

Mr. Rajesh Datar with Ms. Dhruti Datar, for Petitioner.

DATE : 25 NOVEMBER 2025

1. Heard the learned Counsel for the Petitioner.
2. The Petitioner – original Defendant No.3, in the suit for grant of probate in respect of a purported last Will and Testament of Chandrakant Thanawala, the husband of the Plaintiff No.1 and the father of Defendant Nos.1 to 3, by this Petition, assails the order dated 6 May 2025 passed by the learned Civil Judge, Thane, whereby an application preferred by the Petitioner to call Sukumar Chandrakant Thanawala (D1) for cross-examination, came to be rejected.
3. The Plaintiff claims to be the executrix of the last Will and Testament dated 20 May 1999 left behind by her husband Chandrakant Thanawala. Defendant Nos.1 and 2 – siblings of the Plaintiff, have given their consent for grant of Probate. The Petitioner is contesting the suit. The Plaintiff has examined herself and two attesting witnesses in proof of due execution and

attestation of the Will. Defendant Nos.1 and 2 have also closed their evidence. Defendant No.3 took out an application seeking to call Sukumar Thanawala (D1) for cross-examination. It was contended, inter alia, that the Defendant No.1 has filed an affidavit in support of the reply and the said affidavit be treated as an affidavit in lieu of examination in chief of Sukumar Thanawala (D1).

4. By the impugned order, learned Civil Judge was persuaded to reject the application opining that the said affidavit is filed under Order 19 of the Code of Civil Procedure, 1908, and it cannot be treated as an affidavit of evidence under Order 18 of the Code and a defendant cannot be permitted to cross-examine co-defendant who has not filed affidavit in lieu of examination in chief and adduced evidence.

5. Mr. Datar submitted that, in the peculiar facts of the case, where Defendant Nos.1 and 2 are supporting the claim of the Plaintiff and in the affidavit in support of the reply filed by the Defendant No.1, certain assertions have been made by the Defendant No.1, which bear upon the determination of the legality and validity of the purported Will, Defendant No.3 deserves an opportunity to cross-examine the Defendant No.1. Learned Judge took a hyper-technical view of the matter, submitted Mr. Datar.

6. I am afraid to accede to the aforesaid submissions. Evidently, Defendant No.1 has not adduced any evidence. Nor a rare and extra ordinary

case is made out to permit a party to the proceeding to cross-examine another party / adversary. In the absence of examination in chief, in the form of the affidavit in lieu of examination in chief or otherwise, the prayer for cross-examination of Defendant No.1 on the basis of the affidavit in support of the reply filed by Defendant No.1, which partakes the character of pleading, was rightly rejected by the learned Judge.

7. Thus, no interference is warranted with the impugned order.
8. The Writ Petition stands dismissed.

(N.J.JAMADAR, J.)