

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

**TESTAMENTARY SUIT NO. 68 OF 2010
IN
TESTAMENTARY PETITION NO. 810 OF 2008**

Shirin Baman Faramarzi .. Plaintiff/Petitioner
Vs.
Zubin Boman Faramarzi & Shahin
Behrooz Kermani .. Defendants/Respondents

Mr.Rajani Iyer, Senior Advocate a/w. Ms. Manjari Shah and Ms.Vijaya Bhat, Advocate i/b M/s. Mulla and Mulla for Plaintiff/Petitioner.

Mr.Umesh Shetty, Advocate a/w. Ms.Sharila D'souza, Advocate i/b Flavia Legal for Defendant No.1.

Mr.Prasad Apte i/b Ghanshyam Tripathi for Defendant No.2.

**CORAM : K.R.SHRIRAM, J.
RESERVED FOR JUDGMENT ON : 2ND MARCH, 2017
PRONOUNCEMENT ON : 10TH MARCH, 2017**

P.C.

1 One Baman Dinyar Faramarzi (deceased) died at Mumbai on 29th August 2007. At the time of death, the deceased had a fixed abode at 33, Khushnuma Apartments, Carmichal Road, 29-A M.L. Dahanukar Road, Mumbai 400 026. It is the case of the petitioner-the widow of the deceased that the deceased left a Writing in English which is his last Will and Testament. It is alleged in the petition that as the executors appointed by the deceased under the Will namely one Mr.Diniar Darab Mehta and

Mr.Himanshu Vinod Kode failed to come forward and file a petition for Probate, the petitioner filed the petition for grant of letters of administration of the Will propounded by the Petitioner. As per the said Writing, the Plaintiff/Petitioner is the sole beneficiary.

2 The deceased and the Petitioner had three children, viz., (a) Farzin Baman Famarzi (son); (b) Zubin Baman Famarzi (son); and (c) Shahin Behrooz Kermani (daughter). Zubin Baman Famarzi filed a caveat opposing the grant. Shahin Behrooz Kermani- the daughter, did not file a caveat but filed an affidavit dated 28th August 2008 supporting the caveator. Upon the caveat being filed, the petition was converted into a suit and numbered accordingly. The petition, as originally filed, was for grant of probate. Since the petitioner was not the executor and hence could not have filed the petition for probate, the petitioner took out a chamber summons to amend the petition in August 2012 for converting the probate petition into petition for grant of letters of administration. On 6th August 2013, order was passed by this Court granting leave to the Plaintiff to amend the chamber summons and implead the executors in the Will as parties to the chamber summons. The petitioner was directed to serve the papers and proceedings in the suit along with the chamber summons upon the executors. Hereinafter, the petitioner is referred to as Plaintiff and Caveator is referred

to as Defendant.

3 Mr.Diniar Darab Mehta, one of the executor, filed an affidavit in reply dated 13th August 2013 to the Chamber Summons in which he stated that the contents of the Will propounded by the Plaintiff are entirely different from what had been made by the deceased at the time of its execution. Mr.Mehta also has averred that the propounded Will dated 21st January 2002, which is shown to be registered with the office of the Sub-Registrar of Assurances at Mumbai on 22nd January 2002, has not been witnessed by him at the time of registration though in the document it is mentioned that he was one of the witness not only at the time of execution of the Will but also at the time of registration. Mr.Mehta has stated that he did witness a Will but the Will propounded was not the Will that was attested by him because according to Mr.Mehta, the contents of the first three pages of the Will (the signatures are on the 4th page) are different from what had been made by the deceased at the time of its execution.

4 On 22nd September 2013, order was passed permitting conversion of the petition into one for grant of letters of administration.

Issues were settled on 22nd April 2014 and necessary directions were passed for issuance of witness summons to one of the alleged attesting

witness-Mr.Himanshu Kode, an advocate practicing in this Court. The issues that were settled are as under :-

1 Whether the Plaintiff proves that the Will dated 22nd January, 2002 was duly executed by Baman D. Faramarzi in accordance with the provisions of the Indian Succession Act, 1925 ?

2 Whether the Defendant proves that the Will dated 22nd January, 2002 is a false, bogus and fabricated document ?

3 What order ?

5 On 9th July 2014, Mr.Himanshu V. Kode (the only witness in this suit), upon receipt of the witness summons, filed his affidavit in lieu of evidence. In his affidavit, Mr.Kode disputed the genuineness of the Writing dated 22nd January 2002 propounded by the Plaintiff as the last Will and Testament of the deceased. According to the witness, though the deceased had executed a Will dated 22nd January 2002 that was attested by him as well as Mr. Mehta, the Will as propounded by the Plaintiff in its form and contents was not the document which was so executed. According to the witness, the first three pages were different from the first three pages that was executed and he stated upon reading the contents of the first three pages. He, of course, also stated that the quality of the paper and the font used are different from the quality of paper and font in page 4 of the Writing.

6 On 25th July 2014, the affidavit in lieu of examination in chief filed by Mr.Kode was taken on record and the counsel for the Plaintiff commenced asking further questions in examination in chief. After asking few questions, the counsel for the Plaintiff sought leave of the Court to cross-examine the said witness on the ground that (a) the said witness who was appointed as executor and was one of the attesting witness did not come to the Court in spite of service of two chamber summons; (b) did not participate in the testamentary petition by filing the petition as executor; and (c), instead filed an affidavit in lieu of examination in chief which is contrary to the case of the Plaintiff.

7 Caveator No.1 opposed but the Court, after hearing the parties, permitted the Plaintiff to cross-examine the witness. The counsel for the Plaintiff thereafter proceeded to cross-examine the witness. It would be useful to mention here again that Mr.Kode was the only witness who has given evidence in the matter but the other attesting witness Mr.Mehta was not called to give evidence. Though it is the Plaintiff's prerogative to decide who should be called to give evidence, probably the Plaintiff felt that calling Mr.Mehta would cause more harm to their case since the Plaintiff's case had already been dented by the evidence filed by Mr.Kode, one of the attesting witness. One must keep in mind the affidavit that was filed by Mr.Mehta in

reply to the chamber summons that was taken out by the Plaintiff as referred to earlier.

8 Now let us see (i) Whether the Plaintiff has proved that the Writing dated 22nd January 2002 is the last Will and Testament as required under Section 63 of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872; and (ii) Whether the Court can accept the deposition made by the only witness in the whole matter Shri Himanshu V. Kode, who is also the attesting witness that the Writing dated 22nd January 2002 as propounded is the Will that was executed by the deceased and attested by Mr. Kode and Mr.Mehta;

The counsel for the Plaintiff submitted that the Court should ignore the portions where in his evidence, Mr.Kode has expressed doubt on the genuineness of the Writing.

9 Ms.Iyer for the Plaintiff submitted that Mr.Kode is a motivated witness because (i) Mr.Kode was a friend of the Caveator; (ii) He did not come forward to file the petition for grant of probate, (iii) he did not file any reply to the chamber summons taken out by the petitioner for leave to amend the petition and (iv) he has come to the Court only after issuance of witness summons. Therefore, Mr.Kode be considered as motivated witness

and the Court should disregard that portion of his testimony which is not in tandem with the case propounded by the Plaintiff. Ms.Iyer also submitted that Mr.Kode admitted the signatures on page 4 not only to be that of the Testator and himself but also identified the signature of Mr.Mehta. Ms. Iyer further submitted that from the signature as appeared on page 4 of the Writing and the initials on the first three pages appeared to be that of the Testator to a naked eye.

10 Ms.Iyer also submitted :

(A) there was absence of suspicious circumstances which could justify the Testamentary Court refusing to grant Letters of Administration with Will annexed. Ms.Iyer submitted that following may be some of the suspicious circumstances:

- (i) The signature of the Testator may be very shaky and doubtful or not appear to be his usual signature.
- (ii) The condition of the Testator's mind may be very feeble and debilitated at the relevant time.
- (iii) The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.
- (iv) The dispositions may not appear to be the result of the Testator's free will and mind.
- (v) The propounder takes a prominent part in the execution of the

Will.

- (vi) The Testator used to sign blank papers.
- (vii) The Will did not see the light of the day for long.
- (viii) Incorrect recitals of essential facts.

Ms.Iyer submitted that none of these circumstances were present. It was also submitted that the Testator decided to bequeath everything to his wife, who could later give as she pleased.

(B) The settled principle of law is that the Testamentary Court cannot be invited to sit in appeal over the right or wrong of the Testator's decision.

(C) The Court's role it is held is limited to examining whether the instrument propounded as the last Will of the deceased –

- i) Is or is not that of and by the Testator; and
- ii) Whether it is the product of a free and sound disposing mind.

(D) It is only for the purpose of examining the authenticity or otherwise of the instrument propounded as the last Will, that the court looks into the nature of the bequest, i.e., it is not unnatural or improbable.

(E) Mere deprivation of a “due share” by the natural heirs is not a factor which would lead to the conclusion of there being suspicious circumstances.

A Will is executed to alter the mode of succession. In the very nature of things it is bound to result in reducing/depriving the share of a natural heir. There would be no need of a Will if the Testator intends his property to pass to (all) his natural heirs.

(F) In the absence of any case in the Affidavit-in-Support of the Caveat of incompetence of the Testator or of undue influence or coercion in the making of the Will annexed to the Petition or of the said document being in anyway incomplete, the Court must adopt and be guided by the principle of the requirements of a prudent man as an appropriate concrete standard by which to measure proof.

(G) The suspicion which alone would be ground for the Court not pronouncing in favour of a Will must be one inherent in the nature of the transaction of the making of the Will itself. Doubts that may be attempted to be raised belatedly and in a questionable manner by a motivated witness ought not to be entertained by the Testamentary Court.

(H) If a Will appears on the face of it to have been duly executed and attested in accordance with the requirements of the statutes, a presumption of due execution and attestation applies.

(I) The Court ought to have in all cases the strongest evidence before it believes that a will, with a perfect attestation clause, and signed by the Testator, was not duly executed. The presumption of law is largely in favour of the due execution of a will, and in that light a perfect attestation clause is a most important element of proof. Otherwise the greatest uncertainty would prevail in the proving of wills.

(J) It is for the Court to decide whether as a result of cross examination (and contradiction if any) a witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If in the process the credibility of the witness has not been completely shaken the Court may, after reading and considering the evidence of the witness as a whole, accept that part of his testimony which is found to be credit worthy and set upon it.

(K) The Court may on consideration of the evidence come to the conclusion that the recollection of a witness is at fault and that their evidence is of a suspicious character-being motivated in the present case – and accordingly disregard that testimony and pronounce in favour of the Will. Every presumption will be made in favour of due execution and attestation of a Will, regular on the face of it and apparently on the face of it duly executed.

(L) Taking all circumstances into consideration, if the Court comes to a conclusion that the Will was well executed, that Court ought not to rely upon evidence based on recollection of the witness, as in the present case.

(M) The law is well settled that the conscience of the Court has to be satisfied about the absence of suspicious circumstances, due execution, and that the will was the product of free volition after knowing and understanding the contents and the authenticity of the document.

(N) The authenticity of the document/Will of which Letters of Administration with Will annexed is sought, bears no self-evidence of being unfinished or of it containing only a partial disclosure of the testamentary scheme of the deceased, or of it being an imperfect document.

11 Ms.Iyer relied upon the following judgments in support of the above submissions :

(i) ***Mohammad Zia Ullah Khan Vs. Rafiq Mohammad Khan & Ors.***¹ to submit that every presumption should be made in favour of due execution and attestation in case of a Will regular on the face of it and apparently on face of it duly executed. Ms.Iyer also submitted that where the evidence of

1 A.I.R. 1939 Oudh.213

the attesting witness is vague, doubtful or even conflicting upon some material point, the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the statute were complied with.

(ii) ***Madhab Bohora (dead) by LR and Ors. Vs. Braja Kishore Nanda & Ors.***² to submit that in the facts and circumstances emanating from the material available on record, the conscience of the Court has to be satisfied by the propounder of Will adducing evidence so as to dispel any suspicious or unnatural circumstances and if the Court believes that the Will was duly executed by the Testator under the circumstances of that particular case, the Court must act upon supposition that the Will was duly executed by the Testator in the case, the factum of execution of the Will was said to have been proved.

(iii) ***Janki Narayan Bhoir Vs. Narayan Namdeo Kadam***³ to submit that only one attesting witness is required to be proved.

(iv) ***Gopal Swaroop Vs. Krishna Murari Mangal & Ors.***⁴ to submit that the test to be applied always is the test of satisfaction of a prudent mind in such matters and if the Court is satisfied that the Will was executed by the deceased, which is also a duly registered document, and is not surrounded by any suspicious circumstances of any kind then it is proved to have been

2 AIR 2003 ORISSA 107

3 (2003) 2 SCC 91

4 (2010) 14 SCC 266

duly and properly executed.

(v) ***Savithri & Ors. Vs. Karthyayani Amma & Ors.***⁵ to submit that conscience of the Court must be satisfied that the Will in question was not only executed and attested in the manner required under Succession Act, 1925 and when there is no suspicious circumstances, the Court has to accept, it to be validly executed. Ms.Iyer submitted that in the present case, there are no suspicious circumstances because the deceased has bequeathed all his properties to his wife which is the petitioner herein and therefore, the Court must accept the Will having been validly executed.

To the extent that there is nothing unnatural in a man bequeathing his entire estate to his wife and the exclusions of his children estate to his wife and to the exclusions of his children, I agree with Ms.Iyer that there is nothing unnatural.

(vi) ***Bharpur Singh & Ors. Vs. Shamsher Singh***⁶ to submit that an adversarial proceeding in such cases becomes a matter of Court's conscience.

(vii) ***Gurdev Kaur & Ors. Vs. Kaki & Ors.***⁷ to submit that the Court's role is limited to examining whether the instrument propounded as the last Will of the deceased is or is not that by the Testator and whether it is the product of the free and sound disposing mind. It is only for the purpose of

5 (2007) 11 SCC 621

6 (2009) 3 SCC 687

7 (2007) 1 SCC 546

examining the authenticity or otherwise of the instrument propounded as the last Will that the Court looks into the nature of the bequest.

In this case there is nothing unnatural because the bequest has been made to his wife.

(vii) ***Wright Vs. Rogers and Goodison; Winterburn***⁸ to submit that the presumption of law is largely in favour of the due execution of a Will and in that light a perfect attestation clause is a most important element of proof. The Court ought to have seen in all cases the strongest evidence before it believe that a Will, with a perfect attestation clause and signed by the Testator, was not duly executed. Otherwise the greatest uncertainty would prevail in the proving of the Will.

(ix) ***Anil Kak Vs. Kumari Sharada Raje & Ors.***⁹ to submit that the Testator's intention has to be collected from a consideration of the whole document and the Court should tilt towards a presumption in favour of the due execution of a Will.

(x) ***Vishnu Ramkrishna & Ors. Vs. Nath Vithal & Ors.***¹⁰ to submit that under Section 68 only one attesting witness is required to be called out.

12 Shri Shetty, counsel for Defendant No.1 in reply submitted that although Succession Act requires that a Will has to be attested by two

8 (1869) Courts of Probate and Divorce [L.R.678]

9 AIR 2008 SUPREME COURT 2195

10 A.I.R. (36) 1949 BOMBAY 266

witnesses and Section 68 permits the execution of the Will to be proved by only one attesting witness being requisitioned to give evidence, when the attesting witness who is called to prove the execution is not in a position or has not proved the execution of the Will, in such a case, the evidence of the witness must be supplemented by the other witness being called to prove the execution. Since the Plaintiff has not called the other attesting witness, the Court should conclude that the Plaintiff has not proved the execution of the Will. Shri Shetty also submitted that merely proving signature as that of the Testator is not sufficient, what is required is proving due execution of that Will by the Testator. The counsel also submitted that execution of a document does not mean mechanical act of signing the document or getting it signed but an intelligent appreciation of the contents of the document and signing in token of acceptance of those contents. In other words, the onus is on the Plaintiff to prove that the Writing as propounded by the Plaintiff as the last Will and testament is that document in its entirety which was executed by the deceased and attested by the two witnesses. Since in this case, the only witness who appeared, has stated that the Writing which is propounded as the Will was not the one that the Testator had executed and which the witness had attested, the Court cannot hold in favour of the Plaintiff. Shri Shetty, in support of his submissions, also relied upon the following judgments :

- (i) ***Vishnu Ramkrishna and Ors. Vs. Nathu Vithal*** (supra)
- (ii) ***Janki Narayan Bhoir Vs. Narayan Namdeo Kadam*** (supra)
- (iii) ***Dhannulal & Ors. Vs. Ganeshram & Anr.***¹¹
- (iv) ***Rani Purnima Debi Vs. Kumar Khagendra Narayan Deb & Anr.***¹²
- (v)w ***K. Nookaraji Vs. P. Venkatarao & Ors.***¹³
- (vi) ***Jagdish Chand Sharma Vs. Narain Singh Saini (dead) through Legal Representatives & Ors.***¹⁴
- (vii) ***Ratnaprabha Digambar Nemade Vs. Kisan Laxmanrao Deshmukh***¹⁵
- (viii) ***Jivaji Framorze Tarachand Vs. Minoo S. Mistry***¹⁶
- (ix) ***Usha Shrikant Rege Vs. Gauri Gajanan Rege***¹⁷

13 Though Ms.Iyer cited so many judgments and Shri Shetty for caveator submitted almost equal number, the judgment that comes to mind to be looked into to decide this matter is in ***Janki Narayan Bhoir*** (Supra). Therefore, before I proceed further, it would be useful to reproduce paragraphs 7 to 12 of ***Janki Narayan Bhoir (supra)***, which read as under :

7 We think it appropriate to look at the relevant provisions, namely, [Section 63](#) of the Indian Succession Act, 1925 and [Sections 68 and 71](#) of the Indian Evidence Act, 1872 which read:

[Section 63](#) of the Succession Act "63. Execution of unprivileged wills.- Every Testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:-

(a)

(b)

(c) The will shall be attested by two or more witnesses, each of whom has seen the Testator sign or affix his mark to the will or has seen some other

11 2015(4) All MR 917 (S.C.)

12 AIR 962 SC 567 (V 49 C 86)

13 AIR 1974 Andhra Pradesh 13 (V 61 C3)

14 (2015) 8 SCC 615

15 2015(5) ALL MR 227

16 2016(1) ALL MR 730

17 2016(11) ALL MR 801

person sign the will, in the presence and by the direction of the Testator, or has received from the Testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the Testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

Section 68 of the Evidence Act

"68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided..."

Section 71 of the Evidence Act "71. Proof when attesting witness denies the execution.- If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

8 To say will has been duly executed the requirements mentioned in clauses (a), (b) and (c) of Section 63 of the Succession Act are to be complied with i.e., (a) the Testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the Testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in this appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the Testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the Testator, or must have received from the Testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the Testator.

9 It is thus clear that one of the requirements of due execution of will is its attestation by two or more witnesses which is mandatory.

10 Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to

the said Section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of [Section 63](#) of the Succession Act with [Section 68](#) of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the Testator but must also prove that attestations were also made properly as required by clause (c) of [Section 63](#) of the Succession Act. It is true that [Section 68](#) of Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in [Section 63](#). Although [Section 63](#) of the Succession Act requires that a will has to be attested at least by two witnesses, [Section 68](#) of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, [Section 68](#) gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under [Section 63](#) of the Succession Act. But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of [Section 63](#), viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the Testator but it means fulfilling and proof of all the formalities required under [Section 63](#) of the Succession Act. Where one attesting witness examined to prove the will under [Section 68](#) of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to

prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of [Section 68](#) of the Evidence Act.

11 [Section 71](#) of the Evidence Act is in the nature of a safeguard to the mandatory provisions of [Section 68](#), [Evidence Act](#), to meet a situation where it is not possible to prove the execution of the will by calling attesting witnesses, though alive. This Section provides that if an attesting witness denies or does not recollect the execution of the will, its execution may be proved by other evidence. Aid of [Section 71](#) can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. [Section 71](#) has no application to a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the will and other attesting witnesses though are available to prove the execution of the same, for the reasons best known, have not been summoned before the court. It is clear from the language of [Section 71](#) that if an attesting witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an attesting witness examined fails to prove the due execution of will as required under clause (c) of [Section 63](#) of the Succession Act, it cannot be said that the Will is proved as per [Section 68](#) of the Evidence Act. It cannot be said that if one attesting witness denies or does not recollect the execution of the document, the execution of will can be proved by other evidence dispensing with the evidence of other attesting witnesses though available to be examined to prove the execution of the will. Yet, another reason as to why other available attesting witnesses should be called when the one attesting witness examined fails to prove due execution of the Will is to avert the claim of drawing adverse inference under [Section 114](#) illustration (g) of [Evidence Act](#). Placing the best possible evidence, in the given circumstances, before the Court for consideration, is one of the cardinal principles of [Indian Evidence Act](#). [Section 71](#) is permissive and an enabling Section permitting a party to lead other evidence in certain circumstances. But [Section 68](#) is not merely an enabling Section. It lays down the necessary requirements, which the Court has to observe before holding that a document is proved. [Section 71](#) is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and impossibility cannot be let down without any other means of proving due execution by "other evidence" as well. At the same time [Section 71](#) cannot be read so as to absolve a party of his obligation under [Section 68](#) read with [Section 63](#) of the Act and liberally allow him, at his will or choice to make available or not a necessary witness otherwise available and amenable to the jurisdiction of the court concerned and confer a premium upon his omission or lapse, to enable him to give a go bye to the mandate of law relating to proof of execution of a will.

12 Turning to the facts of the case on hand, it is evident that only one attesting witness Prabhakar Sinkar, examined in the case, did not prove the execution of the Will inasmuch as he did not prove the attestation of the Will by the other attesting witness Wagle who though available was not examined. The scribe examined in the case was not an attesting witness, which is clear from the evidence on record and as rightly conceded so by learned counsel for the respondent before us. Hence, it is unnecessary to go into the question whether the scribe in this case could or could not be an attesting witness. The evidence of Sinkar, the only attesting witness, does not satisfy the mandatory requirements of [Section 68](#) of the Evidence Act. We are not in a position to accept the contention urged on behalf of the respondent that the evidence of other witnesses, namely, that of the respondent and the scribe could be considered under [Section 71](#) of the Evidence Act. [Section 71](#) has no application when the one attesting witness, who alone has been summoned, has failed to prove the execution of the will and other attesting witness though available has not been examined. When the document is not proved as mandatorily required under [Section 68](#) of the Evidence Act, the provision of [Section 71](#) of the Evidence Act, which is permissive, and enabling in certain circumstances as discussed above does not help the respondent. In Vishnu Ramkrishna & Ors. v. Nathu Vithal & Ors. [(AIR) 1949 Bom. 266], Chagla, C.J., speaking for the Division Bench in similar circumstances has stated that although [Section 63](#) of the Succession Act requires that a will has to be attested by two witnesses, [Section 68](#) of the Evidence Act permits the execution of the will to be proved by only one attesting witness being called. Where the attesting witness, who is called to prove the execution, is not in a position to prove the attestation of the will by the second witness, the evidence of the witness called falls short to the mandatory requirements of [Section 68](#). [Section 71](#) of the Evidence Act can only be requisitioned when the attesting witnesses who have been called failed to prove the execution of the will by reason of either denying their own signatures or denying the signature of the Testator or having no recollection as to the execution of the document. This Section has no application when one attesting witness has failed to prove the execution of the will and other attesting witnesses were available who could prove the execution if they were called.

14 The Plaintiff has sought Letters of Administration in respect of a Writing as the Last Will and Testament dated 22nd January 2002 of the

deceased Shri Baman Diniar Faramarzi. A copy of the said Writing dated 22nd January 2002 has been annexed as Exhibit “B” to the Petition.

15 In my view, the Plaintiff has not proved the existence of the said purported Will and Testament. From the entire material and evidence on record, it is proved beyond a shadow of doubt that the Will in question has not been proved by the Plaintiff (Propounder of the Will) in the manner as required under Section 63 of the Indian Succession Act 1925 read with Section 68 of the Indian Evidence Act 1872.

16 Though Mr.Kode has identified the signatures on page 4 of the Writing, I would still conclude that the Plaintiff has failed to prove due execution thereof by the Testator and attestation in question by the two attesting witness.

17 The only witness Mr.Kode, in paragraph 5 of the Affidavit in lieu of his evidence in examination in chief, has clearly stated to the effect that contents of the alleged Will dated 22nd January 2002 of the deceased produced on record by the Plaintiff are entirely different from what had been made and executed by the deceased at the time of its execution. The said witness has also clearly stated to the effect that he had read the original

Will executed by the deceased and has also explained as to why the contents of the Will produced by the Plaintiff are different than the original Will that was executed by the said deceased. Significantly, the Plaintiff has not cross-examined the witness on the contents of paragraph 5 of affidavit in lieu of evidence.

Further, in paragraph 6 of the said affidavit in lieu of evidence, in the 3rd sentence thereof, the witness has stated as follows :-

“I say that the Will dated 22nd January 2002 in the present form was not witnessed by me”

Even this part of the evidence has not been subjected to cross examination by the Plaintiff.

18 The witness Mr.Kode has neither in his affidavit in lieu of examination in chief nor in the entire cross examination made any statement to the effect that he has seen the Testator sign or affix his mark to the Writing produced by the Plaintiff and that the said witness and the other purported attesting witness Mr. Diniar Darab Mehta had signed that Writing in the presence of the Testator.

19 From the entire evidence of Mr.Kode, it is clear that the execution of the Will in question has not been proved. Thus, it is clear that the Plaintiff

who is the Propounder of the Will has failed to discharge the initial onus of proving the execution. Despite this, the Plaintiff did not make any attempt to prove the said Will either by examining the other attesting witness Mr.Diniar Darab Mehta and/or by adducing evidence of any other person.

20 In law, merely proving signature on Will as that of the Testator is not sufficient. What is required is proving of due execution of the Will by the Testator and its due attestation as required under Section 63 of the Succession Act, 1925 read with Sec.68 of the Indian Evidence Act, 1872. I find support in ***Vishnu Ramkrishna and others*** (supra) and ***Janki Narayan Bhoir*** (supra). In ***Vishnu Ramkrishna*** (supra) and in ***Janki Narayan Bhoir*** (supra), it is held that if an attesting witness denied execution, the other attesting witness has to be summoned to prove execution and due attestation of the Will. In the present case, despite the only witness Mr.Kode having clearly denied the execution of the Writing propounded in its form as 'the Will', the Plaintiff has not examined the other attesting witness Mr. Dinyar Darab Mehta as contemplated under Section 68 of the Indian Evidence Act, 1872 to prove the due execution of the Will annexed to the Petition. In the aforesaid premise, the Court is unable to even look for other material to hold in favour of the Plaintiff.

21 Execution of a document does not mean mechanical act of signing the document or getting it signed but an intelligent appreciation of the contents of the document and signing in token of acceptance of those contents. This proposition of law has been laid down by the Hon'ble Supreme Court in ***Dhannulal & Ors.*** (supra). Paragraph Nos. 18 and 19 of the said judgment read as under :

18 *“It is evident from the findings recorded by the High Court in the paragraph referred to hereinabove that the Will suffers from serious suspicious circumstances. The execution of a document does not mean mechanical act of signing the document or getting it signed, but an intelligent appreciation of the contents of the document and signing it in token of acceptance of those contents.”*

19 *“Proof of a Will stands in a higher degree in comparison to other documents. There must be a clear evidence of the attesting witnesses or other witnesses that the contents of the Will were read over to the executant and he, after admitting the same be correct, puts his signature in presence of the witnesses. It is only after the executant puts his signature, the attesting witnesses shall put their signatures in the presence of the executant.”*

22 The Hon'ble Supreme Court in ***Ravi Purnima Debi*** (supra) held that the onus of proving the Will is on the propounder. Where, however, there are suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the Will could be accepted as genuine. A propounder himself might take a prominent part in the execution of the Will which conferred on him or her substantial benefits. If this is so, it is generally treated as a suspicious circumstance attending the execution of the Will and the propounder is required to remove the doubts

by clear and satisfactory evidence. The Apex Court also went on to hold that mere fact that a Will is a registered Will is not by itself sufficient to dispel all suspicion regarding it where suspicion exists, without submitting the evidence of registration to a close examination. Therefore, the mere fact of registration may not in itself be enough to dispel suspicion that may be attached to execution and attestation of a Will.

23 In the case of **Karri Nookaraju** (supra), the Andhra Pradesh High Court held :

“24 The propounder would be called upon to show by satisfactory evidence that the Will was signed by the Testator, that the Testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free Will. If the Will is surrounded by the suspicious circumstances it is his duty to remove those suspicious also. The test is whether the judicial conscience of the Court is satisfied in determining the question as to whether an instrument produced before the Court is the last Will of the Testator.”

24 The Hon’ble Supreme Court has in the case of **Jagdish Chandra Sharma** (supra) in paragraphs 22.1, 22.2 and 22.3 was pleased to hold as follows:

“22.1 In the evidentiary context, Section 68 of the 1872 Act enjoins that if a document is required by law to be attested, it would not be used as evidence unless one attesting witness, at least, if alive, and is subject to the process of the court and capable of giving evidence proves its execution. The proviso attached to this section relaxes this requirement in case of a document, not being a will, but has been registered in accordance with the provisions of the Registration Act, 1908 unless its execution by

the person by whom it purports to have been executed, is specifically denied.

22.2 *These statutory provisions, thus, make it incumbent for a document required by law to be attested to have its execution proved by at least one of the attesting witnesses, if alive, and is subject to the process of the court conducting the proceedings involved and is capable of giving evidence. This rigour is, however, eased in case of a document also required to be attested but not a will, if the same has been registered in accordance with the provisions of the Registration Act, 1908 unless the execution of this document by the person said to have executed it denies the same. In any view of the matter, however, the relaxation extended by the proviso is of no avail qua a will. The proof of a will to be admissible in evidence with probative potential, being a document required by law to be attested by two witnesses, would necessarily need proof of its execution through at least one of the attesting witnesses, if alive and subject to the process of the court concerned and is capable of giving evidence.*

22.3 *Section 71 provides, however, that if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by the other evidence. The interplay of the above statutory provisions and the underlying legislative objective would be of formidable relevance in evaluating the materials on record and recording the penultimate conclusions. With this backdrop, expedient it would be, to scrutinise the evidence adduced by the parties.”*

25 The Bombay High Court in the case of ***Ratnaprabha Digambar Nemade*** (supra) has held that if circumstances exist which excite suspicion of the Probate Court and whatever their nature be, it is for those who propound the Will to remove such suspicion and to prove to the fact that the Testator knew the contents of the Will. It is only where this is done that the onus shifts to those who oppose the validity of the Will to prove fraud or undue influence or whatever reason they rely upon to displace the case of

the propounder.

26 In another case of **Jivaji Faramroze Tarachand** (supra), this Court, *inter-alia*, held as follows:

“ 99 In view of all these suspicious circumstances pleaded by the Defendants in their two affidavits, in my view the onus was on the Plaintiffs to dispel such suspicion circumstances. Since the Plaintiff has failed to dispel such suspicious circumstances, it is clear that the Plaintiffs failed to prove the execution and attestation of the alleged will. On overall consideration of evidence thus it is obvious that the earlier Will dated 31st August 2000 was not revoked by the said deceased and that the alleged Will dated 27th December 2004 is forged. Issue No. 1 is accordingly answered in negative. Issue No. 2 is answered in affirmative. Issue No. 3 is answered in negative.”

Similarly, in paragraph No. 133 of the said judgment, the Court also held to the effect that merely by filing of the document which are disputed by the Defendants without proving the existence and contents thereof by leading oral evidence, such documents cannot be construed or read in evidence.

27 The case of **Mohammad Zia Ullah Khan** (supra) and **Madhab Bohora (dead) by LR** (supra) relied upon by the Plaintiff does not take the case of the Plaintiff any further, as the facts in those cases are distinct from the case in hand. In **Mohammad Zia Ullah Khan** (supra), both attesting witnesses and the scribe were examined.

In that case, there were other witnesses apart from attesting witness

who were examined. It is also noted in the judgment that the execution of the Will was not seriously disputed. In the present case, the only witness who was called to give evidence was Mr.Kode, an attesting witness and he has stated that the Writing propounded is not the Will that was executed by the Testator. Even if the Court has to come to a presumption that in view of due execution and attestation the Will propounded is valid, the Court should have other evidence before it to weigh as to what should be the conclusion. Though the Will has been registered, the registration has not been proved, the attesting witness has not confirmed execution of the document that is being propounded. Therefore, this judgment is of not much assistance to the Plaintiff.

In **Madhab Bohora** (supra) in all eleven witnesses were examined. Everybody was in support except the scribe.

28 So far as **Janki Narayan Bhoir** (supra) relied upon both by the Plaintiff and Defendant is concerned, it also does not take the case of the Plaintiff any further. On the contrary, the said Judgment, I would say supports the case of the Defendant as could be seen from the paragraphs 7 to 12 and in particular paragraph 10 quoted above.

29 **Gopal Swaroop** (supra) relied upon by the Plaintiff is clearly distinguishable on facts. In that case, one attesting witness had duly proved

the execution and attestation of the Will. Further, no negative evidence against execution of the Will or the existence of the Will was given by the said witness.

30 So also **Savithri & Ors.** (supra) relied upon by the Plaintiff is clearly distinguishable on facts. In that case, execution of the Will was not disputed.

31 **Bharpur Singh** (supra) relied upon by the Plaintiff also does not help the Plaintiff. In the said case, it is noted that deprivation of a due share to the natural heir by itself may not be held to be a suspicious circumstance but it is one of the factors which is taken into consideration by the Court before granting probate of Will. Further suspicious circumstances surrounding the execution of the Will are set out (they are not exhaustive) one such case being a case where the propounder takes prominent part in the execution of the Will. One other suspicious circumstance as set out in the said judgment is where the disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason. In the present case, the fact that the only attesting witnesses examined has denied the genuineness and correctness of the contents of the alleged Writing produced by the Plaintiff, in my view, is another cause for suspicion surrounding the

execution of the Will.

32 ***Gurdev Kaur & Others*** (supra) relied upon by the Plaintiff is also distinguishable on facts. In that case, the attesting witness and other witnesses have duly proved the execution and attestation of the Will. There were no suspicious circumstances in that case.

33 ***Wright Vs. Rogers*** (supra) relied upon by the Plaintiff is also distinguishable on facts. This was not a case governed by Section 63 of the Indian Succession Act 1925 read with Section 68 of the Indian Evidence Act, 1872. As per Section 63 of the Indian Succession Act, 1925 attesting witnesses are required to sign in the presence of the Testator. In the case of Wright (supra), the said requirement of Section 63 of the Indian Succession Act 1925 never fell for consideration. Moreover, in the said case, the concerned attesting witness has confirmed execution of Will. So far as attestation was concerned, one of the Witnesses stated to the effect that it was done later in the Office. The said witness did not deny the contents of the Will but confirmed the same. The said judgment therefore is not at all applicable to the facts of the present case.

34 The case of ***Anil Kak*** (supra) relied upon by the Plaintiff also does not

support the case of the Plaintiff. In paragraph 39 of the said judgment, the Hon'ble Supreme Court was pleased to lay down the law as follows :

“39 The execution of a Will does not only mean proving of the signatures of the executors and the attesting witnesses. It means something more. A Will is not an ordinary document. It although requires to be proved like any other documents but the statutory conditions imposed by reason of Section 63(c) of the Act and Section 68 of the Indian Evidence Act cannot be ignored”.

35 In the aforesaid premise, it is clear that the Writing dated 22nd January 2002 has not been proved by the Plaintiff as the last Will and Testament of the deceased – Baman Dinyar Faramarzi in accordance with the provisions of the Indian Succession Act, 1925. The issues framed are answered accordingly.

The suit is dismissed.

In view of the facts and circumstances, particularly this being a contest between a widowed mother and her children, no order as to costs.

(K.R. SHRIRAM, J.)