

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
TESTAMENTARY SUIT NO. 66 OF 1987
IN
TESTAMENTARY PETITION NO. 92 OF 1986**

**VIBHUSHIT UMIYASHANKAR
TRIVEDI,**

of Bombay Hindu Inhabitant, residing at
Karunasagar, 267 Deodhar Road, Matunga,
Bombay 400 019, the sole Surviving executor
named In the said Will.

... Plaintiff

versus

1(a) BHARGAV JASVANTRAI TRIVEDI,
Residing at 3rd Floor Karunasagar, 267
Deodhar Road, Matunga, Bombay – 400
019.

**1(b) MRS. MINAKSHI SHARAD
TRIVEDI,**
Residing at 3rd Floor, Karunasagar, 267
Deodhar Road, Matunga, Bombay – 400
019.

1(c) DAXA MADHU OZA
Residing at 3rd Floor, Karunasagar, 267
Deodhar Road, Matunga, Bombay – 400
019.

1(d) MRS. KALPANA JAGDISH SHAH,
Residing at 3rd Floor, Karunasagar, 267
Deodhar Road, Matunga, Bombay – 400
019.

... Defendants

APPEARANCES

FOR THE PLAINTIFF	Mr. Girin Pandit
FOR THE DEFENDANTS	Mr. D.S. Jondhale, i/b M/s. Jondhale & Co.

CORAM : **G.S.Patel, J.**

JUDGMENT RESERVED ON : **23rd July 2015**

JUDGMENT PRONOUNCED ON : **7th April 2016**

JUDGMENT:

1. The Suit seeks probate to the last Will and testament of one Chhotalal Karunashankar Trivedi (**“Chhotalal”**; **“the deceased”**; **“the Testator”**). Chhotalal died in Mumbai on 18th October 1982. He was a widower. He had no children. He is said to have left a testamentary writing in Gujarati dated 6th July 1982. In this Will, which is the one propounded, Chhotalal appointed his brother Umiyashankar, and Umiyashankar’s son, Vibhushit (the present Plaintiff) as the executors of his Will. Umiyashankar and Chhotalal had a brother Jasvantrai. He was the original Defendant. After he died, his heirs have been brought on record as Defendants Nos. 1(a) to 1(d).

2. The Will in question is in Gujarati.¹ However, the Testator has apparently signed it in English on page 2. There is also a signature on page 1, and this is the subject of some dispute in the

¹ Exhibit “P6”, p. 183.

trial. I will turn to this presently. An official translation is also on record.²

3. The execution of the Will was supposedly witnessed by one Dr. H. R. Kamdar, and by one Vrajlal V. Thakkar. Although Vrajlal Thakkar filed two Affidavits during the pendency of the Suit, he died before he was cross-examined.

4. In the Will, Chhotalal said he had an undivided one-third share, right, title and interest in an immovable property named 'Karunasagar' at 267, Deodhar Road, Matunga, Mumbai 400 019. Some portion of it was, he said, in his exclusive possession. The other two-thirds were with his brothers Umiyashankar and Jasvantrai. Chhotalal said his one-third share was his self-acquired property. He bequeathed this one-third share to the Plaintiff, his nephew Vibhushit (Umiyashankar's son).

5. Umiyashankar died on 5th February 1983, leaving the Plaintiff as the sole surviving executor. The Petition was filed on 5th September 1983. A citation dated 8th September 1987 was served on Jasvantrai on 2nd December 1987. Jasvantrai entered a Caveat on 14th December 1987 with an accompanying Affidavit in Support.

6. In this Affidavit he said that the Will in question was fabricated, bogus and not intended to be acted upon. He said that Chhotalal was a chronic asthmatic and suffered from bronchitis; that Chhotalal was an alcoholic; that he was twice operated on for

² Exhibit "P7", p. 185.

hernia, had lost consciousness and was bedridden from 1982 onwards;³ that at that at the time when the Will was executed on 6th July 1982 the deceased was 85 years with severely restricted movements; and that his medical condition was such that he could barely take food and was practically on a liquid diet. Jasvantrai claimed to have accompanied Chhotalal for most of the duration of his illness. It is on this basis that Jasvantrai alleged that Chhotalal lacked sufficient testamentary capacity.⁴

7. He then alleged that Chhotalal was at the mercy of Umiyashankar and the Plaintiff and they had prevailed upon Chhotalal to put his signature to the alleged Will.⁵

8. The next ground taken by the Caveator was that the Will was unnatural and inequitable in its exclusion of the Caveator from its bequests. This ground was sought to be bolstered by alleging that the Karunasagar property of which one-third was bequeathed in the Will, belonged in its entirety to Jasvantrai and Chhotalal had no right, title or interest in it at all. This was also cited as evidence of unsoundness of mind.⁶

9. Jasvantrai also disputed the signatures of the deceased as they appeared on the Will.⁷

³ Affidavit in support of Caveat, paragraph 3, *p.* 20.

⁴ Affidavit in support of Caveat, paragraph 4, *pp.* 20-21.

⁵ Affidavit in support of Caveat, paragraph 4, *p.* 22.

⁶ Affidavit in support of Caveat, paragraphs 5-6, *pp.* 22-25.

⁷ Affidavit in support of Caveat, paragraph 7, *p.* 25.

10. On the Caveat being filed along with its Affidavit in Support, the Petition was renumbered as a Suit and proceeded to trial. Issues were framed by R.D. Dhanuka J on 4th February 2014. These are set out below with my findings against each.

Sr No	Issue	Finding
1.	Whether the Plaintiff proves the last Will and Testament of the deceased Shri Chhotalal Karunashankar Trivedi dated 6th July 1962 and the execution of the Will is duly attested in accordance with law?	Yes
2.	Whether Defendant No.1(a) proves that the testator was suffering from any serious illness and was not of sound and disposing mind at the time of execution of Will?	No
3.	Whether Defendant No.1 proves that the Will was executed under undue influence of the plaintiff?	No
4.	Whether defendant no.1 proves that the signature of the testator is forged?	No.
5.	Whether the plaintiff is entitled to the probate of the last Will and	

Testament of the deceased as **Yes.**
prayed?

6. What reliefs? **Suit
decreed**

11. The Plaintiff led his own evidence as also the evidence of Dr. Kamdar, one of the attesting witnesses. The record also indicates that the other attesting witness Vrajlal Thakkar had made not one but two Affidavits. On 5th September 1983, when the Petition was originally filed, Vrajlal Thakkar filed an Affidavit saying that the Will was executed at the residence of the deceased at the Karunasagar building in Matunga.⁸ Vrajlal Thakkar subsequently filed another Affidavit on 26th March 1990 in which he says that there was a mistake in the first Affidavit on account of a miscommunication with the Advocates and that the Will was actually signed, as the other witness Dr. Kamdar, Chhotalal's family physician of many years says, at Dr. Kamdar's dispensary.⁹ Vrajlal Thakkar himself died on 16th December 1998. By that time, the Caveat had already been filed on 14th December 1997. On 4th February 2014, the issues that I have set out above came to be drawn.

12. For his part Defendant No. 1(a), brought on record following the demise of the original Defendant, Jasvantrai, examined himself on a very limited aspect of the matter, i.e., to introduce the expert evidence of a handwriting expert, Mrs. Titiksha Desai-Kamble. These are the only two witnesses whose evidence was led by the Defendants.

⁸ Petition, *pp.* 10-12.

⁹ Annexure to the Plaintiff's Evidence Affidavit, *pp.* 45-46.

RE: ISSUE NO.1: Whether the Plaintiff proves due execution and attestation of the Will

13. The burden of proving this issue is on the Plaintiff. It actually falls in two parts. The first part of it relates to the due execution by the Testator and the second part relates to the due attestation of that execution by the two attesting witnesses. The Plaintiff must prove both. I believe that the question of the Testator being of sufficient testamentary or dispositive capacity is also a burden that must necessarily fall on the Plaintiff although in Issue No. 2, a burden has been cast on the Defendant to show that the Testator was suffering from serious illness and was not of sound and disposing mind. I will segregate these two for the simple reason that the contesting Defendant No. 1(a) has adopted the original Caveator's stand that the deceased was so infirm for so long that he could not possibly have retained any sufficient dispositive capacity.

14. On the question of the due execution of the Will, we have the evidence of Dr. Kamdar first followed by the evidence of the Plaintiff himself. There are in addition the two Affidavits filed by the second attesting witness Vrajlal Thakkar to which I have just referred. However, since he passed away after the Petition was filed, he was not available for cross-examination. I will consider the evidentiary value of his two Affidavits presently.

15. Dr. Kamdar's evidence was taken on 30th September 1995 on commission. Dr. Kamdar was 70 years old at the time. I must note that on that day, Issues had not even been framed. I can only presume that the evidence of Dr. Kamdar was taken well in advance

because of his own failing health. Another peculiarity of this evidence is that the examination-in-chief was not on Affidavit but was taken directly by the counsel for the Plaintiff before the Commissioner. Further, the Defendant represented himself and appeared in person. He conducted the cross-examination himself.

16. In his examination-in-chief, Dr. Kamdar says that he knew the deceased Chhotalal. He also said that he knew both the Plaintiff and the Defendant. Dr. Kamdar said he had known the deceased for about 20 years before his death. The deceased was Dr. Kamdar's patient and visited his dispensary "of and on" for medical treatment.¹⁰

17. In his examination-in-chief¹¹ Dr. Kamdar was shown the original Will dated 6th July 1982. He identified his own signature at the foot of page 2 as also the rubber stamp with his name. He confirmed that he himself had put the address of the dispensary when he attested the document. Secondly, he identified the signature on page 2 as that of the deceased. He unequivocally stated that this signature was placed by the deceased in his presence on 6th July 1982 after the deceased read it.

18. However, even in his examination-in-chief, Dr. Kamdar was unable to identify the signature on page 1. He also could not say whether the second witness, Vrajlal Thakkar had signed the Will in confirmation of attestation in Dr. Kamdar's presence or not. Dr. Kamdar did recollect that Chhotalal visited his dispensary on 6th

¹⁰ Record, pp. 124-125.

¹¹ Record, p. 125.

July 1982 for the purpose of signing this document along with one or two people. At the time of his examination, he could not recall the names of those persons. He also said that he did not know any person named Vrajlal V. Thakkar. He confirmed that Chhotalal signed the Will first and that he thereafter signed as the first witness. Dr. Kamdar was not told anything else about the contents of the Will. Dr. Kamdar did depose that Chhotalal was at that time in good health and mentally alert although suffering chronic asthma for many years.¹²

19. The cross-examination of Dr. Kamdar by the Defendant appearing in person on that date is extremely brief.¹³ It is in fact no cross-examination at all. Unfortunately, it has not been recorded in question and answer form. Whether it is examination-in-chief or cross-examination, all evidence before a Commissioner should always only ever be recorded in question and answer form so that the work of the Court at the final hearing is not made more difficult by attempting to 'reverse engineer' as it were the precise frame of the questions that were put to the witness. In any case, in cross-examination the witness Dr. Kamdar reaffirmed that the Will was not prepared in his presence. It had been brought by Chhotalal duly prepared when he came to Dr. Kamdar's clinic. Dr. Kamdar confirmed in cross-examination that Chhotalal was accompanied by two other persons at that time but he did not recollect their names. He also could not explain (quite naturally) why the Will was prepared in Gujarati but signed in English. He reconfirmed that the

¹² Record, *p.* 125.

¹³ Record, *p.* 126.

Will was brought by Chhotalal himself on the date that it was signed in his presence.

20. This is the only cross-examination of the only available attesting witness. It is important to note that given the Issues, no case was ever put to this witness that he had not signed the Will as a witness; that the signature of the deceased was not his, i.e., the deceased's; or that the Will was fabricated or a forgery. These are important omissions and they will have a significant bearing on the outcome of this particular case.

21. The Plaintiff filed an Affidavit in lieu of examination-in-chief dated 15th March 2014. It was, therefore, almost twenty years after Dr. Kamdar gave his evidence.¹⁴ In this Affidavit the Plaintiff confirmed that Chhotalal was a widower and that he had no children. Chhotalal's wife died in 1969. After that, Chhotalal was alone and stayed with the Plaintiff and his family who looked after him. He also confirmed that the three brothers, Chhotalal, Umiyashankar and the original Caveator/Defendant Jasvantrai all had a one-third interest in the Karunasagar property at Matunga.

22. The Plaintiff then spoke of the preparation of the Will. He said it was drawn up in Gujarati and was executed at Dr. Kamdar's dispensary at Agarwal Niwas, 402, Telang Road, Matunga Central, Mumbai 400 019, in the presence of Dr. Kamdar and Vrajlal Thakkar. He confirmed that both Dr. Kamdar and Thakkar signed the document as attesting witnesses. Importantly, the Plaintiff did

¹⁴ Affidavit of the Plaintiff, pp. 30-36.

not claim to have been present at the time although he identified the signature of the deceased.¹⁵

23. The Plaintiff then spoke of Vrajilal Thakkar having filed his Affidavits and having since passed away and of Dr. Kamdar having been examined and cross-examined on commission.¹⁶

24. The Plaintiff then produced records showing that the property in question was equally held by the three brothers, each with an undivided 1/3rd share in it.¹⁷

25. The Plaintiff then said that the deceased was once operated for a hernia, but that was well in the past before 1965. The deceased was otherwise fit and healthy at the time of the Will. He was moving about and used to attend his office.¹⁸

26. There was a further examination-in-chief of the Plaintiff on commission. This was on 18th July 2014. The further examination-in-chief reaffirms the evidence given on Affidavit.¹⁹ After this, cross-examination of the Plaintiff began.²⁰

¹⁵ Affidavit of the Plaintiff, paragraph 3, *pp.* 31-32.

¹⁶ Affidavit of the Plaintiff, paragraphs 4-5, *pp.* 31-32.

¹⁷ Affidavit of the Plaintiff, paragraph 7, *p.* 34.

¹⁸ Affidavit of the Plaintiff, paragraph 8, *p.* 34-35.

¹⁹ Further examination-in-chief, *pp.* 67-69.

²⁰ Cross-examination of the Plaintiff, *pp.* 69-123. I notice in passing that this cross-examination before the Commissioner was most unsatisfactory. Although it was taken in a question and answer form, I find that the Commissioner had purported to rule on some of the objections taken before him. Much later, he evidently realised that this could not have been done and refrained from doing so. However, the cross-examination is replete with instances of the Commissioner

27. A suggestion was put to the Plaintiff that the style of signature on the first and the last page of the Will were different.²¹ This was denied. It is however important to note that in answer to Question 7 the Plaintiff confirmed that he was not present at the time when the Will was executed.²² Several questions were put to him ostensibly to try and get him to agree that the two signatures of the Testator on pages 1 and 2 were different. The Plaintiff did not agree with the suggestions put to him.²³ Then a suggestion was put to the Plaintiff that the two pages of the Will were pages from two different documents and for this reason there was no page number on the first page of the Will.²⁴ While this was denied, I find this question exceedingly strange since this was not a case pleaded at all. This was not even the case that was finally referred for the opinion of the handwriting expert brought forward by the Defendant. I am unable to see how any such question could have been allowed to be put to the Plaintiff. Had there been any answer inconvenient to the Plaintiff, I would have been moved to ignore it. What is important however is that there is no suggestion put to the Plaintiff that the property in question at Matunga is or was the sole property of the original Defendant. Now this is an important omission because the Defendant's Affidavit in Support of the Caveat proceeds on the footing that the property in question was exclusively the property of the original Defendant alone.

purporting to rule and adjudicate on the objections taken before him.

²¹ Plaintiff cross-examination, Qns. 2-6, *pp.* 70-71.

²² Plaintiff cross-examination, *p.* 71.

²³ Plaintiff cross-examination, Qns. 8-15, *pp.* 71-74.

²⁴ Plaintiff cross-examination, Qn. 16, *p.* 74.

28. The Plaintiff was then asked when he saw the Will for the first time. He says that he saw it when Mr. Suryakant Mehta a solicitor with M/s. Wadia Ghandy & Co., called him, Defendant No. 1(a), the original Defendant Jasvantrai and the Plaintiff's father Umiyashankar to his office. At that time the Will was presented to them and that was the first time that the Plaintiff learnt of it. This was about a month after the death of the Testator.²⁵

29. There then follows a long and, in my view, wholly irrelevant cross-examination about various properties of the deceased, none of which takes us very far. However, in Question 84 the Plaintiff was asked whether before 6th July 1982 there was any quarrel between the Testator and the Plaintiff.²⁶ An objection was taken to this, in my view quite correctly, that the question was irrelevant and had to be disallowed. The Commissioner noted the objections and the rival submissions. The answer to the question was a simple "No". The reason this is important is because once again we find a case being put to the Plaintiff that has never been pleaded. This is repeated again a few pages later in Question 128.²⁷ This entire passage is worth reproducing.

Q. 128	I put it to you that the Will of the deceased Testator signed before the Witness viz. Dr. H.R. Kamdar is different than the Will submitted by you with your Petition for Probate
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²⁵ Plaintiff cross-examination, Qns. 22-27, *pp.* 76-77.

²⁶ Plaintiff cross-examination, *p.* 97.

²⁷ Plaintiff cross-examination, *p.* 110.

is another and not the same Will as signed by the deceased Testator?

Obj. Ld. Advocate for the Plaintiff raised the objection on above question on the ground that it is not the case anywhere pleaded by the Defendant in his Affidavit in Support of Caveat and as such the Defendant is not entitled to put up a new case not pleaded anywhere.

Reply Ld. Advocate for the Defendant No.1A stated that it was very much pleaded and as such I am entitled.

Rejoinder Ld. Advocate for the Plaintiff requested the Ld. Advocate for Defendant No.1A to point out from the pleading a case put up by you now.

Sur-Rejoinder Ld. Advocate for Defendant No.1A pointed out para 7 of his Affidavit in Support of Caveat.

Sur-Sur-
Rejoinder

Ld. Advocate for the Plaintiff submitted that version in para 7 as stated by Ld. Advocate for Defendant No.1A is completely different and nowhere states case put up now before witness.

*Per
Commissioner*

As the Ld. Court Commissioner do not possess any power to decide any issue nor to over rule and / or disallow any question validly or invalidly put up to the witness and as such witness is duty bound to answer whatever question put to the witness. The issue or relevancy of otherwise will be decided by the Court at the time of final hearing. In the event if the Court feels about the irrelevancy of the above question the same can be taken note of at that time.

Answer

It is incorrect.

30. I am unable to understand how any such case, never once pleaded could ever have been put to the Plaintiff. The case put to the Plaintiff is completely at odds with what is pleaded. It is no part of the Affidavit in Support that the Will signed before Dr. Kamdar is

different from the Will filed along with the Petition. This question assumes that the deceased did in fact execute a Will and that this was in fact witnessed at least by Dr. Kamdar. If this is so, then it must constitute, of necessity, a vital admission on the part of Defendant.

31. Finally we have two Affidavits of Vrajlal Thakkar. Since he was not subjected to cross examination, they must receive limited evidentiary value. The affidavits are noteworthy only for two things. First, that Vrajlal Thakkar mentions the place of execution as the deceased's residence, but later files another Affidavit saying this was the mistake and the Will was actually executed at the Dr. Kamdar's clinic; and second, that he affirms the actual execution of the Will, consistent with Dr. Kamdar's Affidavit. On its own, this evidence cannot be determinative. It is only noted for the record.

32. Thus what we have is this: Evidence that is unshaken that the deceased was of reasonably good health to come personally to the clinic of Dr. Kamdar. He had with him a Will that was already prepared. Dr. Kamdar confirms and reconfirms seeing the deceased sign the Will and recalls attesting it as a witness. While he does not know Vrajlal Thakkar and does not recollect whether the other witness signed in his presence, he does recollect that there were two other persons present. We are, of course, left to speculate as to as to who that other person might have been. Very possibly it could have been Umiyashankar, but by the time of the trial he had already passed away and was no longer available as a witness. Certainly the present Plaintiff, a co-executor as a beneficiary, does not seem to

have had any role to play in either the preparation of the Will or its execution. He is not a participant in the Will-making process.

33. Read as a whole, and considering the tenor of the cross-examination, I find it difficult to accept the suggestion made by Mr Jondhale for the Defendant that the due execution of the Will has not been established. In my view it has. It may not be perfect. It may be considerably less than perfect. But then, so are we all. The jurisdiction of a probate Court is not a jurisdiction of suspicion. It is merely a jurisdiction of circumspection and caution. It is not for the probate Court to adopt what has been described as a resolute scepticism and unshakeable doubt. It is only required to be cautious and careful in its approach.²⁸ The evidence of both the Plaintiff and Dr. Kamdar is wholly undisturbed in cross-examination.

34. Issue No.1 must be answered in the affirmative.

Re: Issue No.4: Whether Defendant No.1(a) proves that the signature of the deceased is forged.

35. This Issue is linked to Issue No.1 and I have, therefore, taken it immediately next in sequence. The burden was entirely on the Defendants and this burden of proof was sought to be discharged by leading the evidence of a handwriting and forensic expert, Dr. Titiksha Kamble-Desai. Her evidence is somewhat unfortunate and is possibly unfair to her. She was specifically commissioned by the Defendant No.1(a) to give her opinion. Defendant No.1(a) filed an

²⁸ *H. Venkatachala Iyengar v B.N. Thimmajamma & Ors.*, AIR 1959 SC 443.

Affidavit only on this aspect of the matter and on nothing else.²⁹ He did not offer himself for cross-examination.

36. Mrs. Desai-Kamble affirmed an Affidavit of Evidence dated 24th March 2000.³⁰ In this she says she is working with Helik Advisory Ltd as a forensic expert. She gives the details of this enterprise and her own technical experience. She says in February 2015, i.e. very recently, she was approached by Defendant No.1A to provide a signature verification report after verifying what is described as the “disputed signature” on page 1 with the “admitted signature” on page 2 of the Will.³¹ These terms are of some consequence. Mrs. Desai-Kamble herself did not inspect the original document. A forensic expert from the firm from one Sukanya Parande seems to have done also on 17th February 2015. Ms. Parande took photographs of the Will.³² It is on a comparison of these two photographs that Mrs. Desai-Kamble came to the conclusion that these are suggestive of different authorship.³³

37. On this basis she made and produced a report dated 26th February 2015.³⁴ Turning first to the report, I find that this is based on a comparison of only these two signatures and the two photographs of the two signatures. In paragraph 2 of her report, Mrs. Desai Kamble accepts that the only ‘admitted’ signature sample provided for comparison was the signature on page 2 of the

²⁹ Defendant No.1(a) Affidavit, *pp.* 127-144.

³⁰ DW1 Evidence Affidavit, *pp.* 148-151.

³¹ DW1 Evidence Affidavit, paragraph 4, *p.* 149.

³² DW1 Evidence Affidavit, paragraph 5, *pp.* 149-150.

³³ DW1 Evidence Affidavit, paragraph 6, *p.* 150.

³⁴ Exhibit D5, *pp.* 197-210.

Will.³⁵ She also accepts in the report itself that every signature is bound to have a minor variation.³⁶ She then compares the signature on page 1, which is written vertically in the left margin with the signature on page 2 of the Will. After setting out her observations she concludes that on account of differences in line quality, spacing, connecting stroke, size of signatures, underscore formation, ending stroke and other aspects, the two signatures are suggestive of different authorship.³⁷

38. Mrs. Desai Kamble was cross examined in Court.³⁸ She confirmed that it was the Defendant No.1(a) who asked her to examine two signatures and gave her opinion.³⁹ She also confirmed that she did not herself inspect the Will but that her junior assistant did so instead.⁴⁰ When confronted with her own report she confirmed that the signature marked 'D1' in her report was the one that was disputed. This is the signature she says that was disputed by Defendant No.1(a). This question and answer is important:⁴¹

6. Q. **(Shown Exhibit.D1.)**

There are two photographs exhibited or annexed to your report. The first is of page 1 of the Will and the second is of page 2 of the Will. On the photograph of

³⁵ Exhibit D5, p. 198.

³⁶ Exhibit D5, p. 199.

³⁷ Exhibit D5, p. 207.

³⁸ Cross-examination of DW1, pp. 152-161.

³⁹ Cross-examination of DW1, Qn. 2, p. 154.

⁴⁰ Cross-examination of DW1, Qns. 3-5, p. 154.

⁴¹ Cross-examination of DW1, pp. 155-156.

page 1 there is a signature in the left margin. This has been circled in red and marked D-1. On the second page there is a signature to the right. This has been marked in red as A-1. Is it correct that by using the marking D-1, you meant to indicate that the signature on page 1 is the one that is disputed?

Ans. This is the signature that was allegedly disputed by the Defendant".

39. This was immediately followed by a confirmation question as to whether the signature on page 2 of the Will was also disputed. That answer is revealing. At this, I myself put a question to the expert.

7. Q. Is the signature on page 2 of the Will and which you have marked as A-1 also disputed?

Ans. The signature marked A-1 is the one that is allegedly admitted.

8. To Am I correct in my understanding that your Court report is about the correctness of a signature marked D-1?

Ans. Yes.

40. Mrs. Desai Kamble then confirmed that the only documents she was given were the photographs of the two pages of the Will and that the only admitted signature sample was the signature on page 2.⁴² She also confirmed that she orally asked the Defendant for more samples but that these were not provided.⁴³

41. At this stage, a most unusual question was put to the expert witness. She was asked if Defendant No.1(a) had ever informed her that the Plaintiff had offered to provide additional signature samples. She said no; meaning only that Defendant No.1(a) had not told her of this.⁴⁴ Mr. Pandit for the Plaintiff then tendered a copy of his letter dated 27th February 2015 to Mr. Jondhale. There was some controversy about delivery of this letter, which I found there and then to be incorrect. I admitted the letter into evidence as Exhibit P-8.⁴⁵ This letter is, in terms of litigation strategy, a bold move: in it, Mr. Pandit, on behalf of the Plaintiff, offered to submit to the handwriting and forensic expert chosen by Defendant No.1(a) additional signature samples. There was no reply to this. I do not suggest that Defendant No.1(a) was bound to accept this offer, but it is certainly a factor to be taken into account in assessing the expert testimony that came to be given in the absence of additional comparison material that was offered for her examination. Mrs. Desai Kamble did what she could with what little was given to her. But the fact that Defendant No.1(a) deliberately kept from her

⁴² Cross-examination of DW1, Qns. 9-11, *p.* 156.

⁴³ Cross-examination of DW1, Qns. 14-18, *pp.* 157-158.

⁴⁴ Cross-examination of DW1, Qn. 19, *p.* 158.

⁴⁵ At *p.* 187.

additional material, especially when she had sought it, should tell us to approach her final conclusion with a very great deal of caution. In fairness, she was then asked whether there was possibility that shown additional signatures samples she might have reached to different conclusion. She quite correctly said that this was possible though not certain.⁴⁶

42. Finally, Mrs. Desai Kamble agreed that factors such as age and illness could cause certain variations.⁴⁷

43. I do not wish to comment at any great length on the evidence attesting witness. It must, of course, be received with caution, among other things because additional material that she herself asked for, and which was on offer, was kept from her. As a result, her evidence is not determinative. It might have some corroborative value, but that requires proof *aliunde* from the+ Defendants that the Testator's signature is a forgery. There is no such proof.

44. What is however significant is Mrs. Desai Kamble's confirmation that the Defendant himself told her that the signature on page 2 is an 'admitted' signature. To my mind, this completely demolishes the Defendants' case regarding the Will being forgery or a fabrication.

45. Therefore, Issue No. 4 is answered in the negative. The Defendants have not proved that the Testator's signature on the Will is a forgery.

⁴⁶ Cross-examination of DW1, Qn. 26, *p.* 160.

⁴⁷ Cross-examination of DW1, Qns. 21-22, *p.* 153.

Re: Issues Nos. 2 and 3: Whether the Defendants prove the Testator's incapacity and whether they prove undue influence.

46. As regards these issues, Defendant No. 1(a) led no evidence at all. The Affidavit in Support of the caveat filed by Jasvantrai was not even attempted to be supported by any evidence. Defendant No.1(a) never stepped into the witness box. On the other hand, at least as regards the ownership of the Karunasagar property, the evidence of the Plaintiff, unshaken in cross-examination, was that each of the three brothers held a one-third share in it. This was established from tax documents,⁴⁸ and the land records.⁴⁹

47. Both issues are answered in the negative.

Re: Issues Nos. 5 and 6: Whether the Plaintiff is entitled to Probate; reliefs.

48. In the result, Issue No.5 must be answered in affirmative. There is absolutely no material on record to deny the grant of probate.

49. The Suit succeeds and is decreed. There is no merit in the caveat. The Suit is decreed in terms of prayer clause (a).

⁴⁸ Exhibit "P-4", *pp.* 167-181.

⁴⁹ Exhibit "P-5", *p.* 182.

50. The Registry is directed to issue probate at the earliest acting on an authenticated copy of the Order.

51. At the request of Mr. Jondhale, the issuance of probate is stayed for a period of four weeks from today.

(G.S. PATEL, J.)