

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**TESTAMENTARY AND INTESTATE JURISDICTION**

TESTAMENTARY SUIT NO. 45 OF 2004  
IN  
TESTAMENTARY PETITION NO. 514 OF 2004

Mahendra Gajanan Karve  
of Mumbai, Hind Inhabitant,  
Residing at Satyalaxmi CHS,  
Pestam Sagar, Road No.4, Chembur,  
Mumbai 400 089.

Plaintiff.

Vs.

Jitendra Gajanan Karve,  
Aged Adult, son of the deceased,  
residence at Prabhat,  
Shree Dattaguru CHS, Type -C 64. Room No.4,  
Sector New Panvel, District Raigad.

...Defendant.

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Mr. Abhijit A.Desai I/by Jaydeep A Shringare for the Plaintiff.  
Mr.Shrinivas Bhawe along with Ms.Sunayna Kashid I/by Bhawe &  
Co.for the Defendant.

**CORAM : R. D. DHANUKA, J.**  
**DATE : Reserved on 20<sup>th</sup> Feb. 2019**  
**Pronounced on 5<sup>th</sup> March, 2019**

**JUDGMENT :**

1. By this testamentary suit which is converted from Testamentary Petition No.514 of 2004, the plaintiff (original petitioner) seeks Letters of Administration with or without Will annexed in respect of the property and credits of the deceased Mr. Gajanan Vishnu Karve who expired on 3.8.2003. 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 Mr.Gajanan Vishnu Karve had executed Will in Mumbai on 8.11.2000.The said deceased died leaving behind him 1) Mr. Mahendra Gajanan Karve-son, 2) Shri. Jayant Gajanan Karve-son, 3) Shri. Jitendra Gajanan Karvwe-son, 4) Smt. Prabha Laxmanrao Raikwar and 5) Smt. Ramita Ravindra Prasade- married daughters. The mother, father and wife of the said deceased predeceased to the deceased. During the pendency of the Testamentary Petition, Shri. Jayant Gajanan Karve expired leaving behind him four legal heirs and next of kins whose names are given in Paragraph-9 of the petition by seeking amendment to the said paragraph after demise of the said Jayant

Gajanan Karve.

3. It is the case of the plaintiff that the said deceased had executed the said Will dated 8.11. 2000 in Marathi which was duly witnessed Mr. Shri. R.S. Bansod and Mrs.Geeta Chandrakant Pawar. The plaintiff filed the Testamentary Petition No.514 of 2004 on 28.6.2004 inter alia praying for Letters of Administration of the Will in respect of the property and the credits of the said deceased in this regard. The plaintiff who was one of the beneficiary of the said Will and one of the legal heir of the said deceased filed an affidavit of one of the attesting witness Mr. Rajesh S. Bansod dated 28.6.2004 along with the said Testamentary Petition. He also filed an affidavit of the second attesting witness Smt. Geeta Chandrakant Pawar along with the Testamentary Petition. Both these witnesses and their said affidavits stated that both of them were present when the said deceased had executed the said Will and the said deceased had signed the said Will in their presence. Signature of the said deceased was witnessed by them.

4. The plaintiff also filed consent affidavit dated 6.9.2004 of one of the son Mr. Jayant Gajanan Karve and of the married daughter namely Smt. Prabha L. Raikwar dated 10.9.2004 giving full and free consent for grant of Letters of Administration with the Will annexed in favour of the petitioner without service of any citation/notice or without justifying any surety in respect of their share in the estate of the said deceased. The citation was served upon the remaining legal heirs of the said deceased. Only Mr. Jitendra Gajanan Karve one of the son of the said deceased signed the caveat dated 18.10,.2004 and affidavit in support of the caveat dated 25.10.2004 raising various issues in respect of the said will dated 8.11.2000 which would be dealt with in the later part of this Judgment. On 6.12.2007 this Court after hearing the parties framed following issues which are dealt with in the later part of the Judgment with conclusion thereon drawn by this Court.

The issues framed by this Court and the conclusions drawn thereon are as under.

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|-------------------------------------------------------------------------------------|---------------------|
| 1) Does the plaintiff proves that the deceased has executed a Will dated 8.11.2000? | In the affirmative. |
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- 2) Does the defendant proves that at the time of execution of the Will dated 8.11.2000 the deceased was not of sound mind, memory, understanding and physically unfit? In the negative.
- 3) Does the defendant proves that the execution of the Will was obtained by undue influence and by fraud and forcefully? In the negative.
- 4) What Order? As per operative part.

5. The plaintiff has also filed consent affidavit of Likhita Karve a grand daughter of late Jayant Gajanan Karve dated 13.2.2009 giving her full and free consent for grant of Letters of Administration in favour of the plaintiff without service of any citation or notice on her and without justifying the share in the estate of the said deceased. The plaintiff has also filed consent affidavit dated 13.2.2009 of Nalini Jayant Karve daughter-in-law of the said deceased giving free and full consent in favour of the plaintiff.

6. The plaintiff thereafter filed affidavit of documents and compilation of documents. The defendant also filed affidavit of documents and compilation of documents before this Court.

7. The plaintiff examined himself as P.W.No.1 and filed affidavit in lieu of examination in chief dated 25.1.2008. The plaintiff examined Smt. Geeta Chandrakant Pawar, one of the attesting witness (P.W.2) and also examined Mr. Harishchandra S. Lad (P.W.3). All these three witnesses were cross examined by the defendant's counsel. The defendant thereafter filed an affidavit in lieu of examination in chief dated 21.2.2012 and was cross examined by the plaintiff's counsel.

8. Mr. Abhijit Desai learned counsel for the plaintiff invited my attention to the various averments made in the Testamentary Petition which was converted into suit, the affidavit in support of the caveat filed by the defendant and various consent affidavits filed by other legal heirs of the deceased, the affidavit in lieu of examination-in-chief filed by the plaintiff and other witnesses examined by the plaintiff. He also invited my attention to the affidavit in lieu of examination in chief filed by the defendant and his cross examination. Learned counsel submits that the plaintiff had discharged burden cast upon him in so far as issue No.1 is concerned. He submits that the defendant has however failed to discharge burden cast on him in Issues Nos. 2 and 3.

9. In so far as Issue No.1 i.e. 'Does plaintiff prove that the deceased has executed a Will dated 8.11.2000?' is concerned, the learned counsel for the plaintiff invited my attention to the averments made in Paragraph 3 of the Testamentary Suit, the affidavits filed by the attesting witnesses Shri. Rajesh Bansod dated 28.6.2004 and Geeta Chandrakant Pawar dated 23.6.2004 stating in those affidavits about the execution of the Will by the said deceased in their presence and the attestation of the said Will by both the attesting witnesses in presence of the said deceased and in presence of each other. He submits that except the caveat and affidavit in support. of Mr. Jitendra Gajanan Karve, rest of the legal heirs have filed consent affidavits giving full and free consent in favour of the plaintiff for grant of letters of Administration in favour of the plaintiff.

10. The learned counsel for the plaintiff has invited my attention to the deposition of the plaintiff in affidavit in lieu of examination in chief dated 24.1.2008 and more particularly, Paragraph 5. He submits that the plaintiff has identified the signature of the said deceased Gajanan

Vishnu Karve in the said affidavit. The said deceased was staying with the plaintiff during his entire life. He also invited my attention to the cross examination of the plaintiff by the defendant. He submits that even during the cross examination of the plaintiff, no suggestion was put to the plaintiff that the Will was not executed by the said deceased or that the same was forged or fabricated. He submits that deposition of the plaintiff in the affidavit in lieu of examination in chief was not shattered in the cross examination by the defendant in so far as issue of execution of the Will is concerned.

11. The learned counsel for the plaintiff invited my attention to the affidavit in lieu of examination in chief dated 1.2.2008 filed by Geeta Chandrakant Pawar one of the attesting witness. He submits that the said witness in Paragraph 4 of the affidavit in lieu of examination in chief deposed that the said deceased had signed the said Will at 2.00 p.m. on 8.11.2000. The said witness has identified the signature of the said deceased on the said Will. The said deceased had written the said will in his own handwriting. The said witness identified the handwriting of the deceased on the said Will. The said witness further deposed that

at the time of execution of the said Will by the said deceased Mr. Rajesh S. Bansod was present along with her. The said deceased had signed the said Will in her presence and in presence of Mr. Rajesh S. Bansod. The said witness also identified the signature of the said deceased and the said witness Mr. Rajesh S. Bansod on the said Will.

12. The learned counsel for the plaintiff invited my attention to the cross examination of the said witness Smt. Geeta Chandrakant Pawar. It is submitted that the said witness in the cross examination deposed that at the time of execution of Will she was residing at Pestam Sagar Road No.4 Chember, Mumbai 400 089. She was called by the said deceased to act as witness for the said Will. She had gone to the house of the said deceased at 3.00 or 3.30 p.m. The persons present at that time were also Mr. Rajesh S. Bansod and the said deceased. The said Will was first signed by the said deceased and thereafter by the said witness Smt. Geeta Chandrakanrt Pawar and by Mr. Rajesh S. Bansod.

13. It is submitted that the said witness denied the suggestion put to her by the Advocate that the Will was already prepared and was kept ready and the said witness had not signed the said Will after the signature of the said deceased. He also denied the suggestion that the said will was brought to her for her signature by Mr. Mahendra Karve- the plaintiff at her house and she has signed the said Will at her house as witness. The said witness deposed that she was called by the deceased on 8.11.2000 himself and not any time prior to that date. The said witness also denied the suggestion that the said Will was prepared by the plaintiff or that she had signed as attesting witness at the instance of the plaintiff.

14. The learned counsel for the plaintiff invited my attention to the examination in chief of P.W.3, Mr. Harishchandra Lad who was Superintendent in the office of Mumbai District Legal Service Authority to prove the document which was marked X-6 which was subsequently marked as Exh.,D-4. The said document was issued to the deceased Mr.Gajanan Vishnu Karve by the said Mumbai District Legal Service Authority. The deceased had approached the said authority by making

a complaint that his son was harassing him.

15. The learned counsel for the plaintiff invited my attention to the affidavit in support of the caveat filed by the Advocate and would submit that in Paragraph 2 of the said affidavit, the Advocate has not disputed the execution of the said Will dated 8.11.2000 but alleged that the said deceased was about 76 years and was not of sound memory and understanding and physically unfit. He submits that in Para 2 it was alleged by the defendant that the execution of the Will was obtained by undue influence and also obtained by fraud and forcefully. It was further alleged in the said paragraph that after perusing the copy of the said letter it appears that the deceased had not approved the contents of the said Will. It is submitted that the defendant has thus not disputed the execution and attestation of the said Will. Be that as it may, the plaintiff has even otherwise proved the execution and its attestation of the said Will.

16. The learned counsel for the plaintiff has invited my attention to Paragraph Nos. 2 and 8 of the affidavit in lieu of examination in chief and would submit that even in the said affidavit in lieu of examination in

chief the defendant has admitted the execution of the said Will dated 8.11.2000 however, has only contended that the said deceased was not of sound mind, memory and understanding and was physically unfit for execution of the said Will. The defendant has also deposed in Paragraph 8 of the said affidavit in lieu of examination in chief that the said Will was prepared by the said deceased at the instance of the plaintiff and that the plaintiff has purposely included the immovable properties and excluded the movable properties like gold ornaments, share certificates and all other investments of the said deceased.

17. The learned counsel for the plaintiff has invited my attention to the cross examination of the defendant. He submits that the defendant has admitted in the cross examination that he had not filed any complaint against the plaintiff alleging fraud and coercion before any police station or any other proceedings. In reply to question No.11 this witness had admitted that cause of death of the said deceased was slipped disc.

18. In so far as Issue No.2 i.e. ' Does the defendant prove that at the time of execution of the Will dated 8.11.2000, the deceased was not

of sound mind, memory, understanding and physically unfit' is concerned, the learned counsel for the plaintiff has placed reliance on paragraph 5 of the affidavit dated 18.6.2004 filed by the attesting witness Shri. Rajesh S. Bansod stating that at the time of execution of the said Will, the said deceased was of sound and disposing mind, memory and understanding . He also placed reliance on paragraph 5 of the affidavit dated 28.6.2004 filed by Smt. Geeta Chandrakant Pawar stating that at the time of execution of the said Will, the said deceased was of sound and disposing mind, memory and understanding.

19. The learned counsel for the plaintiff has invited my attention to the affidavit in lieu of examination in chief filed by the defendant on this issue and more particularly Paragraph 2 alleging that the deceased at the time of execution of the Will on 8.11.2000 was not of sound mind, memory, understanding and was physically unfit. The said witness has also deposed in his examination in chief that Will was obtained by undue influence, fraud and forcefully. The learned counsel for the plaintiff has invited my attention to various answers given by the said witness in the cross examination and more particularly, in reply to

question No.1 and from 11 to 13 and submits that the defendant has failed to produce any document regarding the health of the said deceased in the year 2000. The said witness deposed that he did not know that after discharge of the said deceased from the hospital in May, 2000 and until his demise the said deceased was hospitalized again. He deposed that cause of death of the said deceased was slipped disc. The witness could not produce any medical information or prescription to show that the said deceased was suffering from any mental health condition at any time of his life.

20. It is submitted by the learned counsel that the medical certificate relied upon by the defendant dated 20.5.2000 was issued by Orthopedic Department when the said deceased admitted in the said hospital on 29.4.2000 and was discharged on 2.5.2000. It is submitted that the said medical certificate issued by Orthopedic Department would not indicate that the said deceased was not of sound and disposing mind on the date of execution of the said Will. He submits that the defendant did not examine the said Doctor who had issued the said Certificate. It is submitted that the defendant thus failed to discharge the

burden in so far as Issue No.2 is concerned.

21. In so far as Issue No.3 i.e. 'Does the defendant prove that the execution of the Will was obtained by undue influence and by fraud and forcefully?' the learned counsel for the plaintiff invited my attention to the affidavit in support of the caveat filed by the defendant more particularly, paragraph 2 thereof alleging that the execution of the will was obtained by undue influence and by fraud and forcefully. Similar allegation was also made in the affidavit in lieu of examination in chief. The learned counsel for the plaintiff has invited my attention to the cross examination of the defendant and more particularly, reply to question No.,4 in which the defendant has admitted that he did not file any police complaint or any proceedings against the plaintiff in respect of the allegation of any fraud or coercion as alleged by the defendant in his affidavit in support of the caveat and also in affidavit in lieu of examination in chief. He submits that the burden is on the defendant to prove that the plaintiff caused undue influence, fraud or coercion on the said deceased or anybody else while executing the said Will, which burden the defendant failed to discharge.

22. The plaintiff placed reliance on the Judgment in the case of Veerattalingam and others vs. Ramesh and others reported in AIR 1990 Supreme Court 2201 and more particularly on paragraph 8 in support of the submission that the Court while construing a will should try to ascertain the intention of the testator to be gathered primarily from the language of the document but while doing so the surrounding circumstances, the position of the testator, his family relationship and the probability that he used the words in a particular sense also must be taken into account.

23. Mr. Bhave, learned counsel for the defendant on the other hand invited my attention to two paragraphs of the Will and submits that the property mentioned therein is self acquired property of the deceased. He submits that the said deceased has bequeathed the tenanted property also in the said Will. He submits that however, in the schedule appended to the Testamentary Petition filed by the petitioner, the said tenanted property is not included by the plaintiff.

24. It is submitted by the learned counsel that medical certificate produced by the defendant clearly indicated that the said deceased was in hospital for about 21 days before his death. The plaintiff himself in his evidence has deposed that due to second marriage of the defendant he had left the house and his relations with the deceased were strained. Her submits that after demise of the said deceased father the plaintiff has withdrawn a sum of Rs.1900/- from the bank account of the said deceased which itself indicates that signature of the said deceased was obtained by the plaintiff forcefully. It is submitted by the learned counsel that in the cross examination the witness of the plaintiff has deposed that the said deceased was in hospital for about 7 to 8 days whereas certificate produced by the defendant indicates that the deceased was in hospital for about 21-days. He submits that the plaintiff did not even inform the death of the father to the defendant.

25. The learned counsel for the defendant has invited my attention to Paragraph-3 of the affidavit in lieu of examination in chief Mrs. Geeta Chandrakant Pawar (P.W.2). He further submitted that in the said affidavit of evidence, the said witness has deposed that the

said deceased was having good health. She further deposed that the said deceased died at his residence on 3.8.2003. He invited my attention to the death certificate issued by the Municipal Corporation, Mumbai which indicates that the said deceased died in the hospital. He submits that the said witness has given false affidavit and her evidence cannot be relied upon.

26. The learned counsel for the defendant invited my attention to paragraph 4 of the affidavit of said Smt. Geeta Chandrakant Pawar and submitted that in the said affidavit the said witness has deposed that the said deceased was of sound mind, memory, understanding and signed in her presence at 2.00p.m. However, in her cross examination the said witness deposed that she had gone to the house of the said deceased at about 3 to 3.30p.m. He submits that it is clear that the said witness has also filed false affidavit and was not present at the time when the said deceased had executed the said Will.

27. Insofar as evidence of P.W.3 i.e. Mr. Harishchandra Lad relied upon by the plaintiff and more particularly, the Certificate (Exh.- D) issued by the Brihan Mumbai Kaydevishyak Sahhaya and Salla Samiti

is concerned, the learned counsel has invited my attention to the cross examination of the said witness. He submits that the said witness admitted that he could not tell as to when the said complaint was filed by the said deceased against the son of the said deceased. He submits that the said complaint was however not produced by the plaintiff. In so far as various other documents relating to criminal complaint filed by the plaintiff is concerned, it is submitted by the learned counsel that these documents are not marked and therefore, cannot be relied upon by the plaintiff.

28. In so far as Issue Nos. 2 and 3 are concerned the learned counsel invited my attention to two paragraphs of the affidavit in lieu of examination in chief filed by the defendant which are already referred above and would submit that defendant has discharged his burden cast upon the defendant.

29. The learned counsel for the defendant has invited my attention to the letter dated 9.8.2003 addressed by Mr. Jitendra Karve for M/s. Associated Typewriter Company to the Saraswat Co-op. Bank Ltd. Informing that the the said deceased had expired on

3.8.2003 who was holding Current Account with the said bank and requested to stop all the payment till the dispute among the legal heirs of the said deceased was sorted out. He also invited my attention to reply of the Saraswat Bank dated 24.9.2003 assuring the defendant that it would not allow anybody to operate the said bank account till settlement of dispute by the parties.

30. It is submitted by the learned counsel for the defendant that the plaintiff has already held two flats in his name and thus, the said deceased would not have bequeathed the property in favour of the plaintiff and would not have disinherited the defendant. He submits that in view of the plaintiff having withdrawn an amount of Rs.1900/- from the bank account of the deceased after his demise, integrity of the plaintiff is doubtful and this Court shall draw an adverse inference against the plaintiff.

31. Mr. Desai, the learned counsel for the plaintiff in rejoinder submits that the said amount of Rs.1900/- was not withdrawn by the plaintiff but was withdrawn by another brother Jaywant Gajanan Karve and was withdrawn for payment of the employees who were employed

by the said deceased and for other office expenses. In so far as alleged inconsistency alleged by the defendant in the evidence of Mrs. Geeta Chandrakant Pawar is concerned, it is submitted by the learned counsel that the cross examination of the said witness has to be considered in toto and not few questions. The Court cannot consider the evidence based on the memory test of the said witness. The cross examination of the said witness was conducted after several years.

32. It is submitted that the death certificate of the said deceased produced on record can be considered as conclusive to hold the place of death of the said deceased. Insofar as inconsistency pointed out by the defendant regarding the time of execution of the Will in the affidavit in lieu of examination in chief of Mrs. Geeta Chandrakant Pawar (D.W.1) and the time mentioned in the cross examination is concerned, he submits that this Court can consider the deposition in the cross examination. He submits that the execution and attestation of the Will is not disputed by the defendant. The inconsistency if any in the affidavit in lieu of examination in chief and cross examination would not create any suspicious circumstance in execution of the Will. The place

of death mentioned in the affidavit in support in lieu of examination in chief of the said witness would not be relevant as the said witness was not present at the time of death of the said deceased.

### REASONS AND CONCLUSION

33. Insofar as Issue No.1 is concerned, the affidavit in support of caveat, affidavit filed by various witnesses of the plaintiff, affidavit in lieu of examination in chief filed by the defendant would clearly indicate that the defendant has not disputed the execution and attestation of the Will. The defendant in his affidavit in lieu of examination in chief has admitted the execution of the Will dated 1.11.2000 and more particularly in paragraph Nos. 2,5 and 8. The only allegation made by the defendant was that the said deceased was not of sound mind, memory, understanding and was physically unfit and that his signature was taken forcibly by undue influence and by committing fraud.

34. The plaintiff has examined himself and also an attesting witness whose evidence was not shattered in the cross examination by the defendant. The attesting witnesses were present at the time of execution of the said Will by the said deceased. The plaintiff has

discharged the burden that the deceased had executed the said Will.

Issue No.1 is accordingly answered in the affirmative.

35. In so far as Issue No.2 is concerned, the burden of proof was on the defendant. The defendant in his cross examination admitted that he did not have any material to produce on record any document in regard to health of the deceased in the year 2000. He also did not know as to whether the said deceased was hospitalized again after his discharge on 20.5.2000 and till his demise. He also did not have any document in regard to the health of the deceased in the year 2000. He further admitted that the cause of death of the said deceased according to him was asphyxia. In reply to question No.11 he admitted that he was not aware that his father died due to heart attack. He did not produce any medical opinion or prescription to show that the said deceased was suffering from mental health condition during any period of his life. It is thus clear beyond reasonable doubt that the defendant has failed to discharge the burden of proof in so far as Issue No.2 is concerned. Issue No.2 is accordingly answered in the negative.

36. Insofar as Issue No.3 is concerned though the defendant has made allegations in the affidavit in support of the caveat and also in affidavit in lieu of examination in chief that execution of the Will was obtained by undue influence, fraud and forcefully are concerned, the defendant has not proved this issue by leading evidence on this issue.

In reply to question No.4 the defendant admitted that in regard to allegations of fraud, coercion which were made in his examination in chief, he had not filed any police complaint against the plaintiff. In my view the defendant failed to discharge the burden of proof cast upon him insofar as Issue No.3 is concerned. The said issue is accordingly answered in the negative.

37. Insofar as submission of the learned counsel for the defendant that there was inconsistency in the evidence of Mrs. Geeta Chandrakant Pawar is concerned, since the defendant has admitted the execution of the said alleged Will, such alleged inconstancy cannot be a ground for refusing the grant of Probate. Similarly the place of death mentioned in the affidavit in lieu of examination in chief being inconsistent with the place of death mentioned in the Death

Certificate would also not assist the case of the defendant and would not be a ground for refusal to grant Probate on that ground alone.

38. Insofar as submission of the learned counsel for the defendant that the plaintiff has withdrawn an amount of Rs.1900/- after demise of the said deceased and thus his integrity will be doubtful and plaintiff cannot be granted any relief by this Court is concerned, it is the case of the plaintiff that the said amount was not withdrawn by the plaintiff but by another brother Jayant Gajanan Karve. The learned counsel for the defendant could not contradict this submission made by the learned counsel for the plaintiff. A perusal of the evidence would indicate that the defendant had also left the house of the said deceased long back and did not have cordial relation with the deceased father. It was not the case of the defendant that the plaintiff was not taking care of the said deceased and he was not staying with the said deceased during the life time of the said deceased. In my view, the submission of the learned counsel for the defendant that the said deceased would not have disinherited the defendant and would not bequeathed the property in favour of the plaintiff is concerned, there is no substance in

this submission. The defendant had left the house of the father long back.

39. Insofar as submission of the learned counsel for the defendant that the said deceased has bequeathed the tenanted property but the said property is not disclosed in the Schedule appended to the Testamentary Suit is concerned, in my view the tenanted property could not have been bequeathed by the said deceased and thus grant of probate cannot be refused on that ground. In my view, the plaintiff has made out a case for grant of reliefs as prayed. I therefore, pass the following order.

- a) Suit No.45 of 2004 is decreed as prayed with costs.
- b) The Office is directed to issue Probate of Will in favour of the plaintiff/petitioner in respect of the Will dated 8.11.2000 executed by the deceased Mr. Gajanan Vishnu Karve expeditiously
- c) Drawn up decree is dispensed with.

**( R. D. DHANUKA, J.)**

40. At the request of the learned counsel for the defendant, the operation of the order passed by this court is stayed for a period of four weeks from today. If any appeal is preferred against this judgment, a copy of appeal proceedings shall be served upon the plaintiff's advocate in advance

**( R. D. DHANUKA, J.)**