavit in lieu of examination in chief were based on the information that he had gathered from his office. He was not personally aware of the contents thereof. His affidavit of evidence was prepared not on the basis of his instructions. He admitted that he was not aware of the contents of the alleged Will of the deceased and could not depose that the contents of the alleged Will were correct or not. He also admitted that when he signed the affidavit of evidence, none of the documents were available before him. He joined the plaintiff company only in the year 1986.

60. The witness admitted that none of the other statements

made in paragraph (2) were based on his information or personal knowledge or as per his instruction. He did not visit the residence of the deceased at any point of time. He did not draft the alleged Will nor the said Will was read over to the said deceased by him. The said witness never met or talked to the PW-1 or Trimbak Gajanan Garde or Dr.P.V. Kelkar. He also admitted that the deceased did not sign any Will or Codicil in his presence. He admitted that none of the alleged attesting witness or Dr.Kelkar signed as attesting witness on the alleged Will or Codicil in his presence. He agreed that the substantial part of the paragraph (4) of his affidavit in lieu of examination in chief was incorrect. He also admitted that he had not certified that the said deceased was in sound mind body and good health.

61. A perusal of the oral evidence led by the witnesses of the plaintiff and the defendant summarized aforesaid in earlier paragraphs of this judgment would clearly indicate that the plaintiff had miserably failed to prove the execution and attestation of the Will and Codicil. The witness examined by the plaintiff also admitted that none of them were present when the said Will and Codicil was executed or attested. I am thus not inclined to accept the submission of the learned counsel for the plaintiff that this Court cannot consider the oral evidence as referred to aforesaid on the issue nos.1 and 2 while rendering any finding as to whether the plaintiff had proved the execution and attestation of the alleged Will or Codicil in view of the alleged admission of the defendant in the affidavit in support of the caveat.

62. The Hon'ble Supreme Court in case of **H.Venkatachala**

Iyengar (supra) has held that it is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. If there are any suspicious circumstances surrounding the execution of the Will, the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is held that it is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. The Court is not required to close its mind to the truth. In discovering the truth even in case of grave suspicion, judicial mind must always be open, vigilant, cautious and circumspect.

63. It is held that while deciding the solemn question whether an instrument produced before the Court is the last will of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive. The principles laid down by the Hon'ble Supreme Court in case of **H.Venkatachala Iyengar** (supra) would squarely applies to the facts of this case. The judicial conscience of the Court has to be satisfied before granting any probate or Letters of Administration by the Court.

64. I am thus not inclined to accept the submission of the learned counsel for the plaintiff that though both the witnesses examined by the plaintiff clearly admitted that the Will and Codicil were not executed and they have not the attesting witnesses or were

not even present at the time of the alleged execution or attestation of the Will and Codicil and the alleged attesting witness having admitted that the said alleged Will and Codicil were forged and fabricated, this Court cannot refuse to grant any probate based on such evidence on record contrary to the conscience of the Court. The conscience of the Court has to be satisfied before passing an order of granting of probate or Letters of Administration. In my view, the judgment of the Hon'ble Supreme Court in case of **Vinod Kumar Arora** (supra) relied upon by the learned counsel appearing for the plaintiff would not assist the case of the plaintiff at all.

65. The initial onus was on the plaintiff to prove the execution and attestation of the Will which the plaintiff failed to discharge in this matter. Learned counsel for the plaintiff could not dispute before this Court that none of the witnesses examined by the plaintiff could prove the execution or attestation of the Will and Codicil. Learned counsel also could not dispute various admissions relating to the execution and attestation of Will made by the two witnesses examined by the plaintiff during the course of the arguments.

66. In the facts and circumstances of this case, in my view even if the defendant had admitted the execution of the alleged Will and Codicil in the affidavit in support of the caveat, such admission, if any, could not have been considered in isolation in view of there being sufficient evidence on record led by the plaintiff contrary to such alleged admission and admitting forgery and fabrication of the Will and Codicil and not proving the alleged execution or attestation of the Will.

67. Insofar as the judgment of this Court in case of **Haren Krishnakumar Mehta** (supra) relied upon by the learned counsel for the plaintiff is concerned, it is held by this Court that since the evidence of the defendant was beyond the pleading, it has to be rejected even in the absence of any cross-examination is concerned, the plaintiff never applied for dismissal of the caveat on the ground that there was no dispute about the existence of the alleged Will and Codicil. The issues framed by this Court were framed after hearing both the parties. Admittedly, the onus of proof was on the plaintiff insofar as issue nos.1, 2 and 3 are concerned. The plaintiff examined two witnesses first to discharge the onus cast on him. The judgment relied upon by the learned counsel for the plaintiff in case of **Haren Krishnakumar Mehta** (supra) is not in a testamentary matter where the conscience of the Court has to be satisfied before granting any probate or Letters of Administration. The said judgment is thus clearly distinguishable with the facts of this case and would not assist the case of the plaintiff.

68. Insofar as judgment of the Hon'ble Supreme Court in case of **Daulat Ram & Ors.** (supra) relied upon by the learned counsel for the plaintiff is concerned, the Hon'ble Supreme Court held that the burden to prove that the Will was forged or it was obtained by undue influence is on the person who alleges to be so. There is no dispute about this proposition of law laid down by the Hon'ble Supreme Court in this case. However, the initial onus that the Will as well as the Codicil were executed and were duly attested in accordance with law was on the plaintiff which the plaintiff has failed to discharge. The witness PW-1 examined by himself by the plaintiff himself had admitted that the alleged Will and Codicil were forged and fabricated.

The judgment of the Hon'ble Supreme Court in case of **Daulat Ram & Ors.** (supra) thus would not assist the case of the plaintiff.

69. For the aforesaid reasons issue no.1 is answered in negative.

70. Insofar as issue no.2 is concerned, since the execution and attestation of the Will and Codicil has not been proved and the plaintiff has also failed to prove that the plaintiff was appointed as an executor and is entitled to file the present petition. The said issue is also answered in negative.

71. Section 68 of the Indian Evidence Act, 1872 clearly provides that if a document is required by law to be attested, it would not be used as evidence until 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. The plaintiff has failed to comply with section 68 of the Indian Evidence Act.

72. Section 71 of the Indian Evidence Act, 1872 provides that if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. In this case, the alleged attesting witness who was examined as PW-1 has himself denied the execution of the documents. The other attesting witnesses though could be examined as the witness by the plaintiff, were not examined. The PW-2 examined by the plaintiff also could not prove the execution or attestation of the alleged Will or Codicil. The plaintiff having failed to prove the execution of the alleged Will as

well as Codicil which were required by law to be attested under the provisions of law thus cannot be considered by this Court as proved while considering the relief sought by the plaintiff for grant of probate in respect of such alleged Will or Codicil.

73. Insofar as issue no.3 is concerned, learned counsel for the plaintiff during the course of the arguments fairly conceded that the defendant was the nephew and was a Class II legal heir. He also admitted that the said deceased died without leaving any Class I heir. He further admitted that the defendant has caveatable interest and has right to discharge the alleged Will and Codicil of the deceased. The issue no.3 is accordingly answered in affirmative.

74. Insofar as issue no.4 is concerned, in my view in view of the answer to the question nos. 1 and 2 in negative, issue no.4 does not survive and is answered accordingly.

75. Insofar as issue no.5 is concerned, in my view since the issue nos. 1 and 2 are answered in negative, the issue no.5 also does not survive. Be that as it may, the evidence of the two witnesses examined by the plaintiff and the evidence of the defendant summarized in the earlier part of the judgment would clearly indicate that the alleged beneficiary under the alleged Will was committing physical assault on the said deceased and his relations with the said deceased were not cordial.

76. In my view, no case is made out by the plaintiff for grant of probate in respect of the alleged Will dated 22nd March, 2001 and Codicil dated 16th April, 2003 of the said Mrs.Vimalabai Dattatraya

Purohit. The testamentary petition which is converted into the suit filed by the plaintiff is thoroughly misconceived and is accordingly dismissed with exemplary cost quantified at Rs.1,00,000/- (Rupees one lac only) which shall be paid by the plaintiff to the defendant within four weeks from today.

(R.D. DHANUKA, J.)