

SHEPHALI

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
TESTAMENTARY SUIT NO. 28 OF 1995**

IN

TESTAMENTARY PETITION NO. 41 OF 1995

1 KIRIT NAVNITLAL DAMANIA

Hindu Inhabitant of Bombay, residing at
113, Rewa Apartments, T. G. Pavillion
Compound, B. Desai Road, Bombay 400
026

2 SHANTARAM VENKATRAO

PIKALE, Hindu Inhabitant of Bombay,
residing at A/12, Shree Gajanan Co-op.
Housing Society Ltd., Lt. Dilip Gupte
Road, Mahim, Bombay 400 016
Being the Executors named under the last
Will and Testament of the deceased

...

Plaintiffs

versus

1 ANURADHA ANIL BHAGWAT

2 ASEEM ANIL BHAGWAT

3 AJAY ANIL BHAGWAT

4 PREETI ANIL BHAGWAT

All Indian Inhabitants of Solapur, residing
at 2, Bali Estate, Civil Line, Solapur 413
003

...

Defendants

[illegible]

FOR THE DEFENDANTS Mr. Atul Damle, Senior Advocate, a/w Mr.
NOS. 1 TO 4 Vaibhav M. Parashurami, i/b Vikrant V.
 Parashurami.

CORAM : G.S.Patel, J.

DATED : 9th June 2016

ORAL JUDGMENT:

1. The Plaintiffs seeks probate to a Will dated 4th July 1993 said to have been left by one Shashikala Baburao Alandkar (“**Shashikala**”). Shashikala died in tragic accident on 27th February 1994, succumbing to severe burn injuries. Shashikala was unmarried, and had no children. She was survived by the two branches of her brothers’ families. One of these branches is the family of Mahavir Baburao Alandkar. Mahavir had seven heirs. None of them have challenged this Petition. The other brother, Padmakar Baburao Alandkar, had a daughter Anuradha, who in turn has three children, Aseem, Ajay and Preeti. They oppose this probate petition; Anuradha is Shashikala’s niece, and the other three Defendants are her children. The 2nd Defendant filed the Affidavit in Support of the Caveat for himself and as the Constituted Attorney of the other Defendants.

2. I turn now to the Will in question. The Will has four pages. It is typewritten. There were two witnesses to this Will, one Mr. R. G.

Shenai and Mr. G.V.P. Desai. Page 1 of the Will has the initials of the deceased and of two witnesses. Page 2 has the same initials, but there are also certain handwritten endorsements in blue fountain pen ink. Page 3 has the initials of all three persons, and an entire paragraph 11A has been added in blue fountain pen ink. On page four, we find the signatures of the deceased and the two witnesses. Each witness endorsed the date '4th July 1993' below his signature and put his name and address. At the top of the page, the date "4th" is also handwritten. There was no dispute in the trial that the signature on page 4 and the initials at the previous pages are the deceased's. There is also no dispute that the date "4th" was written by the deceased, or that the handwritten portions at pages 2 and 3 are in the writing of Mr. R. G. Shenai.

3. The Will appoints the two Plaintiffs as executors. Both are Advocates. The 1st Plaintiff is a solicitor of this Court. In clause 2, it contains directions for the funeral. In clause 4, Shashikala sets out that she owned a flat at Mahim and a motor car garage, a second-hand Ambassador motor car. She also claimed to own a temple. She listed some bank accounts and a bank locker. The four bank accounts listed were not in her sole name; they stood in her name jointly with other persons. The Bank of Baroda account was held by her with Mr. Damania and Mr. Pikale, the Plaintiffs; the Saraswat Cooperative Bank account had her name and that of one Peroze Ramchandra Devrukhkar; the account at the Janata Sahkari Bank, Girgaum was in her name and Devrukhkar's; and the Canara Bank account was one she held Mr. Pikale, the 2nd Plaintiff. The Plaintiffs' names also appear on the bank locker. In her Will, Shashikala said this was for convenience.

4. In Clause 6, Shashikala directed her executors to take possession of all her estates, to provide payments of all debts and to provide all the professional and legal expenses of the Plaintiffs for all the legal work that she said they had done for her for many years. In Clause 8, Shashikala noted the joint holdings to which I had earlier referred. In Clause 9, she gave her executors absolute discretion to sell or dispose of the flat, car and garage, set aside a small amount for the purposes of the management of the temple, and directed the two executors to act in consultation with each other.

5. Clause 11 contains the principal bequest. It is to one or more institutions looking after the welfare and shelter of old and aged persons. The clause gives the two executors complete authority not only in the selection of the recipient institutions, but also in deciding the amounts for distribution.

6. There is then the handwritten clause 11A under which a bequest of Rs. 1 lakh is made to. Devrukhkar and the Ambassador car is left to one Mr. Krishna Balu Dhanawade. I understand that Mr. Dhanawade was her chauffeur and Mr. Devrukhkar was supposedly Shashikala's caregiver at some point. There is not much evidence on this.

7. Finally, I must note that the original 2nd Plaintiff, the second executor appointed under the Will, Shantaram Venkatrao Pikale died after this Petition was filed. One of the witnesses, Shenai, filed an Affidavit accompanying the Petition. He died before filing an

Evidence Affidavit. The other attesting witness Mr. G.V.P. Desai did file an Evidence Affidavit but passed away before his cross-examination could be recorded.

8. On this last aspect of the matter, and so as to get it out of the way at the beginning, I believe it is reasonably well-settled in law that in a situation like this, where a witness is unavailable for cross-examination because he has passed away in the meantime, his evidence is not to be entirely disregarded for that reason. However, it is for the Court to decide having regard to all surrounding circumstances and the other evidence as well what weightage, if any, should be given to that evidence and what should be taken as its probative value. This is, in substance, the purport of Section 32 of the Evidence Act.¹

9. The Affidavit in Support of the Caveat contains a single ground of opposition.² It has a long recitation about some properties. The principal challenge is in paragraph 3(1):

“(l) The Caveators state that the deceased was in control of the Petitioners and the Petitioners have taken full advantage of her sickness and old age, and thereby utilized their position as legal advisers of the deceased for their own benefit in breach by trust made by the deceased in the Petitioners as the guardian of her interest.”

1 *Krishan Dayal v Chandu Ram*, ILR (1969) Del 1090, 1096; per H.R. Khanna J (then sitting singly as a Judge of the Delhi High Court).

2 Vol. A, p.33.

10. This is an allegation that the executors, i.e. the present Plaintiffs, obtained or procured the Will for their benefit. I will turn to the contents of the Will itself momentarily.

11. Upon the Caveat being entered, the Petition was renumbered as a Suit. Issues were struck on 23rd August 2010.³ These are set out below with my findings against each:

"Sr. No.	Issues	Findings
1.	Whether the last Will and Testament of the deceased Shashikala Baburao Alandkar was validly executed?	YES
2.	Whether the deceased was under the control of the Petitioners?	NO
3.	What relief, if any, are the Petitioners entitled to?	As per the final order"

12. The Plaintiffs led the evidence of three witness:- the 1st Plaintiff, Kirit Navnitlal Damania (PW1), an Advocate and Solicitor of considerable standing; one Narayan Hari Shibe (PW2) , a watchman in the building where Shashikala lived; and one Prema Mazumdar (PW3), one of Shashikala's neighbours in the same building, and who was herself once a secretary of that society.

³ Vol. A, *p.103*.

13. The Defendants lead no evidence at all.

14. The Will in question was marked in evidence as Exhibit “A”.⁴ There is only one other document marked in evidence; this is a nomination form.⁵ It has been referred by PW3, Mrs. Mazumdar.

15. I have heard Mr. Thakkar for the Plaintiffs and Mr. Damle for the Defendants at some length. With their assistance, I have perused the material on record. They had taken me through the trial record as well.

16. Mr. Thakkar points out that of the three issues framed, the burden of proving the first is clearly on the Plaintiffs. It is his submission that this burden has been fully discharged. As to the second issue, he submits that this is an issue the burden of proving which rests solely on the Defendants. Mr. Thakkar submits, and I think he is completely correct in this, that the Defendants have made no attempts whatever to discharge their probative burden on Issue no. 2. He submits that, as a consequence, the Suit must be decreed and probate must be ordered to be issued.

RE. ISSUE NO. 1

17. This issue is about proof of the Will in its solemn form. It is divided into two parts, one relating to the actual physical act of

⁴ In the trial record, this document is also referenced as Exhibit “P1”.

⁵ Exhibit “B”, Vol. D, p.186-187.

execution as required by Section 63(c) of the Indian Succession Act, 1925 and the other, as a separate or distinct issue, relating to testator's dispositive capacity based on the provisions of Section 59 of the Indian Succession Act, 1925. The burden of proving both issues is on the person propounding the Will. As framed, Issue No. 1 must, I believe, be correctly read to encompass both aspects. In other words, it is for the Plaintiffs to establish not only the actual execution of the Will and its attestation as required by Section 63(c) but also to show that Shashikala possessed the necessary testamentary dispositive capacity at the time when she executed it.

18. Mr. Kirit Damania, PW1, filed an Affidavit in lieu of Examination-in-Chief dated 5th August 2015. In this, he explained that he knew Shashikala since 1965 when he worked as an assistant at M/s. Bhaishankar Kanga & Girdharlal, a firm of solicitors. She used to visit that firm's offices to meet and consult with Mr. J. T. Desai, the firm's senior partner. Shashikala and Mr. Desai's wife were close friends. Shashikala was a teacher and that she lived alone. Mr. Damania separated from M/s. Bhaishankar Kanga & Girdharlal and set up an independent practice. After this, he says in paragraph 3 of his Affidavit, Shashikala often visited his office at Raheja Centre, Nariman Point, Mumbai for legal advice. He says that she made a Will on 4th July 1983 but before it was made she did come to his office to discuss its contents with him. He was told that Mr. Pikale had agreed to serve as an executor. Shashikala requested Mr. Damania to serve as the other executor. There appears to have also been some discussion about the different types of charitable institutions to whom she could make a bequest. Mr. Damania agreed to serve as one of the executors to her Will.

19. Mr. Damania then says that he was informed of Shashikala's death on 22nd February 1994 by Mr. Pikale's daughter-in-law. In paragraphs 7 and 8 of his Affidavit, Mr. Damania refers to various documents and to the Affidavits filed by the attesting witnesses, Mr. Shenai and Mr. Desai. Mr. Damania himself was not present at the time of the execution of the Will and he makes no deposition about this.

20. Mr. Damania was cross-examined in Court. This cross-examination does not, in fact, assist the Defendants. It is a very brief cross-examination.⁶ The only questions of consequence are questions 6, 8 and 9. In these, Mr. Damania says that Shashikala had actually made a previous Will in 1990, and that this was changed when she made the present Will. He reaffirms that he discussed the present Will with her before it was executed and that he was told of its execution thereafter. For the rest, Mr. Damania reaffirms what he said in his Affidavit in lieu of Examination-in-Chief, adding only that after Shashikala's death there was a post-mortem, and that, in circumstances that are not immediately relevant for our present purposes, a cremation was not performed immediately or soon after her death. Her body was kept in the morgue for some time.

21. I will next consider the evidence of PW3, Mrs. Prema Mazumdar. Her Evidence Affidavit is dated 10th August 2015.⁷ In this, Mrs. Mazumdar says that she was well acquainted with Shashikala since 1979 since they both lived in the same building.

6 Vol. C, *pp.* 110-115.

7 Vol. C, *pp.* 151-153.

Importantly, Mrs. Mazumdar says in paragraph 4 that she was present at the time when the Will was executed. It is best perhaps to set out paragraphs 4 to 7 of Mrs. Mazumdar's Affidavit. They read as follows:

"4. I know **SHASHIKALA BABURAO ALANDKAR, alias S. ALANDKAR** since 1979 as I am still residing in the same building of the deceased who died on 27th day of February 1994. That on 4th day of July 1993 the deceased called me at her residence. I received this message from watchman NARAYAN. When I reached her residence, there I saw to Mr. R. G. Shenai along with deceased. After some time Mr. G.V.P. Desai reached there. The watchman Mr. NARAYAN HARI SHIBE also came after half an hour. The said deceased informed Mr. Desai and other person who were present at that time that she (**SHASHIKALA BABURAO ALANDKAR, alias S. ALANDKAR**) wanted to execute her Will. She also stated that she had read the Will and its contents and understood the same. She had kept the Will with her duly typed and ready for execution.

5. I say that at the time the said deceased informed all of us, i.e., myself, late Mr. R. G. Shenai, late Mr. G.V.P. Desai and Mr. Narayan Watchman, did see the deceased set the subscribe her name and her initials in English language at foot of the testamentary paper and on every page of the testamentary papers in my presence which is referred to in the Petition.

6. At the time the deceased informed all of us who were present that the deceased was not in goods terms with her relatives. She further informed that she wanted to gift away her entire property for charity and that's why she intended to form a trust.

7. I say that thereupon late Mr. G.V.P. Desai and late Mr. R. G. Shenai did at the request of the deceased and in her presence and in the presence of each other all being present at the same time set and subscribed their respective names and signature at the foot of the testamentary paper as witness thereto in my presence.”

22. Mrs. Mazumdar was further examined-in-chief in Court on 21st August 2015.⁸ She was then cross-examined on that day.⁹ Some portions of this evidence are crucial to Mr. Damle’s defence. In question 6, Mrs. Mazumdar was asked at what time she was called to Shashikala’s flat on 4th July 1993, and she said this was between 4.00 and 4.30 p.m. on that day. She then said that Mr. Shenai and Shashikala were present at that time; that this was the first time that she had met Mr. Shenai; that, although she did not know and had not met Mr. Desai before that day, she had seen him visit the temple. She confirmed that she met both Mr. Shenai and Mr. Desai for the first time on that day and did not meet them thereafter.

23. I note at this stage what Mrs. Mazumdar says in paragraph 6 of her Affidavit in lieu of examination-in-chief extracted above is actually reaffirmed in cross-examination in answer to question 14:

14. Q. Would it be correct to say that you had no interaction with Shashikala in her personal matters or affairs?

8 Vol. C, *pp.*154-156.

9 Vol. C, *pp.*156-164.

Ans. Generally speaking yes, that is correct. She would often grumble to my mother and me about her relatives.

24. On the question of due attestation, what follows in the cross-examination is, in my view, not only critical but perhaps determinative. Questions 15 to 19 and their answers read:

15. Q. Before 4th July 1993, did you ever see Shashikala executing any document?

Ans. Yes, I did.

16. Q. What kind of document was that?

Ans. I was the Secretary of Cooperative Society for several years. Shashikala made a nomination in respect of her flat in 1992 while I was the Secretary.

17. Q. In whose favour was that nomination?

Ans. It was in favour of Mr. Kirit Damania and Mr. S.V. Pikale.

18. Q. Was it signed in your presence?

Ans. Yes.

19. Q. Where?

Ans. In her house.

25. This evidence, obtained in cross-examination, establishes at least that Mrs. Mazumdar was no stranger to Shashikala's signature on documents and that she knew of the nomination form, Exhibit "B". That form itself is of some consequence because the two nominees of that flat are the Plaintiffs, and the attesting witness to the nomination is the very same Mr. G.V.P. Desai who later also attested her Will, the one in question today.

26. Mr. Damle draws attention to a previous Affidavit filed by Mrs. Prema Mazumdar on 15th November 2010.¹⁰ He submits that in this Affidavit Mrs. Mazumdar only referred to the nomination form and made no reference to the Will. It is his submission that this is an inexplicable omission; if Mrs. Mazumdar knew of both, she ought to have said so. He invites attention to questions 20 to 28 of her cross-examination in this regard to submit that there is no explanation as to why the Will finds no mention in Mrs. Mazumdar's previous Affidavit. What is important, however, is question and answer 28, which reads:

28. Q. At the time of the nomination that you

¹⁰ Vol. C, *pp.* 125-127.

mentioned earlier, who else was present?

Ans. One Mr. Kini was there. I did not know who he was. Narayan, the watchman, was also there and there was one another person as well. I do not recollect if that was Mr. Desai or Mr. Shenai.

27. I do not think that too much can be made of Mr. Damle's submission that Mrs. Mazumdar could not recollect whether the witness to the nomination was Mr. Shenai or Mr. Desai. I do not believe that makes any difference at all. She remembered with great clarity that one of the two was a witness in common to both writings, Exhibit A and Exhibit B. That is surely sufficient. This is reiterated in question 30 when she affirms that she saw one of the two witnesses, she does not recollect which, sign the nomination form, and later goes on to say that she also saw Shashikala's sign in other contexts such as notices and so on.

28. However, it is perhaps her answer to question 29 that establishes everything that the Plaintiffs are required to establish to discharge their evidentiary burden:

28. Q. After you were called by the watchman on 4th July 1993, what according to you happened?

Ans. When I arrived, Mr. Shenai and Shashitai was already there. Narayan went to fetch Mr. Desai. Narayan left for some time and came

back later. Shashitai was again talking about her relatives and how she did not want to give anything to them from her estate. She told us that she made a Will, and that she wanted us to be there. Then she told Mr. Shenai that something needed to be added and some changes needed to be made. Then she signed and initialled it. After that Mr. Shenai and Mr. Desai signed and initialled it.

29. I do not see what further could possibly be added to this. I find that the Affidavit in lieu of Examination-in-Chief is a model of precision and concision. It is fully reaffirmed in cross-examination. As between the examination-in-chief and the cross-examination, Mrs. Mazumdar's evidence remains unshaken. I am unable to accept Mr. Damle's submission that her not being able to identify which of the two witnesses to the Will was also a witness to the nomination form is of such critical importance as would result in an invalidation of the Will or must compel me to dismiss the suit and find that the Will is not proved.

30. The second aspect of the matter regarding the omission of the mention of the Will in her previous Affidavit is also not determinative. In fact, I note that in her cross-examination, Mrs. Mazumdar was not asked why she had omitted to mention or had not mentioned the Will in her earlier Affidavit. She was only asked in question 27 whether she recollected having mentioned the events of 4th July 1993 in that Affidavit and her answer was that she had no

recollection in 2016 of what that Affidavit, made in 2010, six years before the date of her cross-examination, exactly said.

31. This leaves the evidence and cross-examination of PW2, the watchman, Narayan Hari Shibe. His Evidence Affidavit is dated 1st September 2014.¹¹ The Affidavit and Narayan's evidence is important for a limited purpose. That is to establish that he too was present when the Will was executed and attested.

32. In paragraph 4 of his Affidavit he says that on 4th July 1983, Shashikala called him to her residence. When he got there, Mr. Shenai and Mrs. Prema Mazumdar were already in attendance. Shashikala asked him to fetch Mr. Desai who lived nearby. He did so and, this is important, Mr. Desai accompanied Narayan to Shashikala's house. He says that it was there that Shashikala told Mr. Desai that she wanted him to be a witness to the Will, and Narayan then goes on to say that Shashikala and the two witnesses signed the Will at that time, and that he was present then. Mr. Vora took a further examination-in-chief of Mr. Narayan in Court on 21st January 2015.¹² He confirmed that he knew Shashikala since 1977 and he identified certain signatures on the Will in question. Questions 9 to 13 of the examination-in-chief read as follows:

9. Q. Who was present when Ms. Alandkar signed

¹¹ Vol. C, *pp.*130 -133.

¹² Vol. C, *pp.*130 -138.

this document?

Ans. In addition to Ms. Alandkar, there was Mr. Shenai, Mr. Desai and the Secretary of the Society Prema Mazumdar and myself.

10. Q. Who called you to Ms. Alandkar's house?

Ans. Ms. Alandkar herself.

11. Q. When you reached there, what did Ms. Alandkar say to you?

Ans. She asked me to call Mr. Desai. Ms. Mazumdar and Mr. Shenai were already present.

12. Q. After you called Mr. Desai, what happened?

Ans. Ms. Alandkar then showed me the Will. She then asked me to show it to Mr. Shenai. She asked Mr. Shenai if it was in order. She asked Mr. Shenai if any corrections were necessary to it. On her instructions, Mr. Shenai made some corrections to it. Thereafter, Ms. Alandkar signed the Will. This was followed by the signature of Mr. Shenai and then the signature of Mr. Desai.

13. Q. Were you personally present when this

document was signed?

Ans. Yes.

33. Narayan's cross-examination was conducted immediately thereafter in Court.¹³ The material part of this cross-examination has to do with the timing of Narayan's visit to Shashikala's flat. In question 46, he was asked who told him to call Mr. Desai to Shashikala's flat; he responded saying that Shashikala herself did so. When asked at what time this was, Narayan said this was at 11.00 a.m. Mr. Damle then put to Narayan whether he conveyed this message to Mr. Desai immediately. Narayan said that he did so. Mr. Damle then asked whether after conveying the message Narayan returned to his own accommodation; Narayan said yes. To leave no room for doubt, Narayan was then asked whether it was correct that after conveying this message to Mr. Desai and returning to his own lodgings, Narayan did not return to Shashikala's residence. To this, too, Narayan agreed. At this stage, a suggestion was put to him that he did not personally know what happened or transpired at Shashikala's house. Narayan accepted this as well and, I must note in fairness to Mr. Damle, that I made a note at the time that these last two questions were explained to Narayan in Marathi. The questions themselves were placed in Marathi by Mr. Damle and I myself explained the questions to him in that language. His answer remained the same. Mr. Damle then put to Narayan the contradiction between his assertion in his examination-in-chief and his response in the cross-examination and asked which of the two statements was correct, i.e., whether he did go back to Shashikala's

13 Vol. C, *pp.* 138-150.

house or not. Narayan said that what he said in Court was the correct version, and again I noted that the questions were placed in Marathi by both Mr. Damle and myself and that he was visibly reluctant to answer these questions.

34. Mr. Damle makes much of this. He says this gives the lie to Mrs. Mazumdar's evidence. He says that Narayan himself disclaimed having returned to Shashikala's residence and that if it is now shown by his own admission that he was not present at the time, then the Will cannot be said to have been sufficiently proved.

35. There are two problems with this approach. The first follows on the well-established principle, one that was clearly enunciated by the Division Bench of the Calcutta High Court in *A.E.G. Dederian v A. Y. Carpiet*.¹⁴ That was also a testamentary case. In that case, a very similar situation arose where one set of witnesses deposed to a certain state of the testator's health. This state of affairs was not put to the next witness, and an adverse inference was invited on the basis of a contradiction. The Division Bench held that it was a salutary principle that where such a contradiction is sought to be used, it must be put to a witness so that the witness is given an opportunity to affirm or deny it. I am in most respectful agreement with this and, in any case, it is now far too well-established to admit of any distancing. At no point was Mrs. Mazumdar confronted with Narayan's version, although his evidence preceded hers. I do not see how Mrs. Mazumdar's evidence can be sought to be dislodged on the basis of a supposed contradiction in another witness's evidence

14 AIR 1961 Cal 359, paragraphs 8,9 & 10

as to a certain state of affairs or a certain sequence of events if these were never put to her. In any case, I must note that in matters like this, Courts have to make some allowance for various factors such as the educational experience of the witness, their social and financial backgrounds, the fact that being in a Court is never less than an intimidating experience for anyone, and most of all an unfamiliarity with legal language and implications in legalese, irrespective of the tongue in which questions are placed. On an overall appreciation of Narayan's evidence, it seems to me that he was, by this stage in the cross-examination, quite confused and disoriented and was unable to appreciate the precise nuance of the questions that were being put to him

36. In any event, I do not think that this is so material as to warrant a refusal of the probate. After all, it is not as if we have before us only the evidence of Mrs. Mazumdar. There is also, as Mr. Thakkar correctly points out, the evidence of Mr. Desai who filed an Affidavit in lieu of examination-in-chief and although it is true that this could not be tested in cross-examination because he had by then passed away, this does not completely efface its probative value. In his Affidavit,¹⁵ Mr. Desai in terms says in paragraph 12¹⁶ that Narayan was present at that time. The preponderance of probabilities is that from the two educated and literate people, Mr. Desai and Mrs. Mazumdar, we have evidence unshaken of Narayan's presence. But it is Narayan who, perhaps in a state of confusion or mistake, gave an answer that is inconsistent with these

15 Vol. C, *pp.* 116-120

16 *p.* 119.

versions and his own examination-in-chief. This is altogether too slender a thread for Mr. Damle to hang his entire defence on.

37. Mr. Damle's submission that the Will is not proved is not one that I am prepared to accept. As I understand it, the first limb of the argument on this aspect is that Mr. Damle expects Mrs. Mazumdar, who claims familiarity with the signatures, to have said that she personally knew both the witnesses; for, in his formulation, it is only then that she could attest to those signatures. I do not think this is correct either in logic or in law. Mrs. Mazumdar says that she was present when she saw the two persons, to one of whom she was introduced as Mr. Shenai and the other she knew of as Mr. Desai, sign their names to the testamentary instrument. That is enough. No law requires her to have any additional form of social or personal interaction with either of them for the purposes of this evidentiary deposition. As to the fact that Mrs. Mazumdar mentions only the nomination in her previous Affidavit but not the Will, as I have already noted, this does not carry Mr. Damle the necessary distance. I note again that questions 29 and 32 of Mrs. Mazumdar's cross-examination are possibly determinative. Question 29 was decidedly ambitious and certainly risky. It is phrased thus:

"29. Q. After you were called by the watchman on 4th July 1993, what according to you happened?"

When put like this, the Defendants ran the risk of receiving in cross-examination the entire story or version as put forward by Mrs.

Mazumdar. Mr. Thakkar is correct in saying that having received an answer of this kind, one that was clearly against the Defendants' interest, there should have been a further cross-examination to test that answer. There was none. This necessarily means that the correctness of that answer is accepted by the Defendants. The matter must end at that.

38. The only other aspect of the matter to which Mr. Damle adverts is his submission that the Will is "suspicious" because the bequest is, he says, to the Executors. He encourages me to read with him the Will in this fashion and to hold that because the Will makes provision for payment to Mr. Damania and Mr. Pikale of their legal costs and gives them the discretion to decide the amount and direction of the charitable bequests, that it is, in fact, a bequest to them. To begin with, this has nothing whatever to do with the due execution of the Will. It relates to the contents of the Will. This does not in and of itself disprove the due execution and attestation of the testamentary instrument. Second, I am unable to accept the submission as it is framed. This can hardly be said to be, on any fair reading of it, a bequest to the two Executors in question. If there was any doubt about the trust that Shashikala reposed in these two gentleman, I imagine it is completely put to rest not only by the nomination form,¹⁷ for in this she made both nominees of her Will, but also the other clauses, to which there is even today no challenge, and which set out that she had one or the other or both of them as nominees to her bank accounts and lockers. I must note, too, that in her examination-in-chief, Mrs. Mazumdar makes specific mention

17 Exhibit "B", Vol. "D", page 186.

of the fact that relations between her and her family members were not cordial at all. This is a statement that is re-affirmed in cross-examination, i.e., an answer elicited in cross and it is not further challenged.

39. Given all these circumstances, it is impossible to hold that the due execution and attestation of the Will does not stand proved. I do not believe that Mr. Damle's reliance on the decision of the Supreme Court in *H. Venkatachala Iyengar v. B.N. Thimmajamma and others*¹⁸ assists him in any way. A probate Court's jurisdiction is not a jurisdiction of distrust or suspicion. We do not approach Wills with disbelief or on the *a priori* assumption that every Will that is sought to be probated before us is, merely because of a contest, false unless proved otherwise. This is certainly a jurisdiction of caution and circumspection; but it is no more than that. This only means, as the Supreme Court's decision itself points out, that the judicial conscience must be satisfied that all suspicious circumstances have to be explained and removed by a probate Petitioner. But for that to be demanded of a plaintiff seeking probate, there must be suspicious circumstances in the first place. Where there are none, and none are pointed out, there is nothing to explain.

40. In this particular matter, I note that the Defendants do not question the Testatrix's signature on any part of the Will. They do not question any of the handwritten endorsements. They do not question the attesting witness's signatures. The nature of the cross-examination is at a complete variance with what is pleaded. The

18 AIR 1959 SC 443, paragraphs 18, 19, 20, 21 to 24.

only pleading, as I have noted, is whether Shashikala was in the control of Mr. Damania and Mr. Pikale. Indeed even a plea of undue influence is not precisely taken but it will have to be fairly read from this pleading.¹⁹

41. As a result of this discussion, finally there remains Mr. Damle's submission that the contents of the Will are vague and for this reason probate should be refused: he bases this on the Supreme Court decision in *Gurswarup Joshi v Beena Sharma & Ors.*²⁰ I think this is a somewhat inaccurate reading of the decision. The question before the Supreme Court was in relation to a mandatory order for implementation of a clause of the Will that was accepted as being vague. I do not think that it is correct to say that such a situation arises in this case. The Defendants have not been able to show that any part of this Will is in any way vague. The allegation itself is the only thing that is vague. A vague allegation of vagueness is incapable of yielding any result that is certain. That submission too must fail.

42. In the result, the first issue must be answered in the affirmative and it is.

¹⁹ *Joseph John Peter Sandy v Veronica Thomas Rajkumar*, (2013) 3 SCC 801.

²⁰ (2006) 5 SCC 119.

RE: ISSUE NO. 2:

43. Mr. Damle fairly accepts that no evidence has been led by the Defendants on this issue. This issue is answered in the negative.

CONCLUSION AND ORDER

44. In the result, the Suit succeeds and is decreed. The Petition is made absolute. Probate is directed to be issued having effect throughout State of Maharashtra. The original documents, except the Will, tendered by the Plaintiffs are to be returned to them, upon these being substituted by authenticated photocopies. There will be no order as to costs.

45. Drawn up order is dispensed with.

46. At Mr. Damle's request, the issuance of Probate is stayed for three weeks from the date when this judgment is uploaded.

(G.S. PATEL, J.)