
(2014) 09 BOM CK 0160

In the Bombay High Court

Case No : Testamentary Suit No. 46 of 1993 and Testamentary Petition No. 2 of 1993

Usha Shrikant Rege

APPELLANT

Vs

Gauri Gajanan Rege

RESPONDENT

Date of Decision : 15-09-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 1
Evidence Act, 1872 — Section 57, 58, 60, 68, 69
Succession Act, 1925 — Section 63, 63(c)

Citation : (2014) 6 ABR 142 : (2016) 1 ALLMR 801 : (2014) 6 MhLj 781

Hon'ble Judges : R.S. Dalvi, J

Bench : Single Bench

Advocate : Shailesh Shah, Sr. Advocate, Jyoti N. Shah and Jesal Shah, Advocate for the Appellant; Madhav Jamdar and Vrushali Kabre, Advocate for the Respondent

Final Decision : Dismissed

Judgement

R.S. Dalvi, J.—This petition is filed for Letters of Administration with the Will of the deceased one Mangesh Pandurang Rege dated 1st October, 1971 annexed thereto. There are two executors appointed in the will, both of whom are stated to have expired prior to the filing of the petition. The deceased is shown to have left behind his widow, four sons, one married daughter and widows and daughters of two deceased sons.

2. Six consent affidavits have been filed. Two caveats have been filed. One caveatrix has withdrawn the caveat. The only challenge is by the present caveatrix/defendant who is widow of the deceased son of the deceased.

3. The caveat claims that the will has been obtained by fraud, coercion and an undue influence practiced by the original petitioner. It was obtained without explaining the contents to the deceased at the time of obtaining his thumb impression. It also takes exception to inordinate delay of 19 years in filing the

petition. It sets out the position of the family properties and the relationship between the family members to claim that the will is bogus, cooked up and forged.

4. Based upon the aforesaid pleadings the following issues have been framed which are answered as follows:

5. The original petitioner expired pending the petition. His widow is the present petitioner (plaintiff). The caveatrix is the widow of another deceased brother of the original petitioner. The plaintiff has herself deposed and led evidence of a handwriting expert to prove the signature of two of the attesting witnesses to the will. The defendant has examined herself. The plaintiff has relied upon two powers of attorney executed by the deceased as also by the original petitioner (original plaintiff), her deceased husband, which bore the signatures of the two attesting witnesses. These documents have been shown to the handwriting expert along with original will to obtain the opinion of the handwriting expert with regard to the aforesaid signatures. The plaintiff has also relied upon certain correspondence which has been shown in the cross - examination of the defendant which shall be considered presently.

6. The defendant has relied upon the marriage certificate of the defendant, the birth certificate of the daughter of the defendant and the death certificate of her deceased husband amongst other documents which are neither relevant nor proved and need not be considered. The defendant has relied upon inter alia the divorce petition of the plaintiff in the cross -examination of the plaintiff and the judgment in the petition which documents are not denied. The plaintiff has relied upon two agreements of purchase of two flats in her name in the cross - examination of the defendant which are also not denied. The plaintiff has also relied upon certain letters, one of which dated 27.04.1972 is relevant and shall be considered. The aforesaid documents which constitute the material evidence to be considered alongside the oral evidence of the parties in determining the aforesaid issues.

Issue No.1: Re : Execution of the will dated 01.10.1971 by Mangesh Pandurang Rege.

7. The will has been executed when the deceased was 76 years old and 2 1/2 years prior to his death. The will is on typewritten foolscap accounting paper. It shows three attesting witnesses to the execution of the will by the thumb impression of the deceased. The three signatures have been put twice on the last page of the will. The three attesting witnesses have put their initials on pages 1 and 3 also. The will runs in 6 pages. The will is shown to be prepared by an Advocate who is one of the attesting witnesses and a notary who has notarized the powers of attorney of the deceased and the original plaintiff. One attesting witness is the doctor who has also examined the will and has accordingly signed and endorsed with regard to the examination.

8. It would be material to consider the position of the family of the deceased as

also the facts that transpired prior to and after the execution of the will until the filing of the petition about two decades after the death of the deceased. This position is evidenced by various admitted facts which required to be enumerated at the inception. The deceased had six sons; two of the sons are the deceased husbands of the plaintiff and defendant. The facts relating to their family are material and relevant. The original plaintiff is one Shrikant, the son of the deceased and the deceased husband of the plaintiff. The other son is Gajanan who was the husband of the defendant. The plaintiff initially married the defendant's husband. She had then been divorced. She later married her husband's brother, the original plaintiff.

9. The admitted facts and dates which are material may be enumerated thus:

- (i) On 13.10.1960 the plaintiff married Gajanan.
 - (ii) She had two issues; Anuradha and Ashutosh by the said marriage.
 - (iii) The family lived in Datta Bhavan, Hindu Colony, Dadar, Mumbai.
 - (iv) From 1967 -68 the relations between the plaintiff and Gajanan were strained.
 - (v) In September, 1967 and May, 1968 the plaintiff purchased two flats (or 2 flats were purchased for her) being C -7 and C -8 in Piramal Nagar at Goregaon.
 - (vi) On 01.10.1971 the will for which the Letters of Administration is claimed was executed.
 - (vii) On 01.10.1971 the deceased is also shown to have executed one power of attorney (which fact is mentioned in the power of attorney relied upon by the plaintiff. The first power of attorney was in favour of one of the sons of the deceased, one Madhav. Madhav is also one of the executors mentioned in the will executed on the same day.)
- The power of attorney was prepared by Advocate R. K. Rao who is also shown to have attested the will. It is shown to be notarized before the notary who is also shown to have attested the will.
- (viii) On 28.07.1973 the deceased executed another power of attorney appointing one M. S. Rajadhyaksha who was the deceased's wife's sister's son. The said power of attorney was prepared and signed by the same Advocate Mr. R. K. Rao identifying the thumb impression of the deceased. It was notarized also by the same Notary, Mr. J. T. Ferreira.
 - (ix) On 16.06.1974 the deceased expired.
 - (x) On 18.08.1974 Shrikant executed a power of attorney also in favour of the said M. S. Rajadhyaksha, the deceased's wife's sister's son. That power of attorney is also prepared and signed by the same Advocate Mr. R. K. Rao identifying the signature of Shrikant. It is also notarized by the same Notary, Mr. Ferreira.

(xi) On 10.01.1975 Usha filed the divorce petition in the Bombay City Civil Court against Gajanan on the ground of his conversion to Islam faith.

(xii) On 04.04.1975 the petition for divorce was decreed ex parte.

(xiii) On 06.05.1977 the plaintiff, Usha married Shrikant.

(xiv) On 01.09.1978 Madhav (one of the executors) expired.

(xv) On 17.03.1979 the defendant, Gauri married Gajanan as per Hindu rights.

(xvi) On 24.12.1986 Anuradha, the biological daughter of Gajanan and Usha was got married under Hindu rights by Gajanan and Gauri.

(xvii) On 20.04.1991 Gajanan (one of the executors) expired.

(xviii) On 16.10.1991 the above petition was affirmed.

(xix) On 05.01.1993 the above petition was filed/registered though all the objections were yet not removed.

10. The execution of the above will would have to be considered taking into account the circumstances that transpired in the family of the deceased before and after its execution and upon seeing the get up and contents of the will as also the aforesaid powers of attorney.

11. It may be mentioned that two powers of attorney relied upon by the petitioner are admissible in evidence. The original power of attorney of Shrikant is produced and would carry the presumption that it was executed and authenticated by Shrikant before the Notary Public as required by law u/s 85 of the Indian Evidence Act, 1872. A copy of the power of attorney of the deceased is produced along with original certificate of the Notary certifying the copy to be true and correct copy in words and figures of the power of attorney of the deceased given to M. S. Rajadhyaksha. My attention has been drawn to Section 57 of the Evidence Act which required the Court to take judicial notice of certain facts. Under Sub-section 6 of Section 57 the seals of Notary Public are a part of the document of which judicial notice has to be taken. The original seal of Mr. Ferreira as the Notary on the certification of the copy of the power of attorney would require the Court to take judicial notice that such a power of attorney was indeed executed, a copy of which is stated to be true and correct by the Notary before whom it was executed. Once the seal is accepted and the required judicial notice is taken by the Court, the copy of the power of attorney itself would require a presumption to be drawn u/s 85 of the Evidence Act. Consequently the copy of the power of attorney must be taken to have been executed by the Notary Public and authenticated as such. (See. The Performing Right Society, Limited Vs. The Indian Morning Post Restaurant, and Bank of India Vs. Alibhoy Mohammed and Others, relating to presumption of powers of attorney.)

12. Consequently both the powers of attorney require to be read in evidence. It may be mentioned that the powers of attorney have been essentially produced to

see and compare the signatures of two of the attesting witnesses, the Advocate Mr. R. K. Rao and the Notary Mr. J. T. Ferreira on the will as also those documents.

13. The plaintiff has led the evidence of a handwriting expert with regard to the comparison of the signatures. The opinion of the handwriting expert shows the reasons for accepting the two signatures of Mr. Rao and Mr. Ferreira on the aforesaid documents. The handwriting expert is shown to be a post graduate diploma holder in forensic science. He has examined the document upon detailed scientific analysis of the signatures together with 12 photographs thereof. He has deposed that he has found adequate material for comparison. He has deposed that the characteristics in the writing of the signatures being the slant, alignment, speed of writing, shading, line quality, relative spacing between letters, proportional sizing of letters, relative heights of letters, pen -pressure, pen - emphasis, commencement and finals, pen -movement, pen -lift, pen -presentation, etc. revealed similar writing characteristics in all the signatures. He has, therefore, concluded in para 7 of his evidence that the handwriting in the aforesaid signatures are of one and of the same person.

14. He has been extensively cross -examined. He has been asked about the methodology of comparison. He has deposed that that is not the same in all cases but that the signatures can be put together. His cross - examination shows that he decided upon the signatures by himself. This can be done only if the signatures are so similar as to be rather identical. His cross -examination shows that he could locate and hence collated the required signatures on those documents. He has deposed about the instruments that he used for his analysis. He has deposed that he measured the various criteria mentioned above from the quality of the stroke of writing. He has also deposed on the natural variations within limit which naturally occur in all signatures. He has completed his examination in one visit. He has disputed that there was any space between letters A and O in the signatures of Mr. R. K. Rao. He has stood his ground with regard to his opinion with regard to other letters in the signatures. A reading of his evidence shows the signatures to be identical.

15. It would be for the Court to compare the signatures u/s 73 of the Indian Evidence Act taking into account the analysis of the expert (See. Ajay Kumar Parmar Vs. State of Rajasthan, Looking at the three signatures of Mr. R. K. Rao and Mr. Ferreira together, this Court can conclude that they are identical and of the same person as shown in the opinion of the handwriting expert.

16. The signatures of these witnesses are indeed on pages 5 as well as 6 of the will below the left hand thumb impression shown to be of the deceased in the execution clause as also next to the cancellation of the designation of the notary on page 6 since the document was not notarized. Of course, it must be borne in mind that if a document is forged more than one forged signature would usually not appear on the document since the forger would not be emphatic about its authenticity. The two signatures of Mr. R. K. Rao as well as Mr. Ferreira, the

Advocate and the Notary also appear to be indeed similar on pages 5 and 6.

17. One Dr. P. A. Dalvi has also signed as attesting witness at both the aforesaid places on pages 5 and 6. He has also made an endorsement showing that though the deceased is totally blind, he is in a sound and disposing state of mind, fully capable of understanding the contents of the will.

18. The very execution of the will by the deceased is not shown; the plaintiff has only shown the 3 signatures of the attesting witnesses, two of which were on earlier documents whether those signatures had been put as the signatures of the attesting witnesses attesting the execution of the will by the deceased is not shown. The plaintiff has not led any evidence of what the deceased did with the instrument and now he executed his will despite she having been with the deceased just prior to the execution and not at the time of the execution as shall be presently seen.

19. Even the evidence of attestation of the will is not led. u/s 68 of the Evidence Act the mode of proof of a document required by law to be attested is set out. The relevant part of Section 68 runs thus :

68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall 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.

No attesting witness has been called in this case to prove the execution of the will. The death of one of the attesting witnesses is stated but not shown. The plaintiff has claimed that Advocate R. K. Rao expired in 1994. The plaintiff has also claimed that the other two witnesses have expired though the plaintiff does not know the respective dates of their death. It is the plaintiff's case that despite exercise in that behalf she has not been able to obtain the dates of the death of all the three attesting witnesses. The plaintiff has not produced the death certificates of any of them. It is for the plaintiff to prove the death of the three attesting witnesses as claimed by the plaintiff. That can be done by obtaining their death certificates. The plaintiff knew the address of Advocate R. K. Rao which is mentioned not only on the will but also on the docket of each of the three documents. The plaintiff would also know the address of the doctor which is mentioned in the attestation clause of the will. It is seen that though there have been 3 witnesses one of whom is shown to be dead, none is "called for the purpose of proving" the execution of the will of the deceased.

20. The plaintiff has sought to prove the attestation and consequently the execution of the will u/s 69 of the Evidence Act which sets out the procedure of proof where no attesting witness is found. Section 69 runs thus:

69. Proof where no attesting witness found.- If no such attesting witness can be found, or if the document purports to have been executed in the United

Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

21. The expression if "no such attesting witness can be found" would have to be considered. Would it be for the plaintiff to merely state that all 3 attesting witnesses cannot be found because, according to the plaintiff, they have expired? The requirement of the proof of the document requiring attestation is indeed serious. A will is one of such document. The execution of the will is required to be by the deceased as per the 3 modes set out in Section 63 of the Indian Succession Act which runs thus:

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

22. Hence the will must be executed in the presence of the attesting witnesses u/s 63(c) of the Indian Succession Act, 1925. Hence to prove the due execution of the will any of the attesting witnesses or any other witness who had seen the attesting witnesses sign in the presence of the testator and who had seen the testator sign would be required to be called in evidence.

23. The plaintiff has only sought to prove the signatures shown in the will to be the signatures in the handwriting of Advocate R. K. Rao as also Mr. Ferreira, the Notary.

24. This case is on all fours the facts of this case of Girja Datt Singh Vs. Gangotri Datt Singh, in which the Supreme Court has considered Section 63 of the Indian Succession Act along with Section 68 of the Indian Evidence Act relating to attestation of a will. It is held,

In order to prove the due attestation of the will the propounder of will has to prove that "A" and "B", the two witnesses saw the testator sign the will and they themselves signed the same in the presence of the testator.

It is further held that,

It cannot be presumed from the mere signatures of two persons appearing at the

foot of the endorsement of registration of a will that they had appended their signatures to the document as attesting witnesses or can be construed to have done so in their capacity as attesting witnesses. Section 68, Evidence Act requires an attesting witness to be called as a witness to prove the due execution and attestation of the will. This provision should be complied with in order that those two persons might be treated as attesting witnesses.

In that case the Court extensively marshalled the oral evidence before it. The Court found that despite the case of due execution of the will from a rough draft to fair draft and thereafter the execution and the attestation followed by the presentation for registration of the will by the deceased before the Sub -Registrar along with execution of a wakf, the attesting witnesses spoke the untruth and the due attestation by the attesting witnesses signing as such in the presence of a testator to attest the document which could only be a will not proved. The Court, therefore, observed that Section 68 of the Evidence Act requires the attesting witness to be called as a witness to prove the execution of the will as such and mere signature of the attesting witness would not prove due attestation.

In this case the mere signatures of the two attesting witnesses Advocate Mr. R. K. Rao and the notary Mr. Ferreira would not prove that the deceased put his thumb impression on the document knowing it to be a will and confirming it as such after he was read over and explained its contents such that they signed in their capacity as attesting witnesses and none else. In fact the proof of only the true signatures does not prove the thumb impression of the deceased at all. Hence the execution of the will is not proved. There is no question of such a document being attested as a will.

25. This judgment has been followed by the Madras High Court in the case of Ramchandra Marthandam Vs. Linga Vijayan in para 28 of which it has been held that the procedure u/s 63 of the Indian Succession Act requiring the attestation before the testator is mandatory. Consequently when there is no evidence that the attesting witnesses had seen the testator sign the will which is the mandatory procedure, the execution of the will cannot be taken to be proved in the absence of clear evidence in that behalf.

26. All the attesting witnesses are stated to have died. Whether they have died would have to be proved by substantiating evidence. The acceptable mode of proof would be the death certificate issued by the municipality. The plaintiff has not shown why the application for issue of a death certificates of the three attesting witnesses is not made. Merely stating that the witnesses are not alive and cannot be found is, therefore, not sufficient. Mr. Shah would argue that the statement of the plaintiff that the attesting witnesses have died has not been disputed by the defendant as there is no cross -examination of the defendant on that score and hence it must be accepted as an admitted statement. Admitted facts which are not to be proved u/s 58 of the Evidence Act which runs thus are:

58. Facts admitted need not be proved.- No fact need to be proved in any

proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

The facts not required to be proved would, therefore, be the facts mentioned in the pleadings of the parties or in the documents of the parties or specifically which were agreed to be admitted at or before the hearing in writing. They may be facts which are specifically admitted in the oral evidence of the parties. Merely because a fact has not been disputed by cross -examination of a party would not make it an admitted fact such as not requiring it to be proved u/s 58 of the Evidence Act. There need be no cross -examination of unproved facts.

27. The evidence of the plaintiff herself shows in her re - examination that she went along with deceased, her father-in-law, in a taxi to the office of Advocate R. K. Rao where the deceased was to execute the will because she was called by the deceased to accompany him there. She went to the office and went to the University because she had some work at the University. She did not witness the execution of the will. She was only informed by the deceased that the will was read out to "them" and one Ferreira. On that basis she deposed that the will was witnessed by Dr. Dalvi and Mr. R. K. Rao. She has not deposed about the execution of the deceased or about attestation of Advocate Rao, Dr. Dalvi or Mr. Ferreira. Though such evidence cannot legitimately be a part of the re - examination, and must be the direct oral evidence of the plaintiff in her affidavit of examination-in-chief itself, even accepting such evidence it can be seen that there is none who has witnessed the execution of the will.

28. The plaintiff would have to prove the signatures of at least the attesting witnesses if all are not alive and cannot be called to give evidence. How the plaintiff has proved the signatures and what would be the purport of the mere proof that they are the signatures of those persons would require to be considered.

29. All the aforesaid documents including the will of the deceased are executed within the span of time between October, 1971 and July, 1974. The original documents produced before the Court prima facie show the powers of attorney (the contents of which shall be presently considered) to be on older paper than the will which is executed 3 years prior to the last power of attorney. In fact, the docket of the power of attorney dated July, 1974 is more torn and tattered than the pages of the will. This is true of even the other pages 5 to 12 of the power of attorney dated 18th July, 1974. Only the first 2 pages which are on non adhesive stamp paper are not torn because the texture of those papers is more rough and thick. The marriage certificate dated 06.01.1978 of the original plaintiff Shrikant with the present plaintiff Usha performed well after the execution of the will

dated 01.10.1971 is also seen to be wholly tattered and torn and stuck together with various celluloid tapes. Expert evidence with regard to the age of the paper of the will seen alongside the age of the papers of the powers of attorney would have been not only desirable but rather imperative in this case when none of the attesting witnesses has been examined. This important evidence has not been produced before the Court.

30. Advocate R. K. Rao seems to be a family friend of the parties. The plaintiff has relied upon certain letters shown to the defendant in her cross-examination. One such letter dated 27.04.1972 which sets out a particular incident shows reference to Advocate R. K. Rao at least ten places with regard to legal implications of the incident and instructions given to the Advocate. The docket of the documents also bear out that Advocate R. K. Rao has drafted each of the documents. The petition for letters of administration has come to be filed after the death of both executors but whilst Advocate R. K. Rao was alive as shown in the plaintiff's own deposition, the petition having been affirmed in 1991 and registered in 1993 and Advocate R. K. Rao having been stated to have expired in 1994. The Testamentary Petition is required to be in Form No. 105 under Rule 375 of the Bombay High Court (Original Side) Rules with such variation of the circumstances of each case may require. The petition is required to be accompanied inter alia by an affidavit of one of the attesting witnesses, if available. The expression "if available" would mean if the attesting witness is alive, if the attesting witness is in the same city or country and can sign the affidavit. Advocate R. K. Rao was available on the date the petition was affirmed. It is not the plaintiff's case that he was not in India. His address shows his office near the Court premises. Advocate R. K. Rao was, therefore, available to sign the affidavit which was required to be accompanying the Testamentary Petition. The Testamentary Petition shows a draft affidavit of Advocate R. K. Rao annexed thereto and forming a part of the petition. The affidavit is however not signed by Advocate R. K. Rao in Form No.102 as mentioned in Rule 375 of the High Court (Original Side) Rules. In fact, the petition was stated to be kept under objection over an unduly long time. One of the objections would be the lack of signature on the affidavit of the attesting witness which had to accompany the petition. The affidavit has remained at that. The petition has been registered 15 months after it was affirmed and whilst Advocate R. K. Rao was alive. The argument of Mr. Jamdar that Advocate R. K. Rao must be taken to have refused to sign the affidavit stands to reason. The Advocate who had drafted various documents being the two powers of attorney of the father and the son and friend of the household, his name having been mentioned in a personal letter in respect of a particular incident requiring legal advice would be expected to sign the affidavit accompanying a petition for grant of letters of administration of a will which he had attested albeit 17 years prior thereto.

31. Mr. Shah relied upon Rule 384 of the High Court (Original Side) Rules for proof of signatures of the deceased and the attesting witnesses which runs thus:

R.384. In absence of attesting witness, other evidence to be produced.- If it is not possible to file an affidavit of any of the attesting witnesses, an affidavit of some other person, if any, who may have been present at the execution of the will shall be filed, but if no affidavit of any such person can be filed, evidence on affidavit shall be produced of that fact and of the handwritings of the deceased and attesting witnesses, and also of any circumstances which may raise a presumption in favour of due execution.

The rule indeed requires either an affidavit of the attesting witness or an affidavit of any other person present at the time of the execution of the will or evidence on affidavit of the fact of the handwriting of the deceased and the attesting witnesses.

32. The plaintiff would contend that the last of the requirements of Rule 384 has been satisfied by the plaintiff showing the two signatures of two of the three attesting witnesses other than on the will which are indeed similar to those signatures on the will.

Even that proof does not show the handwriting of the deceased and has no reference to the thumb impression of the deceased on the will. Indeed there is no other thumb impression of the deceased in any other document. The copy of the power of attorney of the deceased certified by the Notary to be the true copy does not show the thumb impression of the deceased. Consequently the part of the rule relating to the evidence on affidavit of the handwriting of the deceased is not at all satisfied.

The evidence would only show and suggest that signatures of two attesting witnesses out of 3 attesting witnesses are similar to their earlier signatures.

Other circumstances which would raise a presumption in favour of due execution of the will cannot be seen in view of the aforesaid documentary evidence. Rule 384, however flexible is, therefore, not complied. Mr. Shah would argue that no consequences of non production of any of the aspects under Rule 384 is laid down and hence non production of all those aspects is not fatal to the petition. Even if this argument is accepted, the plaintiff at least must otherwise prove the due execution of the will.

33. Mr. Shah relied upon the judgments in the cases of Owners and Parties interested in Owners and Parties interested in M.V. "ValiPero" Vs. Fernando Lopez and Others, and Smt. Rani Kusum Vs. Smt. Kanchan Devi and Others, in support of his argument that Rule 375 and 384 are directory. The judgment relates to the fatality of the defects of a deposition which was not signed and the written statement which was not filed within the time stipulated under Order 8 Rule 1 of the CPC holding it to be directory. The judgment would have no relevance to the requirement of the affidavit of the attesting witnesses or any other witnesses or the proof of the handwriting/signatures of the deceased and the attesting witnesses to the will.

34. In view of the aforesaid documents the relationship of the parties at around the time of the will also becomes important to consider. The plaintiff initially married Gajanan. The plaintiff herself sued for divorce. Gajanan did not contest the divorce petition. The plaintiff obtained an ex parte decree of divorce. The plaintiff has admitted that she was separated from Gajanan in about 1967 -68. The plaintiff purchased two flats (or they were purchased for the plaintiff) and was residing in Goregaon since 1967 -68. In view of her strained relationship with her husband the purchase of two flats by the plaintiff within a period of about a year cannot be explained. Though the defendant's evidence would show that the plaintiff had a relationship with the original plaintiff to the exclusion of her husband so that the original plaintiff lived in the flat adjoining the plaintiff's flat, an aspect which has been denied by the plaintiff, the fact remains that the plaintiff did not live in the joint family house at Dadar during the subsistence of her marriage. The plaintiff indeed married the original plaintiff Shrikant in 1977, couple of years after obtaining the decree of divorce. The second marriage coupled with the plaintiff's purchase of two flats away from the joint family house would require judicial notice to be taken of the fact of her relationship with the original plaintiff which drove her to file a divorce petition.

35. The plaintiff is seen to have moved out of the family house during the lifetime of the deceased and prior to the date of execution of the will. The plaintiff's later marriage would require a similar judicial notice to be taken of the relationship between the parties. The relationship was within the family and must be taken to have been known by the deceased. The deceased had many children. Gajanan lived with the deceased in the family house during his lifetime. Shrikant, the original plaintiff was usually away on high seas. Mr. Jamdar very justifiably argued that under those circumstances there would have been no reason for the deceased to bequeath the entire property the main part of which consists of two tenanted buildings in Hindu Colony, Dadar, Mumbai to the plaintiff to the exclusion of all other heirs. In fact, the deceased had executed a power of attorney in favour of another son Madhav on the same day as the purported execution of the will. The deceased later executed a power of attorney giving wide and almost complete powers to his wife's sister's son Rajadhyaksha. The original plaintiff was not in contention at all.

36. The original will as well as both the powers of attorney carry the docket of Mr. R. K. Rao along with his designation and address. The powers of attorney are typewritten on legal size ledger paper. The will is typewritten on a foolscap paper. The typewriting in all the three documents appears to be from the same typewriter and in a similar fashion. However the formatting of the paragraphs is different in the will and in the two powers of attorney; whereas the formatting in the will shows the paragraph number in the margin outside the contents of the will which is not the format followed in legal documents, the formatting in the powers of attorney show the paragraph numbers within the paragraphs itself as is usually done in all legal documents (much as in this judgment itself).

37. The appointment of the two executors being Gajanan and Madhav in the will are in consonance with the appointment the power of attorney executed by the deceased on the same day as the will, Madhav being appointed the executor under the will as also his constituted attorney under the power of attorney both dated 1st October, 1971. The appointment of the same constituted attorney by the deceased (father) and Shrikant (son) in their respective powers of attorney dated 28th July, 1973 and 18th July, 1974 under the document prepared by the same Advocate would show the genuineness of the execution of the powers of attorney. That constituted attorney is not found in the will. However the plaintiff has relied upon two signatures of the Advocate and of the Notary in the power of attorney of Shrikant himself as also in the copy of the power of attorney of his father. Though the Notary has signed as an attesting witness, the will is neither notarized nor registered. Consequently it does not bear the material seal and stamp. Mr. Shah on behalf of the plaintiff would argue that the only purpose of producing the powers of attorney is to see the previous signatures of the Advocate and the Notary.

38. The contents of the will also show the fact of the disposing state of mind of the deceased in para 1 of the will. The deceased has bequeathed a life interest in the residential premises as also all movables to his wife. Aside from such bequest, the remainder of the property including the purchase of a wreck of a ship, the immovable properties as also other movables are bequeathed to Shrikant absolutely but only upon the condition that he assumes the burden and liability of the deceased in the mortgages executed by the deceased and the amounts payable thereunder as his debts and liability. Consequently the wife has been given the right of residence and user of the residential flat and the movables therein and Shrikant has been made the residuary legatee of the entire of the other estate of the deceased.

39. The will is executed as far back as on 01.10.1971. The deceased died 2 1/2 years thereafter. Madhav, one of the executors expired on 01.09.1978. Gajanan, the other executor expired on 20.04.1991. The will was not sought to be probated during the lifetime of the two executors though the executors were alive for the period of 4 years and 17 years respectively even after the death of the deceased.

40. The plaintiff has not explained the possession and custody of the will.

41. The plaintiff has sought to explain the delay in applying for probating the will. It is contended that the original plaintiff Shrikant had job in merchant navy and was usually away from home on high seas. It is also contended by the plaintiff that he used to collect the rent from the tenants of the immovable properties of the deceased which were two tenanted buildings in Hindu Colony, Dadar, Mumbai which was allowed and never objected by any of his siblings. The plaintiff would contend that the allowance of the collection of rents would show the lack of interest of his siblings in claiming any rights in the property so that the original plaintiff did not deem it necessary to apply for probate. The plaintiff, in fact,

claims to have applied for probate only when he desired to transfer the immovable properties in his own name. The above chronology shows that that was 17 years after the death of the deceased but within 6 months of the death of Gajanan, his brother. It may be mentioned that from the power of attorney of the deceased dated 28th July, 1973 it would be made clear that the deceased had not appointed the plaintiff either under the earlier power of attorney executed on the date of the will dated 1st October, 1971 or on the later power of attorney dated 28th July, 1973. Consequently the work of collection of rents would be done not by the original plaintiff but by his brother Madhav initially from 1971 and by his mother's sister's son Rajadhyaksha from 1973. Seen from powers of attorney the non objection of his siblings to the plaintiff collecting rents cannot be made out.

42. In fact, Mr. Jamdar on behalf of the defendant drew the Court's attention to the contents of the power of attorney dated 28th July, 1973 of the deceased in para 9 of which the wide powers to contract with any person for leasing the property and letting into possession is also given to the constituted attorney of the deceased aside from the collection of rents. Similarly under Clause 10 of the power of attorney the power to sell and convey the entire property of the deceased is also given not to the original plaintiff, Shrikant, but initially to his brother, Madhav and later to Rajadhyaksha. Mr. Jamdar would justifiably contend that the powers of attorney would run counter to the will of the deceased prepared on the same day as the power of attorney in favour of Madhav, the other son of the deceased, as also the power of attorney in favour of Rajadhyaksha.

43. The original plaintiff would become the owner of the property only upon obtaining probate. Before even a petition for grant of probate is made, the original plaintiff has, within a month of the death of the deceased sought to execute the power of attorney dated 18th July, 1974 also in favour of Rajadhyaksha, who was the constituted attorney of the deceased. The authority of the original plaintiff as the principal cannot be understood. The grant of the authority upon Rajddhyaksha, therefore, follows as a matter of course. The initial power of attorney of the deceased dated 28th July, 1973 would terminate upon his death. Within a year, on 16.06.1974, Rajadhyaksha had to be appointed by the person who has been bequeathed the properties of the deceased under the will or by all his heirs on intestacy. Mr. Shah would claim that the contents of the powers of attorney do not matter; even the authority of the original plaintiff does not matter. The power of attorney has been produced only to compare and verify the two signatures of the two attesting witnesses. Nevertheless, once a document is produced before the Court, it would require to be considered for all purposes.

44. The entire exercise has been undertaken because the original plaintiff has failed to obtain the affidavit of any of the attesting witnesses in support of the petition.

45. Mr. Shah would contend that the husband of the defendant, Gajanan as also the other brothers never objected to the plaintiff's collecting rents and thereafter to the plaintiff applying for the Letters of Administration with the will of the deceased annexed thereto.

The collection of rents by the plaintiff is not shown. The deceased has not executed a power of attorney in favour of the plaintiff. Even if the plaintiff did collect some rents it is stated to be for the maintenance of the mother of the parties, (which was not objected to by any of her children) who resided in one of the flats of the two buildings of the family until 1981 and after which the defendant's daughter Apurva used to stay in that flat during her vacation along with other relations and all expenses during her stay were borne by the original plaintiff. (This has been a part of the record under an affidavit of the defendant dated 7th June, 1994 filed in Notice of Motion No. 277 of 1994 in the above suit). The consent letters of the other siblings are given about two decades after the date of the purported execution of the will. It is an admitted fact that the three of the siblings live abroad. The other siblings live in Mumbai as also other cities like Nagpur. Each of them is well settled in life. The consent letters would only show that all do not want to dispute the will and seek his/her share at that distance of time as contended by Mr. Jamdar. In any case the fact that some of the heirs consent to the grant of probate or Letters of Administration with the will annexed do not require the Court not to evaluate the lack of consent of the heir not consenting.

46. It appears that the siblings indeed had no major disputes amongst one another. None of them claimed a separate share. However all of them as coparceners of HUF would be entitled to share in the undivided property as such coparcener. Mr. Jamdar would point to the Court the fact that the plaintiff appeared to be in no hurry to obtain the probate of the will of his father within a reasonable time after the death of the father but was keen on obtaining the grant of the Court within six months of the death of his brother Gajanan whose wife he had married.

47. It is sought to be contended by the plaintiff that the case of the defendant cannot be accepted because she married Gajanan in 1979 well after the aforesaid evidence transpired and hence would not know any of these personally. Indeed that would be so. However the evidence of the defendant shows that Gajanan made a clean breast of the life of his former wife at the time he proposed to the defendant. That would be the fact as was heard by the defendant personally from Gajanan. Consequently u/s 60 of the Evidence Act, to which my attention is drawn by Mr. Jamdar, her oral evidence to the extent of the fact of the family relationship which she heard from Gajanan would be her direct oral evidence. The relevant part of Section 60 runs thus:

60. Proof of facts by oral evidence.- Oral evidence must, in all cases whatever, be direct; that is to say - If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it; If it refers to a fact which could be

heard, it must be the evidence of a witness who says he heard it;

However the evidence of the defendant is hardly material in view of the aforesaid admitted chronology of events and dates and the documents relied upon by the plaintiff herself being the two powers of attorney, her marriage certificate, the letter dated 27.04.1972 and the two agreements of purchase of flats by the plaintiff.

48. Mr. Jamdar would also contend that there has been no letter sent to any of the executors during the lifetime of Gajanan calling upon them to administer the estate of the deceased. This is despite the fact that the constituted attorney of the deceased as also the plaintiff was the same person Rajadhyaksha, who was one of the executors and Gajanan himself was the other executor.

49. It must be borne in mind that a will, specially one which grants the entire of the estate of the deceased to one of the seven children of the deceased would be required to be probated within a reasonable time of the death of the deceased as it would exclude all the heirs other than the sole beneficiary from the estate. Of course, a petition can be filed even after gross delay is explained and there are no other circumstances to lend suspicion to the execution of the will (See. Vasudeo Daulatram Sadarangani Vs. Sajni Prem Lalwani 1982 (vol.85) The Bombay Law Reporter 113) followed in Wilma Levert Canua Vs. Allan Sebastian D'Souza in Appeal NO. 643 of 2012 dated 1st July, 2013 of this Court.

50. In view of the aforesaid reasons there are number of suspicious circumstances seen by the Court by which due execution of the will of the deceased dated 01.10.1971 as his last will and testament is not proved. Hence Issue No.1 is answered in the negative.

Issue No.2 and 3: Re: Fraud, coercion, undue influence and forgery

51. The forgery of the will cannot be ruled out in view of the observations with regard to the texture of the paper of the will as also in view of the relationship of the parties as members of a family. However the fraud, coercion or undue influence is not required to be proved since the due execution of the will itself is not proved. Hence these issues do not require to be answered and are hence not answered.

ORDER

52. The last will and testament stated to be of the deceased Mangesh Pandurang Rege is not proved. The grant of Letters of Administration with the will annexed is refused. The petition is accordingly dismissed.

53. Drawn up decree is dispensed with.

54. In view of the fact that the texture of the paper of the will is seen alongside the other documents of the same decade being the aforesaid two powers of attorney and the marriage certificate of the plaintiff, these documents shall be kept in a sealed cover in the custody of the Prothonotary and Senior Master of

this Court until the final disposal of all appeals from this judgment.

55. The order dated 24.08.1994 shall continue for two weeks.