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**IN THE COURT OF PRINCIPAL DISTRICT JUDGE,
AT ::::: SURENDRANAGAR.**

REGULAR CIVIL APPEAL NO. :11 / 2016

Exh. __32____.

APPELLANT :-

- [1] Kiranbhai Khelshankar Trivedi
Aged : 50 years, Occupation : Service
Residing at : Kanta Kunj, Janta Ice Factory Road
Surendranagar

V/S.

RESPONDENTS :-

- [1] Yogeshkumar Himmatlal Trivedi
Aged : 70 years, Occupation : Retired
Residing at Bhumi Packaging, Jamnagar Road
Village Targhaadi
Taluka : Paddhari, District Rajkot
- [2] Vijaybhai Khelshankar Trivedi
Aged : 52 years, Occupation : Service
Residing at : Kanta Kunj, Janta Ice Factory Road
Surendranagar

**SUB. : APPEAL UNDER SECTION 96 AND ORDER 43 RULE 1
OF THE CODE OF CIVIL PROCEDURE...**

Appearance :

Mr A A Chauhan, Learned advocate for the appellant.
Mr R A Acharya, Learned advocate for the respondent No.1.
Exparte for the respondent No. 2

:-: JUDGMENT :-:

1. This Regular Civil Appeal is preferred by the appellant / original defendant No.1 against the respondent No. 1 / original plaintiff and the respondent No. 2/original defendant No. 2 against the judgment and order passed by the learned Additional Senior Civil Judge, Surendranagar in Regular Civil Suit No.44/2012 on 29.04.2016. The parties are hereinafter referred to as "the defendant No. 1", " the plaintiff " and " the defendant No. 2 " as they stood in the original petition for the sake of convenience, clarity and brevity.

2. The facts giving rise to the present appeal are as under :-

That Himmatlal Vajeshankar Trivedi the father of the respondent No. 1/original plaintiff had executed a registered will on 17/02/1998 for immovable properties mentioned in the will and after Himmatlal Vajeshankar Trivedi died on 02/12/2005 the respondent No. 1/ original plaintiff preferred an application for probate of the said registered will on 26/11/2012, but objections were filed and admitted and by an order dated 10/05/2012 the Principal Senior Civil Judge registered the application for probate as Regular Civil Suit No. 44/2012. That considering the objections of the defendants the learned trial court framed issues at Exh. 29 and the entire oral and documentary evidence of both the parties was taken on record and by a judgment and order dated 29/04/2016 the learned Additional Senior Civil Judge, Surendranagar was pleased to decree the suit of the plaintiff as prayed for and ordered a probate to be issued for the registered will produced at Exh. 41 on payment of the necessary stamp by the plaintiff.

3. Being aggrieved and dissatisfied by the judgment and order passed by the learned Additional Senior Civil Judge,

Surendranagar, the appellant/original defendant No. 1 has filed the present appeal mainly contending that the impugned judgment and decree is illegal and the order passed by the learned Additional Senior Civil Judge, Surendranagar of granting probate to the plaintiff is against the settled principles of law and against the evidence on record of the case. That the suit of the plaintiff for grant of probate is barred by law of limitation and is liable to be dismissed as it has not been filed within the statutory period of limitation and the learned trial court has grossly erred in allowing the suit of the plaintiff. That the testator died on 02/12/2005 and the plaintiff filed the application for probate on 26/11/2012 after a period of seven years from the death of the testator and the application for probate is not filed within the period of limitation. That the learned trial court has not properly considered the objections raised by the defendants filed at Exh. 26 and has not considered the oral evidence of the defendant at Exh. 67. That in the alleged will produced by the plaintiff at Exh. 41 the earlier registered will of 05/07/1997 and registered at No. 2690 has been cancelled by the testator and the testator has not cancelled any other will and hence the will produced at Exh. 41 cannot be said to be the last and final will of the testator Himmatlal. That Himmatlal had executed a registered will on 27/03/1995 registered at serial No. 649 in favour of the defendant No. 1 for the property mentioned in the will at Exh. 41 and this will has not been cancelled by the testator in the will at Exh. 41. That as the will at Exh. 41 is not the final will of the testator the learned trial court has grossly erred in allowing the suit of the plaintiff and granting the probate of the will in favour of the plaintiff. That the defendants have not filed for any probate of the will executed in their favour and hence the defendants do not have to prove the will by evidence and if one will is executed for a

property another will cannot be executed for the same property without cancelling the previous will. That a false will cannot be considered and the learned trial court ought to have held that the will is a false and fabricated one. That the learned trial court has grossly erred in concluding that the will at Exh. 41 is the last will of the testator and the witnesses of the will are the colleagues of the plaintiff hence the learned trial court should have concluded that they are falsely supporting the case of the plaintiff. That in the deposition the plaintiff has admitted that the possession of the northern portion of the property is with the defendants for the last 23 to 24 years and this shows that the defendants are the owners of the property by adverse possession and hence the will is infructuous and no probate can be given for the said will. That the conduct of the plaintiff is suspicious and the plaintiff has not filed any objections while the defendants got their names entered in the property and the plaintiff did not declare that he had the will for the property executed in his favour. That the appeal of the appellant/original defendant No. 1 must be allowed and the judgment and decree passed by the learned Additional Senior Civil Judge, Surendranagar in Regular Civil Suit No. 44/2012 must be set aside.

4. The respondents have been served with the notice and the respondent No. 1/ original plaintiff has appeared before this Court through his advocate whereas the respondent No. 2/original defendant No. 2 has not appeared and filed any objections and hence it has been ordered to proceed ex parte against the respondent No. 2. The respondent No. 1/original plaintiff has filed the written statement at Exh. 9 mainly stating that the judgment and order passed by the learned trial court is just and proper and the appeal of the appellant must be rejected. That as per the order of the learned Additional Senior Civil

Judge, Surendranagar the respondent No. 1 has produced the non judicial stamp paper of the value of Rs. 75000/- and the probate has been issued in favour of the respondent No. 1. That the appellant has raised the objection of the suit being barred by law of limitation but the learned trial court has considered the aspect of limitation and has passed the order in favour of the respondent No. 1. That in the registered will dated 17/02/1998 the testator Himmatlal Trivedi had cancelled the will executed on 05/07/1997 and in the will executed on 05/07/1997 had cancelled the will executed earlier and the testator has not executed any will after 17/02/1998 and hence the will produced at Exh. 41 is the last and final will of the testator Himmatlal Trivedi. That as per the condition of the will registered at serial No. 649 on 27/03/1995 the appellant had to pay an amount of Rs. 51000/- and the same has not been paid till today and the said fact has been admitted by the appellant in his deposition at Exh. 67. That the registered will executed on 17/02/1998 is the last and final will and the respondent No. 1 has examined one of the attesting witnesses out of the two attesting witnesses as the other witness has died and has also examined the advocate who had drafted the will before the trial court and the appellant could not bring any fact that could cast a doubt on the will in the cross examination of the respondent No. 1. That the appellant and the respondents were living in a joint family and the appellant has falsely raised an objection that Himmatlal Trivedi was not the owner of the property. That if as per the say of the appellant if Himmatlal Trivedi is not the owner the plea of the appellant that he is the owner by adverse possession cannot be accepted. That the learned trial court has rightly held the registered will produced at Exh. 41 to be the last will of the testator Himmatlal Trivedi and the judgment and decree passed by the learned trial court is just and proper and the plaintiff has proved the

registered will at Exh.41 by oral evidence of the witnesses and hence the appeal of the appellant must be rejected.

5. The learned advocate for the appellant/original defendant No. 1 has submitted written arguments at Exh. 29 and the learned advocate for the respondent No. 1/original plaintiff has submitted written arguments at Exh. 30.

6. The learned advocate for the appellant/original defendant No. 1 has mainly reiterated the facts of the appeal in the written arguments at Exh. 29 and has mainly stated that the defendant No. 1 had filed objections against the application for probate and hence the objections were registered and the application was converted to a Regular Civil Suit. That the order of the learned trial court to issue a probate of the will executed on 17/02/1998 is against the settled principles of law and against the evidence on record of the case and is barred by law of limitation. That the testator died on 02/12/2005 and the plaintiff filed the application for probate on 26/11/2012 which has been filed after seven years after the death of the testator which is prima facie barred by the law of limitation. That the suit of the plaintiff ought to be rejected and the learned trial court has grossly erred in not considering the objections and the oral evidence of the defendant No. 1 at Exh. 67 and hence the order of the learned trial court must be set aside. That in the will dated 17/02/1998 produced at Exh. 41 the testator Himmatlal has cancelled the will registered at serial No. 2690 on 05/07/1997 and hence as the other will is not cancelled it is still in existence and hence no probate for the will produced at Exh. 41 can be issued. The learned trial court has grossly erred in concluding that the will produced at Exh. 41 is the last will of the testator and the learned trial court ought to have concluded

that the witnesses are the colleagues of the plaintiff and would be deposing in favour of the plaintiff. That in the deposition the plaintiff has admitted that the possession of the northern portion of the property is with the defendants for the last 23 to 24 years and this shows that the defendants are the owners of the property by adverse possession and hence the will is infructuous and no probate can be given for the said will. That the conduct of the plaintiff is suspicious and the plaintiff has not filed any objections while the defendants got their names entered in the property and the plaintiff did not declare that he had the will for the property executed in his favour. That the appeal of the appellant/original defendant No. 1 must be allowed and the judgment and decree passed by the learned Additional Senior Civil Judge, Surendranagar in Regular Civil Suit No. 44/2012 must be set aside.

The learned advocate for the appellant has submitted the following citations in support of his case.

1. Order passed by the Honourable High Court of Delhi in FAO (OS) No. 181/2009 in the case of Pratap Singh and another Vs. The State and another
2. AIR 2006 Allhabad 75
Begum Shanti Tufail Ahmed Vs. Unknown
3. AIR 1977 SC 282
The Kerala State Electricity Vs. T P Kunhaliumma

I have read the above citations.

7. The learned advocate for the respondent No. 1/original plaintiff has submitted written arguments at Exh. 30 mainly stating that his deceased father Himmatlal Trivedi had executed a registered will on 17/02/1998 for the northern side

of property situated on Janta Ice Factory Road, City Survey Ward No. 1 Survey No. 3421 known as "Kanta Kunj" and the sale deed was executed for the southern side of the property and the plaintiff filed the application for probate of the registered will and the defendants appeared and filed the written objections at Exh. 26. That the plaintiff has deposed on oath at Exh. 38, the deposition of the attesting witness of the will Kothari Dilipkumar Khimchandbhai is produced at Exh. 48 and the deposition of advocate Dharmeshbhai M Joshi, the advocate who drafted and got the will of Himmatlal Vajeshankar Trivedi registered is produced at Exh. 52. The plaintiff has produced the death certificate of Himmatlal Vajeshankar Trivedi at Exh. 39 and the registered will executed by his father at Exh. 41. That the appellant/original defendant No. 1 has deposed on oath at Exh 67 and has produced the will registered at serial No. 649 on 20/03/1995 at Exh. 63, the copy of Exh. 1 of Regular Civil Suit No. 44/2009 at Exh. 64, Copy of City Survey Appeal No. 45/08-09 at Exh. 65 and copy of the property in the will wherein the names of the appellant and respondent No. 2 have been entered in the record of the property at Exh. 66. That the plaintiff has received the probate issued by the Honourable Trial Court and the plaintiff has on innumerable occasions orally and on 14/05/2018 sent a notice to the appellant and the respondent No. 2 to hand over the possession of the property in the will to the plaintiff but they have given a false reply and hence the plaintiff has filed a suit for possession of the property and the same is pending before the lower court. That the appellant has not submitted any reason for filing of the appeal and has requested to allow the appeal and set aside the order, but in fact the required non judicial stamp paper of Rs. 75000/- has been produced and the probate certificate has already been issued by the Honourable Court and a copy of the same is produced in this

matter. That the appellant has mainly raised the question of limitation but in the judgment the learned trial court has relied on the judgment of the Honourable High Court of Gujarat reported in 2011(2) GLH 423 and has concluded that the registered will executed on 17/02/1998 and produced at Exh. 41 is the final will of the testator and has decreed the suit in favour of the plaintiff and the order is legal and just and hence the appeal of the appellant must be rejected with costs.

The learned advocate for the respondent No. 1 has submitted the following citation in support of his case.

1. 2017 SAR (CIVIL) 249
Saroj Agarwalla (D) through LR Abhishek Agrawalla Vs. Yasheel Jain.

I have read the above citation.

8. I have perused the entire record and proceedings of Regular Civil Suit No.44/2012 and from the appeal memo, written statement and written submissions of the parties the, following points arise for the determination of this appeal.

:-: POINTS :-:

- (1) Whether the learned Additional Civil Judge, Wadhwan has grossly erred in concluding that the registered will produced at Exh. 41 is the last and final will of the testator Himmatlal Vajeshankar Trivedi?
- (2) Whether the learned Additional Civil Judge, Wadhwan has grossly erred in concluding that the plaintiff is entitled to the probate of the registered will executed by father Himmatlal Vajeshankar Trivedi?
- (3) Whether the impugned judgment and decree passed by the learned Additional Senior Civil Judge, Surendranagar in Regular Civil Suit No.

44/2012 on 29/04/2016 is arbitrary, illegal, perverse and is required to be set-aside?

(4) What Order?

9. My findings on the above points are as under.

- (1) In the negative.
- (2) In the negative
- (3) In the negative
- (4) As per final order.

-:: REASONS ::-

POINT NOS. 1 to 3 :-

10. All the points are interconnected and for avoidance of repetition and the sake of convenience the points are discussed together.

11. I have perused the entire record and proceedings of Regular Civil Suit No. 44/2012 and it transpires that Himmatlal Vajeshankar Trivedi the father of the respondent No. 1/original plaintiff had executed a registered will on 17/02/1998 for immovable properties mentioned in the will and after Himmatlal Vajeshankar Trivedi died on 02/12/2005 the respondent No. 1/original plaintiff preferred an application for probate of the said registered will on 26/11/2012. That the public notice was issued in the daily Divya Bhaskar on 21/03/2012 and objections were filed and admitted and by an order dated 10/05/2012 the Principal Senior Civil Judge registered the application for probate as Regular Civil Suit No. 44/2012. That considering the objections of the defendants the learned trial court framed issues at Exh. 29 and the deposition of the plaintiff

was recorded at Exh. 38. The plaintiff has produced the copy of the death certificate of Himmatlal V Trivedi at Exh. 39, the public notice at Exh. 40 and the original registered will registered at Serial No. 514 on 17/02/1998 at Exh. 41. On perusal of the document produced at Exh. 39 it transpires that Himmatlal Vajeshankar Trivedi died on 02/12/2005 and his death has been registered with the Sub Registrar, Births and Deaths, Surendranagar Dudhrej Nagar Seva Sadan on 08/12/2005. That the plaintiff filed the application for the probate of the will and the public notice of the same was published in the daily Gujarat Samachar on 21/08/2011 and the public notice is produced at Exh. 40 and on perusal of the registered will produced at Exh. 41 it transpires that the will has been executed by Himmatlal Vajeshankar Trivedi on 17/02/1998 in the presence of witnesses Rameshchandra Chunilal Vyas and Kothari Dilipkumar Khimchandbhai and the will has been drafted by advocate Mr Dharmesh M Joshi. That the will is registered with the Sub Registrar, Surendranagar at serial No. 514 on the same date.

The plaintiff has been cross examined at length by the learned advocate for the defendants wherein the plaintiff has stated that his father lived with him for almost 16 to 17 years prior to his death and he has the ration card as proof that his father lived with him. That the northern side of the property is in the possession of the defendants for the last 23 to 24 years and the will was executed and registered in 1998. That at that time the health of his father was good and the plaintiff has stated that his father had climbed the stairs to the office of the advocate. That at that time his father had age related issues and was hospitalized for two to three times. The plaintiff has denied that the defendants are also legal heirs of Himmatlal

Vajeshankar Trivedi for the property mentioned in the will and he, his sister Vinaben and his brother Chelshankar are the legal heirs. The plaintiff has stated that he does not know if his sister Vinaben had filed any suit for her share in the property and he does not know whether he was defendant No. 1 in Special Civil Suit No. 44/2009 filed by his sister Vinaben. The plaintiff has admitted that the names of the defendants have been entered into the record of the property but he has denied that he has received the notice under section 135(d) from the City Survey. The plaintiff has also denied that his father was not well and hence the fabricated will was made by him. Besides these facts no other material that would help the case of the defendants has come on record during the cross examination of the plaintiff.

12. The plaintiff has examined the attesting witness to the will Kothari Dilipkumar Khimchandbhai at Exh 48. The witness has stated that he knows the parties and also knew the father of the plaintiff Himmatlal Vajeshankar Trivedi and he had registered a will at serial No 2690 and the will was prepared by advocate Paresh M Joshi on 05/07/1997 as per the directions of Himmatlal Vajeshankar Trivedi and he was an attesting witness to the will. That the other attesting witness was Ramesh Chunilal Vyas and in their presence the will was prepared and drafted by advocate Paresh M Joshi and both the witnesses read the will and affixed their signature and they had gone to the office of the Sub Registrar. The witness has identified the original will at Exh.41 and has also stated that this will has been prepared on 17/02/1998 and was drafted by advocate Dharmesh M Joshi as per the instructions of Himmatlal Vajeshankar Trivedi and he had also attested the will. That the other witness was Rameshchandra Chunilal Vyas, who was no more and on 17/02/1998 Himmatlal Vajeshankar Trivedi had

come to the office of the Sub Registrar and the witnesses had affixed their signatures on the will and Himmatlal Vajeshankar Trivedi had also affixed his signature in the presence of the Sub Registrar. The witness has stated that on both the wills prepared 05/07/1997 and 17/02/1998 his signature and the signature of Rameshchandra Chunilal Vyas have been affixed and he has identified both the signatures. That Himmatlal Vajeshankar Trivedi died on 02/12/2005 at Surendranagar. The witness has been cross examined at length by the learned advocate for the defendants and he has stated that at the time of preparation of the will he was working in District Co. Op. Bank and had worked for his whole service in the head office. That while the will was being prepared the plaintiff Yogeshkumar Himmatlal was working in his bank and was his colleague and one branch of their bank is at Sayla. That at the time of preparation of the will he was residing in Jayprakashnarayan Nagar, Sheri No. 2 and the plaintiff stayed about 4 to 5 kms away from his place. The witness has denied that at the time of the execution of the will Himmatlal Vajeshankar Trivedi could not see properly and was very weak and he did not know what he was doing. That both the wills i.e. the will executed on 05/07/1997 and the will executed on 17/02/1998 were prepared at the office of the advocates and they do not know what was written as the will was not prepared in their presence but the witness has stated that he has signed as a witness to the will. That the contents of the will were not discussed in his presence and Himmatlbhai had called him to sign on the will. That he had gone to sign the will at the Sub Registrar office and it was a working day and he had taken oral permission from the office and gone and both the witnesses and the advocate were present and he had read the will. The will that was executed on 05/07/1997 has been produced at Exh, 51 during the cross

examination of the witness and on perusal of the will produced at Exh 51 it transpires that the will is registered with the Sub Registrar, Surendranagar at serial No. 2690 on 05/07/1997. That this will has been executed on a non judicial stamp paper of Rs. 20/- and it is stated in para 2 on page 2 that the earlier will of registration No, A776158 receipt No. 201 executed on 14/03/1995 was cancelled and this will was the last will. The will has been attested by witnesses Rameshchandra Chunilal Vyas and Kothari Dilipkumar Khimchandbhai and drafted by advocate Paresh M Joshi. The witnesses as well as the testator and the advocate have signed the will and the same is registered with the Sub Registrar, Surendranagar.

13. The plaintiff has examined witness Dharmeshbhai Manharlal Joshi at Exh. 52. This witness is the advocate who has drafted the will and he has stated on oath that the will produced at Exh. 51 has been drafted by him as per the instructions of Himmatlal Vajeshankar Trivedi and after preparing the same he had read over the same and thereafter had got the same registered with the Sub Registrar on 17/02/1998. That the witnesses and Himmatlal had affixed their signatures before the Sub Registrar and he had identified all the signatures and had also affixed his signature on the will. The witness has been cross examined at length by the learned advocate for the defendants wherein he has stated that Himmatbhai had come to his office to give instructions about he will and he was about 90 years old. That his office is on the first floor and Himmatbhai is not his relative but he knew Himmatbhai as his house was on the way to his office. That the witnesses and Himmatbhai were all present at the Sub Registrar's office at the time of affixing their signatures on the will. The witness has denied that Himmatbhai had never come

to him to get the will prepared and he does not know how many wills were prepared prior to this will. That besides these facts nothing to help the case of the defendants has come on record and the plaintiff has closed the evidence by a pursis at Exh 53.

14. The defendant No. 2 has submitted his deposition on oath at Exh. 67 and has mainly stated that the northern part of “KantaKunj” is in his possession since the last 25 to 26 years and this fact has been admitted by the plaintiff in his deposition. That the will produced by the plaintiff is an illegal and fabricated one and the suit of the plaintiff is barred by non joinder of necessary parties. That the sister of the plaintiff Vinaben is a necessary party and has not been added as a party to the suit. That Himmatlal Vajeshankar had not cancelled the registered will executed on 27/03/1995 and registered at serial No. 649 and hence that will is still in existence. That after the death of Himmatlal Vajeshankar on 2/12/2005 for a long gap of 7 to 8 years the plaintiff did not file any application and hence the suit of the plaintiff is barred by law of limitation. That Himmatlal Vajeshankar did not purchase any property from his earnings and hence did not have the authority to execute any will and hence the plaintiff cannot claim a probate for the said will. That at the time of the execution of the will Himmatlal Vajeshankar was aged 90 to 95 years and did not have the mental and physical fitness to execute the will and hence no probate can be issued for the said will. The defendant No. 2 has been cross examined by the learned advocate for the plaintiff wherein he has stated that he is working in Saurashtra University, Rajkot since 15/04/1987 and is residing at Rajkot. That “Kantakunj” belonged to Kantaben, the wife of Himmatbhai and Himmatbhai was working in the Railways. That the witness was residing in the house since his birth and they were residing in a joint family

with Kantaben and Himmatbhai. That Kantaben died and had given the house to Himmatbhai and at the time of the execution of the will Himmatbhai was the owner of the house. That they had entered their names in the property card and after the death of Himmatbhai in 2005 they had entered their names in the City Survey record and they had not taken any heirship certificate from the Court. That he does not know whether Himmatbhai had executed another will in 1997 and whether in that will the will executed in 1995 was cancelled. That his brother Vijaybhai resides at Dhrangadhara and both the wills of 1995 and the will of 1997 are registered wills. That he was not present in the Registrar's office at the time of the registration of the will in 1995 and he does not know who had prepared the will. That he had submitted the will for his name to be entered in the City Survey record in the property and in the will on page 3 there is a condition that an amount of Rs. 51500/- has to be paid to Yogeshbhai and no such amount has been paid to the plaintiff. That besides this no other material fact to help the case of the defendant has come on record.

15. The defendant has produced a copy of the will at Exh. 63 and on perusal of the same it is a will executed by Himmatlal Vajeshankar Trivedi and registered with the Sub Registrar, Surendranagar at serial No. 649 on 27/07/1995 and the will has been attested by attesting witnesses Dr Kanubhai Trivedi and Lalbhai V Dave and is also signed by Himmatlal Vajeshankar Trivedi and advocate Paresh M Joshi.

16. On perusal of the documents produced by the plaintiff and particularly the will produced at Exh. 41 which is the will executed by the testator Himmatlal Vajeshankar Trivedi and attested by witnesses Rameshchandra Chunilal Vyas and

Kothari Dilipkumar Khimchandbhai and drafted by advocate Dharmeshbhai M Joshi and the plaintiff has examined the attesting witness Kothari Dilipkumar Khimchandbhai at Exh 48 and witness advocate Dharmeshbhai M Joshi at Exh 52 and has proved that Himmatlal Vajeshankar Trivedi executed the will produced at Exh. 41 and registered at serial No. 514 on 17/02/1998.

17. The learned advocate for the appellant has submitted the order passed by the Honourable High Court of Delhi in FAO (OS) No. 181/2009 in the case of Pratap Singh and another vs. The State and another wherein the Honourable High Court of Delhi has held that when the testator was suffering from mouth cancer and died 15 days after the execution of the will a suspicion is caused on the soundness of mind of the testator and the onus was on the appellant to prove that the testator was in a sound disposing mind to execute the will and the will was prepared on his directions. That when no cogent evidence of the doctor who treated the testator or the lawyer who prepared the will is brought on record the appellant had not discharged the onus to prove that the will is free from suspicion. This citation would not help the case of the appellant as in the instant case the will that has been executed on 17/02/1998 by the testator Himmatlal Vajeshankar Trivedi died on 2/12/2005 the plaintiff has also examined witness Dharmesh M Joshi at Exh 52 and he is the advocate who has drafted the will. The plaintiff has also examined the attesting witness at Exh. 48 and both these witnesses have stated that the mental and physical health of the testator was sound and he himself had given instructions to the advocate to prepare the will.

18. The learned advocate for the appellant has submitted AIR 2006 All 75 in the case of Begum Shanti Tufail Ahmed Vs. Unknown wherein the Honourable High Court has held that the laches when not adequately explained would not entitle the applicant for grant of probate certificate. This citation would not help the case of the plaintiff as in the case cited there was a delay of 20 years which was not explained adequately and no such delay is there in the case on hand. That the plaintiff has proved the will and has also examined the attesting witness and the advocate who had drafted the will.

19. The learned advocate for the appellant has submitted AIR 1977 SC 282 in the case of The Kerala State Electricity Vs. T P Kunhaliumma wherein the Honourable Supreme Court has held that a petition contemplated under the Telegraph Act was a petition falling within the scope of Article 137 of the Limitation Act. This citation would not help the case of the plaintiff as in the case cited the petition was for compensation claimed against the Kerala State Electricity Board constituted under Sec 5 of the Indian Electricity Act and in the petition for enhancement of compensation the plea of the claim being time barred was taken and it was held that the petition was falling within the scope of Article 137 of the Limitation Act. In the present case the plaintiff has filed the application for a probate of a will and hence the citation would not help the case of the appellant.

20. The learned Additional Senior Civil Judge, Surendranagar has appreciated all the oral and documentary evidences produced by both the parties and particularly the deposition of the attesting witness Kothari Dilipkumar Khimchanbhai of the will produced at Exh. 41 and the deposition of advocate Dharmeshkumar M Joshi the advocate

who has drafted the will and who has identified the testator and the witnesses and has rightly concluded that the plaintiff has proved the will as per the settled principles of law. The learned Additional Senior Civil Judge Surendranagar has decided the issues raised at Exh.29 accordingly and after discussing the entire oral and documentary evidence has decreed the suit in favour of the plaintiff and has passed an order that the plaintiff is entitled to the probate as prayed for. I am of the opinion that the learned Additional Senior Civil Judge, Surendranagar has rightly appreciated all the oral and documentary evidences produced by the plaintiff and has in the judgment and order rightly allowed the suit of the plaintiff. The order passed by the learned Additional Senior Civil Judge, Surendranagar is legal and proper and no order of interference is required in the judgment and order passed in Regular Civil Suit No. 44/2012 and hence, I decide point Nos.1, 2 and 3 in the negative.

POINT NO. 4 :-

21. In view of the above discussion, I pass the following final order.

-:: ORDER ::-

- (i) The present Regular Civil Appeal No. 11 of 2016 of the appellant is hereby rejected.
- (ii) The judgment and decree passed by the learned Additional Senior Civil Judge, Surendranagar in Regular Civil Suit No. 44/2012 dtd. 29.04.2016 is hereby confirmed and made absolute.
- (iii) The parties to bear their own costs.
- (iv) Decree to be drawn accordingly.

(v) R. & P. be sent back to the trial Court with a copy of the order.

Pronounced in the open Court on this **26th** day of **February, 2019.**

Date : **26 -02- 2019.**

Place: Surendranagar.

(Susan Valentine Pinto)

Principal District Judge,
Surendranagar.
(GJ00416)