

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

TESTAMENTARY SUIT NO. 58 OF 2009

IN

PETITION NO. 695 OF 2008

Rebendra Datta.

..... Deceased.

Prasad T. Tendolkar
Hindu, Indian Inhabitant,
Having address at R-52,
2nd floor, Baria Mansion,
Opp. Mahatma Phule Market,
L.T. Marg, Mumbai – 3.

..... Plaintiff.

AND

1. Seema Parab,
401/B Surbhi, Jankalyan Nagar,
Malwani No.1, Malad (West),
Mumbai 400 095,

2. Diana G. Virwani,
603-B Nivedita Terrace,
65/2, Kedari Nagar, Wanawadi,
Pune 411 040,

3. Rebecca Datta nee Rebecca Dey,
A-17, Aashirwad,
Cross Road No.2,
Swami Samarth Nagar,
Lokhandwala Complex,
Andheri (East), Mumbai
400 053.

.... ... Defendants/
Caveators.

Mr.Vishal Kanade, a/w. Mr.Rajeev Carvalho, i/b. Mr.Sanjay Gawde for
the Plaintiff.

Ms.Rebecca G. Dey, Defendant no.3 present in person.

Ms.Seema Parab, Defendant no.1 present in person.

Ms.Diana Virwani, Defendant no.2 present in person.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 22nd December, 2019
PRONOUNCED ON : 2nd May, 2019

JUDGMENT :

1. By Testamentary Petition No.695 of 2008, which is converted into Testamentary Suit No.58 of 2009 Mr. Prasad Tendolkar who claims to be the executor of the alleged last Will dated 21.10.2006, alleged to have been executed by the deceased Mr. Rebendra Narayan Datta (hereinafter referred to as the said deceased) seeks grant of probate.

2. The said deceased had four issues i.e. Rajiv Rebendra Datta (son) and three daughters i.e. Mrs. Seema Rebendra Datta alias Mrs. Seema Parab, Mrs. Rebecca Datta alias Mrs. Rebecca Dey and Mrs. Diana Datta alias Mrs. Diana Virwani. The three daughter filed the caveats in Testamentary Petition No.695 of 2008. Mr. Prasad T. Tendolkar claims to be the executor of the alleged Will dated 21.10.2006 of the said deceased and filed the said Testamentary Petition No.695 of 2008 *inter alia* praying for probate in respect of the said Will dated 21.10.2006. The said Prasad Tendolkar also claims to be an executor under a separate alleged Will dated 16.10.1996 alleged to have been executed by Catherine Rebecca Datta who was the mother

of the aforesaid four parties. The daughters had filed caveats in the said Testamentary proceedings No.695 of 2008 which was converted into Testamentary Suit bearing No.65 of 2009. The said Catherine Rebecca Datta was the wife of the said Rebendra Datta. Both the testamentary suits were heard together.

3. By a separate order passed by this Court in the said Testamentary Suit No.65 of 2009, the said Testamentary suit has been disposed of. In so far as the said Testamentary Suit No.58 of 2009 is concerned, it is the case of the Plaintiffs that the said deceased had left his Will testament dated 21.10.2006 by which the Plaintiff was appointed as a sole executor. The said deceased died on 28.10.2006. The wife of the said deceased had already pre deceased the said deceased. The parents of the said deceased also pre deceased of the said deceased. On 16.07.2008, the plaintiff filed the said Testamentary Petition No.695 of 2008 *inter alia* praying for grant of probate in respect of the alleged Will dated 21.10.2006. In the said Testamentary Petition, all the three daughters referred to above filed their caveats in support of their caveats on various issues. Those affidavits in support of caveats are taken on record. The said Petition No.695 of 2008 was accordingly converted into Testamentary Suit No.58 of 2009.

4. It is the case of the plaintiff that by the said Will dated 21.10.2006, the said deceased was keeping sound health. It is the case of the plaintiff that under the said Will, the said deceased had bequeathed the flat No.A-2, at Rajgol Park, Lonavala, Taluka Mawal, District Pune, in favour his daughter Rebecca Datta @ Rebecca Dey. In

so far the flat no.G-1 of the Chaitanya Co-Operative Housing Society at Bainginim, Goa in Navelkar Estate is concerned, the said flat was bequeathed in favour Seema Datta @ Seema Parab, another daughter of the said deceased. In so far as the flat in 'Maya Enclave" Plot No.163, Lulla Nagar, Pune 411040 is concerned, the said flat is bequeathed in favour of daughter Diana Datta @ Diana Virwani. In so far as the flat No.13, Mistry Park, Bhulabhai Desai Road, Mumbai 400 036 is concerned, it is the case of the plaintiff that under the said Will, 50% share in the said flat belongs to the said deceased is bequeathed in favour of son of the said deceased namely Rajiv Datta.

5. It is also the case of the plaintiff that remaining 50% share in the said flat belongs to the wife of the said deceased has been already bequeathed by her by a separate Will in favour of son Rajiv Datta which is the subject matter of the Testamentary Suit No.65 of 2009. The said deceased testator also allegedly bequeathed a garage in the Mistry Park viz. Garage No.19 in favour of the said Rajiv for parking his vehicle. The said deceased has also allegedly bequeathed the flat No.105 in the New Pavan Vihar Co-operative Housing Society in favour of his son Rajiv exclusively. Under the said alleged Will, the said deceased allegedly bequeathed all the movable properties in favour of his son Rajiv Datta.

6. It is the case of the plaintiff that under the said alleged Will, some of jewellery and ornaments of the said deceased were already given to each of the daughters earlier by the wife of the said deceased as per her Will. Remaining ornaments and jewellery were alleged to

have been given by the said deceased under the said Will in favour of his daughter-in-law Anjali. The existence of the alleged Will is disputed by the daughters, in affidavit filed in support to caveat on various grounds. It was alleged that the said alleged Will was bogus, fraudulent, forged and invalid in law. The said Will was allegedly in direct contradictions to the contents of the MOU dated 20.09.2006 which MOU was voluntarily signed by all the parties just prior to the death of the said deceased father. The caveator also referred to the FIR dated 28.06.2008 filed by one of the caveatrixes Rebecca Datta against the son of the said deceased and brother of the caveator Rajiv Datta.

7. On 19.03.2015, this Court framed the following issues which are answered by this Court in later part of this judgment :

1	<i>Does the plaintiff prove that the document dated 21.10.1996 was duly and validly executed in accordance with law by Rebendra Narayan Datta as his last Will and Testament ?</i>	<i>No.</i>
2	<i>Whether the plaintiff proves that at the time of alleged Will, the deceased was of sound and disposing state of mind, memory and undertaking ?</i>	<i>No.</i>
3	<i>Whether the defendants prove that the alleged Will is fraudulent ?</i>	<i>Yes.</i>
4	<i>Whether the defendants prove that the alleged Will is forged ?</i>	<i>Yes.</i>
5	<i>Whether the defendants prove that the alleged Will was procured by undue influence of coercion ?</i>	<i>Does not arise.</i>

6	<i>What relief ? What order ?</i>	<i>Suit is dismissed with costs.</i>
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8. The plaintiff examined himself as PW2. He was cross examined by the caveator. The plaintiff also examined Ruchika Tendolkar who was one of the alleged attesting witness who filed an affidavit in lieu of examination in chief on 25.04.2015. The said Ruchika Tendolkar also filed additional affidavit in lieu of examination in chief on 18.09.2017. The son of the said deceased did not enter the witness box. None of the caveatrixes also led any oral evidence. All the witnesses were cross examined by the defendants who appeared in person in these proceedings.

9. Mr. Kanade, learned counsel for the Plaintiff placed reliance on the affidavit of evidence and additional affidavit dated 18.09.2017 filed by the alleged attesting witness Ruchika Tendolkar, affidavit in evidence of the plaintiff who claims to be executor appointed under the said Will. It is submitted by the learned counsel that there was no cross examination of the deposition of the attesting witness who had deposed that she has witnessed the Will along with her father in law Advocate T. S. Tendolkar as witness to the Will. He submits that admittedly the defendants did not lead any oral evidence. In respect of issue Nos. 3, 4 and 5 the onus was on the defendants which they have failed to discharge. He submits that in so far as issue nos. 1 and 2 are concerned, the plaintiff has discharged the said onus by leading evidence of

plaintiff who was appointed as executor under the said Will and by examining the attesting witness whose evidence was not shattered in cross examination by the defendants. He submits that there are no suspicious circumstances which affect the validity of the Will in question.

10. Mrs Diana Virwani, one of the caveatrixes argued this matter for herself and on behalf of the other two caveatrixes . She also filed written arguments in this suit in which caveator has raised various issues. The arguments of the defendants forming part of the written submission are summarised as under :

11. The alleged Will dated 21.10.2006, shows that the plaintiff i.e. Advocate Prasad Tendolkar was appointed as the alleged executor in the Will of the father was one of the attesting witness; whereas the wife of the alleged executor was the second attesting witness to the alleged Will. She submits that the sole involvement of a single Tendolkar family in execution of the alleged Will without even intimation to the daughters about such alleged Will itself create sufficient suspicious circumstances and dubious circumstance in execution of the said alleged Will. The said alleged Will was suppressed by the plaintiff and his family for several months till April, 2007 and was shown to the caveator only after 22 months of the demise of the said deceased.

12. It was submitted that the affidavit of attesting witness was not filed along with the petition in July, 2008 as contemplated under

Rules 374C and 384 of the Bombay High Court (OS) Rules and Section 281 of the Indian Succession Act, 1925. It is submitted that the said affidavit of attesting witness was dated 25.04.2015 and was obviously not annexed to the Testamentary Petition dated 16.07.2008 but was filed in the office of this Court seven years after filing of the petition when the matter had appeared on board.

13. It is submitted that from the affidavit of the alleged attesting witness, there is no clarity on the venue of the execution of the alleged Will why the Advocate T. S. Tendolkar , father of the plaintiff and the father-in-law of the first alleged attesting witness was present during the execution of the alleged Will. The Will was allegedly executed on the day of Diwali. She submits that the second alleged attesting witness Ruchika Tendolkar has stated that she had read first affidavit of attesting witness before she had signed it. No delay of more than seven years in filing the affidavit of attesting witness was explained by the said witness. It is submitted that even the said affidavit shows contradictions. Firstly, the alleged Will was alleged to have been sworn at the residence of the said deceased testator and secondly in the absence of the alleged executor Advocate Prasad Tendolkar at the said venue. The said attesting witness after designating the “*Testator's Residence*” as the venue for the execution of the Will had written home address on the first page of the affidavit but had also self attested with her signature at the foot of the page.

14. It is submitted that after getting the first affidavit notarised, the said alleged attesting witness affirmed second affidavit in lieu of

examination in chief of the plaintiff's witness dated 06.05.2015. In the second affidavit, there were two distinctive amendments. The venue of execution of Will was changed to "*Baria Mansion Office*" and secondly "*alleged executor Prasad Tendolkar's Presence*" at the said venue was added. She submits that two self contradictory affidavits were filed together and were submitted to this Court on 06.05.2015 by the plaintiff. However, a copy of the said affidavit was served upon the caveator on the same day. It is submitted that the affidavit filed by the alleged second attesting witness was counter signed by the said alleged attesting witness herself, Advocate for the plaintiff Sanjay Gawde who has filed Vakalatnama for the plaintiff. The contradiction about the execution of the venue was however not rectified. She submits that such contradiction could not be considered as a bonafide mistake or a typographical error as sought to be canvassed by the plaintiff in their Chamber Summons No.191 of 2017.

15. Defendant no.2 placed reliance on the order dated 12.10.2017 passed by this Court in the said Chamber Summons. She submits that two separate venues are reflected in the two affidavits filed by the alleged attesting witness for the execution of the alleged Will itself creates suspicious circumstance. She submits that the affidavit of evidence filed by the said Mrs. Ruchika Tendolkar , the Chartered Accountant by profession and wife of the plaintiff is absolutely false and cannot be considered by this Court. She submits that the plaintiff and his witnesses filed a third affidavit in Chamber Summons No.191 of 2017 to rectify unacceptable discrepancies reflected in earlier two affidavits. The alleged presence of the plaintiff

at the venue at the time of the alleged execution of the Will was not added by the said Mrs. Ruchika Tendolkar in third affidavit of attesting witness dated 18.09.2017. According to the earlier two affidavits filed in these proceedings by the said Ruchika Tendolkar the absence of the plaintiff was identified in two earlier affidavits.

16. It is submitted by the defendant no.2 that in her cross examination the said Ruchika Tendolkar acknowledged that out of her three affidavits dated 25.04.2005, 06.05.2015 and 18.09.2017, the affidavit dated 06.05.2015 was the right one. She placed reliance on the order dated 22.11.2017 passed by this Court. It is submitted that the plaintiff's Advocate insisted in adding the fourth affidavit namely "*Additional Affidavit in lieu of examination of plaintiff's witness*" in the compilation of documents inspite of this court having disallowed any of the additional affidavit by order dated 29.09.2017. This Court had admitted only one additional affidavit of attesting witness by order dated 12.10.2017.

17. The said Ruchika Tendolkar in her cross examination stated that her father in law was practicing at their Baria Mansion office till six to seven years back. In the evidence, she has deposed that her father in law Advocate T. S. Tendolkar was regularly attending Baria Mansion Office till 2009-2010. Advocate T. S. Tendolkar himself stated in his cross examination on 13.07.2017, that he attended Baria Mansion Office only two to three years back. She placed reliance on the affidavit submitted by Advocate T. S. Tendolkar jointly affirmed along with the plaintiff which was submitted to the Bar Council of

Maharashtra and Goa dated 30.04.2008. The said affidavit was affirmed just 75 days prior to the date of filing probate petition. Advocate T.S. Tendolkar had stopped coming to Baria Mansion office after 1998 due to heart surgery, old age and due to their office being on the third floor without lift.

18. It is submitted that the plaintiff in his cross examination stated in affidavit before the Bar Council of Maharashtra and Goa in very casual manner. She submits that this is serious case of perjury violating Sections 191 and 193 of IPC, by the plaintiff and his father. It is submitted that the plaintiff as well as his father were reluctant to show any alleged Will to the caveatrixes though they were daughters of the said deceased. The defendants had not seen the alleged Will document till 2008. This is also one of the serious surrounding circumstance. It is submitted that the different place of venue mentioned at which the alleged Will was executed itself would show the clear case of falsity and contradictions in the case of the plaintiff causes suspicious surrounding suspicious circumstance. She submits that on the date of alleged Will, the said deceased was 66 years old and the father of the Plaintiff was 80 years old having heart ailment could not have been asked to climb third floor of their Baria Mansion office without a lift. The entire case is based on falsehood.

19. It is submitted that when the plaintiff and his wife were asked questions in the cross examination separately as to the time of the day when the Will was allegedly executed at their office, both witnesses failed to remember the time during the day which also shows a

suspicious circumstance. It is submitted that in the cross examination of Mrs. Ruchika Tendolkar, she remembered that 21.10.2006 was a Laxmi Puja Diwali and public holiday and whereas the plaintiff deposed that he had no idea whether it was Laxmi Puja Diwali or public holiday on the date of the execution of the alleged Will. There was vast contradiction in the evidence of the plaintiff and his wife who claims to be one of the attesting witnesses.

20. It is submitted by the defendant no.2 that the MOU dated 20.09.2006 was duly signed by the parties. The said MOU was drafted by Rajiv Datta and signed by all the legal heirs and also by the said deceased Rebendra Datta, confirming that the flat bearing No.13, Mistry Park, Bhulabhai Desai Road, Mumbai, was entirely in the name of the deceased Rebendra Datta. However in the alleged Will of the mother of the caveator, it was stated that 50% of the said flat was nominated by Mrs. Catherine Datta to Rajiv Datta. In the MOU, it was stated that Mrs. Catherine Datta and Diana Virwani should get flat No. 105, New Pavan Vihar, Bandra, Mumbai, however the alleged Will of the mother states that Diana Virwani was disowned by Mrs. Catherine Datta. She submits that Rajiv Datta had hidden the alleged Will of the mother from his father and the caveatrixes till the end. The said Rajiv Datta was not examined as a witness.

21. It is submitted that the alleged Will of Mrs. Catherine Datta was suppressed by Advocate T. S. Tendolkar and Rajiv Datta from the said deceased Rebendra Datta, the father of the caveatrixes and Rajiv Datta, since 1997. She submitted that the statements made by

Advocate Prasad Tendolkar and his wife that it was Mr. Rebendra Datta who informed them about the Will of Mrs. Catherine Datta in the third week of September, 2006 is totally false. The father of the plaintiff himself admitted that he has personally collected the alleged Will from the office of the Registrar in January, 1997 itself and was already aware of the said Will of Mrs. Catherine Datta. She submits that the father of the plaintiff not informing the plaintiff about he being appointed as an executor for ten long years itself creates suspicious in execution of the alleged Will.

22. It is submitted that Ruchika Tendolkar in her affidavit stated that her father in law was also present in their office in September, 2006, when the said deceased Rebendra Datta came to visit them and talk about the alleged Will of mother of the caveator and Mr. Rebendra Datta desired to make a Will document for himself. It is submitted that if the father of the Plaintiff was present in the office when the deceased had attended then the father of the plaintiff would not have kept quiet and would have conveyed the information of the existence of the alleged Will of the mother to the plaintiff ten years earlier. The said Advocate Mr. T. S. Tendolkar who claims to be witness to the alleged Will of the mother in December, 1996 in the office of Registrar and had allegedly picked up the original copy of the Will from the office of Registrar in January, 1997.

23. It is submitted that if the plaintiff was a genuine executor of the Will of the mother, he could have asked Mr. Rebendra Datta for the copy of the alleged Will of the mother in third week of September,

2006 and could have initiated probate proceedings. Not having filed probate proceedings for several years itself creates suspicious surrounding circumstance. It is submitted that in the month of April, 2008 the fabrication of the Will of the father was still under process. Since September, 2008, none of the daughters were shown the alleged Will document. Neither the plaintiff nor Advocate Mr. Damle showed the alleged Will of the father to the caveator till September, 2008. It is submitted that the plaintiff admitted before this Court that he had never given notice to the caveatrixes, daughters of the said deceased before opening the alleged Will document. The plaintiff falsely stated that after the death of the said deceased Rebendra Datta, the alleged Will was in possession of his father Advocate T. S. Tendolkar from 21.10.2006 to April, 2007. He also admitted that his father was also aware of demise of Rebendra Datta. He deposed that he did not know if the caveator has seen the Will document till April, 2007. The plaintiff stated that he had handed over the Will document to Advocate Damle in order to get the Will probated.

24. It is submitted that after the demise of the said deceased father, one of the caveatrixes i.e. Mrs. Seema Parab had applied to the Mistry Park Society on 04.12.2006 for transfer of flat No.13, in the said society in the name of four children as per nomination form submitted by the said deceased father. It is submitted that however after one month, the Chairman of the society informed the said Seema Parab that Rajiv Datta had informed the society office about the existence of the alleged Will of the deceased Mr. Rebendra Datta. It is submitted that except caveatrixes all other persons were aware of the

alleged Will document. It is submitted that the caveatrixes had called upon Advocate Mr. Damle, through their Advocate's notice for a copy of the alleged Will. The caveatrixes, however, were not furnished a copy of the alleged Will for a period of 22 months from October, 2006 till September, 2008.

25. It is submitted that the said deceased father of the caveatrixes expired within seven days from the date of execution of the alleged Will. The plaintiff, his wife, and his father as per their own claim had pre decided the date of execution of the Will ought to have called the doctor during the execution of the alleged Will of the father of the caveatrixes. It is submitted that the alleged Will document shows the witnesses signature column before/above the testator on the fourth page of the alleged Will cannot be considered as mistake. The plaintiff and his father, both are professional Advocates could have easily pasted a wrong draft on the last page of the Will. This circumstance also shows that the Will was surrounded by suspicious circumstance. It is submitted that the evidence of Ruchika Tendolkar that the witness column was not above but along side the name of the testator is *ex facie* false. The reliance is placed on Section 63(B) of the Indian Succession Act, 1925 in support of his submission that the mark of the testator or signature of the person signing shall be placed that it shall appear where it was intended thereby to give effect.

26. It is submitted that the father of the said deceased wanted to change his nomination in the records of the society. As alleged in the alleged Will, the said deceased could have filed a fresh nomination

form instead of writing a letter to the Society for cancelling his previous nomination. This is also one of the suspicious circumstances. It is submitted that in the schedule appended to the Testamentary Petition, the plaintiff had listed Maya Enclave, Pune property without verifying the property documents. In the alleged Will, the said deceased had named Rebendra Datta as owner of Maya Enclave Pune property. The plaintiff and his wife were already aware of fact that Rajiv Datta did not own the said Maya Enclave Pune property. Mrs. Ruchika Tendolkar who had alleged to have drafted the Will had listed the said Pune property in the Will. In the cross examination, the plaintiff stated that inclusion of Maya Enclave Pune property in the schedule was merely his general assumption. It is submitted that this fact itself indicates that the said deceased was not aware of the contents of the alleged Will. This fact itself would indicate that the said deceased was not of sound and disposing mind on the date of the execution of the alleged Will.

27. Reliance is placed on the judgment of this Court in the case of *Mr. Idrian Bryan Lobo Vs Mrs. Creesie S. Vaz* delivered on 10.10.2017 in Testamentary Suit No.61 of 1989, in support of the submission that onus lies on the propounder of the Will that the said Will was validly executed, the testator had understood the contents of the document to which he had to put his signature and that he did so in his own volition. Any legitimate doubts raised in the mind of the Court with regard to the validity of the execution of the Will must also be put to rest by the propounder independent of whether any accusations made by any caveator or not. The plaintiff had failed to dispel

suspicious surrounding circumstances by leading appropriate evidence. It is submitted that the Plaintiff has totally failed to dispel several suspicious circumstances pointed out by the caveatrixes .

28. Reliance is placed on the judgment of Delhi High Court in the case of *Satish Chander Sabharwal and others* in support of the submission that if there are suspicious circumstances in execution of the Will or no doubt is created on the veracity of Will and if there are glaring contradictions and discrepancies in evidence of witnesses of the plaintiff, Will cannot be probated by the testamentary Court. She submitted that in view of false evidence on oath led by the plaintiff and his witnesses, an action under Sections 191 and 193 of the IPC shall be initiated against the plaintiff and his witnesses.

29. Mr. Kanade, learned counsel for the plaintiff in rejoinder submitted that there is no substance in these submissions made by the caveatrixes . The plaintiff has already proved the alleged execution of the Will left by the said deceased; whereas the caveatrixes have failed to discharge the onus cast upon them. He submitted that the Court be pleased to grant probate in respect of the said Will.

30. I shall consider all the issues together as the same are interlinked and can be conveniently considered based on the evidence on record which would be common to all these issues.

31. It is not in dispute that the plaintiff examined himself and Mrs. Ruchika Tendolkar, who was one of the alleged attesting witnesses. The defendants, however, did not examine any witness in this matter.

32. A perusal of the alleged Will dated 21.10.2006 of Mr. Rebendra Narayan Datta, who was the father of Rajiv Datta and three caveatrixes, indicates that at the time of the alleged execution of the said Will, the said Mr. Rebendra Narayan Datta had completed 66 years of age. Under the said Will, the said deceased allegedly appointed the plaintiff as an executor. The said alleged Will is allegedly attested by the father and the wife of the plaintiff. The said Will was not registered.

33. The deceased expired on 28.10.2006. The testamentary petition was filed by the plaintiff herein on 16th July, 2008. The plaintiff has not explained any delay in filing the testamentary petition, *inter alia*, praying for grant of probate in respect of the alleged Will in the said testamentary petition at all.

34. The first alleged attesting witness Mrs Ruchika Tendolkar did not file the affidavit of attesting witness along with the testamentary petition, but filed such an affidavit only on 25 April 2015. In her affidavit, she alleged that on 21st October, 2006, she was present together with Mr. T.S. Tendolkar, at the residence of the deceased and had fixed her signatures as an

attesting witness.

35. The said Mrs. Ruchika Tendolkar filed an affidavit-in-lieu of examination-in-chief dated 6th May, 2015. In her said affidavit, she deposed that the said deceased used to regularly visit the office at R. 52/53, Baria Mansion, Opp. Crawford Market, 138, L.T. Road, Mumbai 400 003. The said deceased used to consult her father-in-law in matters relating to taxation and other legal issues. The said witness is a Chartered Accountant. She deposed that she used to assist her father-in-law in the said office over a period of time since 1989 and during that time she became familiar and acquainted of the said deceased and his family.

36. The said witness further deposed in her deposition that in third week of September, 2006, the deceased had come to the said office of her father-in-law and expressed his desire of preparing a Will and requested her father-in-law and the witness to stand as attesting witnesses to the proposed Will. He also expressed his desire to appoint the plaintiff as an executor. The said Will was, accordingly, prepared as per the instructions of the deceased.

37. In paragraph 3 of the affidavit, she deposed that on 21/10/2006, she along with her father-in-law, were present in the Office at R. 52/53, Baria Mansion, Opp. Crawford Market, 138, L.T. Road, Mumbai 400 003. The said deceased read the Will

and confirmed that the contents thereof were in accordance with her instructions, in her presence. The said Will was, thereafter, signed by the said deceased and witnessed by her and her father-in-law.

38. In paragraph 5 of the said affidavit, she deposed that the said deceased was in her perception of sound and disposing mind, memory and understanding and to the best of her belief had made, and published the said deed as of his free will and pleasure.

39. On 18.9.2017, she filed an additional affidavit-in-lieu of examination-in-chief. In paragraph 2 of the said affidavit-in-lieu of examination-in-chief, she alleged that in paragraph 2 of the affidavit dated 25th April, 2015, it had been mentioned that on 21st October, 2006 she was present together with her father-in-law Mr. T.S. Tendolkar, at the residence of the deceased.

40. In paragraph 3 of the said affidavit, she deposed that on 21.10.2006, she was present along with her father-in-law in his office at R. 52/53, Baria Mansion, Opp. Crawford Market, 138, L.T. Road, Mumbai 400 003 and not at the residence of the deceased. She had allegedly missed noticing the said statement mentioned in paragraph 2 of the affidavit dated 25th April, 2015. She deposed that the said statement was made inadvertently and there was a bonafide mistake.

41. In the said affidavit-in-lieu of examination-in-chief she also deposed for the first time that the plaintiff was also present on 21st October, 2006, along with her and her father-in-law, in the Office of her father-in-law. This witness was cross examined by Mrs. Dina R. Datta, defendant No.2 in the testamentary suit and one of the caveatrixes . The said witness was confronted with her statements made in the affidavits dated 25th April, 2015, 6th May, 2015 and 18th September, 2017 and was asked as to which of the two statements i.e. the statement made in the affidavit dated 25th April, 2015 or the statement made in the affidavit dated 6th May, 2015 were correct about the presence of the said witness at the residence of the said deceased or in the office of her father-in-law on the date of the alleged execution of the Will, the witness clarified that the statement made in the affidavit dated 6th May, 2015 was correct. All those persons were present in the office of the father-in-law of the witness.

42. In reply to question No.2, the witness answered that her father-in-law Mr. T.S. Tendolkar stopped practising law and also attending the office about 6 to 7 years back. In reply to question no.3, the said witness deposed that in the third week of September, 2006, when the said deceased had come to the office of the father-in-law of the said witness, she herself, her father-in-law, and her husband Mr. Prasad Tendolkar were present in the office and she made a request to the said witness and her father-in-law to be the attesting witnesses to the proposed Will.

43. In reply to question no.9, when the witness was asked whether her office was working on Laxmi Pujan day, she deposed that usually that depended on the work at hand. She further deposed that the said deceased usually resided at Bandra and it was possible that he would have come on a Diwali day and sought an appointment for execution of the Will. When the witness was asked whether it was because he was to leave immediately that he had come to your office on the Diwali day for signing the Will, the witness deposed that she did not remember this.

44. When the witness was asked as to why doctor was not present in the office when the Will was executed, the witness deposed that she had no idea. He might have not thought of bringing a doctor along with them at the time of execution of the Will. She did not inform the said deceased that a doctor should be present at the time of execution of the Will. She did not remember the time of the day when the Will was allegedly executed, according to the witness.

45. The plaintiff also filed his affidavit-in-lieu of examination-in-chief dated 8th June, 2015. In paragraph 5 of his affidavit, the said witness deposed that in the third week of September, 2006, the deceased had come to his office to meet him. At that time, the deceased expressed his desire of preparing his Will and as he was already named as an executor in the Will

dated 16.10.1996 of the wife of the said deceased, he requested the plaintiff to stand as an executor to his proposed Will. The said Will was prepared as per the instructions of the deceased.

46. In para 5 itself, he further deposed that on 21st October, 2006, he along with his father and wife were present in the office of his father Mr. T.S. Tendolkar and on that day, in his presence, the deceased read the Will and confirmed that the contents thereof were in accordance with his instructions. The said Will was, thereafter, signed by the said deceased and two attesting witnesses i.e. the father and the wife of the plaintiff. The plaintiff was also personally present at the time of execution of the said alleged Will.

46. In paragraph 6 of the said affidavit, he deposed that the said deceased had expressed his desire to have the Will registered just as the Will of his wife was registered and expressed that the said Will shall be registered after his return from Baroda where he was working and after taking suitable appointment in the Registration Office. The said deceased allegedly gave the said Will after signing it, to his father till the same would get registered. The said deceased, however, suddenly passed away within a week, on 28.10.2006 in Baroda, after suffering from a sudden massive cardiac arrest.

47. In paragraph 8 of the said affidavit, the said witness

deposed that after receiving the said Will from his father Mr. T.S. Tendolkar, he issued a notice dated 27th April, 2007 through Advocate Mr. Atul Damle to all the legal heirs of the deceased informing about the Will and requested to pay the charges for payment of court fees and expenses towards obtaining probate of the said alleged Will. The said letter was replied by Mrs. Rebecca Dey. Court fees and expenses were paid to the witness.

48. The plaintiff was cross examined by the defendant No.2. The said witness admitted that he had not sent any official communication to any of the daughters of the said deceased at the time of opening of the packet containing the alleged Will. When the said witness was asked as to who was in possession of the said Will of the said deceased for 22 months after his death, the plaintiff replied that his father was in possession of the said Will. He volunteered that he did not think that it was for 22 months. It was for about 7 months.

49. When the witness was asked as to when the caveatrixes got to see the Will according to the plaintiff, he replied that he had no idea. He further replied that the said Will was handed over to him in April, 2007 and till then it was in possession of his father. His father was aware that the said deceased expired in the month of October, 2006.

50. In response to the question as to whether there was

any reason why his father did not give the Will to the plaintiff any time before April, 2007, the plaintiff replied that till around April, 2007 the relations in the family were good and the probate proceedings, both in the cases of the Will of Mrs. Datta and Mr. Datta commenced around April, 2007. That was the time when the plaintiff collected the Will from his father. He deposed that it was only when the said deceased came to the office in September 2006 for executing his Will, the plaintiff came to know about the Will executed of his wife Mrs. Datta. The said deceased mentioned to the plaintiff that he was appointed as an executor of last will and testament of his deceased wife.

51. When the witness was asked whether he could tell the Court as to why Mr. Rajiv Datta, the brother of the caveatrixes, was informed about the Will two months after the death of the deceased, the witness replied that he could not say why.

52. In response to a question as to why the medical doctor was not called at the time of execution of the Will, the plaintiff answered that when the said deceased came for executing the Will, he appeared to be in good health.

53. In response to question no.16, when the witness was asked as to how frequently his father visited the office around that time, he replied that he did not remember exactly, but might be three or four times a week. When the witness was confronted with

the reply given by his father to the Bar Council in reply to a complaint (D.C.No.45 of 2008) stating that as a result of his old age and ill-health, he had stopped attending his office and carrying out legal work since the year 1998, since the office did not have a lift, what the witness had to say about such reply given by his father, the plaintiff replied that prior to his bypass surgery in the year 1998, he was attending the office regularly and after his father's bypass surgery he was attending the office twice or thrice a week.

54. When the attention of the plaintiff was invited to his statement made before the Bar Council that his father had stopped attending legal work which reply was given in the year 2008, what he had to say about the same, the witness deposed that he thought that it was mentioned in a casual manner. He was in fact attending office occasionally at least till the years 2009-2010.

55. In response to question no.23, according to the witness his father had given the Will to the plaintiff in April, 2007 and he held it thereafter, during this period who saw the said will, the witness answered that he did not remember. He further stated that he thought that it was handed over to Advocate Mr, Damle for probate work in April, 2007.

56. In reply to question no.27, when he was asked the time of the day of 21.10.2006, when the Will was executed,

according to the plaintiff, he did not remember. When was asked whether it was Laxmi Pujan day, he replied that he did not remember. He replied that the Will was allegedly drafted by his wife Mrs. Ruchika Tendolkar.

57. When the witness was asked how the property at Maya Enclave, Pune belonging to the deceased was included in Schedule 1 of the petition, the witness answered that he thought that the property was mentioned in the Will itself. He did not check whether the property included was there or not. When the witness was asked how he had written in the petition that it was a self occupied property, he replied that he only assumed that it would be self occupied. It was just a general assumption. He did not find it necessary to know the correct position before including it in the schedule.

58. In response to question no.35, attention of the witness was invited to Schedule 1 of the petition wherein he had mentioned about the Bandra flat fetching a rent of Rs.22,000/- per month in the year 2008, and was asked whether he told the Court who signed the lease agreement and who was collecting the rent, the witness answered that he did not know about signing of the lease agreement or collection of the rent and the figure of Rs.22,000/- might have come from the information given by Mr. Rajv Datta, son of the deceased. He did not have knowledge whether Rajiv Datta was collecting the rent.

59. When the witness was asked to explain the delay of 22 months from the date of death of the deceased and filing of the petition, he deposed that the entire process started in April, 2007 and in April, 2008, he had filed the petition for probate.

60. A perusal of the affidavit of the attesting witness dated 25th April, 2015, filed by Mrs. Ruchika Tendolkar, the alleged attesting witness clearly indicates in paragraph 2 of the said affidavit which was filed on 25th April, 2015, that though the testamentary petition was filed in the year 2008, it was mentioned that on 21.10.2006 she was present together with her father-in-law at the residence of the deceased where the alleged Will was executed. After more than 2 years and 5 months, the said Mrs. Ruchika Tendolkar filed an additional affidavit of attesting witness and alleged that on 21.10.2006, she was present along with her father-in-law at his office, and not the residence of the deceased. She had noticed the said statement mentioned in para 2 of the affidavit dated 25.4.2015, in her affidavit in lieu of examination in chief dated 6.5.2015, alleged that on 21.10.2006, she along with her father-in-law and her husband were present in the Office of her father-in-law. In the earlier affidavit, filed by her she had stated that her husband was also present in the office of her father-in-law when the said Will was allegedly executed. In her affidavit-in-lieu of examination-in-chief dated 18.9.2017, she alleged that in the evidence of attesting witness dated 25.4.2015, it was

inadvertently mentioned that she, along with her father-in-law were present at the residence of the said deceased on 21.10.2006.

61. In the earlier affidavit filed by her, she had not alleged that her husband was also present at the time of the alleged execution of the said alleged Will on 19.9.2017 when said Mrs. Ruchika Tendolkar was present before this Court for recording her evidence. When the witness was shown her affidavit dated 6.5.2015 and the additional affidavit dated 18.9.2017 and was asked whether contents of the affidavits were true and correct, she answered in the affirmative. In her cross examination, she clarified that her statement made in the affidavit dated 6.5.2015 was correct.

62. A perusal of the cross examination of PW.1 clearly indicates that she admitted that her father-in-law had stopped attending office and practising law about 6 to 7 years back. In the third week of September, 2006, the said deceased had allegedly requested her and her father-in-law to be the attesting witnesses to the proposed Will, when the plaintiff was also present. There was no reference to the presence of the plaintiff in the month of September 2006 even in the affidavit of evidence filed by the plaintiff himself.

63. In the affidavit of evidence filed by the plaintiff, he deposed that in the third week of September, 2006, the said

deceased had come to his office to meet him and at that time the deceased expressed his desire of preparing a Will as the plaintiff was already named as an executor in the said Will dated 16.10.1996 of the wife of the said deceased. He also requested the plaintiff to stand as an executor to the said proposed Will. The same was then prepared as per the instructions of the said deceased. The plaintiff did not depose in his affidavit-in-evidence as to whether the said Will was prepared by him. He also did not mention about the alleged presence of his wife in third week of September, 2006. The said deceased had allegedly visited his father's office to meet him. He also did not mention about the alleged presence of his wife Mrs. Ruchika Tendolkar, or his father when the said deceased alleged to have visited the office in the third week of September, 2006.

64. Cross examination of PW.1, on the other hand, indicates that it was in her deposition that in the third week of September 2006 when the deceased had come to the office of her father-in-law, the said witness, her father-in-law, and that person were present in the office when the said deceased made a request to the said witness and her father-in-law to be the attesting witnesses to the proposed Will. There is total inconsistency in the evidence of the plaintiff and his wife (PW.1).

65. In reply to question no.6, PW. 1 deposed that she had prepared a manuscript of the Will. The evidence of the plaintiff

does not indicate that it was the case of the plaintiff that a request was made by the said deceased to PW.1 to draft the Will. The plaintiff did not even remember as to whether the said Will was allegedly executed on the Laxmi Pujan day.

66. The plaintiff was confronted with the reply filed by the plaintiff along with his father to the complaint filed by one of the caveatrixes before the Bar Council stating that the father of the plaintiff due to his old age and also due to bypass surgery which took place in 1998, he had stopped practising and stopped attending his office at Baria Mansion, as the same was located on the third floor of that building. The said witness answered that the said answer must have been given in a casual way. The plaintiff was also a signatory to the said reply to the complaint filed by one of the caveatrixes, to the Bar Council. There is inconsistency in the evidence of the plaintiff, as well as PW.1 on the issue as to whether the father of the plaintiff was practising and was attending office at the time of the alleged execution of the Will and also reply given by the plaintiff and his father to the complaint filed by one of the caveatrixes before Bar Council. PW.1 deposed before this Court that what was stated by her in the affidavits dated 6.5.2015 and 18.9.2017 was correct.

67. A perusal of the record clearly indicates that the affidavit of the attesting witness which was required to be filed along with the testamentary petition under Rule 374 and 389 of

the Bombay High Court (OS) Rules, was admittedly not filed by the said alleged attesting witness along with the Petition, but was filed only in the year 2015.

68. There is serious discrepancy and contradiction in the two affidavits filed by PW.1 about the place of the alleged execution of the Will which creates suspicious surrounding circumstance in execution of the alleged Will. Contradictory statements made by the plaintiff and her husband in the evidence and in the reply to the Bar Council by the plaintiff and his father also shows surrounding suspicious circumstance in executing the Will by the said deceased in the office of the father of the plaintiff. Execution of the alleged Will on the day of Laxmi Pujan itself would show the suspicious circumstance when there was no urgency allegedly expressed by the said deceased even according to the plaintiff. A perusal of the record further indicates that said Mrs. Ruchika Tendolkar, after getting the first affidavit notarized, affirmed the second affidavit-in-lieu of examination-in-chief dated 6.5.2015. In the second affidavit, she introduced two amendments i.e. first about the venue of the execution of the Will changed from the residence of the said deceased to the Office of the father-in-law of the witness. Secondly about the presence of the husband of the plaintiff at the venue on the date of alleged execution of the Will.

69. In my view, the alleged contradictions in the

affidavits filed by PW.1 about the venue of the execution the alleged Will cannot be considered as a bonafide mistake or an inadvertent error. The falsehood in the case of the plaintiff is apparent. The affidavits of evidence filed by the plaintiff, as well as by his wife, are *ex facie* false and cannot be believed by this Court.

70. The story of the plaintiff that the copy of the alleged Will was given by the deceased, to the father of the plaintiff for about 7 months and thereafter, the said Will was handed over to the plaintiff in the month of April, 2007, is *ex facie* false. The plaintiff has deposed that only in the month of April, 2007 he collected the Will from his father. The Will was, allegedly thereafter, handed over to Advocate Mr. Atul Damle in the month of April, 2007 itself. The plaintiff has not explained the delay even from the month of April till July 2008.

71. The plaintiff admittedly did not show the alleged Will to the caveatrixes, though the caveatrixes were the daughters of the said deceased. The plaintiff also admitted that he had not sent any official communication to any of the caveatrixes at the time of opening of the packet containing the alleged Will. He did not have any idea as to when the caveatrixes got the said alleged Will. The plaintiff and his wife were asked specifically to tell the Court the time of the day when the Will was allegedly executed at the office of the father of the witness, the witness failed to tell the

time of the day of the alleged execution of the Will, which itself shows the suspicious circumstance. It has come on record that the father of the plaintiff was about 80 years old having heart ailment and could not have been asked to climb third floor of their Baria Mansion office without a lift.

72. This Court in the case of case of **Mr. Idrian Bryan Lobo Vs Mrs. Creesie S. Vaz** in the Judgment delivered on 10.10.2017 in Testamentary Suit No.61 of 1989, has dealt with the onus casts on the propounder of the Will that the same was validly executed and that the testator had understood the contents of the document to which he had to put his signature and that he did so in his own volition. If any legitimate doubts raised in the mind of the Court with regard to the validity of the execution of the Will, must also be put to rest by the propounder independent of whether any accusations made by any caveator or not.

73. In my view, since there are several suspicious circumstances surrounded in execution of the Will which has created doubt on the veracity of the Will, and since there are glaring contradictions and discrepancies in the evidence of the witnesses of the plaintiff, such a Will cannot be probated by the Testamentary Court. The onus was on the plaintiff to dispel all the suspicious circumstances created in the mind of the Court by the defendants, which onus the plaintiff has failed to discharge. A perusal of the record clearly indicates that the plaintiff, his father

and his wife who had claimed to be the consultants of the deceased, have colluded together in forging and fabricating the Will of the deceased.

74. Though none of the defendants have stepped into the witness box in this case, by cross examining the witnesses examined by the plaintiff, they have totally shattered the case of the plaintiff and have proved that the alleged Will was surrounded by various suspicious circumstances and is forged and fabricated. The evidence led by the plaintiff does not inspire confidence and, thus, cannot be accepted by this Court.

75. In so far as the submission of Mr. Kanade, learned counsel for the plaintiff that in so far as issues No.3, 4 and 5 are concerned, the onus was on the defendants to prove that the alleged Will was fraudulent, forged or was procured by undue influence and coercion is concerned, in my view, the defendants have discharged the onus by shattering the evidence of the witnesses examined by plaintiff.

76. In so far as issue no.5 is concerned, since the plaintiff has failed to prove execution of the alleged Will dated 21.10.2006, and whether plaintiff proved that the deceased was of sound and disposing state of mind, memory and undertaking on the date of the execution of the alleged Will and has failed to dispel the suspicious surrounding circumstances, the plaintiff has failed to

discharge the burden cast on him in respect of those issues. Since the plaintiff has failed to discharge the onus in so far as issues no.1 and 2 are concerned, the defendants are not liable to prove that the Will was procured by undue influence of coercion.

77. In so far as the submission of Mr. Kanade, learned Counsel for the plaintiff that there was no cross examination of the deposition of the attesting witness who has deposed that she had witnessed the Will along with her father-in-law is concerned, there is no merit in this submission of the learned counsel for the plaintiff. The evidence of the alleged attesting witness is *ex facie* false and contradictory. She was extensively cross examined by defendant No.2. In my view, there is no substance in the submission of the learned Counsel for the plaintiff that there are no suspicious circumstances which affect the validity of the Will in question.

78. In so far as issues no.1 and 2 are concerned, the same are answered in the negative. In so far as issues no.3 and 4 are concerned, the same are answered in the affirmative. In so far as issue no.5 is concerned, since the plaintiff has failed to prove execution of such a Will which was surrounded by suspicious circumstances, the defendants were not required to prove issue no.5. Issue no. 5 does not survive and is answered accordingly.

79. I have perused the provisions of the Indian

Registration Act and also the Maharashtra Registration Manual, Part I, relied upon by the caveatrixes in support of their submission that the alleged Will propounded by the plaintiff which was allegedly registered with the Registrar of Assurance and collection of the alleged original Will by the father of the plaintiff is *ex facie* in violation of those provisions already referred to aforesaid. In find substance in the submission made by the defendant no.2.

80. I, there, pass the following order :

Testamentary Suit No. 58/2009 is dismissed with costs. The plaintiff is directed to pay costs of Rs.1,00,000/- to the defendants within two weeks from today.

(R.D. Dhanuka, J.)