

GSP|AGK

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
TESTAMENTARY SUIT NO. 23 OF 2003
IN
TESTAMENTARY PETITION NO. 667 OF 2002

1. SULOCHANA DINANATH TARKAR
(since deceased)

1-a. SUNIL DINANATH TARKAR
Adult Indian Hindu Inhabitant of Mumbai,
Residing at 3rd Floor, Prabhat Apartment,
'B' Wing, Hanuman Road, Vile Parle
(East), Mumbai 400 057

1-b. HARISH DINANATH TARKAR
Adult Hindu Inhabitant of Mumbai,
Residing at 108/141, Kalpataru Co-op Hsg
Soc Ltd, Anant Waman Vartak Marg, Vile
Parle (East), Mumbai 400 057

... Plaintiffs

~ VERSUS ~

1. ANIL DINANATH TARKAR
Adult Hindu Inhabitant of Mumbai,
Residing at 629 A.P. D'Souza Chawl, ,
Ambewadi Western Express Highway, Vile
Parle East, Mumbai 400 057

**2. SAVITA CHANDRAKANT
NARINGREKAR**
Adult Hindu Inhabitant of Mumbai,
Residing at 135/7, Shiva Smruti, Sector 11,
Jui Nagar, Vashi, Navi Mumbai, 400703

... Defendants

APPEARANCES

FOR THE PLAINTIFFS **Mr BG Saraf** *a/w Ms Jessie Misquitta*

FOR THE DEFENDANTS **Mr Farkhan Khan** *i/b R. Sathyanarayan*

CORAM : G.S. Patel, J.

JUDGMENT RESERVED ON : 19th July 2018

JUDGMENT PRONOUNCED ON : 29th January 2019

JUDGMENT:

CONTENTS

A.	BACKGROUND; PARTIES.....	3
B.	THE DISPUTED WILL.....	4
C.	ISSUES.....	5
D.	EVIDENCE.....	6
E.	RE: ISSUES NOS. 1 AND 2.....	7
F.	RE: ISSUES NOS. 3 & 4.....	17
G.	CONCLUSIONS.....	26
H.	ORDER.....	28

A. BACKGROUND; PARTIES

1. Dinanath Harishchandra Tarkar (“**Dinanath**”; “**the testator**”; “**the deceased**”) died on 20th January 2001. He left a Will dated 9th March 1981.¹ The original Plaintiff, Sulochana

¹ Exhibit B, *pp.* 9-11

Dinanath Tarkar (“**Sulochana**”), sought Letters of Administration with this Will annexed. She was Dinanath’s second wife and the sole beneficiary under his Will.

2. Dinanath’s first wife was also named Sulochana, the name she was given after marriage. Her maiden name was Sumati Poyrekar. She died on 11th November 1954. She and Dinanath had two children, Anil Dinanath Tarkar (“**Anil**”) and Savita Chandrakant Naringrekar (“**Savita**”; Snehalata before marriage). Anil was an infant a few days old, and Savita a child of three when their mother passed.

3. Dinanath then married the original Plaintiff, his second wife, also named Sulochana, in May 1955.² The original Plaintiff’s maiden name was Godavari Ganpath Birje. She was given the name Sulochana on marriage. They had three children, Sunil Dinanath Tarkar (“**Sunil**”), Harish Dinanath Tarkar (“**Harish**”), and Nisha Dilip Shivalkar (“**Nisha**”; Alka before marriage). Dinanath and both his wives came from Devgad taluka in Sindhudurg district.

4. The Petition for Letters of Administration with Will annexed was filed on 4th September 2002. Sunil, Harish and Nisha filed their consent affidavits to this petition.³ Citations were served in 2003. On 10th April 2003, Anil and Savita each filed Caveats and identical Affidavits in Support.⁴

2 References in this judgment to ‘Sulochana’ are, therefore, to Dinanath’s second wife.

3 Compiled record, *pp.* 17–22.

4 Compiled record, *pp.* 117–135.

5. Upon the Caveats being filed, the Petition was renumbered as Testamentary Suit No. 23 of 2003.

B. THE DISPUTED WILL

6. Dinanath's Will is a two-page document typed in English. Dinanath is said to have put his signature at the foot of the Will. Below his signature, are the signatures of the two attesting witnesses, one Shatrughna Mahadev Hirlekar ("**Hirlekar**") and one Ramakant Ganpat Sakpal ("**Sakpal**"). The Will was registered on 9th March 1981 under No. 612 of 1981 of Book No. III. The Will is simple and straightforward. In it, Dinanath makes an absolute bequest of his assets in favour of his second wife, Sulochana. He states in the last paragraph that none of his children shall have any right or claim against Sulochana. He does not appoint an executor for the Will.

7. In their Affidavits, the Defendants say that the signature on the Will is not Dinanath's; and if it is genuine, it was made under undue influence; that the Will was not duly attested; that the Will is unnatural; that the Will was fabricated, and obtained by fraud and coercion; and that the attesting witness have not witnessed execution and merely signed it. Specifically, the Affidavits say that the Will does not reflect Dinanath's true last wishes. They claim that in his lifetime the deceased personally told Anil and Savita that after his death his property would be equally distributed amongst Anil, Savita, Sulochana, their step-brothers, Sunil and Harish, and

their step-sister, Nisha. In the Will, however, Dinanath bequeaths his entire property to the Defendants' step-mother, Sulochana. They say that the Will is suspicious: it does not appoint an executor. It is also uncharacteristic: the document is typed, whereas Dinanath was in the habit of personally writing his documents.

C. ISSUES

8. On 17th March 2005, S.K. Shah, J, framed issues in the present proceedings.⁵ These are reproduced below with my findings against each.

Sr. No.	Issue	Findings
1.	Whether the alleged Will dated 9.3.1981 was validly executed by the deceased Dinanath Harishchandra Tarkar?	Yes
2.	Whether the deceased Dinanath Harishchandra Tarkar was of sound and disposing state of mind at the time when the said Will was executed?	Yes
3.	Do the Defendants prove that the said Will was procured by the Plaintiff and her children by exercising undue influence on the deceased as alleged in Paragraph 5 of the affidavit of the defendants, dated 10.4.2003, in support of the Caveat?	No
4.	Do the Defendants prove that Plaintiff has committed fraud and practised coercion as alleged, in paragraph 10 of the said Affidavits?	No
5.	What relief?	As per final order.
6.	What order?	Letters of

⁵ Compiled record, *p.* 135.

Sr. No.	Issue	Findings
		Administration granted to the Plaintiffs.

D. EVIDENCE

9. The Plaintiff examined Hirlekar (PW1) and Sunil (PW2). The Defendants only led Savita's evidence.⁶ Sulochana affirmed an Affidavit in lieu of Examination-in-Chief on 4th December 2006. She died on 3rd October 2007. Her sons, Sunil and Harish, were brought on record as Plaintiffs pursuant to an order of 26th February 2008 of the Prothonotary & Senior Master. Sunil adopted and re-affirmed Sulochana's Affidavit in his own Affidavit in lieu of Examination-in-Chief dated 28th January 2009,⁷ annexing Sulochana's earlier affidavit to his own.⁸

10. The Plaintiff introduced 18 documents in evidence. I will refer to these documents to the extent necessary while discussing the evidence. Not all of these documents are relevant to prove the due execution of the Will.

11. I have heard Mr Saraf for the Plaintiffs and Mr Khan for the Defendants. With their assistance, I have considered the record, the authorities cited and their respective written submissions.

6 Compiled record, *pp.* 203–207.

7 Compiled record, *pp.* 136–157.

8 Compiled record, *pp.* 140–157.

E. RE: ISSUES NOS. 1 AND 2

12. I will consider these two issues together. They seem to me to be facets or dimensions connected to proof of the Will in its solemn form. A Will must be proved like any other document; but where an ordinary document may be proved in its 'common' form, a Will requires proof in its 'solemn' form. This is because an unprivileged Will requires attestation of execution by at least two attesting witnesses,⁹ and the Will cannot be received in evidence unless the evidence of at least one of those attesting witnesses is led.¹⁰ If no

9 Indian Succession Act, Section 63(c): 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) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(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 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.”

10 Evidence Act, Section 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:

attesting witness is available, then Section 69 of the Evidence Act¹¹ read with Rule 384 of the Bombay High Court (Original Side) Rules¹² permit proof the handwriting and signature of the testator and at least one of the attesting witnesses.

13. In other words, a Will is proved in its solemn form only if it meets the requirements of the Indian Succession Act, 1925: that it is made by an adult of sound mind,¹³ without any importunity that takes away the testator's free agency,¹⁴ and is duly attested, in the prescribed manner, by at least two witnesses.¹⁵

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

11 **Section 69 — Proof where no attesting witness found**

"If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the documents is in the handwriting of that person."

12 **Rule 384:** In absence of attesting witness, other evidence to be produced. — If it is not possible to file an affidavit of any of the attesting witnesses, an affidavit of some other person, if any, who may have been present at the execution of the will shall be filed, but if no affidavit of any such person can be filed, evidence on affidavit shall be produced of that fact and of the handwritings of the deceased and attesting witnesses, and also of any circumstances which may raise a presumption in favour of due execution.

13 Indian Succession Act, Section 59.

14 Indian Succession Act, Section 61.

15 Section 63, *supra*. See, generally, the discussion in *Lalitkumar Chapsey v Nickie Nanavati*, 2018 SCC OnLine Bom 698.

14. PW1, Hirlekar, filed an Affidavit dated 4th September 2002 with the Petition.¹⁶ He later filed an Evidence Affidavit dated 16th June 2009.¹⁷ The two are consistent. PW1 stated that he was well-acquainted with Dinanath. On 9th March 1981, he and Sakpal, the second attesting witness, were at Dinanath's house. There, in the presence of Hirlekar and Sakpal, Dinanath signed the Will. PW1 Hirlekar stated that he and Sakpal then put their signatures to the Will in Dinanath's presence and at his request. He stated that the name and signature of "D. H. Tarkar" subscribed at the foot of the Will was Dinanath's handwriting. He identified Dinanath's signature, and his own and Sakpal's signatures. PW1 Hirlekar stated that the date written on the second page of the Will was inscribed by Dinanath. He stated that Dinanath was of sound and disposing mind, memory, and understanding and executed the Will of his own free will and pleasure. He stated that the Will was registered on the same day.

15. Hirlekar's cross-examination was brief. He confirmed that Dinanath prepared the Will on 9th March 1981.¹⁸ He also confirmed that he signed the Will as a witness without reading the document, and that he did not know anything the contents of the Will.¹⁹

16. Sunil adopted and reproduced Sulochana's Evidence Affidavit. She died before she could be cross-examined on it. The law in this regard is compactly stated in the decision of HR Khanna

16 Compiled record, *pp.* 13-15.

17 Compiled record, *pp.* 185-189.

18 Compiled record, *p.* 195.

19 Compiled record, *p.* 195.

J (as he then was), of the Delhi High Court in *Krishan Dayal v Chandu Ram*.²⁰ Where the testimony is incomplete by reason of death or incapacity of the witness before cross-examination, the evidence, admissible when given, does not cease to be so merely on account of that intervening factual circumstance. What probative or evidentiary value is to be attached to this evidence is another matter, and turns on the circumstances of each case. A court may seek independent corroboration of that evidence. It may accept it, albeit cautiously, and that is no infirmity *per se* in the final decision. Therefore, if what Sulochana said in her Evidence Affidavit is corroborated by PW1 Hirlekar, who was cross-examined, and her own son, Sunil, who adopted her testimony, then Sulochana's evidence is not to be discarded only for want of her availability for cross-examination. In her affidavit, Sulochana identified her husband's signature on the Will. Given that they had been married since 1955, this is to be expected. She produced documents to substantiate this, including a ration card, tax documents, etc.²¹ She said she learnt of the Will only after Dinanath's death.²² She attested to his mental and physical health around the time he made his Will.²³ Dinanath lead an active life after retirement; and he lived for another 20 years after the date of his Will.²⁴ Sulochana also produced a nomination form for the Parle Kalpataru Cooperative Housing Society by which Dinanath made Sulochana his sole

20 (1969) ILR Del 1090.

21 Compilation *p.* 147, paragraph 19. The Plaintiffs' documents (Compiled record, *pp.* 164–189) were all received in evidence as Exhibit "A" collectively, by an order dated 23rd August 2010 (Compiled record, *p.* 192–193).

22 Compiled record, paragraph 10, *p.* 142.

23 Compiled record, paragraph 12, *p.* 143.

24 Compiled record, paragraph 15, *p.* 145.

nominee for the flat.²⁵ He also made her the sole nominee in regard to his gratuity and other dues, and this was as far back as on 30th August 1957.²⁶ From her affidavit and the documents, we learn that on both sides, Sulochana's and Dinanath's, the families were of very modest means, poorly educated and steeped in traditional, patriarchal ways. The women were not involved in financial affairs, and she said in paragraph 8 of her affidavit that Dinanath did not consult her or take her — or any other family member — into confidence in his financial or commercial affairs. She described him as an introvert, domineering, overbearing, and a strict disciplinarian. She herself had only a limited education to the VIIth standard in an all-girls' school in Devgad, and was brought up in a culture and tradition where the women were kept from all business or commercial matters. She remained a housewife, tending to the house and her domestic chores, and bringing up the children.

17. In paragraph 11 of her Evidence Affidavit, Sulochana gives us a short portrait of her husband, Dinanath. He was, she said here, a self-made man. He came to the city at the age of 13 to live with his sister. He worked during the day and attended night school. He put himself through school and, at the age of 25, joined the Scindia Steam Navigation Company as a compounder in its dispensary in Mumbai in May 1948. He went on to become a registered pharmacist in 1952. He obtained qualification in ayurveda, and took a short course at the Nowrosjee Wadia Maternity Hospital. He

25 Compiled record, part of Exhibit "A", *pp.* 183–184.

26 Compiled record, paragraph 17, *p.* 145; letter dated 30th August 1957 from Scindia Steam Navigation Co to DH Tarkar, compiled record, *p.* 170, part of Exhibit "A" in evidence.

retired on 5th April 1984 and then set up a private medical practice in rented premises at Mhatre Chawl, Nagardas Road, Mogradada, Andheri (E) in 1985. He surrendered these in 1988, and in 1990, took other premises for his practice at Yadav Chawl, Chakala, Bamanwada, Vile Parle, nearer home. While employed with Scindia Steam, he commuted by train daily, and, after retirement, was active both physically and mentally. In paragraph 12 of this Affidavit, Sulochana said that Dinanath always managed his own financial affairs of his volition.

18. Then comes paragraph 18 of the Affidavit.²⁷ Here, Sulochana said that she looked after the Defendants and treated them as her own. She raised both with equal love and care, and looked after the 2nd Defendant until her marriage in 1969, and cared for Defendant No.1 since the time he was an infant. She complained in paragraph 20 of the Defendants' ingratitude and said that even before the petition was filed, the Defendants sought a share.

19. While the affidavit contains material that will have a bearing on the next issues (undue influence, fraud and coercion), and to which I will turn presently, this testimony is indeed powerful. It is by its nature reliable, coming as it does from a person who was the testator's constant companion and spouse from 1955 until his death in 2001, nearly half a century later. Should it be disbelieved only because Sulochana passed before she could be cross-examined on it? That is not the correct approach, as the *Krishan Dayal* decision tells us, and I can find no binding authority (and none is cited before me)

²⁷ Compiled record, p. 146.

to suggest that such an affidavit must, for this reason, be disregarded totally. Caution is advised, of course; and a better approach would be to consider what Sunil said in his affidavit, where he adopted his mother's, in his cross-examination, and what the Defendant No.2, Savita, said in her testimony.

20. Sunil's Affidavit simply adopts his mother's testimony. He was cross-examined on commission.²⁸ The cross-examination is, to my mind, appalling. It is in itself a testament to the utter failure of our system in training lawyers in the delicate art of cross-examination, of imparting to them the skill sets essential to a trial. We have forgotten, in our obsession with interim applications, that a trial is the single most daunting challenge before any lawyer. It is not simply a matter of shooting out questions without regard for how those questions are worded or what it is that is being suggested. A skilled cross-examiner is always cautious when he 'puts' something to a witness, because when he does so he takes on the burden of proving that which he suggests; and that suggestion must be rooted in his client's pleadings. Sunil's cross-examination is an perfect example of what a cross-examination should *not* be. The questions reproduced below destroy the Defendants' cause beyond any hope of redemption.

Q.9) Is it true to say that the property is the hard-earned (self acquired) property of the deceased?

Ans) It is true.

Q. 10) Can it be said that the deceased till his death was having full confidence in the Original Plaintiff?

28 Compiled record, *pp.* 196–202.

Ans) It is true.

Q. 11) Is it correct to say that the deceased had full confidence in his wife Sulochana that his will would be fully respected and followed by the Original Plaintiff after the death of the deceased?

Ans) Yes.

Q. 12) Is it correct to say that while making the will the deceased was in good health even though there is no doctor's certificate in the will?

Ans) The deceased was in sound health.

Q. 13) Is it true that the suit will dated 9th March 1981 is the only will of the deceased?

Ans) It is true that it was the only will.

Q. 17) Is it true that Dinanath Tarkar died after 20 years of making the Will?

Ans) It is correct.

Q.18) Is it correct to say that from 1981 to 2001 Dinanath did not execute any Will for the properties acquired during this period?

Ans) It is correct and no other Will was executed.

21. This cross-examination utterly destroys the Defendants' case. These questions prove that the Will was executed on 9th March 1981; that it was Dinanath's only Will; that Dinanath was of sound mind when he executed the Will; and that Dinanath had full confidence in Sulochana that his last wishes would be respected. Sunil's answers indicate that Dinanath trusted Sulochana to carry

out his last wishes, and this also destroys the Defendants' own averment that the Will is suspicious because it does not appoint an executor, for Sulochana was always ready to execute the Will, even though there was no formal appointment of her as an executor.

22. What did Savita say in her own Evidence?²⁹ It contains no specifics at all, but only the most general and vague allegations of undue influence. In paragraph 4, Savita says her father was 'hen pecked' and under Sulochana's influence. The only material allegation is that Dinanath handwrote his correspondence, whereas the Will is typed; she says he 'could not have got it typed'. That in itself is not proof of undue influence, for she does not counter Sulochana's testimony of having only a modest education herself and being a home maker. She claims the Will is intended to deprive her and her brother of their share (but ignores that Sulochana's own children were bequeathed nothing either). She says the accusation in the Will against the 1st Defendant is false. In short, she does nothing at all to counter Sulochana's detailed historical narrative in her evidence. There is no evidence beyond this of Sulochana dominating Dinanath in any way. As to the question of Dinanath only ever handwriting documents, it was for Savita to show this affirmatively, and she has done nothing to that end.

23. On this affidavit, there was really nothing on which Savita could be cross-examined in regard to Issues Nos. 1 and 2. She had one allegation about Dinanath being hen-pecked and dominated by Sulochana, and another allegation that the statements in the Will

29 Compiled record, *pp.* 203–206.

about the 1st Defendant were untrue. But those are, for what they are worth, directed towards Issues Nos. 3 and 4 (undue influence, coercion and fraud). On the matter of due execution and soundness of mind, her affidavit evidence says nothing at all. On 12th January 2017, before KR Shriram J, Mr Saraf made a statement declining to cross-examine Savita; and the trial thus closed. From the Defendant, therefore, there is no independent material at all to refute the Plaintiffs' case on due execution.

24. Issues Nos. 1 and 2 are thus answered in the affirmative.

F. RE: ISSUES NOS. 3 & 4

25. The burden of these two issues is squarely on the Defendants. They allege undue influence, fraud and coercion. Undue influence and coercion are both facets of importunity, taking away the free will and agency of the testator. Fraud in a testamentary proceeding, like in any other, must be pleaded with sufficient particulars.³⁰ It is never enough to merely use the phrase with nothing more. There are no particulars of any fraud, and this portion of the issue is thus required to be answered against the Defendants, in the negative.

26. That leaves the question of undue influence and coercion. First, as to the jurisprudential framework in which the evidence must be set. In testamentary dispositions, all influence is not axiomatically 'undue'. It must be shown that the testator was

30 *Afsar Shaikh & Anr v Soleman Bibi & Ors.*, (1976) 2 SCC 142.

compelled to act against his wishes. This means, necessarily, that it must be shown by cogent evidence that the testator desired something different than the will shows. This is not a matter that can be left to conjecture or surmise. It is not enough to show that there was mere *influence*. There must be evidence of *undue* influence, i.e., material to show that the testator did something he did not intend or could not reasonably be expected to have intended.³¹ Mere opportunity is insufficient to warrant any inference of undue influence or coercion.³² In *Naresh Charan Das Gupta v Paresh Charan Das Gupta*,³³ the Supreme Court said:

"13. **It is elementary law that it is not every influence which is brought to bear on a testator that can be characterised as "undue".** It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour. **And if the testator retains his mental capacity, and there is no element of fraud or coercion — it has often been observed that undue influence may in the last analysis be brought under on or the other of these two categories — the will cannot be attacked on the ground of undue influence."**

(Emphasis added)

In the very old English decision in *Hall v Hall*,³⁴ one that has held the field on this aspect of the law, the Court said:

31 *Wingrove v Wingrove*, 1885 XI PD 81; *Hall v Hall*, 1868 I XXXI P&D Vict LR 481

32 *Arvind v Indirabai*, 2008 (5) All MR 651.

33 AIR 1955 SC 363.

34 (1868) LR 1 P&D 481.

Even a reprehensible placing of pressure on a testator will not always be undue influence so as to avoid the will: **"To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affection or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like - these are all legitimate, and may be fairly pressed on a testator.** On the other hand, **pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes is overborne will constitute undue influence, though no force is either used or threatened.**" And thus Sir Wilde concludes:

"In a word a testator maybe led but not driven and his Will must be the off-spring of his own volition and not the record of someone else's."

(Emphasis added)

27. Although not framed as a distinct issue, I will also consider here the case argued by Mr Khan and hinted at elsewhere that the Will is unnatural in its dispositions, and therefore highly improbable, for it contains no bequest to the Defendants, Dinanath's children by his first wife.

28. With this in mind, I turn to the material on record, and begin this discussion with the case most strenuously urged by Mr Khan that the Will is unnatural and improbable. Our starting point should, in my view, be the Will itself. It contains a reason for excluding the 1st Defendant and the daughters. The Will says that Dinanath spent much money educating the 1st Defendant, Anil, but his educational career was a constant source of worry and trouble because of the 1st Defendant's neglect of his studies and truant nature. The 1st Defendant, the Will says, lives with his family at Vile Parle. As to the daughters (the 2nd Defendant and Alka, Dinanath's daughter from his second marriage), Dinanath says in his Will that he has paid their marriage expenses and giving them ornaments and gifts according to his means.

29. I will read this in the context of what Sulochana said in her Evidence Affidavit about the family being conventional and adhering to old traditions, customs and ways of thinking. This approach to the daughters is, clearly, to a pattern of Indian patriarchy, and is not in itself uncommon. Indeed, even the 2nd Defendant says nothing at all about this aspect of the matter. But what of the 1st Defendant? Against him the Will contains a direct allegation of truancy and educational neglect. The 1st Defendant could have countered this himself. He chose not to lead any evidence and Mr Khan cannot, I think, legitimately gloss over this failure to give evidence. The 2nd Defendant's evidence — if it can even be called that — is second-hand and not to her personal knowledge. She says nothing at all about it, and only denies the correctness of the statement in the Will. But a Will is not an affidavit, pleading or evidence. It calls for no traverse. It demands proof, and where something in it is

disputed, it calls for proof of its incorrectness. Without this, the denial itself is not evidence; and Mr Khan's submission that the failure to cross-examine the 2nd Defendant must mean that her allegations are proved is incorrect. Proof speaks to satisfaction of the mind and conscience of the Court; it is never a matter of a legal entitlement. As I have noted, the 2nd Defendant's Evidence Affidavit is so barren as to warrant no cross-examination at all. In fact, it is no evidence at all, and does not become so because cross-examination was declined.

30. On the other hand, what the Plaintiffs have brought in is documentary corroboration of what the Will says about the 1st Defendant. This takes the form of two letters and a progress report of the Gurukul Boarding School in Lonavala, in which the 1st Defendant was enrolled. All three are part of Exhibit "A" in evidence, items at Sr Nos 6,³⁵ 7³⁶ and 8³⁷ respectively. In his letter, of 4th August 1970, Dinanth said he was disappointed in the 1st Defendant's lack of progress in school. The letter from the school, on 18th February 1971, details the 1st Defendant's truancy — thefts, street brawls, beating up other students, extorting money from the locals on false pretexts and so on. Then there is his report card of 1970 when the 1st Defendant was in the IXth standard. He scored 8/50 in Hindi, 19/50 in English and 12/50 in Math, a total of 39/150. Now this completely corroborates the statement Dinanath made in his Will; and, as against this, from the Defendants we have absolutely nothing. The one person who had personal knowledge,

35 Compiled record, *p.* 171; letter from Dinanath.

36 Compiled record, *p.* 172; letter from the school.

37 Compiled record, *p.* 173; report card.

the 1st Defendant himself, remained silent. He led no evidence. His elder sister, the 2nd Defendant, only said the accusations in the Will were false — and she said this (and only this, nothing more) *after* the Plaintiffs had led evidence, including these three documents. She did not address the documents at all. Her statement is in itself no evidence, because, as I have noted, it is nothing but a bald denial; and these are not matters that could have been to her knowledge.

31. What is even more interesting is the fact that even the Evidence Affidavit of the 2nd Defendant comes very late, almost as an after-thought. The cross-examination before the court-appointed commissioner closed on 7th April 2011. The commissioner filed his report on 3rd February 2012. The suit was listed for arguments. The Plaintiffs filed their written submissions on 24th November 2014, when the suit came up before me. I directed the matter be listed for final hearing. It did not reach. Some three years after the hearings before the commissioner closed (in 2011), in 2014 the Defendants filed Notice of Motion No 166 of 2014 seeking to re-open the evidence and for leave to lead their own evidence. On 7th June 2016 — by now it was *five years* since the closure of the hearings before the commissioner — I rejected the prayer for re-opening the evidence and for leave to further cross-examine the Plaintiffs' witnesses, but allowed the Defendants to put in their own evidence, directing that this was to be done by 24th June 2016. On exactly that day, the 2nd Defendant filed her Evidence Affidavit. The 1st Defendant filed nothing, despite this liberty.

32. As against this, consider the case that was put to Sunil, Plaintiff No.1-a:

Q.8) Is it true to say that the deceased was worried about the livelihood of Anil even when he was 18 years of age?

Ans) It is true.

33. Presumably, this was asked to substantiate that the Will was 'unnatural', but it is not proof of any particular affinity. Even the original Plaintiff says she cared for both Defendants, her step-children, as her own, and there is nothing exceptional in a father expressing concern. This is no answer at all to the documented record of truancy by the 1st Defendant; who never himself gave evidence to the contrary.

34. To PW1 Hirlekar, the Defendants put the following question:

Whether the deceased was worried about the education of his son Anil?

The Plaintiffs' lawyers objected to this (they ought not to have). The witness replied:

Ans: It is true that he was very worried about his son Anil's education. I say that the deceased was very worried about Anil's education as he was very worried about his future.

This actually *corroborates* what the Will says about Anil, and what is further proved by the three documents to which I have referred to and from Anil's boarding school in Lonavla.

35. It does not end at that. The cross-examination by the Defendants actually demolishes their case on the Will being unnatural. These are the questions put to PW1 Hirlekar:

Question: Will it be correct to say that the deceased Mr Dinanath did not differentiate between the children of his first wife and the children of his second wife?

Again, the Plaintiffs needlessly objected. The witness answered, agreeing with the suggestion.

36. To PW2, Sunil, Plaintiff No.1-a, the Defendants put the following questions:³⁸

Question 4: Is it proper to state that the Original Plaintiff did not discriminate between Sunil Tarkar, Harish Tarkar and Alka and Defendant No. 1 and 2?

Answer 4: It is true that there was no discrimination.

This is most interesting. To PW1 Hirlekar, the question was whether Dinanath discriminated between his five children. The witness said he did not. To Sunil, the question was whether *the Original Plaintiff*, the mother of the Plaintiffs and Alka/Nisha, and the step-mother of the two Defendants discriminated between them; and Sunil said she did not. This entirely corroborates what Sulochana, the original Plaintiff said in her own Affidavit. Neither Dinanath nor his second wife, the original Plaintiff, discriminated between any of the five children, and this fact is therefore proved. I note, too, that both questions were placed *as the case of the Defendants*, viz., “Will it be correct to say” and “Is it proper to state”. If this is so, then there is simply no question of the Will being

38 There is an absurd question at page 196 as to why “Alka”, the daughter by the second marriage, was not made a party. Alka took the name Nisha after marriage, and she filed a consent affidavit supporting the grant. The Defendants could not have been unaware of this.

improbable or unnatural. As Sulochana says, the Will is even-handed: it cuts out all five children.

37. Mr Khan's reliance on the decisions of the Supreme Court in the case of *H Venkatachala Iyengar v BN Thimmajamma & Ors.*,³⁹ *Shashi Kumar Banerjee & Ors v Subodh Kumar Banerjee*⁴⁰ and *Bharpur Singh v Shamser Singh*⁴¹ to say that the disposition made in the Will is *ex-facie* unnatural, improbable, and unfair is thus without substance, and is contrary to the record, including the Defendants' own case. His submission that the exclusion of the Defendants is highly suspicious is without factual or evidentiary foundation. A Will, by definition, disrupts the natural line of succession;⁴² if it did not, there would be no need for it. The argument about the Will being unnatural or improbable fails.

38. This leaves only the question of undue influence, coercion and fraud. As I have noted, there is no case on fraud. As to undue influence and coercion, I have already set out the settled jurisprudence. Now the only statement the 2nd Defendant makes in her Evidence Affidavit is that Dinanath was a hen-pecked husband and 'always under the influence' of his second wife, the original Plaintiff. But on its own, sans proof or particulars, this is worthless and calls for no cross-examination. The original Plaintiff reared both Defendants, and saw the 2nd Defendant herself through to her

39 AIR 1959 SC 443.

40 AIR 1964 SC 529.

41 (2009) 3 SCC 687.

42 *Rabindra Nath Mukherjee and Another v Panchanan Banerjee (dead) by LRs & Ors.*, (1995) 4 SC 459.

marriage. If anyone could give ocular or other evidence of this so-called influence, it was she. But she is silent and says nothing. What is even more peculiar is that this is not even a case put to Sunil, Plaintiff No.1-a, when he was cross-examined, nor to PW1 Hirlekar, who claimed to have known the family. There is also no answer to Sulochana's evidence of Dinanath being a self-made, self-willed, introverted, domineering and overbearing individual. If Savita insists that her step-mother imposed her views on Dinanath, she had to prove this; and merely saying the Will is not handwritten is no proof at all. The Will has a degree of formality to it, entirely consistent with Dinanath's life and the way he handled his affairs. It is not only typed, but is typed on a special kind of paper with double-ruled margin lines, the kind of paper only used by old-school lawyers. How Sulochana could have managed this is something Savita leaves entirely to conjecture and surmise, and the allegation is actually self-defeating, for it means that Sulochana, herself of limited education, somehow pressured Dinanath into this degree of formality in preparing his Will.

39. The Defendants have been unable to discharge their evidentiary burden on Issues Nos. 3 and 4, or on the question of the Will being unnatural or improbable.

G. CONCLUSIONS

40. In contested testamentary matters especially — more than in any commercial dispute — Courts are presented with portraits.

There is the life of the testator and how he lived it, with whom and where; his relationships; his business dealings; his character and nature. The entire narrative must be looked at with dispassion and some distance, as objectively as possible, including such elements of context as emerge from the record. There is a texture to these lives, and a judge must assess the testamentary document not in isolation, and not in component bits and pieces, but as part of the life and times of the person who made it.

41. What is the picture of Dinanath Tarkar that emerges from this record? He came from Devgad taluka, from a traditional and conventional family of modest means and moderate education. The social and cultural background was patriarchal and male-dominated. Dinanath himself was entirely a self-made man: he came to Bombay as a young teenager, put himself through night school, working during the days, and took up a job with a then prominent company as a compounder. He did not rest at that, and strived to improve his lot: he became a registered pharmacist, took a degree or certificate in ayurveda, and attended a course at a hospital. He lost his first wife early, in or shortly after childbirth, when the 1st Defendant was a few days old, and the 2nd Defendant no more than three years old. He re-married soon thereafter. Both wives came from the same region and shared the same social and culture milieu. By his second wife, he had three children; and the two nurtured all five children, neither parent discriminating against any one of them. Dinanath appears to have been cautious in his financial and commercial affairs, carefully husbanding his resources and growing his wealth, but there is no indication that he consulted Sulochana, his second wife, on any of these matters. On this, there is evidence to show that

he was meticulous: he ensured nominations in Sulochana's favour of his flat and his service dues, for instance.

42. Sulochana says he was overbearing, domineering, introverted and a disciplinarian; and there is no reason or material to refute this. He remained active after his retirement, setting up a private practice, and was in good health. He took his daily walks and, while in service, used public transport. This is actually the portrait of the quintessential traditional Indian man, self-contained and intact, with inflexible and fixed ideas and rhythms to his life, strict in his daily routine and demanding conformity to his norms and notions. None of this makes him a bad husband or a poor father; to the contrary. He may not have voiced his appreciation of his wife to her in his lifetime — that was probably not in his nature — and to his children he may have seemed stern and even forbidding. But his concern for his family was true and genuine within the bounds of his beliefs and standards. He saw both daughters to their marriages, and educated his sons. With the 1st Defendant, he struggled and despaired at his son's truancy and educational failings, but this is not proof of exceptional affinity or favouritism, but rather a demonstration of even-handedness, and the concern that any parent might have for a difficult child.

43. There is nothing therefore adduced in the nature of proof by the Defendants. Merely alleging suspicion is not enough. This is a jurisdiction of circumspection, not suspicion.

H. ORDER

44. The Suit is decreed, and the Petition is allowed. The Registry will proceed to issue Letters of Administration with Will annexed in respect of the Will dated 9th March 1981 of Dinanath Harishchandra Tarkar to the Plaintiffs within four weeks from today. The registry is not to insist on further proof of service of citations after this order. Drawn up order is dispensed with. No costs.

45. I have found not a shred of substance in the Defendants' case. The best evidence, that of the 1st Defendant, on a matter that directly concerned him, has been kept out. The Defendants have deliberately delayed this final hearing from 2011. They led the evidence late, only in 2016, and only of the 2nd Defendant, and even that was no evidence at all, and nothing more than a set of allegations. For these reasons, the application for stay is refused.

46. All concerned to act on an authenticated copy of this order.

(GS PATEL, J)