

Atul

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

TESTAMENTARY SUIT NO. 10 OF 2013

IN

TESTAMENTARY PETITION NO. 917 OF 2011

WITH

NOTICE OF MOTION NO. 10 OF 2013

AND

NOTICE OF MOTION NO. 11 OF 2013

**DR. PRABHAKAR BHAGWAN
SATPUTE,**

of Mumbai Hindu Inhabitant, residing at
307, Jay Sai Darshan, S.V. Road, Borivali
(West), Mumbai 400 092, being one of the
Executor named under the Will of the
deceased.

...PLAINTIFF

versus

**1. SHAMITA SANJAY
GALWANKAR**

residing at Block No. 301, 3rd Floor,
Ashirwad, Babhai Naka, L.T. Road,
Borivali (West), Mumbai 400 092

2. GEETA ASHOK SAMANT

residing at Block No. 12, Building No.
3, Mavalankar Nagar, Datta Mandir
Road, Malad (East), Mumbai 400 097

...DEFENDANTS

APPEARANCES

FOR THE PLAINTIFF **Mr. Neel G. Helekar.**

FOR THE DEFENDANT **None**

CORAM : G.S.Patel, J.

DATED : 21st November 2016

ORAL JUDGEMENT:

1. The Petitioner in this probate action is a senior citizen. The Petition itself was filed in 2011. Caveats were filed considerably later in 2013, when the Petition was renumbered as a Suit. I notice from the record that the matter has appeared on board, frequently before me, since April 2015. During that time, the Defendants often have been absent. Mr. Helekar for the Plaintiff points out that although there was an order of 17th July 2015 by which documents were marked and the Commissioner for recording evidence was appointed, nothing progressed in the matter despite the efforts of the Commissioner, Ms Geeta Sonawane, and Mr. Helekar himself. The order of 1st September 2015 notes this. Paragraphs 1 and 2 of that order are important. They read as follows:

“1. On 17th July 2015, the presence of the Plaintiff and the 2nd attesting witness in Court was noted. It was noted that both had filed their Affidavits in lieu of examination in chief. I appointed Ms. Geeta Sonawane as a Commissioner and requested her to record the cross-examination.

2. Ms. Sonawane is personally present in Court. She states that it has not been possible to proceed because the Defendants have not cooperated. She had personally called Mr. Tiwari for the Defendants and informed him of dates available. She states that Mr. Tiwari did not communicate his agreement to proceed on those dates. The matter has remained without any progress for the last six weeks. This is completely unacceptable. I am not prepared to delay this matter or have references to commissioners used as reasons for delaying the trial of the suit. The reference to the Commissioner is withdrawn with thanks to Mr. Geeta Sonawane for her efforts.”

2. Even then, I granted indulgence to the Defendants. On 2nd September 2015, Mr Tiwari for the Defendants said that he was prepared to continue with the cross-examination. I fixed a schedule appointing specific dates. This is noted in paragraph 2 of my order of 2nd September 2015. On 22nd September 2015 and then again on 20th October 2015, I extended time.

3. Then there is an order of Mr. Justice A.K. Menon of 21st December 2015, and this records that despite all that went before, the Defendants had still not commenced cross-examination of the Plaintiff’s second witness. Mr. Justice A.K. Menon extended time for the commission and specifically ordered that cross-examination would have to be completed before 25th January 2016.

4. This where the matter stood, *i.e.*, with an incomplete cross-examination of the Plaintiff's second witness right till 4th July 2016. I then closed the trial and directed that the Suit be set down for hearing and final disposal.

5. Mr. Helekar for the Plaintiff has prepared the record for final hearing. The matter was listed on Friday, 18th November 2016. When it was called out an Advocate appeared for the Defendants and sought time. I stood the matter over till today on the supplementary board.

6. When this matter was called out this morning, none appeared for the Defendants. This runs to a defined pattern where the Defendants' only intention is to delay the completion of the trial at any cost. Even so, I kept the matter back to the end of the supplementary board. When called out a second time, even then none appeared for the Defendants. I am, therefore, not adjourning the matter any further and have proceeded to hear Mr. Helekar finally at some length and, with his assistance, considered the material on record.

7. The Petition was filed seeking probate to a Will dated 9th September 1996 executed by one Mr. Vitthal Yeshwant Samant. At the time when he executed this Will, the Testator was about 68 years old. He had by then retired from work and led what seems to have been quiet life in Borivali, living in a house named "Prashant". This was a bungalow initially of a ground and first floor. The deceased and his wife Pramila had four children, two sons and two

daughters. The elder son Prakash was permitted to put up an additional floor on the Prashant Bungalow, and this is of some significance because this relates directly to the dispositions in the Will, and to which I will turn presently.

8. The Will appointed the Petitioner, a practising physician, Dr. Prabhakar B. Satpute (“**Dr. Satpute**”) as his executor. Dr. Satpute was also the second attesting witness to the Will. The first attesting witness was one Mr. Subhash Achyut Abhyankar. The Will was registered on 1st October 1996.

9. Vitthal Yeshwant Samant lived good for 14 years after the Will was executed. He died on 5th August 2010 in Mumbai.

10. I will turn now to the contents of the Will. This is in Marathi. It is typewritten. The Will itself is of five pages and the signature of the Testator appears in English on the fifth page, as do the signatures of the two attesting witnesses. Clauses (1) to (4) make dispositions that are particularly related to the Testator’s wife and two sons. Clause (1) sets out that at the time of the Will, Vitthal Samant lived and occupied the ground and first floor of the “Prashant” Bungalow with his wife and younger son Prashant, after whom the bungalow was apparently named. Clause (2) sets out that the second floor was constructed by the elder son Prakash and mentions an agreement dated 23rd October 1987. It also mentions that Prakash paid some compensation to the contractor under that agreement with the Testator. Clause (2) also contains certain directions to Prakash to pay the municipal taxes for the second floor

and half the expenses for repairing and painting the bungalow. Prakash is directed not to object if any additional construction is to be put up. In essence, the Testator left the first floor, motor car garage and terrace above that garage to the younger son Prashant; the second floor to the elder son Prakash and the entire plot as a whole to his widow Pramila along with directions that she be supported by her sons and be allowed to occupy the ground floor.

11. Clause (5) mentions that the Testator had two daughters Geeta and Shamita. These are the two Caveatrixes. In this clause, the Testator specifically points out that he has not only adequately provided for both of them at the time of their marriage and even thereafter but, more materially, for both he has purchased residential accommodation. For Geeta Ashok Samant (*née* Leena Vitthal Samant), he purchased Block No. 12, Building No. 3 at Malad (East), Mumbai where she resides even now. Although that flat was in the deceased's wife's name, he directed that it be left to Geeta. The second daughter Shamita Sanjay Galvankar (*née* Sarita Vitthal Samant) was given Flat No. 301, Ashrwad Building, Babhai Naka, L.T. Road, Borivali (West), Mumbai. It was on account of this that the Testator left nothing else to either of the two daughters.

12. Clause (6) refers to his company M/s. Leena Industries and directs that it be left to his wife Pramila exclusively. In the event that she predeceased the Testator, it was to go to Prashant. A similar provision was made in regard to the fixed deposits in clause (7).

13. In clause (8), there is a disposition in respect of another industry, M/s. United Metal Ware and Plastic at Bhainder, Shantinagar and this was left to the other son Prakash. The third industry M/s. Maruti Industries at Borivali (West) was left to Prashant.

14. The Petition was filed on 27th March 2011. Citations were issued and served thereafter. There is an Affidavit of Service on file. The widow Pramila consented to the grant of probate. Neither of the sons filed Caveats or challenged the Will in any way. Both daughters Geeta and Shamita filed nearly identical Caveats dated 30th January 2013 and the Petition was renumbered as a Suit.

15. The Caveats contain no objection of substance. Paragraph 4 of both the Caveats filed by Geeta Ashok Samant and Shamita Sanjay Galwankar contain a peculiar submission directed not to the Will in question but to Pramila's consent or no-objection to the probate petition. It reads:

“4. I say my mother was not in sound mind at the time of execution of consent affidavit dated 27/3/2011 and my younger brother and Petitioner forcibly took her signature by misrepresentation. I say my younger brother and Petitioner are business partners and therefore have colluded with each other to usurp the property of our joint family with ulterior motives.”

16. This is, of course, wholly irrelevant to the question of proof of the Will in its solemn form. has never been explained. The reference in this paragraph does not relate to the Testator's testamentary capacity. Paragraph 5 contains an allegation that Prashant, the younger son placed the Testator under undue influence and that the Will is, therefore, fraudulent. That, therefore, is the single issue of substance.

17. It was on these pleadings that the issues were struck and settled on 23rd April 2015. These issues are set out below with my response against each of them :

Sr. No.	ISSUE	Findings
1.	Whether the Plaintiff proves that the writing dated 9th September 1986 was duly and validly executed by the deceased Vitthal Yashwant Sawant and duly and validly attested in accordance with law as the deceased's last will and testament?	YES
2.	Whether the Plaintiff proves that at the time of writing the deceased was of sound and disposing state of mind, memory and understanding?	YES
3.	Whether the Defendants prove that the alleged Will was obtained by undue influence or undue pressure?	NO
4	Whether the Defendants prove that the	NO

Sr.	ISSUE	Findings
No.		
	alleged Will was obtained by fraud and misrepresentation?	
5.	What relief and what order?	Suit decreed

ISSUES NOS. 3 AND 4:

18. These must be immediately negated. The burden of proving these two issues was on the Defendants. They led no evidence. They did not cross-examine the second attesting witness, PW2. They have brought out nothing in support of these two issues in the cross-examination of PW1, the Plaintiff. These two issues are therefore answered in the negative.

RE: ISSUES NOS. 1 AND 2

19. The evidence in question is principally that of the Petitioner since he was both the executor and the attesting witness. He filed an Affidavit of Evidence dated 12th June 2015.¹ He was cross-examined before the Commissioner Ms. Geeta Sonawane. The Commissioner's Report is meticulously maintained.

20. The cross-examination is entirely ineffective. As to the second issue of testamentary capacity, other than a suggestion that the deceased suffered from blood pressure, hypertension and

¹ Vol B, *pp.* 52-54.

diabetes, there is nothing to indicate the lack of testamentary capacity. These ailments in themselves do not point to any one of testamentary capacity. They are not such as would render a Testator incapable of understanding that which he was doing when he made his Will. The law does not expect a Testator to be in complete and perfect physical health and wholly ailment free when making a disposition. The explanations to Section 59 make it clear that certain impediments such as hearing, speech or sight impediments do not constitute testamentary incapacity. Under Explanation 3 even persons who are, to use the unfortunate expression of the statute, “insane” – afflicted by any one or more of the well-known medical mental health disorders that are known to medical science today – he or she may still validly make a Will during an interval of lucidity. Consequently, it is never enough merely to say, for instance, that a testator suffered from this or that ailment. It is unreasonable to expect a testator to be in a most complete and perfect state of health. Nobody ever is. That is most emphatically not mandate of the law, as the Privy Council itself noted in *Judah v Isolyne Shrojbashini Bose & Anr*,² a view followed by this Court in *Dr. Feroze Homi Duggan v Jean Duggan*,³ and by the Delhi High Court in *K.L. Malhotra v Sudershan Kumari & Anr*.⁴ The law does not require every testator to be in peak physical and mental condition, or to be possessed of ‘sound and disposing mind and memory’ in the highest degree. Were it so, few would be able to make testaments at all. It is not even necessary for a testator to be in the same state as once he used to be, for even this would disable most in the inevitable decline of life.

2 AIR 1945 PC 174

3 (2011) 6 Mah LJ 516.

4 (2008) 149 DLT 783.

Enfeeblement with age and a degree of debilitation is to be expected. So long as the testator has enough to discern and discreetly to judge the matters that enter into a rational, fair and just testament, that is surely enough.⁵ So long as the testator has enough to discern and discreetly to judge the matters that enter into a rational, fair and just testament, that is surely enough. *A.E.G. Carapiet v A.Y. Derderian*,⁶ a decision frequently (and usually wrongly⁷) cited on the issue of the need of 'putting one's case' also deals with this issue:

16-19. The question of a sound mind is a dominant question in a court of probate. Numerous decisions of high authorities have laid down from time to time tests by which to judge a sound disposing mind. It is not an absurd test. Nor is it the test of a perfectly healthy and perfect mind. Indeed most of the wills are not made by persons young and vigorous and glowing in health. The test of a sound disposing mind is in law a workable test. It means in plain language an appreciation of the fact that the man is making a will, an appreciation of the contents of that will and an appreciation of the nature of disposition that he is making having regard to the claims of affection and family relationship and claims of the society or community to which he belongs. It is not a hypothetical nor an impracticable test. It is not the test of a psychologist or a psycho-analyst or a psychiatrist

5 *Kanwar Sain v State & Ors.*, AIR 1976 Del 11; *Gordhandas Nathalal Patel v Bai Suraj & Ors.*, AIR 1921 Bom 193 (DB).

6 AIR 1961 Cal 359.

7 2015 (1) Bom CR 361.

who in the modern age is prone to consider all human mind to be inherently unsound by nature and abnormal. Nor is it the too Scientific test which would satisfy the highest technical medical examinations. Some idea of what this sound disposing mind in testamentary law is, can be gathered from Section 59 of the Succession Act and the statutory Explanations thereunder. In Explanation 2 of Section 59 of the Succession Act it is expressly stated that persons who are deaf or dumb or blind are not thereby incapacitated for making a will if they are able to know what they do by it. Similarly under Explanation 4 of Section 59 of the Succession Act no person can make a will while he is in such a state of mind whether arising from intoxication or from illness or from any other cause that he does not know what he is doing. The illustrations make it clear that a mere perception of what is going on in the immediate neighbourhood and an ability to answer familiar questions but without competent understanding as to the nature of his property or the persons who are kindred to him or in whose favour it would be proper that he should make his will, will not be enough proof of a sound mind within the meaning of Section 59 of the Succession Act. These Statutory Explanations are not intended to be exhaustive but they give practical illustrations to explain a sound disposing mind.

(Emphasis added)

21. Questions 16 and 17 of the cross-examination read thus:

Q. 16 What chronic medical problems the deceased was suffering from?

Ans. In initial 80's, the deceased was not suffering from any chronic medical problem but later on he had developed blood pressure and diabetes.

Q. 17 Would it be correct to say that the person suffering from blood pressure/hypertension and diabetes is under constant medication for rest of his life?

Ans. Yes.

22. Other than this, there is nothing produced as regards the testamentary capacity.

23. As to the due execution, in my view, the cross-examination actually destroys the defence. Questions 32 to 34 and their corresponding answers read thus:

Q. 32 When you attended the office of Advocate S. A. Abhyankar who all were present in his office?

Ans. Nobody else except three of us namely, Mr. Vitthal Yashwant Samant, Advocate S. A. Abhyankar and myself.

Q. 33 Who was the first person to sign the Will dated 09.09.1996 after the same was typed

or ready?

Ans. The Will dated 09.09.1996 was firstly signed by Mr. Vitthal Yashwant Samant.

Q. 34 Thereafter who signed the Will dated 09.09.1996?

Ans. Thereafter, Advocate S. A. Abhyankar signed the Will dated 09.09.1996.

24. I find from the remaining cross-examination that a large number of wholly irrelevant questions were placed to the attesting witness, including as to the contents of the Will and the Plaintiff's awareness of these contents.⁸ This is not germane at all. It certainly does not disprove due execution and attestation or establish lack of testamentary capacity.

25. The second attesting witness also filed and served Affidavit of Evidence. This is dated 12th June 2015.⁹ Although the Plaintiff made this witness available for cross-examination repeatedly, the Defendants failed to cross-examine him. His testimony must be taken as uncontroverted.

26. The Defendants have led no evidence whatsoever. There is nothing in this regard that even remotely indicates that the

8 Worse yet, as to the witness's date of marriage and his wife's date of birth. If there was ever a reason to examine an alternative to recording evidence on commission, where a hapless commissioner has no option but to record such thoroughly irresponsible questions, it is this.

9 Vol. B, *pp.*125-128.

Defendants have discharged their evidentiary burden or have been able to dislodge the case placed by the Plaintiff.

27. In this view of the matter, the suit is decreed. Both Caveats are discharged. The Petition is allowed. Probate to be issued expeditiously. I expect the probate to be issued at the earliest, and in any event on or before 22nd December 2016.

28. Drawn up order dispensed with.

29. Registry is not to insist upon an Affidavit of Service of citations since I have already held that citations have been duly served.

30. In view of this, the two Notices of Motion do not survive and are disposed of accordingly as infructuous.

(G. S. PATEL, J.)