

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

**TESTAMENTARY SUIT NO.85 OF 2015
in
TESTAMENTARY PETITION NO.320 OF 2015**

Madhukar Kashinath Tupe .. Deceased
Sainath Madhukar Tupe .. Plaintiff/Petitioner
Vs.
Mr.Arun Madhukar Tupe & Ors. .. Defendants/Respondents

**WITH
TESTAMENTARY SUIT NO.36 OF 2014
in
TESTAMENTARY PETITION NO.1581 OF 2013**

Madhukar Kashinath Tupe .. Deceased
Mr.Arun Madhukar Tupe & Ors. .. Plaintiffs/Petitioners
Vs.
Sainath Madhukar Tupe .. Defendant/Respondent

Mr.Uday G. Jaguste for the plaintiff in TS 85 of 2015 and for the
defendants in TS 1581 of 2013.
Mr.T.G. Vora i/by Bina S.Shivhare for the defendant in TS 85 of 2015
and for the plaintiffs in TS 1581 of 2013.

**CORAM : R.D. DHANUKA, J.
DATE : 26th July 2017**

P.C. :

. On 29th June 2017, the matter was on board for marking of
the Will sought to be propounded by the plaintiff. Learned counsel for
the defendants raised an objection that in the compilation of documents
filed by the plaintiff, copy of the alleged Will was not filed. It was

contended by the learned counsel for the plaintiff that copy of the Will was already annexed at Exhibit 'B' to the plaint and though the same was described as 'Nomination Form,' the same was the last Will and Testament of the deceased testator. He made a statement before this Court that the third office copy of this alleged Will is deposited with the Prothonotary and Senior Master and that the same would be produced through the witnesses proposed to be examined by the plaintiff.

2. Pursuant to the liberty granted by this Court, the plaintiff has filed additional affidavit in lieu of the examination-in-chief on 11th July 2017.

3. Office has produced a Triplicate copy of the Nomination Form (alleged Will) which was filed by the plaintiff with the Prothonotary and Senior Master.

4. Mr.Ashish Mistry, Chairman of the Purshottam Nagar "A" CHS Ltd. is present in Court and produces the original and duplicate of the nomination form (alleged Will) of the deceased Madhukar Kashinath Tupe.

5. Mr.Vora, learned counsel for the defendant strongly raises an objection of the Honorary Chairman of the Society producing the documents before this Court on the ground that the plaintiff has filed this petition for probate on the basis of the Triplicate copy of the said alleged nomination form/alleged Will. He also opposes the production of the document filed by the plaintiff with the Prothonotary and Senior Master

on the ground that in the compilation of the documents, the said document is not annexed.

6. It is not in dispute that the plaintiff has filed this probate petition on the basis of Triplicate copy of the alleged nomination form/ alleged Will which was filed by the plaintiff with the Prothonotary and Senior Master and is numbered as '116 of 2015,' a copy whereof is annexed to the petition. In my view, there is thus no merit in the submission of the learned counsel for the defendant that the said document was not included in the compilation of documents referred to and relied upon by the plaintiff and thus cannot be produced.

7. In so far as the document sought to be produced by the Honorary Chairman of the Society is concerned, as on today, there is no application made by plaintiff for leading secondary evidence. As and when application for leading secondary evidence is made, the same would be considered by this Court on its own merit.

8. The plaintiff has not filed any affidavit under Rule 384 of the Bombay High Court (Original Side) Rules, 1980 till date though it is the case of the plaintiff that both the alleged attesting witnesses who had attested the said nomination form (alleged Will) have expired.

9. Learned counsel for the plaintiff states that the plaintiff would examine one of the persons who had filed affidavit before this Court whose affidavit is included in the compilation of the documents under Rule 384 of the Bombay High Court (Original Side) Rules, 1980

since both the alleged attesting witnesses have expired and would file affidavit of such witnesses within two weeks from today and undertakes to serve a copy thereof upon the defendants' advocate simultaneously. He would also file a list of the other witnesses, the plaintiff proposes to examine within one week from today and would serve a copy thereof upon the defendants' advocate simultaneously.

10. Since the document is produced from the record of the Prothonotary and Senior Master, Triplicate copy of the nomination form (alleged Will) dated 7th June 1996 of the deceased Madhukar Kashinath Tupe is marked as Exhibit 'X-1' for identification. It is made clear that since the said document produced from the record of the Prothonotary and Senior Master is marked only for identification, existence and contents thereof are not proved at this stage.

11. Place the matter on board for 'Directions' after four weeks. It is made clear that no further extension would be granted. The alleged attesting witness whose affidavit would be filed is directed to remain present before this Court on 28th August 2017 at 11.00 a.m. without fail. Office is directed to produce the document marked today as Exhibit 'X-1' for identification on the next date. The document produced by the Honorary Chairman of the Society is returned back to him.

R.D. DHANUKA, J.