

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

TESTAMENTARY SUIT NO.67 OF 2014

IN

TESTAMENTARY PETITION NO.360 OF 2014

Dr. Veena Ramchandra Patel,	]	
Age : 40 years, Hindu, Indian Inhabitant,	]	
residing at 1/7, Dattatraya Building,	]	
Ground Floor, Ambaji Clinic & Lab.,	]	
T.J. Road, Mumbai – 400 007.	]	
Being sole Legatee mentioned in the	]	
last Will and Testament of the deceased.	]	Plaintiff

V/s.

1. Neville Sam Daruwalla,	]	
B-11, Gilder Baug, J.B. Nagar,	]	
Andheri (E), Mumbai – 400 059.	]	
2. Bakhtawar Arzan Ghadially,	]	
E-30, Godrej Baug,	]	
Off Napeansea Road,	]	
Near Simla House, Mumbai – 400 026.	]	Defendants

Ms. Savita H. Pattni for the Plaintiff.

Mr. Bhalchandra G. Saraf for the Defendants.

CORAM : A.K. MENON, J.

RESERVED ON : 11TH OCTOBER 2019.

PRONOUNCED ON : 11TH DECEMBER 2019.

JUDGMENT :

1. The suit is a result of the defendant opposing the grant of Letters of administration with Will annexed to the property and credits of one Dinshaw Hormusji Gandhi, a widower, in Mumbai. The plaintiff claims to be the sole legatee and has filed Testamentary Petition No.360 of 2014 seeking grant, as aforesaid. The defendant-Caveator claims to be the grand-niece of the deceased by reason of her claim to the "deceased wife's cousin brother's daughter". The Caveat is supported by an affidavit dated 15th December 2014.

2. The pleadings, in brief, are as follows :-

One Dinshaw Hormusji Gandhi, the deceased, died on or about 7th December 2013 at Mumbai. He was a resident of flat no.3 in Sodawaterwalla Building No.II, Batliwala Villa Compound, Sleater Road, Naushir Bharucha Marg, Mumbai and left properties in Mumbai and in the State of Maharashtra. According to the plaintiff, the deceased left behind a Will said to have executed on 27th December 2009. Since no executor was appointed, the plaintiff as a legatee filed this suit. The deceased's wife Homai predeceased him on 17th August 2006 and the deceased had no children. The plaintiff has contended that there are no legal heirs from either his father's side or his mother's side. Whereabouts of distinct relatives, agnates or cognates, were not known. Thus, no heirs contemplated under Sections 54 and 55 of the Indian Succession Act, 1925, were known to the plaintiff and as a result of which the plaintiff proceeded to apply for service of Citation by publication in two

newspapers. The plaintiff has averred that no other petition or application has been filed in any District Court or in other High Court for probate of the Will of the deceased or for Letters of Administration with Will annexed.

3. The Caveat filed by the defendant is supported by her affidavit dated 15th December 2014, in which the defendant has contended that the Will dated 27th December 2009 is not an authentic document, because the deceased was said to be 82 years old at the time of execution of the Will and was physically unfit to execute the Will. The defendant has disputed the authenticity of the signature and the thumb impression of the deceased and contended that the signature and the thumb impression may have not been affixed by the free will of the testator, but due to undue pressure brought on the deceased by the plaintiff, taking advantage of old age and ill health of the deceased. The defendant says so because the plaintiff is a total stranger and not related to the deceased. The defendant also contended that the deceased was forgetful and the Will was not genuine and is a forged and fabricated document. That apart, the deceased had no right to prepare the Will in relation to the property, which is allegedly joint family property belonging to the defendant's grand-father one Edulji Daruvala and aunt Nargis Edulji Daruvala. There are also bank accounts in the Zoroastrian Co-operative Bank and the Central Bank of India, in which the defendant claims right.

4. Based on the aforesaid, the following issues were settled on 27th July, 2015.

- (1) Whether the plaintiff proves that the document dated 27th December 2009 was duly and validly executed and attested in accordance with law as the last Will and Testament of the deceased – Dinshaw Hormusji Gandhi ?
- (2) Whether the plaintiff proves that at the time of the said alleged Will, the deceased was of sound and disposing state of mind, memory and understanding ?
- (3) Whether the defendant proves that the alleged Will was fraud and fabricated document ?
- (4) Whether the defendant proves that the alleged Will was obtained by coercion and undue influence ?
- (5) What reliefs and what orders ?

5. It is necessary to mention here that apart from the Caveat filed by the defendant, the petition was sought to be opposed by one Neville Sam Daruwalla, who had filed a Caveat dated 17th April 2014, along with an affidavit-in-support of the even date. The Caveator in that case had filed a short affidavit claiming to be legal heir, but not disclosing the relationship. The court had occasion to consider that Caveat, which came to be dismissed on 19th November 2014 by a reasoned order, which inter alia recorded that the grant could not be opposed on the ground that the Caveator did not “trust

the petitioner". That Caveat contained no challenge to the Will itself. The petition was directed to proceed as an uncontested petition.

6. The record indicates that defendant no.1–Neville Sam Daruwalla had filed his Caveat in person and which was rejected, as aforesaid. It has also seen from the record that a Caveat has also been filed on behalf of seven other persons, namely, Mr. Dinyar Jal Jamshedji, Dr. Kyamas Ardeshir Palia, Mr.Homi Phiroze Ranina, Mr. Rusi Sorabji Khambatta, Sir Jamssetjee Jejeebhoy, Mr. Rohinton Bomanshaw Anklesaria and Mr. Kaezad Hector Karanjawala; however, no affidavit-in-support was filed in time and vide order dated 28th October 2014 passed by the registry, the said Caveat came to be rejected.

7. In the meanwhile, however, the present defendant, i.e. Bakhtawar Arzan Ghadially, had filed her Caveat on or about 4th / 9th December 2014, as aforesaid, which resulted in the petition being converted to a suit.

8. On behalf of the plaintiff, the learned Advocate submitted that the Will is duly proved and is a genuine document. She contended that the plaintiff has honestly set out the facts, as they have transpired, and has also led evidence on these aspects. According to learned counsel for the plaintiff, on perusal of the additional affidavit-of-evidence of the plaintiff dated 20th August 2015 and on perusal of the cross-examination, it will be evident that the plaintiff has proved that the Will was validly executed in accordance with

law. The evidence also shows that the deceased was of a sound and disposing state of mind and perfectly understood the consequences of his actions. The learned counsel for the plaintiff submits that the cross-examination of the plaintiff did not put the depositions of the plaintiff in any doubt. The veracity of the plaintiff's case has not been put into doubt and that the evidence of the plaintiff confirms to the facts and the plaintiff accurately having spoken the truth and that the deceased made a rational choice after clearly understanding the consequences of the rational. It is submitted that the plaintiff herself was a medical professional and was treating the deceased. She has fairly stated that the Will is in her own handwriting, having been asked by the deceased to write down the Will. It is submitted that the cross-examination has not shaken the credibility of the plaintiff's evidence and that of the attesting witnesses.

9. The plaintiff's Advocate has relied upon the Death Certificate of the deceased's wife (Exhibit-P-2); that of the deceased (Exhibit P-3); 3 Pass-Books of the Central Bank of India, Tardeo Branch, Mumbai in respect of Account No.3061004865 held by the deceased jointly with the plaintiff; the second Account No.1144781527 also with the Central Bank of India at August Kranti Marg Branch, Mumbai held by the deceased and his late wife Homai and; the third pass-book is in respect of Account No.1144782906 held in the joint names of the deceased wife and the deceased at the August Kranti Marg Branch, Mumbai. These are marked as Exhibits P-4, P-5 and P-6 respectively.

These pass-books apart, the plaintiff also relied upon the Specimen Signature Card, true copy of which has been filed by the Central Bank of India, Tardeo Branch, Mumbai, in which the name of the deceased appears as the first-holder and that of the plaintiff as the second-holder. The account is to be operated on either or survivor basis. In addition, there are several fixed deposits held in the joint names of the deceased and his wife. In other words, these are the joint accounts, but held in the names of the deceased and his wife, in which he is the first-holder. The statements of fixed deposits and aforesaid three bank accounts are marked as Exhibit P-8.

10. Mr. Saraf on behalf of the defendant submitted that the Will is forged and fabricated. The deceased being mentally and physically unfit could not have executed the Will. The execution of the Will being disputed, the signature is required to be investigated and compared with the signatures appearing in the records of the Central Bank of India. He submitted that the defendant had deposed to the effect that upon the demise of the deceased, his final rites were carried out by the landlord of the building and not by the plaintiff, although the plaintiff claims that she was treated as the daughter of the deceased. Mr. Saraf further submitted that although the plaintiff had contended that she looked after the deceased, provided him food and attended him as his patient, whenever he was unwell, nothing in the evidence explains why she was not aware of his whereabouts on the day the deceased expired. Certainly, it was contended by Mr. Saraf that, the defendant had deposed that

the plaintiff's name was not added as a nominee in the bank accounts between 2009 to 2015 and the contention that the deceased had handed over three pass-books would not be sufficient to prove her case. Mr. Saraf further submitted that the defendant also held a bank account in the Zoroastrian Co-operative Bank, which mentioned the address of the deceased. He submitted that this was evident of the fact that the property was not belonging to the deceased alone, as set out in the affidavit-of-evidence of the defendant. On this basis, Mr. Saraf submitted that the Will was a false, forged and fabricated document and must have been obtained by exercising coercion or undue influence. He, therefore, submitted that the suit be dismissed.

11. The issues cast the onus on the plaintiff to prove execution, attestation and validity of the Will, as also whether the deceased was of a sound and disposing state of mind, memory and understanding. The defendant was burdened with proving that the Will was a forged and fabricated document, obtained by coercion or undue influence. Based on the aforesaid factual statements, the parties proceeded to trial. The plaintiff has filed her affidavit-of-evidence along with the compilation of documents. In her evidence, the plaintiff has set out the factual background of the relationship between the plaintiff and the deceased and has deposed to the regular interactions between the deceased and the plaintiff. The affidavit is dated 15th August 2015, when the plaintiff was administered oath, after which she was cross-examined. The execution of the Will was proved on 5th October 2015 and the

Will came to be marked as Exhibit P-1. In support, the plaintiff has filed an affidavit dated 20th August 2015 disclosing that the Will was in the plaintiff's handwriting, because the deceased dictated the Will to the plaintiff in his house. The deceased went through the said writing and the deceased has signed the Will in the presence of the two witnesses one Jimmy Bhoot and Zenobia Bhoot and the plaintiff.

12. According to the plaintiff, Mrs. and Mr. Bhoot attested the Will in the presence of each other, the deceased and the plaintiff. After execution of the Will, it was handed over to the plaintiff by the deceased. The Will has since been marked, the original Will has been lodged in the registry as Will No.153/2014. In addition to the affidavit-of-evidence of the plaintiff, the attesting witness – Jimmy Bhoot, then aged 79 years, has filed an affidavit dated 15th August 2015, supporting the plaintiff's case, which sets out that the deceased had subscribed his signature at the foot of the Will in Gujarati and English languages and affixed his left hand thumb impression on the Will in the presence of the deponent – Jimmy Bhoot, his wife – Zenobia and the plaintiff and thereupon, the deceased attested the Will by putting his signature. His wife – Zenobia also signed in the presence of the deceased, the deponent – Jimmy and the plaintiff. The second affidavit was filed by Mrs. Zenobia Bhoot, then aged 72 years. Jimmy Bhoot was cross-examined on 28th October 2015. His wife Zenobia was also cross-examined on the same day. Thereafter the plaintiff was cross-examined by the Advocate for the

defendant. The defendant has filed her affidavit dated 21st October 2016 in lieu of examination-in-chief and the defendant was to be cross-examined and therefore the matter was referred for recording evidence. It is in these pleadings and the evidence that the parties have since made submissions before me.

13. I have heard learned counsel for the parties. Perused the pleadings, the depositions and the documents. I have also considered the pleadings and depositions in the light of the issues settled.

14. Issue No.1, in my view, is to be answered in the affirmative. The execution of the Will has been proved by the attesting witness (PW-1) Jimmy Bhoot, who has deposed in his affidavit dated 15th August 2015 that he knew the deceased since 2003, as he was the secretary of the Zoroastrian Building Funds Trust, which owned the building and wherein the deceased was residing. The deponent has stated that the deceased had informed him that the plaintiff had been looking after the deceased and his wife like their daughter. The second attesting witness (PW-2) Zenobia Bhoot has deposed that she has never seen the defendant and the deceased had never told the deponent about the defendant till his death. According to Mr. Bhoot, he was in a good state of health and of sound mind. His wife and he had gone to the residence of the deceased a few days before the execution of the Will. The deceased had shown him a Will, which had not been executed. The deponent has stated that

the deceased informed him that the deceased had asked the plaintiff to write the Will and that he would execute the Will on 27th December, 2009. The deceased requested the witness Mr. Bhoot and his wife Zenobia to attend execution of the Will and attest the same. The deponent has further deposed that the deceased had set and subscribed the signature on the Will in Gujarati and English languages and also affixed his left hand thumb impression in the presence of Zenobia Bhoot, the plaintiff and himself and that the witness has affixed his signature on the Will with an intention to attest the same. The witness has further deposed that the deceased had handed over the Will to the plaintiff, after its execution.

15. Mrs. Zenobia Bhoot, the second attesting witness, has deposed on similar lines. She has deposed that the deceased informed the deponent that he was giving everything away to the plaintiff under a Will. The contents of the affidavit of Mrs. Zenobia Bhoot are very similar to that of her husband. This, however, can be attributed to a common draftsman and Advocate. The identity of the contents is through the attesting witnesses' affidavits, which is not uncommon and in my view, in the facts of the present case, cannot be faulted, considering the fact that the draftsman appears to be the one and intention was to depose to the attestation of the Will and nothing further.

16. I have also perused the cross-examination of the attesting witness (PW-1) Jimmy Bhoot, who has deposed that the unsigned Will was shown to

him five or six days before it was executed and the Will was prepared by the deceased. The witness was aware of the plaintiff and the fact that the plaintiff was a Doctor. Plaintiff was introduced to the said attesting witness (PW-1) in the year 2006 by the deceased himself and PW-1 approached the plaintiff to treat him for his ailments. He has refuted the suggestion of the defendant's Advocate that the Will was not attested by PW-1 or PW-2.

17. The cross-examination of Zenobia Bhoot (PW-2) proceeded on similar lines. The witness deposed that her husband Jimmy, the plaintiff and she herself were present at the time of execution of the Will. She refuted the suggestion that PW-2 or PW-1 did not witness execution of the Will or attest the same. Nothing in the cross-examination supports the case of the defendant that the Will was forged or fabricated or that it was obtained under coercion or undue influence. In fact, there was no cross-examination whatsoever on the aspect of conditions prevailing at the time of execution of the Will. The execution of the Will has been proved beyond all doubts and, therefore, I am of the view that issue no.1 viz. whether the execution of the Will was in accordance with law, must be answered in the affirmative and is accordingly answered.

18. As far as issue no.2 is concerned, nothing in the evidence of the attesting witnesses has revealed any facts that would give rise to the doubts as to the deceased's sound and disposing state of mind. I have perused the

evidence of the plaintiff as well, in which PW-3, i.e. the plaintiff, has deposed that she knew the deceased since the year 2001, because she had acted as their Doctor and used to attend to the deceased and his wife at their residence. That relationship gradually grew close and the deceased and his wife treated her like their own daughter. The deponent (PW-3) has also deposed that she used to stay with them on some days when their health was not good and they required her support. In view of the close relations that had developed, the plaintiff also used to send food for the deceased, after the demise of his wife. The deponent has deposed that PW-1 Jimmy and PW-2 Zenobia also used to visit the house of the deceased, who had no other legal heirs. The deceased or his wife did not mention any other legal heir or next-of-kin to the plaintiff and the plaintiff had never seen the defendant in the house of the deceased. Pass-books of two of the aforesaid bank accounts in the Central Bank of India had been handed over to the plaintiff. One other bank account in the Central Bank of India was maintained by the deceased jointly with the plaintiff.

19. A certificate of the specimen signature in that account maintained by the Central Bank has also been introduced in evidence and has since been marked as Exhibit P-7. The deponent has fairly stated that the Will was in her handwriting. The deceased dictated the contents to her and the plaintiff wrote it down. After the deceased went through the contents, he executed the Will in the presence of the two attesting witnesses. She has deposed that the

deceased was hale and hearty. During his lifetime, he used to go to the bank to withdraw the money, visit the Parsi Agiary as also the Ambaji Temple near Bhatia Hospital. He used to personally visit the market, without being escorted, and till his demise, he was of sound and disposing mind, memory and understanding. She, therefore, supported issuance of Letters of administration.

20. The cross-examination of the plaintiff was conducted on 18th November 2015. In the course of the cross-examination and as canvassed by Mr. Saraf, the plaintiff was asked as to why she treated the deceased for any ailment if the deceased was hale and hearty. The plaintiff has deposed that the deceased did not suffer from any major illnesses and was generally of good health but had minor complaints of cough and cold etc. In my view, being hale and hearty does not mean that a person cannot feel ill. Minor indispositions do not take away from a generally hale and hearty disposition. The cross-examination has proceeded to question the plaintiff's habits as a professional; whether home visits were made, whether in her professional capacity, discussions with the patients restricted to their illness or would also encompass general discussions or personal issues. The evidence of the plaintiff and as evident from the cross-examination has been consistent. A few days prior to 27th December 2009, the deceased requested the plaintiff to go over to his residence, when she did. The deceased dictated the contents of the Will to the plaintiff, which she wrote down in her own handwriting and

on 27th December, 2009, the deceased requested the plaintiff to attend the residence stating that he proposes to execute the Will and when she arrived there, Mr. Jimmy Bhoot (PW-1) and his wife Mrs. Zenobia Bhoot (PW-2) were already present and thereafter the deceased executed the Will, as set out in the cross-examination of the plaintiff (PW-3). She had refuted the contention that she took undue advantage of the fact that the deceased did not have issues and, therefore, the plaintiff induced the deceased to execute the Will. This is the extent of the cross-examination. Nothing of the cross-examination of the plaintiff therefore assists the defendant in refuting the deceased's sound and disposing state of mind. The cross-examination of the plaintiff also does not contest her version that the Will was written by the plaintiff, upon the contents being dictated to her by the deceased. Thus, issue no.2, in my view, must be answered in the affirmative and is accordingly answered.

21. Issue nos.3 and 4, which essentially requires the defendant to discharge the burden cast upon him to establish that the Will is a forged and/or fabricated document and also whether the Will was got executed by use of coercion or undue influence, can be considered together. The evidence of the Caveator on these aspects leaves much to be desired. In her affidavit-of-evidence, she has contended that the thumb impression and signature of the deceased are "not authentic". The deceased, according to her, died intestate, because the plaintiff had not explained why the landlord of the building was required to carry out the last rites of the deceased and that the plaintiff did

not participate, although she was allegedly treated like a daughter of the deceased. One other reason given by the Caveator-defendant is that the plaintiff was not a nominee in the bank accounts. The defendant (DW-1) has deposed that she knew most of the relatives of the deceased and she has keys of the room, where deceased was residing; she knows the lay-out of the house and the room occupied by the deceased and the wife, who is said to be the aunt of the defendant. She further deposed that she knew the position of a Godrej cupboard in the room of the deceased and was very much aware of the family photographs. The defendant has deposed that the plaintiff is wrong in contending that she knew nothing about the relatives of the deceased. She relies upon the pass-book of Central Bank of India, Mahatma Gandhi Road Branch, in respect of Account No.168861, which mentions the address of the deceased and which account is held by the defendant along with her mother and her aunt. She also relies upon a copy of an extract of the bank account Nos.0000608 and 0001481 held by the defendant along with her daughter and her aunt in the Zoroastrian Co-op. Bank, Tardeo Branch, Mumbai, which shows the address of the deceased. Originals of these were produced and copies have been taken on record vide order dated 25th October 2016 and marked as Exhibit D-1. These documents are pressed into service in support of the contention that the Will was fabricated and got executed by coercion and undue influence.

22. The passbook for Central Bank of India account no.168861 and the

passbook of Zoroastrian Bank's account nos.0000608 and 0001481 bearing the defendant's name, along with that of her daughter and that of her aunt, is said to show the address of the deceased. The address does not refer to any flat number. There is no evidence to suggest that this was the very address of the deceased. There is also a reference to the first floor, but the defendant has stopped short of identifying her address at the material time as being that of the deceased. Her deposition reveals that she was aware of the lay-out of the house. She did not claim to be residing at that very address. Besides, the depositions of the attesting witnesses and the plaintiff to the effect that they had never seen the defendant at the premises of the deceased has not been called into question. No questions have been put to either the attesting witnesses or to the plaintiff apropos the commonality of addresses, nor has the deposition of the plaintiff in paragraph 3 to the effect that she had never seen the defendant at the house of the deceased, been challenged in cross-examination by the defendant.

23. Even assuming that the address given by the defendant and that appearing on the pass-books is common, that is no ground to oppose the petition for Letters of Administration. It is not the case of the defendant, nor has it been established, that the Will was forged or fabricated or that its execution occasioned due to exercise of coercion or undue influence. No attempt, in my view, has been made by the defendant to prove that the Will was not executed in accordance with law, but its execution was forged by

coercion or undue influence. As far as the contention of forgery and fabrication is concerned, the evidence of the plaintiff to the effect that the contents of the Will were dictated by the deceased and handwritten by her, has not been seriously challenged. The plaintiff's deposition that the deceased signed in Gujarati and English languages and also affixed his thumb impression on the writing in the presence of the two attesting witnesses and the plaintiff, has not been seriously disputed.

24. The cross-examination has not shaken the credibility of the attesting witnesses' depositions or that of the plaintiff. On the other hand, the cross-examination of the defendant reveals that the defendant has no documentary evidence to establish that she need not have any documentary evidence to support her claim to be the niece of the deceased or the deceased wife's cousin brother's daughter. She has never applied for Legal Heirship Certificate or Succession Certificate, nor did she have anything to support her contention that the deceased were not physically or mentally fit. She was aware of the fact that the Neville Sam Daruwalla had filed a Caveat and that Caveat was dismissed. The defendant has filed a Caveat after the dismissal of her brother's Caveat.

25. Although there is no further cross-examination on the aspect of the execution of the Will, in my view, the defendant has failed to prove that the execution of the Will was false and by coercion and undue influence of three

persons, who were said to have been present at the time of execution of the Will. There is no reason to doubt the veracity of the depositions of the attesting witnesses. The attesting witnesses have also clearly stated that the deceased informed them that the Will was written down by the plaintiff herself on the contents being dictated by the deceased. Furthermore, the plaintiff holds a bank account jointly with the deceased and the Specimen Signature Card (Exhibit P-7) has not been disputed. No attempt has been made to controvert the fact that the account was jointly operated on either or survivor basis. The opening of the account for execution and signatures appearing thereon have not been disputed. The contents of the Will itself then perused clearly reveals the intention of the testator. The testator has given reasons why the bequest has been made in favour of the plaintiff. The testator has referred to the fact that the plaintiff was also taking care of his wife and nobody except the plaintiff has authority over his belongings.

26. The testator has in uncertain terms stated that he has not prepared any other Will and that the suit Will was his first and final Will and even assuming that somebody has unknowingly obtained signature and thumb impression or any writing prior to 27th December, 2009, such writing would be considered as illegal and invalid. The deceased in his own handwriting set out the two signatures and thumb impression having been affixed. He had signed in Gujarati and English languages and due to his shaky hands, he had also put his thumb impression. The signature appearing on the Will and that

appearing on the Specimen Signature Card (Exhibit P-7) appears to be the same and in any event, the defendant has not controverted this aspect and challenged the signature appearing thereon. The reason that the deceased's handwriting being shaky would justify the fact that he dictated the contents of the Will to the plaintiff. There is no reason to doubt that the Will was executed in the presence of Jimmy Bhoot (PW-1) and Zenobia Bhoot (PW-2), both of whom have been examined and cross-examined. They were known to the deceased and nothing has been shown to the contrary.

27. To my mind, the fact that the plaintiff was known to the deceased since 2001 and has treated the deceased's wife and the deceased over these years, is not disputed. Whether or not the deceased and his wife considered the plaintiff to be like their daughter is not relevant, but it could be true considering the fact that the plaintiff also stayed with them for some days and used to send food for them. These are the aspects which had not been disputed by the defendant. There is no cross-examination to challenge the deposition of the plaintiff on these aspects. The plaintiff and the attesting witnesses have both deposed that they have never seen the defendant at the house of the deceased; yet, the defendant had made no attempts to question this contention or establish that she was a regular visitor. Merely deposing that she is aware of the lay-out of the house and the bank accounts held by the deceased, wherein deceased's address was shown as her address, and knowing the location of the furniture in the house of the deceased does not

come to the aid of the deceased to establish that the Will was forged or fabricated or got executed by coercion or undue influence or it was otherwise bad in law. The defendant has also failed to establish that the deceased was not of sound and disposing state of mind. The deposition to the effect that the deceased used to visit the Parsi Agiary or go to the bank has not been disputed. There is no challenge to the deposition on these aspects.

28. The law on the subject and as obtaining from Section 59 of the Indian Succession Act, 1925 enables every person of sound mind and not being a minor to dispose his property by Will. A person of sound mind is explained by the illustrations to the said section. In my view, in the case at hand, nothing has been shown to me to suggest that the testator in the present case was not of sound mind.

29. As regards Section 59, under Explanation-2, even persons who are deaf or dumb or blind are capable of executing Wills, if they know what they are doing by it. Explanation-3 to Section 59 provides that even an insane person can make a Will during the period when he is of sound mind. There is an exception however in Explanation-4, which clarifies that a person suffering from illness or intoxication or is in such a state of mind that he does not know what he is doing, cannot make a Will.

30. In the present case, the evidence led on behalf of the defendant does not indicate that the testator was incapable to such an extent that he did not

understand what he is doing. On the other hand, the evidence of the plaintiff has been supported by the evidence of the attesting witnesses that the contents of the Will were dictated to the plaintiff to be written down in her own handwriting.

31. Section 63 of the Act provides for testator to sign or affix his mark to the Will. It could also be signed by other persons in his presence and on his directions. The signature or mark so affixed should be made in a manner as it is intended to give effect to the writing as a Will. Under Section 63, the Will is also required to be attested by two or more witnesses, each of whom must have seen the testator signing or affixing his mark to the Will. In the present case, the execution of the Will is witnessed by both the attesting witnesses and the plaintiff. The testator has not only signed in English, but he had also signed the Will in Gujrati and affixed a mark by way of his thumb impression and accordingly I am of the view that the requirements of Section 63 have been met.

32. Furthermore, the intention of the testator to dispose his property cannot be doubted. The contents of the Will (Exhibit P-1) are clear and unambiguous. The testator, in my view, appears to have signed the Will after having understood the effect thereof. He had dictated the Will to the plaintiff. The plaintiff as a propounder has in my view established that the Will was signed by the testator while he was in a sound and disposing state of mind

and being conscious of the effect of what he was doing. I do not find any suspicious circumstances concerning the execution of the Will. The shaky signature of the testator has been considered by the testator himself, who has signed in Gujarati as well and affixed his thumb impression for avoidance of any doubt that may be created by the shaky signature.

33. In my view, the tests laid down by the Supreme Court in the case of *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*¹, when applied to the facts of the present case, leaves one with a clear impression that the execution of the Will was intentional, consciously completed by the testator and beyond any doubt.

34. Normally, when propounders take a prominent part in the execution of the Wills and which confer substantial benefits on them, it would be treated as a suspicious circumstance and in such situation, the propounder is required to remove the suspicion by clear and satisfactory evidence. This would entail application of the test whether the judicial conscience of the court is satisfied. Apart from the fact that no effort has been made by the defendant to establish suspicious circumstances, except by way of stating that the Will is forged and fabricated and that the testator is not of a sound and disposed mind at the time of execution of the Will, no evidence has been brought on record which would cause this court to take a different view in

1 *AIR 1959 SC 443*

respect of the veracity of the plaintiff's evidence and that of the attesting witnesses.

35. In *Pentakota Satyanarayana and Ors. Vs. Pentakota Seetharatnam and Ors.*², the Supreme Court held that although the initial onus is on the propounder to prove execution of the Will, the onus thereafter shifts to the party alleging undue influence or coercion in execution of the Will. The mere fact that the beneficiaries under the Will had actively participated in the execution of the Will or that natural heirs were debarred thereby or whether the testator had a draft Will with him while going to the scribe or that he was at that time accompanied by a number of persons or that one of the beneficiaries was merely present at the time of registration, could not make out a case of a suspicious circumstance, undue influence, coercion or fraud. Mere presence of a beneficiary or propounder of the Will at the time of registration of the Will, it was held, was not a suspicious circumstance.

36. In the present case, I am of the view that the plaintiff has discharged her burden of proving execution of the Will notwithstanding her participation and preparation of the Will and that the burden of proving that the Will was invalid by reason of the testator not being of sound and disposing mind and that the execution of the Will was caused by exercising coercion or that the testator was coerced or subjected to undue influence

² (2005) 8 SCC 67

leading him to execute the Will, having shifted to the defendant, the defendant has failed to discharge this burden.

37. In the circumstances, issue nos.3 and 4 are answered in the negative and as a consequence, the suit is liable to be decreed. Accordingly, I pass the following order :-

- (i) Caveat is accordingly discharged.
- (ii) Registry shall issue grant in favour of the plaintiff.
- (iii) Suit is decreed in the above terms.

(A.K. MENON, J.)