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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY & INTESTATE JURISDICTION

TESTAMENTARY SUIT NO.183 OF 2013
IN
TESTAMENTARY PETITION NO.827 OF 2012

Gobind Khanchand Jhangiani)
Occupation : Retired Indian Navy Officer,)
Hindu, residing at 15, New Hindustan)
Co-operative Housing Society Limited,)
270, Linking Road, Bandra (West),)
Mumbai – 400 050.) ...Plaintiff

....Versus....

Maya Arjun Thadani @ Maya Shahaney)
residing at 75, Edgewarebury Lane,)
Edgeware, Middlesex, HA88, LU,)
England, U.K.) ...Caveatrix
Defendant

Mr. Phiroze Colabawalla with Mr. Murari Madekar and Mr. Sachin Kudalkar I/b M/s. Madekar & Co. for the Plaintiff.

Mr. Mohan Pungliya with Mr. Neel Mohan Pungliya for the Defendant.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 7TH MARCH, 2019
PRONOUNCED ON : 25TH JUNE, 2019

JUDGMENT :-

1. The petitioner, who is the son of the deceased Khanchand Jhangiani (hereinafter referred to as the “said deceased”) filed Testamentary Petition No.827 of 2012 *inter-alia* praying for Letters of Administration with the Will and Testament dated 20th March, 1980. In view of the caveat filed by Maya Arjun Thadani @ Maya Shahaney,

married daughter of the said deceased, the said Testamentary Petition No.827 of 2012 was converted into a Testamentary Suit (183 of 2013). Some of the relevant facts for the purpose of deciding this testamentary suit are as under :

2. It is the case of the plaintiff that the said deceased had left a Will and Testament dated 20th March, 1980 which Will was in the handwriting of the said deceased (a holograph Will) allegedly signed by the said deceased and attested by two witnesses. It is the case of the plaintiff that the said deceased had also left another writing dated 16th April, 1983 giving further instructions pertaining to bequest under the Will dated 20th March, 1980. The said alleged writing dated 16th April, 1983 however was not attested by two witnesses. The plaintiff therefore, did not apply for probate of the said alleged writing dated 16th April, 1983. The plaintiff is son of the said deceased. The plaintiff was an officer in Indian Naval Service and had been stationed all over India. The caveator (defendant) is daughter of the said deceased and sister of the plaintiff. It is the case of the plaintiff that the defendant after her marriage was residing in England.

3. It is the case of the plaintiff that on 8th February, 1971 the said deceased named the plaintiff along with his two sisters viz. Sajini and the caveator herein as the joint nominees in respect of Bandra premises. It is further the case of the plaintiff that on 20th February, 1980, the said deceased had nominated the plaintiff as a single nominee of the society in respect of the said Bandra premises. On 11th March, 1980, the Indian Naval transferred the plaintiff from Navy Headquarters, New Delhi to Mumbai.

4. It is the case of the plaintiff that on 20th March, 1980, the said deceased executed another writing i.e. last Will and Testament which was witnessed by R.B. Hirani and Dr.K.R. Chandiramani. Both the attesting witnesses however have died. It is the case of the plaintiff that the wife of the plaintiff, who had come to Mumbai for his daughter's school admission was also present when the Will was signed.

5. It is the case of the plaintiff that some time in the month of mid April, 1981, the plaintiff joined as Additional Indian Naval Angre as Worship Production Superintendent. On 9th April, 1981, the said deceased changed the nomination form and named the plaintiff and Sushila Khanchand Jhangiani, the mother of the plaintiff as the joint nominee in respect of the said flat in the record of the society. On 9th April, 1981, the said deceased allegedly addressed a letter to the Secretary to the said society wherein a note was addressed by the said deceased to the plaintiff placing on record that his wife's name was added in the nomination form with the plaintiff. On 2nd July, 1981, the plaintiff retired as Captain from the Indian Naval and since then residing at Bandra house along with his family. In the month of October, 1982, the plaintiff took up a job with one Shobokshi Maritime Company of Saudi Arabia.

6. It is the case of the plaintiff that on 14th September, 1983, the said deceased had sent a hand written letter to the plaintiff at Saudi Arabia intimating the plaintiff that he had bequeathed Bandra house to him and had filed a nomination with the said society nominating the mother and the plaintiff's mother as two nominees of the Bandra house. It is the case of the plaintiff that in the said letter,

the mother of the plaintiff, in her hand writing in Sindhi language informed the plaintiff of the well-being of his two sisters, Sajini Malani, the caveator herein and his wife and two children. It is the case of the plaintiff that on 11th July, 1984, the plaintiff returned to India, as the said deceased had fallen sick. On 20th July, 1984, the said deceased expired. At the time of his death, he was 84 years old.

7. It is the case of the plaintiff that on 25th July, 1984, a sealed envelope containing the last Will and Testament of the deceased dated 20th March, 1980 was opened and read jointly by the plaintiff and his sister Sajini Malani. The defendant was not present at that time since she was in U.K. It is the case of the plaintiff that the endorsement to that effect that the plaintiff and his sister had opened and read the Will is made on the reverse side of the Will.

8. It is the case of the plaintiff that on 26th July, 1984, the plaintiff addressed a letter to the defendant informing her that their deceased father has left their last Will and Testament dated 20th March, 1980 and his written instructions dated 16th April, 1983 directing certain amounts to be paid to her. On 23rd May, 1985, the plaintiff left his job in Saudi Arabia and came back permanently to India since his mother was of old age.

9. It is the case of the plaintiff that since there was no reply received from the defendant to the letter dated 26th July, 1984, the plaintiff addressed another letter to the defendant by registered post A.D. at her address in England reiterating the said facts as recorded in the letter dated 26th July, 1984 addressed to the defendant.

10. It is the case of the plaintiff that on 14th August, 1985, during a meeting between the plaintiff and his two sisters i.e. Sajini Malani and the defendant herein, the plaintiff read over the contents of the Will and offered to pay legacies provided by the said deceased to the beneficiaries under the said Will. The defendant however, refused to accept the money directed to be given to her by the said deceased under the said Will. It is the case of the plaintiff that a copy of the said Will was once again handed over by the plaintiff to the caveator (defendant herein). The defendant however, did not raise any objection to the existence of the Will. The minutes of the said meetings was allegedly prepared and signed by the plaintiff and his two sisters i.e. Sajini Malani and the defendant herein.

11. In the month of October, 1985, the defendant herein and Sajini Malani filed a Suit bearing No.594 of 1986 against the plaintiff and others *inter-alia* praying for administration of the estate of the said deceased. The mother of the parties did not join the plaintiffs in the said suit. On 29th July, 1988 the plaintiff herein filed his written statement in the said Suit No.594 of 1986. In paragraph 12 of the written statement, the plaintiff disclosed the said alleged Will of the said deceased. Some time in the month of November, 2007, the said Suit No.594 of 1986 came to be dismissed. On 28th April, 2011, the said Suit No.594 of 1986 came to be restored.

12. On 28th February, 2012, the sister of the plaintiff i.e. Sajini Malini filed an affidavit which was annexed to the petition for Letters of Administration with the Will annexed by the plaintiff thereby identifying the alleged handwriting and the signature of her deceased father's last Will and Testament dated 20th March, 1980.

13. By orders dated 3rd July, 2012 and 31st July, 2012 in Notice of Motion No.27 of 2017 read with Chamber Summons No.1130 of 2011 in Suit No.594 of 1986, this Court permitted the said Sajini Malani to be transposed from the plaintiff no.2 to defendant no.4 in the said suit.

14. On 3rd October, 2012, this Court directed that the said Suit No.594 of 1986 filed by the defendant herein against the plaintiff and others, which was transferred to the City Civil Court be withdrawn from that Court and be tagged along with Testamentary Petition No.827 of 2012 filed by the plaintiff herein.

15. On 29th January, 2013, the defendant herein filed a caveat in the said Testamentary Petition No.827 of 2012 contending that the (i) document called Will dated 20th March, 1980 was in the form of a writing and not a Will, (ii) that such document was procured, there were number of suspicious circumstances surrounding the Will, (iii) the language was not coherent and relations like wife and daughter have been excluded, (iv) the said document is not signed by the deceased in the presence of both the attesting witnesses, (v) the signature of the deceased was not attested as required under law, (vi) the attesting witnesses did not see the maker of the document signing it, (vii) the attesting witnesses did not sign the Will in the presence of the Testator, (viii) the deceased was not in full senses, (ix) the plaintiff was manipulating the deceased to give his property to the plaintiff, (x) one room was constructed by monies given by the defendant and thus the said property allegedly was not exclusive property of the deceased, (xi) the plaintiff's wife neglected, harassed

and tortured the parents, (xii) the testamentary petition deserves to be dismissed on the ground of delay etc.

16. The said Sajini Malani did not file any caveat but had filed an affidavit which was annexed to the testamentary petition filed by the plaintiff. In view of the caveat and the affidavit in support filed by the defendant herein, the said testamentary petition was converted into the Testamentary Petition No.183 of 2013.

17. On 4th February, 2014 this Court framed five issues which are answered by this court in the later part of the judgment :-

1). Whether plaintiff proves that the Will dated 20th March, 1980 is the Will and Testament of the deceased late Mr.Khanchand Tekchand Jhangiani and is validly executed and attested in accordance with law ?

...In Negative

2). Whether defendant proves that the purported Will was obtained under coercion and undue influence ? ***...In Affirmative***

3). Whether plaintiff is entitled to probate of the Will and Testament of the deceased Mr.Khanchand Tekchand Jhangiani ? **...In Negative**

4). What Order ?) ..**As per operative**
) **part of the**

5). What relief ?) **Judgment**

18. The plaintiff led the evidence of four witnesses i.e. (i) Asha Jhangiani, wife of the plaintiff, who was allegedly present at the time of execution of the Will, (ii) Ramesh Ramchand Hirani, son of one of the attesting witnesses, (iii) Vinod K. Gidwani, Secretary of the Society and (iv) Gobind Khanchand Jhangiani, the plaintiff himself. The defendant examined herself as a witness. All the witnesses examined by the parties were cross-examined by other side.

19. Mr.P.S. Colabawalla, learned counsel for the plaintiff invited my attention to section 69 of the Indian Evidence Act and would submit that since in this case on the date of filing of the testamentary petition by his client, none of the attesting witnesses were alive, the plaintiff is permitted to prove that the attestation of one of the attesting witness at least was in his handwriting and that the signature of the person executing the document was in the handwriting of that person. He also strongly placed reliance on Rule 384 of the Bombay High Court (Original Side) Rules and would submit that since none of the attesting witnesses are alive, it was not possible to file affidavit of any of these witnesses, the plaintiff could have filed an affidavit of the wife of the plaintiff, who was present at the time of execution of the Will for proving that the said Will was in the handwriting of the deceased and was executed in the presence of the attesting witnesses and also to prove the circumstances causing presumption of due execution of the Will.

20. In support of his submission that the Will was validly executed and the attestation was in accordance with law, learned counsel invited my attention to some of the portions of the affidavit in

lieu of examination in chief filed by the witnesses examined by the plaintiff. He also invited my attention to some of the portions of the cross-examination of those witnesses examined by the plaintiff. He also invited my attention to various portions of the objections raised by the defendant herein in her affidavit in support of the caveat and would submit that there is no dispute that the Will was in the handwriting of the said deceased.

21. Learned counsel invited my attention to the reply given by the wife of the plaintiff (PW 1) and more particularly to question nos.39, 40, 47, 52 onwards, 60, 62 and 65 and would submit that the said witness had proved beyond reasonable doubt that she had witnessed the execution of the Will. She had deposed that the Will was signed in her presence. She identified the signature of the deceased and the attesting witnesses on the Will. He submits that there was absolutely no cross-examination on this part of the deposition made by PW 1 in her examination in chief. He submits that the suggestion made in question no.65 that the said witness had come specifically for execution of the document would clearly indicate that the defendant was not disputing the fact that the document was executed. It was not suggested to the said witness (PW 1) by the defendant that the said Will was procured by the plaintiff by undue influence.

22. Insofar as the affidavit of evidence filed by Ramesh Ramchandra Hirani, who is the son of one of the alleged attesting witness filed on 15th July, 2015 is concerned, it is submitted by the learned counsel for the plaintiff that the said witness had identified the signature of his father in compliance with section 69 of the Indian

Evidence Act. He submits that though in his cross-examination, the said witness deposed that the signatures shown to him at Exhibit -A at two places were not made in his presence, the said witness stated that the signatures were very much familiar to him and that he knew the signature and the handwriting of his father.

23. It is submitted by the learned counsel that the said witness (PW 2) has thus identified the signature of his father as one of the witnesses to the said Will and Testament. There was no suggestion made to the said witness by the defendant that the signature on the alleged Will and Testament was not that of his father. He submits that the said witness was examined only to identify the signature of his father on the said Will and Testament but was one of the attesting witness in compliance with section 69 of the Indian Evidence Act. The said witness was not required to prove as to when the said signature was made by his father on the said Will.

24. Insofar as affidavit of evidence of Vinod K.Gidwani, Secretary of the New Hindusthan Co-operative Housing Society Limited in the month of February, 2016 is concerned, the said witness had produced the original nomination form dated 20th February, 1980 filed by the said deceased whereby the plaintiff was made the sole nominee of the Bandra flat in the said society. The said witness produced original nomination form dated 9th April, 1981 filed by the said deceased in the name of the plaintiff and in the name of the mother of the plaintiff jointly. The said witness also produced a letter dated 9th April, 1981 allegedly addressed by the said witness to the Secretary of the said society enclosing the nomination form dated 9th April, 1981.

25. Learned counsel placed reliance on those documents and also on the endorsement of the then Secretary D.T. Thadani *inter-alia* recording the said nomination in the records of the said society on 10th April, 1981. He also placed reliance on an endorsement made by the deceased on the office copy of the letter dated 9th April, 1981 stating that the nomination in the name of mother was made because the other ladies had also nomination forms in their names. Learned counsel for the plaintiff submits that the said witness had also produced five counter-foils issued by the said society dated 21st March, 1980 to its members which certificates carry the signature of the said deceased testator as the committee member of the society.

26. It is submitted by the learned counsel that the said witness (PW 3) deposed in his cross-examination and more particularly in reply to questions 12 and 13, on the basis of the record maintained by the said society. The society had authority to verify any correspondence or all these documents on record of the society. He submits that the cross-examination of the said witness and in particular reply to question nos.14 to 17, 25 and 27 would clearly establish that the said deceased was of sound and disposing mind when he made his Will on 20th March, 1980 and had also changed the nominations made in respect of the said flat.

27. Learned counsel for the plaintiff placed reliance on paragraphs 1, 19 and 20 of the affidavit of evidence filed by the plaintiff and would submit that in the said affidavit, the said witness (PW 4) had clearly deposed that the said deceased was in sound state of mind and had prepared the said Will in his own handwriting.

The said witness had also identified the handwriting of his father, the signature of his father and also the signatures of the attesting witnesses. He also placed reliance on the affidavit filed by the sister of the plaintiff viz. Sajini Malani identifying the handwriting and the signature of the said deceased on the said Will.

28. Learned counsel for the plaintiff invited my attention to the cross-examination of the plaintiff to question nos.6, 45, 50, 64 and 159 and would submit that the said witness had clearly deposed that he was told that the property which was bequeathed to him under the said Will would come to him. The said witness deposed that though the said Will was not prepared in presence of his wife, she was present when the same was being executed and attached. His wife never ill-treated his parents. It is submitted by the learned counsel that there is absolutely no cross-examination of the witness with respect to the sound state of mind of the deceased when he had prepared the said Will and Testament. Some part of the evidence of the plaintiff was not rebutted and is accepted. There was also no suggestion to the plaintiff that the said deceased had not written and executed the said Will and Testament. It was the case of the defendant herself that the parents used to communicate the defendant by way of letters during the period 1980's.

29. It is submitted by the learned counsel that the defendant did not produce even a single letter to show that the said deceased had complained about the plaintiff and his wife ill-treating them and thus the question of the said deceased executing the said Will and Testament under undue influence did not arise. It is submitted that there was no cross-examination of PW 4 on the identification of the

signature of Dr.Chandiramani, who was one of the attesting witness. The signature of Dr.Chandiramani also thus stands proved.

30. Insofar as the affidavit in lieu of examination in chief filed by the defendant is concerned, learned counsel for the plaintiff invited my attention to paragraphs 4, 6, 9 to 15, 17, 18, 22 and 24 thereof and her cross-examination to the question nos.10, 12, 13, 21, 28 to 30, 32, 36 to 43, 60, 61, 63, 66 to 70, 72, 77, 79, 81, 82, 107 to 110, 112, 116, 119, 121, 135, 162, 165 to 169, 182, 183, 185, 188, 189, 191, 192, 203, 204 and 205. It is submitted by the learned counsel for the plaintiff that in her cross-examination, the defendant admitted that she made a false statement in paragraph 4 that she got married and then moved to England. In reply to question no.30, the defendant admitted that the affidavit had not been drafted by her. In reply to question 36, she admitted that she did not have any document to substantiate her own that the Will was fabricated document. It is submitted that though various letters addressed by the plaintiff were received by her, she did not reply to those letters at all.

31. It is submitted by the learned counsel for the plaintiff that the defendant in her cross-examination and more particularly in reply to question nos.81 and 82 admitted that she had made a false statement in her affidavit that after the death of husband of Sajini Malani, she was in need of money. In reply to question no.107, the said witness admitted that she had signed the minutes of meeting dated 14th August, 1985. In reply to question no.164, the defendant deposed that she had never personally witnessed the ill-treatment of the said deceased by the plaintiff or his wife. She did not do anything

when she learnt of the so called ill-treatment. In reply to question nos.188, 189 and 191, the defendant admitted that she was never present when the so called manipulation in the Will of the father took place. She however had a feeling that the said Will was manipulated and her father could never do that. The witness deposed that she personally saw that the plaintiff and his wife manipulating the parents. When the witness was asked as to when she saw the plaintiff and his wife manipulating the parents, she deposed that she could not see it but she knew it. In reply to question nos.203 and 204, the witness deposed that she feels and knows that the said Will is fabricated document. She has no documentary evidence to show that the Will is fabricated document.

32. It is submitted by the learned counsel for the plaintiff that the witness examined by the plaintiff and by cross-examination of the defendant by the learned counsel for the plaintiff, the plaintiff has discharged the onus cast on the plaintiff that the Will dated 20th March, 1980 is the Will and Testament in of the said deceased late Khanchand Jhangiani and is validly executed and attested in accordance with law. He submits that the defendant on the other hand has failed to prove that the purported Will was obtained under coercion and undue influence.

33. On the issue as to whether the said deceased was of sound and disposing mind or not on the date of execution of the Will, learned counsel for the plaintiff placed reliance on the affidavit of evidence of the plaintiff and more particularly paragraphs 1, 19 and 20 and would submit that it was specifically deposed in the said affidavit that the said deceased was of sound state of mind. There

was however, no cross-examination on this part of deposition of the plaintiff. Learned counsel for the plaintiff submits that the documents produced by the Secretary of Hindustan Co-operative Housing Society Limited has also proved beyond reasonable doubt that the said deceased had recorded the nomination in the name of the plaintiff and the mother of the plaintiff. The nomination made by the said deceased in favour of the plaintiff was consistent with his desire as expressed in his Will dated 20th March, 1980.

34. It is submitted that the said deceased was of sound and disposing mind which fact is also proved by five counter-foils of certificates issued by the said society dated 21st March, 1980 to its members which certificates carry the signature of the deceased as the committee member of the society. The said deceased was carrying on day to day affairs including of the society as a committee member. The said deceased died after four years of the said deceased executing the Will and Testament dated 20th March, 1980. It is submitted that if the said deceased was forced to make a Will as canvassed by the defendant, the said defendant would have definitely informed the daughters of the said alleged ill-treatment and would have changed his Will before his death which took place after four years after execution of the said Will and Testament. He submits that though the said deceased had executed further writing incorporating the bequest to his daughters, there was no change of bequest insofar as the plaintiff is concerned by the said deceased in the said writing dated 16th April, 1983.

35. It is submitted by the learned counsel that the defendant was fully aware of the execution of the said Will and Testament. She

herself had pleaded in the suit for administration filed by her that she was shown some document pretending it to be Will of the late father which in fact was not valid and proper Will of the late father. It is submitted that in reply to question no111, the defendant admitted that she was aware of the Will but she did not believe it. In reply to question no.112, the said witness deposed that she had just said that she did not believe that there was Will.

36. It is submitted by the learned counsel that perusal of the Will would clearly show that there are no suspicious surrounding circumstances in execution of the said Will. Both the daughters were married and had their own matrimonial homes. The house bequeathed to the plaintiff was the only house of the plaintiff. He submits that the said Will was provided for life interest in the said flat in favour of the mother of the plaintiff and thus she was adequately protected. The defendant as well as other sisters were made monetary bequest. The defendant had helped the father in constructing the third room. There was thus no question of any suspicious surrounding attachment to making of the Will. In support of this submission, learned counsel placed reliance on the judgment of the Supreme Court in case of **Savithri & Ors. vs. Karthyayani Amma & Ors., (2007) 11 SCC 621.**

37. Learned counsel for the plaintiff placed reliance on the judgment of this Court in case of **S.M. Nooruddin vs. Mahomed Oomer Mahomed Narulla Saheb, AIR 1956 Bombay 641** and in particular paragraph 7 in support of his submission that the signature of the said deceased and the attesting witnesses has been duly proved by the witnesses examined by the plaintiff. The defendant has

failed to prove that the said Will and Testament was forged or fabricated or was executed by the said deceased under any undue influence.

38. Learned counsel for the plaintiff placed reliance on the judgment of the Madras High Court in case of **Ponnuswami Goundan & Anr. vs. Kalyanasundara Ayyar & Ors., ILR (Madras) Vol.LVII 662** and in particular at pages 663 to 665 in support of the submission that since none of the attesting witnesses can be called, secondary evidence with regard to the attestation is admissible i.e. evidence of somebody who either saw them attesting or is familiar with their signatures. He submits that the son of one of the attesting witness who identified the signature of his father was produced by the plaintiff. The plaintiff had also examined his wife, who was present at the time of execution of the said Will and had identified the signature of the said deceased and two attesting witnesses.

39. Learned counsel for the plaintiff placed reliance on the judgment of the Madras High Court in case of **G. Vaidehi vs. S. Govindarajan, 1992 Madras Law Journal Reports** 393 and in particular paragraphs 6 and 11 in support of the submission that under section 69 of the Indian Evidence Act, since none of the attesting witness was alive on the date of execution of the Will by the said deceased, the Will could be proved in accordance with section 69 of the Indian Evidence Act which burden is discharged by the plaintiff.

40. Learned counsel for the plaintiff placed reliance on the judgment of the Supreme Court in case of **Joyce Primrose Prestor**

(Mrs.) (Nee Vas) vs. Vera Marie Vas (Ms.) & Ors. (1996) 9 SCC 324 and in particular paragraphs 15, 17 and 18 in support of the submission that since the Will and Testament in question was prepared by the said deceased in his own handwriting and was a holograph Will, presumption in execution of such Will and the writing of the testator is greater than presumption in case of ordinary Will. He submits that the defendant has not disputed the execution of the Will in the handwriting of the said deceased testator. He submits that since the caveator had alleged undue influence and fabrication, the onus was on her to prove the same, which she failed to discharge.

41. Mr.Mohan Pungliya, learned counsel for the defendant on the other hand invited my attention to the pleadings and various portions of the affidavit in lieu of examination in chief and the cross-examination of the witnesses.

42. Insofar as issue no.1 is concerned, learned counsel for the defendant invited my attention to the evidence of the wife of the plaintiff (PW 1), who stated on oath that she was present at the residence on 20th March, 1980 when she witnessed that the said deceased subscribing his name in presence of two individuals, who also subscribing their respective signatures in presence of the deceased at that time. Later the said deceased informed her that the names of the said two individuals were Mr.R.B. Hirani, who was a resident neighbour and member of New Hindustan Co-operative Housing Society Limited and Dr.K.R. Chandiramani, a practicing Doctor having his dispensary in the vicinity. He invited my attention to the alleged Will propounded by the plaintiff and would submit that the said alleged Will would clearly indicate that the deposition made by

the plaintiff that the said deceased had told her that the witnesses were R.B. Hirani and Dr.K.R. Chandiramani on the date of date of the alleged execution of the alleged Will and Testament is patently false. It is submitted that the evidence produced by the plaintiff himself would show that the alleged Will produced before this Court could not be the Will made by the said deceased and what is produced in the Court is a different document.

43. It is submitted by the learned counsel for the defendant that the document produced by the plaintiff before this Court clearly shows that the so called attestation was done after four days by one of the alleged attesting witness and another witness had allegedly attested even thereafter. From the said document, there is a reason to believe that even if there was attestation, that it was done after the signature of the first so called another attesting witness i.e. on or after 24th March, 1980. He submits that the witness examined by the plaintiff i.e. PW 1 would thus clearly prove that when the alleged Will was signed by the testator on 20th March, 1980, it was not signed before any witness. Even if any presumption of attestation under section 90 of the Indian Evidence Act arises, it is rebuttable. He submits that in fact rebutted by the plaintiff himself by producing the evidence of PW 1, who deposed that she herself in fact saw the executant and both the attesting witnesses signing the witness at the same time which deposition is *ex-facie* contrary to the document propounded by the plaintiff.

44. It is submitted that the signature of Dr.K.R. Chandiramani is on the left side of the bottom who allegedly signed four days thereafter on 24th March, 1980 as can be seen from the alleged Will.

At the time of making of the alleged Will by the said deceased, there was enough space on the left side for signature of another attesting witness. It however shows the alleged signature of other witness R.B. Hirani on the alleged Will after Dr.K.R. Chandiramani's signature which could be only after 24th March, 1980. He submits that the evidence of PW 1 is thus *ex-facie* false and cannot be considered by this Court to come to a conclusion that the plaintiff had proved valid execution of the alleged Will and Testament and valid attestation in accordance with law.

45. The plaintiff no.1 in his evidence also deposed that she did not know both the attesting witnesses before and at the same time contradicted herself that she knew them since the time she had come to stay in the flat. He submits that it is thus clear that the wife of the plaintiff had forced or pressurized the said deceased father in law to make the Will entirely in favour of the plaintiff and thus the said Will cannot be considered as a voluntarily Will.

46. It is submitted by the learned counsel that the wife of the plaintiff went back to Delhi on the same day i.e. 20th March, 1980 and thus she could not be present when the alleged attesting witnesses were present on 24th March, 1980 or any other day when the alleged attesting witnesses signed it. In support of this submission, learned counsel placed reliance on the cross-examination of PW 1 on question nos.60 to 65.

47. It is submitted by the learned counsel that on the left side of the signature of the testator, there was signature of the alleged witness D.K.R. Chandiramani and if the said signature was his

signature, it was obtained four days later to the signature of the testator. The alleged signature of another attesting witness though was in the margin of paper, no explanation came to be given as to why it came to be made in the margin and not in the place where Dr.K.R. Chandiramani has put his signature four days later. It is submitted that the alleged signature of R.B. Hirani was obtained subsequently after the alleged signature of D.K.R. Chandiramani and thus none of the alleged attesting witnesses had signed on the date of the alleged execution of the Will on 20th March, 1980. He submits that if R.B. Hirani would have been the witness to the signature of the testator, he would have signed in the normal course where the purported signature of D.K.R. Chandiramani was appearing as there would not have reason to sign in the margin when there was ample space to sign at the bottom of page. The plaintiff's witness Asha Jhangiani (PW 1) herself had rebutted it. The falsehood of the entire case of the plaintiff is exposed by his own wife.

48. It is submitted by the learned counsel that the plaintiff's own evidence throws light on why and how the alleged Will was not to be made by the plaintiff bequeathing the entire flat to him. It is admitted by the plaintiff that it was done in presence of his wife which was obviously to bring the pressure on the said deceased to make the entire Will allegedly in favour of her husband which could not be the true and genuine intention of the alleged testator. It is submitted that contradictory evidence produced by the said witness would prove that it was she who dictated or pressurized him to write what she wanted and also proves that it was not executed in presence of any attesting witnesses.

49. It is submitted by the learned counsel that when the plaintiff realized that this truth was going to the root of the matter, PW 1 changed her stand in the cross-examination and made false statement on oath contrary to her own evidence. In her examination in chief, PW 1 deposed that she had seen two individuals subscribing their respective signatures in presence of the deceased at that time. The said deceased had informed her the names of those two individuals as R.B. Hirani and Dr.K.R. Chandiramani. The deceased also informed her that the hand written paper signed by him in presence of the alleged two attesting witnesses was his Will and Testament. In her cross-examination, she admitted in reply to question nos.36 to 38 that she knew Mr.R.B. Hirani since the time when she got married, whereas in her examination in chief she deposed that the name of Mr.Hirani came to be known to her subsequently from the deceased testator. She submits that the evidence of PW 1 is full of falsehood and contradiction and thus her evidence cannot be relied upon by this Court.

50. It is submitted by the learned counsel for the defendant that PW 1 i.e. the wife of the plaintiff did not accompany the said deceased testator just by chance. The said witness admitted in reply to question no.65 that she was sent to Mumbai by her husband for specifically getting the document from her father in law bequeathing his house to her husband (the plaintiff herein). He submits that it is thus clear that the Will in question is not voluntarily executed document. The testator was compelled to make the alleged Will against his own wishes as dictated by the wife of the plaintiff and thus the said alleged document cannot be considered as valid and voluntary document in accordance with law and is surrounded by

suspicious circumstances. He submits that the alleged Will thus cannot be considered as natural. The evidence of PW 1 is unreliable, obscure and totally unsatisfactorily. It is a clear case of fraud.

51. It is submitted by the learned counsel that when the said deceased was free from pressure of the plaintiff and his wife, in order to give some protection to his wife, the said deceased added her name as a joint nominee along with the plaintiff in the society record on 9th April, 1981. At the same time he felt it necessary to reassure the plaintiff that it was done as the wife of the testator was fully nervous.

52. It is submitted that the provision in the alleged Will in favour of the son was not voluntarily and he was feeling unsecured and guilty for not making the provision for securing his wife. However, at the same time he had reassured the plaintiff that he did not have to worry as his name was first in the nomination form which clearly shows the pressure and fear of the plaintiff on the said deceased testator. It is submitted that there is obvious mystery and gave suspicious surrounding circumstances in execution of the alleged Will. It is submitted that the said alleged Will was suppressed for about 28 years.

53. It is submitted by the learned counsel that at the time of making the alleged Will, the wife of the said deceased who was residing with him was also not present. The wife of the plaintiff claimed to be present on the date of execution of the alleged Will. The fact of the said alleged Will was not even known to the wife of the said deceased who was to be most affected by it. The plaintiff

himself has admitted in his evidence that his mother never knew about the alleged execution of Will and also that she was not present when the plaintiff opened the envelope containing the alleged Will.

54. It is submitted by the learned counsel that the alleged Will propounded by the plaintiff is entirely one sided and in favour of the plaintiff which creates serious suspicious circumstances about its genuineness. The only residential house is entirely given to the plaintiff without providing any accommodation for his wife. The wife of the deceased did not have any other place of residence to live and was not capable of having her own source of income whatsoever. In these circumstances, any husband would make sufficient provision for his wife first during her life time. The son of the said deceased was at a secured post in the Indian Navy. The daughter in law of the said deceased was also educated and thus it was not necessary for the deceased to give the house exclusively to his son who was capable of taking care of his wife and children.

55. It is submitted by the leaned counsel for the defendant that the plaintiff has not removed suspicious circumstances concerning the alleged Will. The plaintiff has not disputed that the daughters of the said deceased had filed a suit in this Court for seeking Letters of Administration of the estate of the deceased against the plaintiff in the year 1986 on the premise that the said deceased died intestate. Though the said suit was filed in the year 1986, the plaintiff did not file the testamentary petition or seeking probate of the alleged Will till 2012 i.e. after 28 years. The deceased had died in the year 1984, whereas the testamentary petition came to be filed only in the year 2012 on a flimsy excuse that he did not have Rs.10,000/- towards the

expenses for filing the said suit, whereas if she would have been succeeded , he would have to loose heavily.

56. Learned counsel for the defendant invited my attention to paragraph 4 of the examination in chief of the plaintiff who deposed that while going through the documents and papers of his father, he found a folder containing various documents with a handwritten note on the said folder stating "Will - of Estate - Insurance Papers etc." in which he found a sealed envelope with a note "Original confidential (Will of Khanchand Jhangiani) (to be opened after his death). He submits that this part of deposition is in complete contradiction of the evidence of the wife of the plaintiff who had stated that she was present all along when the alleged Will was made by her father in law and signed by the attesting witnesses, which fact was conveyed by her to the plaintiff. He submits that this deposition shows complete falsehood on the part of the plaintiff on oath.

57. It is submitted by the learned counsel for the defendant that the plaintiff had deposed that the alleged Will was opened on 25th July, 1984 in presence of the sister Sajini Malani. He submits that this part of evidence is patently false since the said Sajini Malini and the defendant herein had filed a suit for administration in the estate of the deceased in this Court in the year 1986 in which the said Sajini Malani had made a statement on oath that her father had died intestate and hence the alleged endorsement made by Sajini Malani on the said Will is patently false. The said Sajini Malani reversed her stand totally in favour of the plaintiff. He submits that the said Sajini Malani however, was not examined by he plaintiff as one of his witness to avoid her cross-examination which would have exposed

by her perjury.

58. It is submitted by the learned counsel for the defendant that if the said Sajini Malani would have made any such endorsement when the alleged Will was opened on 25th July, 1984, the plaintiff would have produced the said endorsement along with a copy of the Will in the suit of 1986 filed by the defendant herein along with said Sajini Malani which the plaintiff failed to do so. He submits that this circumstance would also clearly indicate that the alleged Will of the said deceased was not valid, legal and was obtained by exercising undue influence.

59. It is submitted by the learned counsel for the defendant that the alleged Will is intrinsically suspicious and unnatural document also on the ground that there is no explanation as to why the wife of the said deceased was not provided for anything immediately after his death. The wife of the said deceased was house wife and was entirely dependent on her husband during her life time and she had no source of income of her own and was going to be more helpless after his death leaving her entire life at the mercy of her son and specially her daughter in law. This suspicion is confirmed by the evidence of the plaintiff's wife when she has stated on oath on affidavit dated 16th July, 2015 that she was present at the residence of the deceased on 20th March, 1980.

60. It is submitted that it was not the case of the wife of the plaintiff that she was present in Mumbai on 24th March, 1980 when Dr.K.R. Chandiramani had allegedly signed on the said alleged Will which was allegedly executed on 20th March, 1980. The said witness

PW 1 was admittedly there at Mumbai only for few hours. It is submitted that it is thus not possible to conclude that the said alleged Will was attested as required under section 63 of the Indian Succession act, 1925 and section 68 of the Indian Evidence Act. Insofar as the alleged Will is concerned, the wife of the plaintiff is the only witness, whose evidence is full of falsehood and contradictions and thus her evidence cannot be relied upon. She was in any event an interested witness.

61. It is submitted that the plaintiff has failed to produce any evidence to show that the alleged Will was prepared voluntarily and signed by the testator and attested by two witnesses in accordance with section 68 of the Indian Evidence Act. The visit of the wife of the plaintiff was not accidental but was voluntarily since she came to Mumbai to make sure that the said deceased would bequeath his house only in favour of the plaintiff and not to his daughter and even to his wife. This is clear case of undue influence exercised on the testator by the beneficiary and the said alleged Will cannot be construed as voluntary Will by the said testator.

62. The plaintiff has not at all explained the gross delay of 28 years in filing the testamentary petition after the death of the said deceased and for more than 26 years from the date of filing of the suit for administration of estate filed by two daughters of the said deceased alleging that the said deceased died intestate. In support of the submission that since the Will is surrounded by suspicious circumstances and the plaintiff failed to remove such suspicious circumstances, it cannot be treated as last testamentary disposition of the testator, learned counsel for the defendant placed reliance on

the judgment of the Supreme Court in case of **Bharpur Singh & Ors. vs. Shamsher Singh, (2009) 3 SCC 687** and in particular paragraphs 14, 16 and 22.

63. In support of the submission that since there is gross unexplained delay of 28 years in filing the testamentary petition, the testamentary suit deserves to be dismissed on this ground alone, learned counsel for the defendant placed reliance on the judgment of this Court in case of **John Francis Anthony Gonsalves & Anr. vs. Mrs. Agnes Mary Conception Febello, AIR 2001 Bombay 372** and more particularly paragraphs 21 and 27.

64. In support of the submission that there is no compliance with the provisions of section 63(c) of the Indian Succession Act, 1925 as the testator had not signed in presence of two attesting witnesses, learned counsel for the defendant placed reliance on the judgment of the Andhra Pradesh High Court in case of **Dr.M. Ratna vs. Kottiboyina Navaneetam (died) & Ors., 1994 Andhra Pradesh 96** and more particularly paragraph 17.

65. In support of the submission that the plaintiff has failed to remove suspicious surrounding circumstances in execution of the Will and thus the testamentary petition deserves to be dismissed on that ground itself, learned counsel for the defendant placed reliance on the judgment of the Supreme Court in case of **H. Venkatachala Iyengar vs. B. N. Thimmajamma & Ors., AIR 1959, SC 443** and in particular paragraphs 18, 21, 22 and 39.

66. Mr.Colabawalla, learned counsel for the plaintiff in

rejoinder submits that PW 1 in her affidavit in lieu of examination in chief has deposed her witnessing the execution of the Will. In her cross-examination, she had not been asked any question to rebut what she had stated regarding witnessing the execution of the Will i.e. signing of the Will by the deceased and two witnesses who had also expired. Since no question had been asked to rebut, what she had stated in her evidence was proved to be true and correct and accepted by the defendant.

67. It is submitted that the argument advanced by the learned counsel for the defendant that the Will was dated 20th March, 1980 and the signature of one of the attesting witness was on 24th March, 1980 is made across the bar for the first time during the course of final argument. No such case was put up to the witness examined by the plaintiff and no opportunity was given to the PW 1 to clarify as to what she had stated in her examination in chief. Since no such opportunity was given to the plaintiff to explain the dates mentioned on the Will i.e. the date of execution and the date mentioned by Dr.K.R. Chandiramani, the defendant cannot be allowed to argue across the bar to suggest that what is deposed by PW 1 is not true.

68. Learned counsel for the plaintiff placed reliance on the judgment of the Supreme Court in case of **Rajinder Pershad (Dead) By L.Rs. vs. Smt. Darshana Devi, (2001) 7 SCC 69** and in particular paragraph 4 holding that there is an age old rule that if you dispute the correctness of the statement of a witness you must give him opportunity to explain his statement by drawing his attention to that part of it which is objected to as untrue, otherwise you can not impeach his credit. He submits that if any such opportunity would

have been given to PW 1, she would have explained whether the date 24th March, 1980 as written on the said Will was signed on that date or whether it was written by mistake. Since both the attesting witnesses have died, they could not give any explanation. There was no question of asking PW 1 in the cross-examination to rebut the positive testimony that she witnessed execution of the Will. Her testimony has to be thus believed by this Court.

69. It is submitted by the learned counsel for the plaintiff that even if so called Will of which the probate is being sought in the suit, is not the same which was executed in presence of the wife of the plaintiff as sought to be canvassed by the defendant, since both the attesting witnesses to the Will have died and since PW 1 was not the only witness, whose evidence was led by the plaintiff to prove the Will, even then by the evidence of PW 1, the plaintiff has proved the Will. In support of this submission, learned counsel placed reliance on section 63 of the Indian Succession Act, 1925.

70. It is submitted that in a given case, the testator may sign the Will on a particular date and thereafter on some other date, may accompany a person and personally acknowledge his signature on the Will and ask the said person to sign as an attesting witness. Both the attesting witnesses need not be there at the same time. He submits that even if the testator had written the said document in his own handwriting on 20th March, 1980 and himself had signed the said document on 20th March, 1980, and thereafter went to Dr. K.R. Chandiramani on 24th March, 1980 gave personal acknowledgement of his signature and got his signature thereon and thereafter went to Mr.Hirani who gave personal acknowledge of his signature and got

his signature thereon as attesting witness, the Will even then being properly executed and attested.

71. It is submitted that under section 69 of the Indian Evidence Act, 1872, the plaintiff was required to prove in these circumstances that the signature of the testator was in the handwriting of the testator and that the attestation of one of these witness at least was in his handwriting. There is no dispute that the Will was in the handwriting of the deceased testator and he had signed it. He submits that to prove the signature of one of the attesting witness, the plaintiff led evidence of Mr.Ramesh Hirani, PW 2. The said Mr.Ramesh Hirani had identified the signature and handwriting of his father Mr.Ramchandra Hirani. Mr.Ramesh Hirani was cross-examined by the counsel for the defendant. In the said cross-examination, the examination in chief of Mr.Ramesh Hirani was not at all shaken.

72. It is submitted that the signature of other attesting witness i.e. Dr.K.R. Chandiramani was identified by the plaintiff in his examination in chief. There was absolutely no cross-examination on that aspect by the defendant. The signature of Dr.K.R. Chandiramani also stands proved. He submits that in this case since both the attesting witnesses have expired prior to the date of filing of the testamentary petition, the Will is required to be proved in accordance with section 68 of the Indian Evidence Act, 1872. He submits that the signature of the attesting witnesses having been proved by the plaintiff. Learned counsel placed reliance on the judgment of the Delhi High Court in case of **Jagdish Prasad vs. State (2015) 218 Delhi Law Times 690** and in particular paragraphs 6 to 15.

73. Insofar as the submission of the learned counsel for the defendant that the Will is surrounded by suspicious circumstances is concerned, it is submitted by the learned counsel for the plaintiff that in the affidavit in lieu of examination in chief of PW 1, she had stated as to the fact that the testator and the attesting witnesses signed in her presence on 20th March, 1980. The evidence regarding her having witnessed the execution remained unchallenged in the cross-examination. The execution of the Will and attestation thereof thus stood proved as on 20th March, 1980. He submits that in any event under section 63 of the Indian Evidence Act, both the witnesses need not be there at the same time and thus even if the testator had signed on 20th March, 1980 and witnessed on 24th March, 1980, it was still a valid execution. There was nothing suspicious about it. In support of this submission, learned counsel placed reliance on the judgment of the Supreme Court in case of **Kashibai w/o Lachiram & Anr. vs. Parwatibai w/o Lachiram & Ors. (1995) 6 SCC 213** and in particular paragraphs 10 and 11.

74. It is submitted by the learned counsel for the plaintiff that in her affidavit in lieu of examination in chief, PW 1 had nowhere stated that she met Mr.Hirani and Dr.K.R. Chandiramani for the first time on 20th March, 1980. The said witness had reproduced what the said deceased did on 20th March, 1980. He told her about those two persons would not mean that she did not know them prior to that date. The defendant ought to have sought explanation from PW 1 about the alleged inconsistency in her evidence. Learned counsel placed reliance on the judgment of the Supreme Court in case of **Rajinder Pershad (Dead) By L.Rs.** (supra). He submits that there is no contradiction in the evidence of PW 1. In her cross-examination,

PW 1 had stated that she had shifted to Bandra in or about 1982. She knew Dr.K.R. Chandiramani couple of years before she shifted to Bandra which would mean 1980 when the said Will was executed.

75. Learned counsel for the plaintiff placed reliance on paragraph 10 of the plaint filed by the defendant herein jointly with Sajini Malani stating that the defendant no.1 herein (plaintiff herein) had shown some document to them pretended it to be the Will of their father but in fact is not valid and proper Will of the late father. The plaintiffs do not admit it as to be valid and legal Will of their late father. Learned counsel placed reliance on a letter dated 10th June, 1985 addressed by the plaintiff to the defendant recording that a copy of the Will was sent to her by Sajini Malani soon after the death of the father, but the plaintiff could send her another copy if required by her. He submits that the defendant thus had full knowledge of execution of Will and was also having a copy thereof prior to the date of filing of the said suit for administration of estate jointly with Sajini Malani.

76. It is submitted by the learned counsel for the plaintiff that there was no settlement between the plaintiff and Sajini Malani as sought to be canvassed by the defendant. The defendant herself had admitted in her cross-examination that Sajini Malani was not financially dependent on anybody but was always financially independent. In support of this submission, learned counsel placed reliance on the cross-examination of the defendant and more particularly to question nos.77, 79, 81 and 82.

77. Insofar as reliance placed by the learned counsel for the

defendant to answer of PW 1 to question no.65 that PW 1 was sent specifically to Mumbai for getting a document from the deceased bequeathing his house to the plaintiff is concerned, learned counsel for the plaintiff submits that a perusal of the answer to question no.65 given by PW 1 would indicate that the witness answered "I agree". She thereafter volunteered that she had combined the visit with her father's birthday and she did not come for the purpose suggested in the question.

78. Insofar as the submission of the learned counsel for the defendant that the Will is surrounded by suspicious circumstances or is unnatural is concerned, it is submitted by the learned counsel for the plaintiff that as far as the wife of the said deceased is concerned, the deceased has provided in the Will that the house cannot be sold without her consent and that if the house is to be sold, she should be paid a sum of Rs.25,000/- from the sale proceeds to be used as per her discretion provided in the Will. The wife of the said deceased was thus provided with life interest in the flat. The wife of the said deceased was aware of the said Will. In support of this submission, learned counsel placed reliance on a letter dated 14th September, 1983 (Exhibit P-8).

79. Insofar as the defendant is concerned, the said deceased had given her a cash bequest in lieu of her having contributed making of one room. She had been also given other monetary bequest. The wife of the deceased had not joined the defendant in filing the suit for administration of estate of the deceased on the basis of intestacy which also would clearly show that she was not only herself wanting that house but was accompanying the plaintiff and

also the wife and was treated fairly by the plaintiff and his wife. As far as Sajini Malani is concerned, it is submitted that she was not single and had got married some time in the year 1973 she also had been given monetary bequest. The defendant as well as Sajini Malani being married and having their own houses, the deceased left the house to the plaintiff with knowledge and approval of the wife. This house is only the house of the plaintiff and his family member. Learned counsel strongly placed reliance on the judgment of the Supreme Court in case of Savithri & Ors. (supra) and would submit that merely because the defendant or the wife of the said deceased or another daughter Sajini Malani was given lesser share or were excluded in the Will, that cannot be ground of suspicious circumstances.

80. Insofar as the issue of delay of 28 years in filing the testamentary petition after the death of the said deceased is concerned, it is submitted that the plaintiff had set out the reason in para 9 of the testamentary petition and paragraphs 23 to 25 of his affidavit of evidence dated 16th July, 2015.

81. Insofar the nomination dated 9th April, 1981 in favour of the plaintiff jointly with the wife and letter dated 9th April, 1981 written by the deceased to the society is concerned, the defendant did not produce even a single letter to prove that the parents were ill-treated as alleged or that the Will was not voluntarily made and made through undue influence. If there was any undue influence on the said deceased by the plaintiff or his wife, the said deceased could have changed his Will within four years from the date of execution of the said Will and before his death which the said deceased did not

admittedly change. There was thus no undue influence in execution of the said Will either by the plaintiff or his wife upon the said deceased.

82. It is submitted by the learned counsel for the plaintiff that in the affidavit of evidence filed by the plaintiff, he had not stated that he was trying to find the will of the said deceased. The plaintiff had only set out as to how he had found the Will. Even in his cross-examination he had maintained that he knew of the Will, as his wife had informed him and his father also informed him by a letter addressed in writing in 1983. The plaintiff was through out told by the father that property was coming to the plaintiff.

83. Insofar as the judgments relied upon by the learned counsel for the defendant is concerned, it is submitted by the learned counsel for the plaintiff that there is no dispute as to the position of law stated therein. However, the said judgments have no relevance to the fact of the present case. It is submitted that there is no substance in any of the arguments advanced by the learned counsel for the defendant and thus the testamentary suit filed by the plaintiff be decreed as prayed.

REASONS AND CONCLUSIONS :-

84. I shall deal with the issue nos. 1 and 2 together as the same are interconnected and can be decided based on the common evidence touching both the issues.

85. Insofar as issue no.1 is concerned, the onus to prove that the Will dated 20th March,1980 is the Will and Testament and is validly executed and attested in accordance with law is on the

plaintiff. The plaintiff (original petitioner) Mr.Gobind Khanchand Jhangiani had filed a testamentary petition on 30th April,2012 in respect of the alleged Will and Testament dated 20th March,1980 of the said deceased who admittedly died on 20th July,1984. In view of the caveat and affidavit in support filed by the defendant Mrs.Maya Arjun Thadani who is one of the married daughter, the said testamentary petition was converted into the testamentary suit. The said deceased had left behind him surviving as his only heir and next of kin according to Hindu Succession Act, 1956 i.e. Smt.Sushila Khanchand Jhangiani, wife of the said deceased who died on 4th July, 1987 i.e. after the death of the said deceased Mr.Khanchand Tekchand Jhangiani, the plaintiff herein (son), Ms. Maya Arjun Thadani (married daughter) and Mrs.Sajini Chandru Malani (married daughter).

86. It was alleged in the testamentary petition that the said deceased had left the Will and Testament dated 20th March,1980 which was allegedly executed at Mumbai on 20th March,1980. The plaintiff was the sole administrator appointed under the said Will and Testament dated 20th March,1980. It is stated that it is not possible to file affidavit of any of the attesting witness as both the attesting witnesses Mr. Ramchand Bhromal Hirani and Dr.K.R. Chandiramani had since passed away. The plaintiff annexed affidavit of Mr. Ramesh Ramchand Hirani, son of Mr.Ramchand B. Hirani who was one of the alleged attesting witness, affidavit of Mrs.Renu Hiranand Jhangiani who was secretary of the Renuka Co-operative Housing Society Ltd. to allegedly identify their respective signature as attesting witness of the said Will. The plaintiff also annexed an affidavit filed by Mrs.Sajini Chandru Malani, one of the married

daughter of the said deceased affirmed on 28th February, 2012 along with the testamentary petition allegedly identifying handwriting and the signature of the said deceased on the alleged Will and Testament. No caveat and affidavit in support was filed by Mrs. Sajini Chandru Malani.

87. Mrs. Maya Arjun Thadani, another married daughter however filed caveat and affidavit in support dated 29th January, 2013. In the said affidavit in support of the caveat, the caveator alleged that a document called Will dated 20th March, 1980 was in the form of the writing and not a Will for disposing of the assets of the said deceased after his death. The said document was procured by the petitioner to grab the entire immoveable property of the said deceased and to deprive the wife and the daughters of the said deceased with any share in the same. If the said deceased had any real intention to make the Will, he would have made proper Will any time thereafter also when he was alive for more than four years after the execution of the what is described as the Will by the petitioner. It is alleged that the said document cannot be a genuine Will. There are suspicious circumstances surrounding the same.

88. It was alleged that the language is not coherent and near relations like his wife and daughters have been excluded. When the wife was alive, the deceased could not have in the normal circumstances deprived her of her right in the said property. There are purported to be two Wills, one dated 20th March, 1980 and another dated 16th April, 1983 which itself creates suspicion about the said documents. Both the said documents came from the possession of the petitioner and both the said documents cannot be the Will of the

deceased. It is alleged that there are reasons to believe that the petitioner has manipulated to obtain a writing from the deceased to suit his own purposes. The said document is not signed by the deceased in the presence of both the attesting witnesses. The signature of the deceased is not attested as required under the law. The attesting witnesses did not see the maker of document signing it. The attesting witnesses did not sign the Will in the presence of the testator. The said document is suspicious document. The disposal of the property of the testator is unnatural as neither his wife nor his daughters were given shares in his properties.

89. It was alleged that the delay of 28 years in filing petition was not explained. When the petitioner was spending lots of money in opposing the suit for administration of estate of the deceased in this court filed by the caveator and Mrs.Sajini Chandru Malani for last 28 years and leading a lavish lifestyle, it could not be alleged by the petitioner that he did not have Rs.10,000/- for payment of court fees required for filing the testamentary petition. It is also alleged that the said deceased purported to dispose off his property which did not belong to him entirely. The caveator had contributed to the development and maintenance of the said immoveable property of the said deceased.

90. It was further alleged that the said deceased was not in his full sense and did not sign the said document voluntarily and understanding its implications. The petitioner was always manipulating the said deceased to give his property to the petitioner and obtained the said writing under duress from the testator. The caveator strongly placed reliance on the Suit No.594 of 1986 filed by

her and and Mrs.Sajini Chandru Malani *inter alia* praying for administration of the estate of the said deceased filed on the premise that the said deceased died intestate.

91. The caveator also contended that the affidavit filed by her sister Mrs.Sajini Chandru Malani was patently false. Mrs.Sajini Chandru Malani herself was one of the co-plaintiff with the caveator in the suit for administration of estate of the late father and was prosecuting the said suit for more than 26 years. The said Mrs.Sajini Chandru Malani must have entered into some arrangement and conspiracy with the petitioner to deprive the petitioner of her share in the property of the deceased. She had also made a statement in the said suit that the said deceased died intestate and his legal heirs i.e. widow of the deceased and three children were entitled to equal share in the estate of the said deceased. She also made allegation against the petitioner that he had usurped the entire immoveable and moveable properties of the deceased and he had been using and enjoying the same for his own benefit to the exclusion of other legal heirs. She admitted that the caveator had contributed to the development and maintenance of the said property during lifetime of the said deceased. The said deceased had admitted during his lifetime that the caveator also had share in the said property and the deceased wanted his entire estate to be divided equally among his wife and three children after his death.

92. The caveator also referred to the removal of the name of the mother of the parties by the said deceased from the nomination form since the petitioner had forced the deceased to remove the name of the mother or his children in the records of the society in

respect of the flat. The caveator also disputed the contents of the affidavit filed by Mr. Ramesh Ramchand Hirani and Mrs. Renu Hiranand Jhangiani and alleged that both the affidavits have been procured by the petitioner to suit his purposes.

93. Insofar as affidavit dated 28th February, 2012 filed by Mrs. Sajini Chandru Malani, another daughter of the said deceased is concerned, in paragraph (3) of the said affidavit, it is alleged that after demise of the deceased father on 20th July, 1984, the plaintiff in or about July 1984, showed her a document contending to be the last Will and Testament dated 20th March, 1980 of the said deceased. She further alleged that during the lifetime of the said deceased, she had numerous occasions to deal with and interact with the handwriting and the signature of the said deceased. She alleged that she is well acquainted with the handwriting and signature of the said deceased.

94. On 25th July, 1984 i.e. five days after the death of the said deceased, she along with the plaintiff opened a sealed envelope containing the document dated 20th March, 1980. She had allegedly perused the original of the said document dated 20th March, 1980. She alleged that she did not agree with the contents of the said document dated 20th March, 1980. However, the said document dated 20th March, 1980 is in her father's own handwriting as she is aware of and familiar with the handwriting of her father and signature on the said document dated 20th March, 1980.

95. Insofar as affidavit dated 28th February, 2012 filed by Mr. Ramesh Ramchand Hirani, son of Mr. Ramchand Bhromal Hirani who was one of the alleged attesting witness is concerned, the said Mr.

Ramesh Ramchand Hirani alleged that he had perused the original document i.e. Will dated 20th March,1980 signed by the said deceased and witnessed by his father late Mr.Ramchand Bharomal Hirani and Dr.K.R.Chandiramani. He alleged that he is well acquainted with the signature of his father. He further alleged that from the perusal of the original of the document i.e. Will dated 20th March,1980, he found that the signature put on both the pages of the said document i.e. Will as attesting witness is to the best of his knowledge was that of his late father Mr.Ramchand Bharomal Hirani.

96. Insofar as affidavit dated 7th April,2012 filed by Mrs.Renu Hiranand Jhangiani along with the said testamentary petition is concerned, the said deponent alleged that she was the secretary of the Renuka Co-operative Housing Society Ltd. since last more than 10 years. Late Dr. K.R.Chandiramani owned flat no.2 in the said society and had filed his nomination in the said society records in respect of his premises in the said society. She had occasions to interact with the said Dr.K.R.Chandiramani in the matters pertaining to the administration of the said society and she had perused his signatures on numerous occasions. She alleged that she was well acquainted with the signature of late Dr.K.R.Chandiramani. She had allegedly perused the original document Will dated 20th March,1980 executed by Mr.Khanchand T.Jhangiani and allegedly witnessed by late Dr.K.R.Chandiramani and Mr.Ramchand Bharomal Hirani. She alleged that on perusal of the original of the document i.e. Will dated 20th March, 1980, she found that the signature put on both the pages of the said document i.e. Will as attesting witness is to the best of her knowledge was that of late Dr.K.R.Chandiramani.

97. Ms.Asha Jhangiani, (PW-1), wife of the plaintiff filed her affidavit in lieu of examination in chief dated 16th July, 2015. She deposed in the said affidavit that by a letter dated 11th March,1980, Indian Navy had transferred the plaintiff from Naval Headquarters, New Delhi to Mumbai. In view of the said letter, she came from Delhi to Mumbai on or about mid March 1980 to arrange for school admission of her daughter. During her visit to Mumbai, she was present at the residence of the deceased on 20th March,1980 when she saw the said deceased set and subscribed his name on some papers in the presence of two individuals. She allegedly saw the said two individuals subscribing their respective signatures in the presence of the deceased at that time. She alleged that later the said deceased informed her that the names of the said two individuals were Mr.R.B.Hirani who was a resident neighbour and member of New Hindustan Co-operative Housing Society Ltd. and Dr.K.R.Chandiramani, a practicing doctor having his dispensary in the vicinity.

98. The deceased also allegedly informed her that the handwritten paper signed by him in the presence of Mr.R.B.Hirani and Dr.K.R.Chandiramani was his Will and Testament. In her further examination in chief, when the said witness was shown the contents of her affidavit dated 16th July, 2015, she confirmed that the contents of the said affidavit of evidence were true and correct. In reply to question no.6 in her cross-examination, she admitted that her husband was in Indian Navy and he was posted in Lonavala after her marriage. She deposed that from July 1982 after her husband retired from Navy, she was staying in Bandra. She admitted that the third room was constructed by the said deceased with a little bit of money

from the caveator. The witness deposed that she knew this from a family in the colony that i.e. Mr.Gidwani's and one Mr.Hirani. She admitted that she knew these three families when the said deceased was alive and since she got married.

99. The said witness admitted that the relations of the in-laws of the said witness with the daughters were very cordial and loving. When the witness was asked as to whether she knew who was doctor who was attending to the said deceased, she deposed that she could not remember his name. When she was asked whether she knew any doctor in her housing colony or around it personally, she deposed that she knew Dr.Chandiramani. She knew Dr.Chandiramani a couple of years before she shifted to Bandra. In reply to question no.52, the witness deposed that she had come to Mumbai on 18th March, 1980 for her daughter's school admission. The witness deposed that when she came to Mumbai, she stayed with her parents in Napean Sea Road for two days.

100. In reply to question no.60, the witness deposed that on 20th March,1980 she came to her father-in-law's house to visit her in-laws on her way to the airport to go back to Delhi. She spent few hours there. She deposed that her father-in-law asked her to join him at the table where he was sitting with two other gentlemen. He introduced her to them as Doctor Chandiramani and Mr.Hirani. After they left, he told her that they were witnessing his Will. When she went back to Delhi, she told her husband that her father-in-law had made a Will. Beside her husband, she did not tell this fact to anybody else. She agreed that her husband had sent her to Mumbai specifically for getting a document from her father-in-law bequeathing

his house to her husband. The witness however volunteered that she combined the visit as 18th March was her father's birthday and she did not come for the purpose suggested in the question.

101. Learned counsel for the defendant raised an objection in respect of the voluntary statement on the ground that the said statement did not have any relevance to the question put to the witness. The learned Court Commissioner recorded that the voluntary statement was recorded subject to the objection and ruling thereon by the court. In my view, the voluntary statement was as and by way of afterthought. The witness had already agreed to the suggestion put to her by the learned counsel for the defendant that her husband had sent her to Mumbai specifically for getting a document from her father-in-law bequeathing his house to her husband. It is an admitted position that both the alleged attesting witnesses had already expired. The testamentary petition was filed after 28 years of the demise of the said deceased. PW-1 was examined by the plaintiff to prove that she was allegedly present at the residence of the said deceased on 20th March, 1980. The said witness specifically agreed when suggestion was put to her that she was specifically sent to Mumbai by her husband for getting a document from the said deceased bequeathing his house to her husband.

102. A perusal of the alleged Will indicates that the signature of one of the alleged attesting witness Dr.K.R. Chandiramani was on 24th March, 1980. Insofar as alleged signature of Mr.Ramchand Bhromal Hirani as another attesting witness is concerned, the said signature was allegedly made in the margin on the said document

though there was sufficient space below the signature of the Dr.K.R.Chandiramani. It is obvious that the alleged signature of the said second attesting witness may have been obtained even beyond 24th March,1980 and not when the alleged Will was executed by the said deceased purportedly on 20th March,1980.

103. A perusal of the said alleged document also indicates that there was enough space on left side for signature of the another attesting witness. It however shows that the alleged signature of the other attesting witness Mr.R.B.Hirani was on the alleged Will after the signature of Dr.K.R.Chandiramani which could only after 24th March,1980. The PW-1 had already returned back to Delhi on the same day of the alleged execution of the said Will dated 20th March,1980 and was not present when the alleged attesting witness had signed the alleged Will on 24th March, 1980 or thereafter. It is not the case of the plaintiff that PW-1 had accompanied the alleged testator subsequently at the place of the two alleged attesting witnesses for their signature when the said deceased informed those alleged attesting witnesses about his signature on the alleged Will before those two alleged attesting witnesses and affirming his signature before obtaining the signature of the alleged attesting witnesses.

104. On the contrary, it was a specific case of the PW-1 in her affidavit in lieu of examination in chief dated 16th July, 2015 that she was present at the residence of the said deceased on 20th March,1980 when she saw the said deceased set and subscribed his name on some paper in presence of two individuals. She also saw the two individuals subscribing their signatures in the presence of the

deceased at that time. I am not inclined to accept the submission of Mr.Colabawalla, learned counsel for the plaintiff that the PW-1 was not asked any question to rebut as to what she had stated regarding witnessing the execution of the Will i.e. signing of the Will by the deceased and two witnesses who had also expired. I am also not inclined to accept the submission of the learned counsel appearing for the plaintiff that no opportunity was granted to the PW-1 by the defendant to explain the alleged inconsistency for the date of execution of the Will as 20th March,1980 and the date of alleged attestation as 24th March,1980.

105. The defendant in her affidavit in support of the caveat had already raised this specific objection that the said document was not signed by the deceased in the presence of both the attesting witnesses. The attesting witnesses did not see the maker of the document signing the Will. The attesting witnesses did not sign the Will in the presence of the Testator. The signature of the deceased was not attested as required under law. The document was suspicious document. In view of the specific objection raised in the affidavit in support of the caveat raising a specific plea, the onus was on the plaintiff to explain the discrepancy in the date of execution of the alleged Will and the date of the attestation. Be that as it may, in view of the specific deposition of the PW-1 that the alleged Will was executed and attested on 20th March,1980, the question of any further opportunity to the plaintiff to explain the inconsistency did not arise.

106. In my view, in the facts and circumstances of this case, there is no substance in the submission of the learned counsel for the

plaintiff that if any opportunity would have been given to PW-1, she would have examined whether the date 24th March,1980 as written on the said Will was signed on that date or it was written by mistake.

107. In my view, there is also no substance in the submission of the learned counsel for the plaintiff that by evidence of the PW-1, the plaintiff has proved the Will. In my view, there is no merit in the statement of the learned counsel that in a given case, the testator may sign the Will on a particular date and thereafter on some other date, may accompany a person and personally acknowledge his signature on the Will and ask the said person to sign as an attesting witness or that both the attesting witnesses need not be there at the same time. The submission of the learned counsel is that even if the testator had written the said document in his own handwriting on 20th March, 1980 and has himself signed the said document on 20th March, 1980, and thereafter went to Dr. K.R. Chandiramani on 24th March, 1980 gave personal acknowledgement of his signature and got his signature thereon and thereafter went to Mr.Hirani who gave personal acknowledge of his signature and got his signature thereon as attesting witness, it will still amount to proper execution and attestation of the Will in compliance with section 63.

108. In my view this hypothetical illustration given by learned counsel for the plaintiff is devoid of merit in view of the specific case of the plaintiff that the alleged Will was executed and also attested on 20th March,1980 itself. It was not case of the plaintiff in the testamentary petition or in the evidence of any of the witness that the alleged testator had executed the Will on 20th March,1980 and thereafter on 24th March,1980. He had taken the said alleged

document to Dr. K.R. Chandiramani on 24th March,1980 and gave his personal acknowledgement of the signature and thereafter objected the signature of Dr. K.R. Chandiramani on 24th March,1980 and followed the same procedure for obtaining the signature of Mr.R.B.Hirani. This submission of the learned counsel is thus totally devoid of merits and cannot be accepted.

109. Insofar as the reliance placed by the learned counsel for the plaintiff on section 69 of the Indian Evidence Act in support of his submission that the son of Mr.Ramchand Bhromal Hirani had proved the handwritten of the said attesting witness and thus the same was in compliance with section 69 of the Indian Evidence Act, 1872 is concerned, it would be appropriate to refer to the evidence led by Mr.Ramesh Ramchand Hirani. In his affidavit in lieu of examination in chief filed on 20th March,2014, he has deposed that the plaintiff had shown him the handwritten original document dated 20th March,1980 of the said deceased. He perused the said handwritten original document and upon perusal, he easily could recognize and identify the signature of his father late Mr.Ramchand Hirani, appended on the said Will of the said deceased. In the left margin of the first page of the said Will as well as in the left margin of the second page of the said Will, he also allegedly identified the words "Retd.Postmaster, Baroda, G.P.O." written below the signature as the handwriting of his late father. The said witness filed further affidavit of examination in chief on 15th July, 2015. The said additional affidavit was filed on the premise that the original of the affidavit dated 20th March,2014 had been misplaced. In the said additional affidavit, he repeated, reiterated and adopted the statements made in the earlier affidavit.

110. However, in the cross-examination of the said witness, the said witness deposed that he knew the family of the plaintiff since last about 30 years including the plaintiff and his wife. He admitted that his father also knew the said deceased and his wife. He admitted that his father must be friendly with the members of the Jhangiani family. He deposed that his father expired on 20th February, 1981. The said witness was contacted by the plaintiff in the year 2012. He never discussed about the Will with the said witness before 2012. The said witness was asked by the plaintiff to make his affidavit only after 2012 for the first time. The said witness is advocate by profession. In reply to question no.19, the witness admitted that the signature shown by him at Ex.A in two places were not made in his presence. The said witness however volunteered that the signatures are very much familiar to him and he knew his father's signature and handwriting. When the witness was asked as to whether he knew when the said signatures were made, he replied that it must be when the Will was signed by the testator.

111. In reply to question no.22 when the witness was asked whether the document shown to him would show as to when his father had signed on that document, the said witness replied that he was asked to identify the signature of his father on pages 1 and 2 and he identified that both the signatures are of his father and apart from that he could not read the contents of the personal document like Will. The witness deposed that to his knowledge, must be on the very same date i.e. 20th March,1980, on the same date when the said late Mr.Khanchand Jhangiani had signed. In reply to question no.27, when a suggestion was put to the witness that Ex.A did not show for what purpose and when i.e. on what date, the signatures of what he

claimed to be of his father, the witness initially replied that he simply said that his father had signed the document as one of the main witness. When the witness was repeated the question, he admitted the suggestion put to him that Ex.A did not show for what purpose and when i.e. on what date, the signatures of what he claimed to be of his father's was affixed.

112. A perusal of the evidence of Mr.Ramesh Ramchand Hirani (PW-2) examined by the plaintiff clearly shows that he was not present when his alleged signature was taken on the alleged document. He also admitted that the said document does not show for what purpose and on what date the signature of his father was allegedly taken. He also bluntly replied that he could not read the contents of the personal document Will when he was asked whether document shown to him would show as to when his father had signed on the document. When the said witness was asked to answer the question put by the learned commissioner, he deposed that to his knowledge, the said document must be on the same day i.e. 20th March,1980 i.e. on the same date when late Mr.Khanchand Tekchand Jhangiani had signed. The father of the said witness was working with the Government Department of the Post Office since last several decades and retired as General Post Master. The said witness admitted that his father was qualified and he always used to write with clarity.

113. In my view, the said witness PW-2 examined by the plaintiff could not prove the signature or handwriting of his father on the said alleged Will as an attesting witness or otherwise. He was not present when his father had allegedly signed the said alleged

Will. The alleged Will was shown to him after 32 years. The said witness could not prove the date on which his father had allegedly attested the alleged Will. No reliance thus can be placed on the evidence of the said witness. The evidence of PW-2 thus would not prove the case of the plaintiff that the alleged Will was executed by the said deceased and was attested by his father as one of the attesting witness.

114. Insofar as the submission of the learned counsel for the plaintiff that the signature of the other attesting witness Dr.K.R. Chandiramani was identified by the plaintiff in his examination in chief or that there was absolutely no cross-examination on that aspect by the defendant and thus the signature of Dr.K.R. Chandiramani also stood proved is concerned, it would be appropriate to refer to the relevant part of the evidence of the plaintiff on this issue.

115. The plaintiff filed his affidavit in lieu of examination in chief (PW-4) on 16th July, 2015. In the said affidavit, he deposed that he was an executor of the last Will and Testament dated 20th March,1980 of his late father. At the time of death of the said deceased, he was 84 years of age and was of sound mind and enjoyed good health. He used to perform all his routine activities without any assistance from others till just a couple of months before his death on 20th July, 1984. He deposed that the said deceased was staying along with his wife, wife of the plaintiff and his two children at 15, New Hindustan Co-operative Housing Society Ltd., 270, Linking Road, Bandra (West), Mumbai – 400 050. The plaintiff retired from Indian Navy on July 1982. He came back to India on 11th July, 1984

from Saudi Arabia. The said deceased however expired on 20th July, 1984.

116. In paragraph (4) of the said affidavit, he deposed that after the death of his father, while going through documents and papers of his father, he found a folder containing various documents with a handwritten note in the said folder stating "WILL – OF ESTATE – Insurance papers etc.". In the said folder he also found a sealed envelope with a note in the handwriting of his father thereon stating that "Original Confidential (Will of Shri Khandchand T.Jhangiani) (to be opened after his death)". The said envelope was opened on 25th July, 1984 at about 3 p.m. by him when his sister Mrs.Sajini Malani was also present. The defendant was not present at that time since she was staying in U.K. He opened the said sealed envelope. He and his sister Mrs.Sajini Malani found another sealed envelope in it with a note on it "to be opened after my death". He and his sister Mrs.Sajini Malani opened the inner envelope and found a handwritten Will and Testament dated 20th March, 1980. The plaintiff as well as his sister Mrs.Sajini Malani put their respective signatures and names below the said note on the reverse of the said alleged Will.

117. In his affidavit, he deposed that he was familiar with the signature of the said Dr.K.R. Chandiramani as he had seen him signing on earlier occasion along with his father. He had produced photocopy of the affidavit dated 28th February, 2012 signed by his sister Mrs.Sajini Malani. The said witness also filed an additional affidavit in lieu of examination in chief on 1st February, 2016 annexing certain documents. In his cross-examination, Mr.Gobind Khanchand Jhangiani (PW-4) when the said witness was asked

whether before opening the envelope containing Ex.A, had he come to know that his father had made some document regarding his property to which he replied that his father informed him in 1983 that he had made a nomination in his mother's name and his name and also made a Will.

118. In reply to question no.3, however he deposed that in 1983 when his wife came back from Mumbai, she informed him that his father had made a Will. He admitted that his mother was alive when the father had expired. His mother had never told him that the father had made any document for his property. The mother of the plaintiff expired on 4th July, 1987. He admitted that the mother of the plaintiff was not present when the plaintiff claimed to have opened and found out Ex.A. She was in the next room. He deposed that he did not call his mother at the time of opening the envelope.

119. When the witness was asked that if his mother was not in a position, because of the mourning, what was the hurry to open the envelope and not wait till his mother was out of mourning, the plaintiff deposed that since his mother did not know English, it would make no sense for her to be present. Secondly, the plaintiff was to leave for Saudi Arabia. When the witness was asked as to how he came to know that the document was in English language even before opening the envelope containing Ex.A, the plaintiff deposed that his father's normal mode of communication was English. His wife even did not even know the existence of the envelope containing Ex.A. He did not know about the language of the document. He deposed that his wife did not mention the language but only said his father had made a Will. When the witness was asked that since 1980 till 1984,

when he opened the document, he had not seen Ex.A at all, he answered in affirmative.

120. The said witness deposed that when the envelope opened, he did not tell about the contents of the envelope to his mother immediately because sister Mrs.Sajini's reaction was very unhappy. When things cooled down, then they told her about it. When he was asked why was Sajini upset about, he deposed that this question shall be asked to her. He admitted that Sajini had filed a suit saying that his father had not left a Will. The witness deposed that the suit filed by the defendant and Sajini was initially dismissed. Advocate Mr.N.V.Adhia who was appearing for them had expired.

121. In reply to question nos. 36 and 37, the plaintiff admitted that he did not actually produce the Will in the suit filed by the defendant and Mrs.Sajini Malani for administration of the estates of the deceased. The suit never progressed to the stage where he had to produce the document. He admitted that in the written statement in that suit filed by the defendant and Mrs.Sajini Malani, though the plaintiff relied upon several documents and annexed copies thereof to the written statement, he did not annex a copy of the Ex.A i.e. alleged Will and Testament of the deceased father. In reply to question no.42, the witness admitted that the deceased had nominated his two sisters and the plaintiff only and not his mother. He admitted that the nomination was changed for the first time on 20th February, 1980 by omitting the name of others and making the plaintiff as the executive nominee in the society.

122. In reply to question no.49, when the witness was asked

whether during the period between July 1980 to June 1982, the said deceased and the mother of the plaintiff had stayed with him in his official quarters and whether he had talk with the parents regarding the properties of the said deceased, he replied that he told the said deceased that this was his last appointment before retirement and he asked the deceased's permission and blessings to develop the property. When the witness was asked to inform whether he had asked the said deceased how he was going to dispose off his property after his death, he replied that there was no need to ask his father as they all knew all along that the property would be coming to the plaintiff and the reasons are amply explained in paragraph (2) of the Will. The witness admitted that there was no property in the name of the mother and she did not have any source of income of her own.

123. In reply to question no.72, the witness admitted that he was contesting the suit filed by the defendant and Mrs.Sajini Malani with the help of a lawyer. He further admitted that he had shown Ex.A to his lawyers. When the witness was asked whether any of the lawyers advised him to file probate petition as it would be a complete answer to the 1984 suit, the witness deposed that none of the lawyers gave such advice and on the contrary he was advised that it was a family dispute and would be resolved with the passage of time when the things cool down. He deposed that he made a serious mistake in not going for probate petition immediately after his mother expired in 1987.

124. In reply to question no.77 when the witness was asked whether it was not correct that he did not file probate petition because

he was short of money, he deposed that initially that was correct. When he was asked what was the initial period, he deposed that it was till 1987-1988. he found that cost in filing probate petition at that time was Rs.10,000/-. He went to Saudi Arabia for employment. His salary was around 2000\$ a month. When the witness was asked whether he was going to examine Mrs.Sajini Malani in this case, the witness answered in negative. The witness admitted that the said deceased and his mother and the mother of the plaintiff had good relations between them and did not have any differences. The witness admitted that the said deceased had written a letter to the society that he was transferring all his rights in respect of the first floor to his wife and asked the society to make wife of the plaintiff as member of the society and to allow the shares to her in respect of the first floor.

125. The plaintiff had also made a statement on oath that his wife is the owner of the first floor premises and he wanted to make his wife party to the suit filed in the year 1986 by the defendant and Mrs.Sajini Malani. He admitted that the nomination in favour of the daughters came to be cancelled on 20th February, 1980 and came to be exclusively in favour of the plaintiff on 20th February, 1980. He admitted that there was a difference of one month between the nomination of the single name and the date of the Will.

126. In reply to question no.133, when the witness was asked whether it was correct to say that prior to 20th March,1980, the deceased had visited the hospital for various health check ups, the witness deposed that he really would not know as he was not around in Bombay. He did remember that in or about 1975 the said

deceased had a heart problem and he had taken the said deceased to Vishakhapattanam for usual treatment and care. He admitted that the relationship that existed between his parents and the defendant in 1980 was normal and warmed as is the relationship between the parents and their daughter. The witness admitted that share certificate of the society was transferred in the joint name of the plaintiff and his mother. He deposed that the name of the mother was however deleted from the share certificate of the suit premises on 29th March,2011 when the Suit No.584 of 1986 stood dismissed. The alleged Will of the mother was not shown to the society. He admitted that in the pleadings filed by the plaintiff in the Suit no.584 of 1986, he had not spoken of or mentioned anywhere about the endorsement on the reverse of the Will at Ex.A. He admitted that there was no endorsement of his mother of having seen a Will of Ex.A.

127. In reply to question no.151, the witness deposed that his sister Sajini was upset with the contents of the Will after opening of the Will of the deceased. In reply to question no.174, when the suggestion was put to the witness that at the time of execution of the Will, the deceased did not witness the signatures of any of the attesting witnesses, the witness did not agree to the said suggestion. Similarly he also did not agree to the suggestion put to him that neither of the witnesses had witnessed or seen the said deceased placing his signatures on the Will at Ex.A. It is thus clear that there is no substance in case of the plaintiff that the Will was attested by Dr.K.R. Chandiramani or that there was no cross-examination on the said part of the evidence of the plaintiff as sought to be canvassed by the learned counsel for the plaintiff.

128. A perusal of the evidence summarized aforesaid would clearly indicate that the plaintiff was pressurizing the said deceased for transferring the property in his name and accordingly the wife of the plaintiff had visited Mumbai so that the said deceased could execute the document to transfer the immoveable property in favour of the plaintiff. Insofar as the judgment of Delhi High Court in case of **Jagdish Prasad** (supra) learned counsel for the plaintiff is concerned, the facts of the said case before the Delhi High Court in the said judgment are totally different and clearly distinguishable in the facts of this case.

129. Insofar as reliance placed on Rule 384 of the Bombay High Court (Original Side) Rules by the learned counsel appearing for the plaintiff is concerned, in this case, the plaintiff has filed a testamentary petition after about 28 years from the demise of the said deceased. In the meanwhile, both the alleged attesting witnesses expired. Insofar as the evidence of PW 1 sought to be relied upon by the plaintiff is concerned, PW 1 is the wife of the plaintiff. In my view, there being several inconsistencies and contradictions in her affidavit in lieu of examination in chief and the cross-examination, her evidence cannot be relied upon even on that ground. She is an unreliable witness. Except her bare allegations that she was present at the time of the alleged execution of the Will, PW 1 could not produce any other proof of her presence at the time of the alleged execution of the Will.

130. Insofar as the affidavit of evidence of Ramesh Ramchandra Hirani relied upon by the learned counsel appearing for

the plaintiff is concerned, for the reasons already recorded aforesaid while dealing with the evidence of the said witness, in my view, the evidence of the said witness also cannot be considered in compliance with section 69 of the Indian Evidence Act or otherwise. The said witness failed to prove that the alleged attestation of his father was in the hand writing of his father and that the signature of the person executing the document was in the handwriting of that person. The said witness having failed to comply with the requirements of section 69 of the Indian Evidence Act, 1872, his evidence also could be of no assistance to the plaintiff.

131. Insofar as reliance placed on the evidence of Vinod K. Gidwani, Secretary of New Hindustan Co-operative Housing Society Limited is concerned, the parties have no dispute that the said deceased had filed various nomination forms in favour of the daughters and the plaintiff and the wife of the said deceased. These documents would not prove the execution of the alleged Will. The evidence of the said witness thus is of no assistance to the plaintiff.

132. The plaintiff has failed to prove that the said deceased had already told him that the property was bequeathed to him or he was going to get the said property from the said deceased and in the meeting between the plaintiff with the parents, the plaintiff had asked the permission of the deceased and his blessings to develop the property. I am inclined to accept the submission of the learned counsel for the defendant that the plaintiff had pressurized and had caused undue influence upon the said deceased to execute the said alleged Will in favour of the plaintiff.

133. Insofar as reliance placed on various answers given by the defendant in her evidence by the learned counsel for the plaintiff is concerned, it is not in dispute that the defendant as well as her sisters had filed a suit for administration of the estate of the said deceased on premise that the said deceased had died intestate. The plaintiff had not produced the said alleged Will in the said proceedings. If the said alleged Will was already executed as far back in the year 1980, the plaintiff ought to have produced the said Will in the suit filed by the defendant jointly with her sister Sajini Malani. In my view, the defendant in her evidence has clearly disputed the existence of the alleged Will and had made several allegations in the affidavit in support of the caveat. Admittedly the plaintiff had not informed the defendant about the execution of the alleged Will for quite some time. Even when the said envelope containing the alleged Will was opened according to the plaintiff, the plaintiff admittedly did not inform the defendant or even his mother.

134. Insofar as the judgment of the Supreme Court in case of **Savithri & Ors.** (supra) relied upon by the learned counsel for the plaintiff is concerned, the Supreme Court has adverted to the earlier judgment of the Supreme Court in case of **H. Venkatachala Iyengar** (supra) **(2002) 2 SCC 85** in which it was held that that when a doubt is created in regard to the condition of mind of the testator despite his signature on the Will, when the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances and where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit, such circumstances would be relevant for determination of existence of suspicious circumstances.

135. In my view, each of these principles laid down by the Supreme Court apply to the facts of this case. Though the wife of the said deceased was admittedly staying with him all through out and admittedly the relations between the said deceased and the caveator daughters, and the wife were always cordial, the said deceased would not have excluded his own wife and daughters from bequeathing any property in their favour. PW 1 examined by the plaintiff herself admitted in her cross-examination that the plaintiff had deputed her to Mumbai to obtain a writing from the said deceased for bequeathing the property in his favour. The plaintiff and his wife having played prominent part in the alleged execution of the Will conferring substantial benefit upon the plaintiff, on this ground alone the alleged Will has to be rejected on the ground of existence of suspicious circumstance. The principles laid down by the Supreme Court in case of **Savithri & Ors.** (supra) would assist the case of the defendant and not the plaintiff.

136. Insofar as the judgment of this Court in case of **S.M. Nooruddin** (supra) relied upon by the learned counsel appearing for the plaintiff is concerned, this Court rejected the contention of the defendant about the validity of the Will on the ground that there was cross-examination of three witnesses, which identified the signature of the deceased. In the facts of this case, the defendant has raised serious doubt about the alleged execution of the said Will and also to the effect that the maker of the alleged Will had not seen the signatures of the alleged attesting witnesses and *vice-versa*. The judgment of this Court in case of **S.M. Nooruddin** (supra) thus would not assist the case of the plaintiff and is clearly distinguishable in the

facts of this case.

137. Insofar the judgment of the Madras High Court in case of **Ponnuswami Goundan & Anr.** (supra) relied by the learned counsel for the plaintiff is concerned, it is held by the Madras High Court that since neither of the remaining attesting witnesses could be called, secondary evidence with regard to their attestation is admissible. It is held that the evidence of somebody who either saw them attesting or is familiar with their signatures can be considered. There is no dispute about the proposition of law laid down by the Madras High Court. However, the plaintiff by leading secondary evidence also has failed to prove the handwriting of one of the alleged attesting witness. The judgment of the Madras High court thus would not assist the case of the plaintiff.

138. Insofar as the judgment of the Madras High Court in case of **G. Vaidehi** (supra) relied upon by the learned counsel for the plaintiff is concerned, the Madras High Court has held that it cannot be contended by any stretch of imagination that in case where the attesting witnesses were dead, the Will could not be proved otherwise though one of such situation is envisages under section 69 of the Evidence Act. In the facts of this case, however the plaintiff has failed to prove the attestation even by leading secondary evidence. The said judgment of the Madras High Court in case of **G. Vaidehi** (supra) thus would not assist the case of the plaintiff.

139. Insofar as the judgment of the Supreme Court in case of **Joyce Primrose Prestor (Mrs.) (Nee Vas)** (supra) relied upon by the learned counsel for the plaintiff is concerned, the Supreme Court has

held that in case of holograph Will, the presumption is greater than the presumption in case of ordinary Wills. There cannot be any dispute about this proposition of law. In that case, the Supreme Court had rendered a finding that the handwriting of the Will and the signature of the testator was admitted. There was also due and proper attestation in accordance with the relevant statutory provisions. No suspicious circumstances had appeared on the face of the document. The Will appeared to be moderate and rational. After considering these facts, the Supreme Court held that there was a great presumption even bordering on actual proof of the due execution and attestation of the Will. The facts before the Supreme Court were totally different and are clearly distinguishable in the facts of this case. The said judgment thus would not assist the case of the plaintiff.

140. Insofar as the judgment of the Supreme Court in case of **Bharpur Singh & Ors.** (supra) relied by the learned counsel for the defendant is concerned, it is held by the Supreme Court that if the Will is surrounded by suspicious circumstances unless suspicious circumstances are dispelled by the propounder of Will such Will would not be treated as the last testamentary disposition of the testator. Its proof ceases to be a simple lis between the plaintiff and the defendant. An adversarial proceeding in such cases becomes a matter of Court's conscience and propounder of the Will has to remove all suspicious circumstances to satisfy that the Will was duly executed by the testator.

141. In the facts of this case, the wife of the plaintiff was alleged to be present and was sent to Mumbai to obtain the writing

from the said deceased for transfer of property in favour of the plaintiff. The alleged signature of one of the witness was dated 24th February, 2000 after four days of the alleged signature of the testator. The nomination was changed in the name of the plaintiff exclusively in the records of the society one month prior to the date of execution of the alleged Will. The wife of the said deceased though did not have any source of income or any other property and though the said deceased had cordial relation with the wife and the defendant, did not bequeath any property in their favour. The plaintiff failed to remove such suspicious circumstances by leading cogent and reliable evidence. The principles of law laid down by the Supreme Court in case of **Bharpur Singh & Ors.** (supra) clearly applies to the facts of this case. I am respectfully bound by the said judgment.

142. There is no dispute that there was delay of 28 years in filing the testamentary petition by the plaintiff. Though the defendant jointly with her sister Sajini Malani had already filed a suit for administration of the estate of the said deceased on the premise that he had died intestate and the plaintiff was appearing in the said suit through an advocate, the plaintiff did not produce a copy or the original of the alleged Will in the said proceedings. At one stage the plaintiff allegedly did not have an amount of Rs.10,000/- with him for filing the testamentary petition at the relevant time. In his cross-examination however, he admitted that he was already working at the relevant time and was getting the salary of US \$ 2000 per month. The plaintiff was bound to explain the delay of 28 years in filing the testamentary petition. No explanation is rendered by the plaintiff for 28 years in filing the testamentary petition. This Court in case of **John Francis Anthony Gonsalves & Anr.** (supra) has held that

non-explanation of delay in the petition itself is strong circumstance that would have to be held against the plaintiff. In that case also, the testamentary petition was filed after more than 21 years. The judgment of this Court in case of **John Francis Anthony Gonsalves & Anr.** (supra) would apply to the facts of this case. I am respectfully bound by the said judgment.

143. There being a delay of 28 years in filing the testamentary petition, the same being one of the strongest circumstances against the plaintiff has to be considered by this Court against the plaintiff. The plaintiff did not examine his sister Sajini Malani who had though initially was one of the co-plaintiff in the suit for administration of estate filed on the premise that the said deceased died intestate had allegedly filed an affidavit supporting the case of the plaintiff. The plaintiff had not brought on record in the said suit that the said Sajini Malani was shown the original of the said alleged Will and had put her endorsement on the back side of the said alleged Will.

144. In the judgment delivered by the Andhra Pradesh High Court in case of **Dr.M. Ratna** (supra) relied upon by the learned counsel for the defendant, it has been held that under section 63(c) of the Indian Succession Act, 1925, an attesting witness is one who signs the document in presence of the executant after seeing the execution of the document or after receiving personal acknowledgement from the executor as regards the execution of the document. The Andhra Pradesh High Court distinguished the judgment of the Supreme Court in case of **Beni Chand vs. Kamla Kunwar, AIR 1977 SC 63** in which it was held by the Supreme Court that “by attestation” is meant the signing of a document to signify that

the attester is a witness to the execution of the document.

145. In my view the obligation was on the plaintiff to prove that the Will was executed by the said deceased and was duly attested in accordance with section 69 of the Evidence Act read with 63(c) of the Indian Succession Act, 1925. Though none of the alleged attesting witnesses were available when then testamentary petition was filed by the plaintiff, the plaintiff failed to prove the conditions prescribed under section 63(c) of the Indian Succession Act, 1925 read with section 69 of the Evidence Act. The judgment of the Andhra Pradesh in case of **Dr.M. Ratna** (supra) and the judgment of the Supreme Court in case of **Beni Chand** (supra) would apply to the facts of this case. I am respectfully bound by the judgment of the Supreme Court in case of **Beni Chand** (supra). I am in agreement with the views expressed by the Andhra Pradesh High Court in case of **Dr.M. Ratna** (supra).

146. For the reasons recorded aforesaid, I am of the view that the plaintiff has failed to prove the execution and attestation of the alleged Will dated 20th March, 1980 of the deceased Khanchand Jhangiani in accordance with law and thus issue no.1 is answered in the negative.

147. In my view, the defendant has proved that the purported Will was obtained under coercion and undue influence for the aforesaid reasons and thus issue no.2 is answered in the affirmative.

148. Insofar as issue no.3 is concerned, since this Court has answered issue no.1 in the negative and issue no.2 in the

affirmative, the plaintiff is not entitled to probate of the alleged Will and Testament of the deceased Khanchand Jhangiani and thus the said issue is answered in the negative. Insofar as issue no.4 is concerned, it is answered as per operative part of the judgment.

149. I therefore, pass the following order :-

a). Testamentary Suit No.183 of 2013 is dismissed with costs quantified at Rs.1,00,000/- which shall be paid by the plaintiff to the defendant within two weeks from today.

(R.D. DHANUKA, J.)