

(2016) 07 BOM CK 0164

In the Bombay High Court

Case No : Testamentary Suit No. 37 of 1995 in Testamentary Petition No. 242 of 1994

Bhavesh Vinodrai Doshi

APPELLANT

Vs

Smt. Hansaben Vinodrai Doshi

RESPONDENT

Date of Decision : 22-07-2016

Acts Referred:

Succession Act, 1925 — Section 59, 63

Citation : (2016) 5 AIRBomR 340

Hon'ble Judges : G.S. Patel, J.

Bench : Single Bench

Advocate : Mr. Naresh Ratnani, with Mr. A. Sharma, i/b Ashwin Ankhad & Associates, for the Plaintiff; Mr. Yogesh Yagnik, Advocate, for the Defendant

Final Decision : Dismissed

Judgement

G.S. Patel, J.—The Plaintiff ("Bhavesh") propounds a testamentary writing that he claims says was the Last Will & Testament of his father Vinodrai Bachubhai Doshi ("Vinodrai").(1) The Will is said to be dated 7th January 1993. Vinodrai died on 23rd January 1993. Bhavesh says his father made the Will at home, 905, Chandanbala Apartments, 4, Ratilal Thakker Marg, Malabar Hill, Mumbai 400 006. The Petition is for Letters of Administration with Will Annexed.

(1) Paper book, p. 6.

2. Vinodrai's only heirs were his son, the Plaintiff ("Bhavesh"); his widow, the 1st Defendant, Smt. Hansaben Vinodrai Doshi ("Hansaben"); and their married daughter, Mrs. Rita Amit Shah, the 2nd Defendant ("Rita"). After her marriage, Rita lives not far from the Chandanbala Apartments flat at Walkeshwar Road.

3. The Petition was initially opposed by both Hansaben and Rita. It seems that Hansaben later attempted to withdraw her Caveat.(2) Rita opposed the Petition to the very end.

(2) Paper book, pp. 37 & 40.

4. The Will in question, marked in evidence as Exhibit "A", is a holograph, i.e., a handwritten Will in Gujarati. It has two pages. Vinodrai is said to have signed it at the foot of its second page. His name is written in English beneath his signature. To the left of his signature are the signatures of the two persons said to be witnesses. The first is one Manish Doshi. The second is one Dr. Mahesh J. Kapadia, a physician. There is an official translation of the Will on record.(3)

(3) Paper book, p. 8.

5. In the Will, the testator left his residential flat at Chandanbala Apartments to Bhavesh. He also left to Bhavesh his office premises at 50, Nagdevi Street, First Floor, Bombay 400 003. In Clause 3, the deceased divided his ornaments equally between Bhavesh and Rita. Clause 4 said that all other wealth was to be divided equally between Hansa, Bhavesh and Rita.

6. The next Clause, with no number, lists five separate properties in Navi Mumbai and Ahmedabad. These are said to be in the names of Vinodrai with either Hansaben or Bhavesh. These are all left to the person whose name appears second. Here again it seems that Bhavesh has a share in all five properties and an exclusive title in three of these five. In the other two, Hansaben has an interest.

7. Hansaben filed a caveat and an Affidavit in Support.(4) Rita adopted it. The Affidavit in Support has several allegations. The Defendants say that the Will is unnatural; that the signature on the Will is not Vinodrai's; and that if it is genuine, it was made under undue influence at a time when Vinodrai wholly lacked testamentary capacity. Specifically, the Affidavit in Support of the Caveat says that on the day on which the alleged Will was executed, both Rita and Hansaben were in the house.(5) They have no knowledge of any such execution. The Testator did not mention any such execution either.(6) They deny that either of the witnesses, or anybody else, ever visited the house on 7th January 1993. As to the first attesting witness, Manish Doshi, the Defendants say that not only is he Bhavesh and Rita's first cousin (Manish Doshi's father, Umedbhai, and Vinodrai were brothers), but that he is particularly close to Bhavesh. The Defendants also say that the Will is entirely suspicious: though written in Gujarati, it is allegedly signed in English, but there is no mention that the Will was ever read over and explained to Vinodrai.(7) There is also no explanation as to how Bhavesh came upon the Will, or when.

(4) Paper book, p. 24.

(5) Affidavit in Support of Caveat, paragraph 6, p. 26.

(6) Affidavit in Support of Caveat, paragraph 3, p. 25.

(7) Affidavit in Support of Caveat, paragraph 6, p. 27.

8. More importantly, the Affidavit says that at that time, and ever since 1988,

Vinodrai suffered from cirrhosis. He had extensive liver damage. He contracted malarial fever in December 1998. This led to jaundice. On 22nd December 1992, he was admitted to the ICU at Harkisondas Hospital. The doctors said that his liver was completely destroyed. It was because he expressed a wish not to die in hospital that he was brought home on 4th January 1993. Given his medical condition of advanced liver damage, he was very nearly comatose. Hansaben says she was by his side throughout those last days. His health deteriorated daily. It was not possible to move him back to hospital at that time: the city was under a curfew following the riots of that year. Ultimately, he was taken back to hospital, but that was only on 14th January 1993. He died a few days later, on 23rd January 1993.(8)

(8) Defendant's Evidence Affidavit, paragraphs 3-5, pp. 125-126.

9. In the Affidavit, Hansaben also says (and Rita reiterates this in her Evidence) that the Will is completely unnatural. It leaves nothing to Rita or to her, though she, Hansaben, devoted her life to her husband and their home, and they lived a happy married life.

Hansaben herself does not speak English. She has no source of income. She never has had, and was always dependent on the deceased. As recently as 1991, Vinodrai executed a nomination in respect of the Chandanbala Apartments flat. Hansaben was his sole nominee of this flat. That nomination form is marked in evidence as Exhibit "B1".(9) In the Affidavit, therefore, Hansaben questions why, given all this, Vinodrai would have excluded her so totally from the Will and made no provision for her at all.

(9) Paper book, p. 448.

10. She also says that Vinodrai was very fond of their daughter Rita. If he did have any disagreement, it was with Bhavesh, not Rita; and these disagreements became more frequent after Bhavesh's marriage. She specifically accuses Bhavesh of harassing her and of trying to usurp the flat of which it was she, Hansaben, and not he who was the nominee.(10)

(10) Affidavit in Support of Caveat, paragraph 9, p. 30.

11. I may only note that there is on record an Affidavit filed by Hansaben for leave to withdraw the Caveat saying that she was pressured in to filing it by her daughter, Rita.(11) I do not find any formal order allowing this withdrawal. In fact, till as late as 7th September 2010, when issues were framed, Hansaben was shown as one of the Defendants. In later orders, her name is not shown. In any case, this makes a little difference given that both the Plaintiff and Rita, the 2nd Defendant, went to trial on this understanding.

(11) Paper book, pp. 37-38.

12. Issues were framed on 7th September 2010. Before me, both Mr. Ratnani for the Plaintiff and Mr. Yagnik for the 2nd Defendant agreed that those issues

needed to be recast, as they did not correctly reflect the understanding and basis on which the parties proceeded to trial. Grounds specifically taken in the Affidavit in Support of the Caveat appear to have been missed out as issues though they clearly arise. Hence, at their request, I proceeded to frame issues afresh. These are set out below with my answers noted against each.

Sr. No.

Issues

Findings

1.

Whether the Plaintiffs prove that the writing dated 7th January 1993 was duly and validly executed and attested in accordance with law as the last Will and Testament of the deceased, Vinodrai Bachubhai Doshi?

In the negative

2.

Whether the Plaintiffs prove that at the time of the said alleged Will, the deceased was of sound and disposing state of mind, memory and understanding?

In the negative

3.

Whether the Defendant proves that the alleged Will is unnatural?

In the affirmative.

4.

Whether the Defendant proves that the alleged Will was procured by undue influence and pressure?

Does not survive.

5.

What reliefs and what orders?

As per final order.

13. The Plaintiff examined both attesting witnesses. The Plaintiff did not, however, examine himself. This is a matter that will have a significant bearing on the outcome of this particular contest. For her part, the Defendant, Rita, examined herself and a handwriting expert, one Mr. Neerav Vasa, DW2.

14. I heard Mr. Ratnani for the Plaintiff at some length on 14th July 2016 and Mr. Yagnik briefly, to the extent I thought necessary. By the time the hearing concluded, it was 5:00 pm. Rather than proceed to dictate judgment in open

Court, as I would otherwise have done, I reserved it and posted it to today, 22nd July 2016, for pronouncement. In the meantime, before the judgment was pronounced, the Plaintiff moved Chamber Summons No. 112 of 2016 inter alia seeking to reopen the evidence and for leave to lead his own evidence, that of Pravin Mehta, who played a role in the making of the Will and, to my very great surprise, of Hansaben, though she is still a Defendant. By an order dated 20th July 2016, I dismissed that Chamber Summons. I am therefore proceeding to pronounce this judgment.

Re: Issues 1 and 2

15. It is now well-settled that these two issues are the necessary components of constituents that must be established if a Will is to be duly proved. They are covered respectively by Section 63 and 59 of the Indian Succession Act, 1925. The first aspect speaks to the manner and mode of execution. There must be two witnesses and each must have seen the testator sign or received from him an acknowledgement of his having signed the Will, or must have seen some persons sign at the testator's request and on his behalf. The two witnesses need not both be present at the same time. Section 59 speaks soundness of mind and it says that any adult may make a Will provided that he is not of unsound mind. The initial burden therefore is squarely on the Plaintiff to establish both these facts. Now establishing the first, it must be shown that the witnesses were actually present at the time when they say the Will was signed and executed.

16. To establish this, the Plaintiff first led the evidence of the first attesting witness, Manish Umedbhai Doshi, PW1. He filed an Evidence Affidavit⁽¹²⁾ on which he was then extensively cross examined.⁽¹³⁾ He says in his Evidence Affidavit that one Pravin Mehta, his father's sister's husband (i.e., his uncle) informed him on 5th January 1993 that Vinodrai had asked Pravin Mehta to prepare his Will, and that he had done so. Manish Doshi does not say in his Affidavit why Vinodrai asked Pravin Mehta to do this, or why Pravin Mehta spoke to Manish about it. He does say that it was Pravin Mehta who told him that he would have to be present at Vinodrai's house at Chandanbala Apartments, Nepeansea Road on 7th January 1993 at about 12.30 p.m. as an attesting witness.

(12) Paper book, pp. 44-46.

(13) Paper book, pp. 47-74.

17. The next sentence of paragraph 1 is important. It reads thus:⁽¹⁴⁾

(14) Paper book, p. 44.

"1. ? ? ? The said Pravinbhai also asked me to inform Dr. Mahesh Kapadia the family Doctor of the deceased to remain present on the said day at the same time to sign the said Will as the second attesting witness. I accordingly informed the said Doctor."

I note this because something turns on whether or not any of this was possible on that date, and also because we see here no evidence of Vinodrai ever asking Pravin Mehta to draw up the Will, or of Vinodrai asking either Manish Doshi or Dr. Mahesh Kapadia to be witnesses. Indeed, I imagine that a very great deal of this Affidavit is inadmissible in evidence.

18. To begin with, paragraph 1 of this Affidavit itself raises several questions. PW1, Manish Doshi, the first attesting witness to the Will, has himself no personal knowledge whether Vinodrai ever asked Pravin Mehta to draw up the Will. Second, the entire chain of events is very peculiar. Vinodrai does not seem to have spoken to PW1 or PW2 directly. All that we are told is that PW1 was informed by Pravin Mehta that Vinodrai had spoken to him; asked him to prepare the Will; asked him (Pravin Mehta) to ask PW1 (Manish Doshi) to be a witness and apparently told Pravin to tell PW1 to tell PW2 to be the second witness. This is altogether too far-fetched.

19. I should also note that P.W. 1 says that on 7th January 1993, he went to Vinodrai's house between 12.30 and 1 p.m. He claims that apart from himself and Vinodrai, P.W. 2 Dr. Mahesh Kapadia and P.W. 1's uncle, Pravin Mehta, were both present.(15) This latter fact is of some consequence because it is admitted that Pravin Mehta lived in Ghatkopar and the Defendant has been able to demonstrate that during this time most of Mumbai was under a curfew due to the riots of January 1993. This is also to be read with the 2nd Defendant's testimony, to which I will presently turn, that she and Hansaben were home at that time and that nobody came to the house at Chandanbala Apartments. The Defendant also says that Vinodrai was, by this time, nearly in a coma. He was throwing up blood. He was in no condition to move about. He died a few days later.

(15) PW1's Evidence Affidavit, paragraphs 2 and 3, pp. 44-45; Qn. 48, p. 96.

20. Under cross examination, P.W.1 admits that he also lives in another wing of Chandanbala society.(16) He says, however, that he does not remember the flat numbers, including his own(17). He admits that he and the Plaintiff are first cousins(18). They had other brothers as well. He provides their names.(19) That the flat itself is valuable is not disputed: PW1 puts the value at Rs. 8-9 Crores. (20) As to the relations between Bhavesh and Hansaben, he says that they were good,(21) but that relations between Bhavesh and Rita were not.(22) More importantly, PW1 admits that Vinodrai was suffering from liver disease for several years.(23) We then come to the question of preparation of the Will. Here questions 130 to 137 are important. They read:

(16) Qns. 20-22, p. 52.

(17) Q. 39 p. 54.

(18) Qs. 73 and 74 p. 58.

(19) Qs.76 and 77 p. 58

(20) Q. 88 p. 60.

(21) Q.113 p .165.

(22) Q.114 p. 165

(23) Q.120-121 p. 166

"Q.130 According to your affidavit the Will was prepared on 5th January 1993 by Mr. Pravin Mehta as per your affidavit. Is it correct?

A. According to my affidavit Mr. Pravin Mehta informed me on 5th January. I do not know the exact date on which he has prepared the Will. (Shown paragraph 1 of the Affidavit of the Witness)

Q. 131 You have said in your affidavit that the Will was prepared on 5th January 1993. Is it correct?

A. In my affidavit, I have mentioned that Pravin Mehta informed me on 5th January 1993. I have not mentioned 5th January 1993 as the date of preparation of the Will.

Q. 132 So according to you, the Will was not prepared on 5th January 1993?

A. Nowhere I have stated when it was prepared.

Q. 133 You were informed about the Will by Mr. Pravin Mehta. Is it true?

A. Yes.

Q. 134 He also informed you that the Will is prepared. Is it true?

A. Yes.

Q. 135 He also informed you to remain present for signing the Will. Is it true?

A. Yes. Mr. Mody objects to the line of questioning on the ground that all this has been stated in the affidavit of the witness.

Q. 136 Mr. Pravin Mehta informed you to inform Mr. Mahesh Kapadia for signing the Will. Is it true or false?

A. True.

Q. 137 If I say that the Will dated 7th January 1993 was prepared on 5th January 1993. Is it true?

Mr. Mody objects to the question on the ground that the witness has already stated that he does not know when the Will was prepared.

A. I do not know the exact date on which the Will was prepared.

21. For some strange reason, PW1 says that it was he who was in possession of the Will after it was executed.(24) If this be so, this raises a question about when and how the Plaintiff obtained a copy of it. PW 1 says that before the Will was

signed, it was with Pravin Mehta; after it was signed, the Will was with PW1; and thereafter it was with the Plaintiff.(25) When this was handed over to the Plaintiff is again not stated. If there was any doubt that it was he who called Dr. Mahesh Kapadia, PW2, and did so at the instance of Pravin Mehta, this is put to rest by his answers to questions 178 and 179,(26) where he admits this. The Will itself has a blank for the age of the deceased. This was filled in later. However, PW1, although he claims that he was present at the time when it was signed, says he does not know who filled in this blank or when.(27) PW1 does admit that the Will is in the handwriting of Pravin Mehta.(28) In further cross-examination he was shown a nomination form in respect of the flat in favour of Hansaben. This was taken on record.

(24) Qn.163, p.171

(25) Qn. 232, p. 84

(26) Paper book, p. 176.

(27) Qns. 206-208, p. 79.

(28) Qn. 46, p. 85.

22. The evidence of PW2 does not assist matters. He says that PW1 is his patient as was the deceased. He confirms that he was informed by PW1 to remain present on 7th January 1993 at Chandanbala Apartments to be a witness to the execution of a Will by Vinodrai. He claims that he agreed because he was a family doctor of the deceased. He says that PW 1 and Mr. Pravin Mehta were present at that time and that Vinodrai was lying on the bed in the bedroom when he was there. He claims to have spoken to Vinodrai at that time.(29)

(29) PW2's Evidence Affidavit, paragraphs 1 and 2, pp. 102 and 103.

23. PW2 was cross-examined at his clinic from 16th December 2013 onwards. (30) I find his conduct in cross-examination most unacceptable. He seems to have been under the impression that the questions were irrelevant; at some point he stopped answering them, and retreated into a sulken and taciturn mood. He does, however, say that it was he who detected Vinodrai's liver condition.(31) However, from Question 19 onward his evidence deteriorates. There is a note by the Commissioner(32) to the effect that the witness appeared upset and exasperated due to his impression that the questions were personal and were "nonsense", and that he expressed this during his cross-examination. Perhaps as a result of this, from Question 29 onwards, the witness kept answering in the vaguest of the terms, saying that he did not remember and so on.(33) He was asked a general question as to what he noticed when he went to Vinodrai's residence.(34) His answer was that "he must have seen Vinod Doshi either sitting or lying on a bed". This answer not only contradicts his examination-in-chief but is no answer at all. It continues in this vein with more denials of remembering anything. Questions 29 to 46 read thus:(35)

(30) Paper book, pp. 106-123.

(31) Qn. 8, p. 111.

(32) Paper book, p. 114.

(33) Paper book, p. 114.

(34) Qn. 31, p. 114.

(35) Paper book, pp. 114-118.

Q.29 Is it correct that Mr. Amit Shah who is present today, was present on that day?

Ans. I do not remember.

Q.30 Is it correct that Mrs Rita Amit Shah, who is present today, was present on that day?

Ans. I do not remember anything.

Q.31 When you went to the residence of the Testator, what did you notice?

Ans. I must have seen Mr. Vinod Doshi sitting or lying down on the bed.

Q.32 Who were by the side of his bed?

Ans. I do not remember.

Q.33 Do you know which was the hospital from where the deceased was last discharged?

Ans. I do not remember.

Q.34 Do you know how many times was the deceased admitted and readmitted in the hospital?

Ans. I do not remember.

Q.35 Do you know the reason why the deceased was discharged from the hospital on the last occasion?

Ans. I do not remember.

Q.36 Can you tell us how many times you have paid visits to the Testator while he was admitted in the hospital?

Ans. Generally, I visit the patient at least once when he is hospitalised.

Q.37 What would you do generally if there is a curfew in the area whether you will stay home or you will go out?

Ans. If there is a curfew I will be where I am.

Q.38 I put it to you that the Testator was discharged from the hospital due to

there being a riotous condition and curfew in the area so that Doctors also were not in a position to attend to the patient/hospital. What do you have to say about this?

Ans. I do not remember anything like this.

Q.39 I put it to you that on 7th January, 1993, there was a curfew in the area. What would you say about that?

Ans. I do not know.

Q.40 Are you aware that on 7th January, 1993, the Testator vomited blood and thereafter he became unconscious?

Ans. I do not remember.

Q.41 As a Doctor do you agree that if the condition of the patient is such as is mentioned in the above question, it cannot be said that the patient is in a proper state of health and mind?

Ans. In the field of medicine, if a patient has vomited blood that does not mean that he is unconscious. If a person is unconscious, then I cannot say anything more.

Q.42 Are you aware how many family members are there in the family of the deceased Mr. Vinod Doshi?

Ans. I know that the family of Mr. Vinod Doshi comprised of Mr. Vinod Doshi himself, his wife Hansa Doshhi and his son Bhavesh and daughter Rita,

Q.43 Are you aware that as on 7th January, 1993, Mr. Bhavesh Doshi was married and that his wife was also there in the family?

Ans. I do not remember.

Q.44 Would it be correct to say that after vomiting blood and becoming unconscious, the person would not be in a position to walk around or get out of the bed?

Ans. If the person is unconscious, he would not be able to walk.

Q.45 I put it to you that on 7th January, 1993, Mr. Vinod Doshi was in the same condition and he was not in a position to walk or get out of the bed.

Ans. I do not remember.

Q.46 Will it be correct to say that if a person is suffering from liver cirrhosis, he can vomit blood and become unconscious?

Ans. Yes. Any person can be unconscious or semi unconscious.

24. In my view, this cross-examination is fatal to the Plaintiff's case. The second attesting witness, PW2, a medical doctor, seems to have all but abandoned any

pretence of confirming his testimony in chief. The next set of questions, to do with the signatures on the Will, is the final nail in the coffin.(36) This is what the witness says:

(36) Paper book, pp. 118-119.

Q. 47 Can you identify the signature now shown to you?

Ans. After looking at the signature, it looks to me that it is either "U.B. Doshi" or "V.B. Doshi".

(Attention of the witness is drawn to Exhibit PW3(a) which is contained on Exhibit PW3.)

Q. 48 Can you identify the signature now shown to you?

Ans. After looking at the signature, it looks to me that it is either "U.B. Doshi" or "V.B. Doshi".

(Attention of the witness is drawn to Exhibit PW4(a) which is contained on Exhibit PW4.)

Q. 49 Can you identify the signature now shown to you?

Ans. After looking at the signature, it looks to me that it is either "U.B. Doshi" or "V.B. Doshi".

(Attention of the witness is drawn to the Will from the custody of the Court and the signature appearing above words "Vinodrai B. Doshi".)

Q. 50 Can you identify the signature now shown to you?

Ans. It is either "U.B. Doshi" or "V.B. Doshi".

(Attention of the witness is simultaneously drawn to the Will from the custody of the Court and the signature appearing above words "Vinodrai B. Doshi" and the signature which is marked Exhibit "4A")

Q.51 After comparing the signatures now shown to you, what do you have to say about the signatures?

Ans. There is a difference in the manner of writing the letter "B" in both the documents shown to me.

25. This is important because clearly PW2 is unable to identify the signatures. In question 51, he clearly accepts a difference in signature. If this is so, then this puts a cloud over the proof of the Will and over this witness's evidence.

26. On its own, this evidence was most unsatisfactory. This was actually the entirety of the Plaintiff's case. The Plaintiff himself never set foot in the witness box. He also never led the evidence of Pravin Mehta. How the Will came to be drawn up by Pravin Mehta in the first place, and when; how the Plaintiff came into possession of it; how it was that Pravin Mehta travelled from Ghatkopar to

Malabar Hill in a riot-torn city (hardly disputable; and very much a matter of public record); how the Plaintiff came to have possession of the Will and when, were all matters specially within the knowledge of the Plaintiff and Pravin Mehta. They remained unexplained. Who else was present at the time when the Will was made at Vinodrai's house, where the Plaintiff lived, is also unclear. When the best evidence, though available, is withheld, an adverse inference must be drawn, and in this case it must be drawn against the Plaintiff. There are far too many suspicious circumstances surrounding this will. None are explained. The first two issues are answered in the negative.

Re: Issues No.3 and 4

27. The Plaintiff's case is damaged even further by the decidedly peculiar cross-examination of the 2nd Defendant, Rita. She filed a substantial Affidavit of Evidence.(37) In this, she not only said that the area was under curfew but she also made specific allegations in paragraph 2 against the Plaintiff. Paragraph 2 of her Affidavit of Evidence reads thus:

(37) Paper book, pp. 124-156.

"2. I hereby further say that in fact after the death of my father, my brother was harassing my mother and my brother was threatening my mother to drive her out of the house and my brother and his wife has been illtreating my mother. I say that my brother, the petitioner herein, was pressurising my mother to give consent for transfer of said flat in his exclusive name and when my mother refused to do so, after the expiry of about 12 months of my father's death, in or about February or March 1994, for the first time, my brother, the petitioner herein disclosed to us (to me and my mother) that my deceased father has made a WILL in his favour and till that point of time, I and my mother were never informed about any such WILL. Even we were given copy of the said WILL or shown to us copy of the said WILL. I say that thereafter my mother and myself went to an Advocate and as per advise of Advocate, my mother also filed a Suit bearing No. 2882 of 1994 in the Bombay City Civil Court to ensure that the said flat is not transferred by the society in the exclusive name of my brother, the Petitioner herein. I hereby further say that only thereafter my brother preferred the probate petition before this Hon'ble Court. In that petition also my mother has filed an Affidavit in this Hon'ble Court narrating the true and correct facts of the entire matter and objected to grant of probate to him."

28. As to evidence of 7th January 1993, she in terms said that she was at home at the Chandanbala Apartments flat on that day and that neither PW1 nor PW2 nor any other person had come there on that day. Paragraph 4 of her Affidavit of Evidence reads thus:

"4. I say that day by day condition of my father was deteriorating. He was vomiting blood and he was becoming unconscious or semi unconscious. I hereby further say that on the alleged date of preparation of WILL i.e. 7th January, 1993, in fact, I myself and my mother, Smt. Hansaben Vinodrai Doshi only were

at home, accompanying my father, the said testator at Chandanbala flat. On the said date, in fact, in the morning, the testator had vomited blood and there upon, I gave the medicine prescribed by Dr. Snehal Sanghavi, under whose treatment my father was, at the Harkisandas Narrotamdas Hospital. Thereafter, he was asleep in deep, rather, he was in semi unconscious stage for whole day and therefore, there is no question of his preparing the alleged WILL on that day, as claimed by the plaintiff. On that day there was a curfew in our area as well as in the area of Harkisandas Narrotamdas Hospital and, therefore, even we could not move the testator to the hospital also. I hereby further say that the plaintiff, my brother, is even suppressing the medical records of my father and not giving even the copy of the same to me. I say that on that day i.e. on 7th January 1993, neither Dr. Mahesh Kapadia, nor Manish U. Doshi or any other person had come to our residence for attesting the alleged WILL or for any other purpose. They are deposing falsely to do undue favour to my brother, the plaintiff, for their personal relations with my brother, the plaintiff."

29. In her evidence, she also said that the signature was not that of her father; and then went on to say that after his marriage in 1990, the Plaintiff was constantly fighting with Vinodrai. In paragraph 9, she said that Will was forged and fabricated. She said there was a large property at Virar worth several crores, which finds no mention in the Will.

30. The 2nd Defendant's cross-examination was conducted in Court. The first four questions of this cross-examination on 3rd July 2014 are critical. This is how they read:

Q.1. Will it be correct to say that you were a favourite with your father?

Ans. Yes.

Q. 2 Will it be correct to say that you have a son, who was born on 8th July 1991?

Ans. Yes.

Q.3. Will it be correct to say that your son was also your father's favourite?

Ans. Yes.

Q.4. Will it be correct to say that your father used to carry your son and take him for a stroll?

Ans. Yes.

31. I must confess that I am at a loss to understand why there should have been any such suggestions put to the 2nd Defendant. Perhaps the intention was to establish that on the day in question Vinodrai was in a sound state of health. The questions do not, in fact, achieve that purpose: the questions do not specify any period or time-frame at all. In fact, these questions on their own clearly further the 2nd Defendant's case that the Will is unnatural; for it is now the Plaintiff's own case that the 2nd Defendant was their father's favourite and that he was

very fond of the 2nd Defendant's young son. If this be true, there was no question of the 2nd Defendant being completely cut out of the Will in question.

32. The remaining cross-examination was also conducted in Court. I turn now to Questions 30 to 32 of the cross-examination. I cannot begin to understand why this line of cross-examination was pursued; but it was, and it is fatal to the case of the Plaintiffs.

Q.30

Can you tell the Court when did you last meet your mother?

Ans.

It was long time back may be approximately five years back.

Witness volunteers: my brother and sister-in-law are not allowing me to meet my mother.

Q.31

Have you filed any complaint with the Police that your brother and sister-in-law are not allowing you to meet your mother?

Ans.

No.

Attention of the witness is drawn to paragraph 2 of her Affidavit of Evidence dated 7th June 2014.

Q.32

Can you tell the Court in what manner your mother is pressurised and/or ill-treated by your brother and sister-in-law?

Ans.

They were mentally torturing her by telling her that since they are taking care of her and her needs, she should listen only to them.

33. I cannot accept Mr. Ratnani's argument that merely because the Defendant filed no police complaint therefore there is no substance to this evidence. What is telling, however, is not what the 2nd Defendant was asked in cross-examination, but what she was not. There is no cross-examination at all of the Defendant on paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 of the Affidavit of Evidence. This is critical. It means that the 2nd Defendant's version has gone completely uncontroverted in cross-examination. It has not even been tested in cross-examination.

34. The 2nd Defendant also led the evidence of one Mr. Nirav Vasa, a graphologist or handwriting expert. He submitted a report. This was taken on record. He also filed two Affidavits of Evidence dated 12th August 2014(38) and 12th November 2014.(39) He was cross-examined on commission.(40) The cross-

examination is entirely ineffective. Mr. Ratnani relies on the answer to Question 20, to the extent that Mr. Vasa agreed that a signature may vary over time and on account of the physical, mental or medical condition of the signatory at any given point, saying that this is possible. That is a completely correct and honest answer. It does not take the Plaintiff anywhere. A re-examination of sorts was conducted before the Commissioner. I refer to it only because it was taken by consent. This was Question 34. The whole of the re-examination is reproduced below:(41)

(38) Paper book, p. 454.

(39) Paper book, p. 470.

(40) Paper book, p. 480.

(41) DW2?s Cross-examination, pp. 484.

Re-examination of the witness by Advocate Mr. Yogesh Yagnik

Q. 34 With reference to question No. 20 above, can you tell us in what manner can a signature vary for aforesaid reason stated in question No. 20 and in what circumstances such signature does not vary because of said reason?

The Learned Advocate for the Plaintiff objects to the above question being asked in re-examination on the ground that the question does not pertain to any ambiguity in the answer to Question 20 which requires any explanation or clarification. and therefore, the question is not relevant and should be disallowed.

Advocate Yagnik in response states that the answer given to question No. 20 is incomplete and requires more clarification and explanation from the expert witness and therefore, the question be allowed.

Per Commissioner:

By consent of the Learned Advocates, the witness is to answer this question subject to the objection raised by the Learned Advocate for the Plaintiff, which objection can be decided by the Hon?ble Court.

A. A person signature/handwriting has certain fixed traits or unfixed traits. Some of the fixed traits which remain constant are articulation of the alphabets, the shape and size, pressures, slant of the alphabets. These traits do not change in general/normal conditions. When a person is ill or not in conscious state or is under influence of drugs or alcohol the handwriting of such a person in that condition will become sloppy, very slanting from one direction to another with no thym in it at all. Such handwriting will be easily diagnosed or analysed to conclude that such handwriting, is not produced under the normal circumstances.

35. Now this answer is certainly one that demanded a further cross-examination. In this, the expert clearly deposes to the signature not being that of the deceased.

36. As to the probative value of a handwriting expert's testimony, Mr. Ratnani's submission that this can never be accepted without further corroboration seems to me to be an entirely incorrect statement of the legal position. The law relating to the probative value of an expert's opinion is fairly settled now. In *Murari Lal s/o Ram Singh v. State of Madhya Pradesh*, (1980) 1 SCC 704 the Supreme Court held that while dealing with the opinion of a handwriting expert, the court must proceed cautiously, probe the reasons for the opinion, consider all other relevant evidence and decide finally whether to accept or reject it. The science of handwriting analysis is not a perfect science. An expert's opinion is also likely to have errors, like any other witness. Therefore, it must be backed by cogent, scientific reasons and corroborated with other circumstances surrounding the writing in question. Further, nothing prevents the court from comparing the disputed writing with the admitted writing and then coming to a conclusion of its own. If there is an opinion of an expert, or of any witness, the court may apply its own observation by comparing the signatures, or handwriting for providing a decisive weight or influence to its decision.

37. In any case, there is no need to rely only on the evidence of the handwriting expert. The trial record includes a nomination form signed by the deceased.⁽⁴³⁾ The deceased's signature appear at pages 449, 451 and 453. The barest look at these signatures and the one on the Will shows that the two are entirely different.

(43) Paper book, 448-453.

38. Mr. Ratnani relies on the decision in the case of *Ryali Kameswara Rao v. Bendapudi Suryaprakasarao & Ors.*, AIR 1962 Andhra Pradesh 178 and *Rajesh Arora v. State & Ors.*, AIR 2009 Delhi 111. These decisions do not assist Mr. Ratnani in any way. It is hardly possible to contend that no suspicious circumstances have been pleaded or proved. To the contrary, they have been expressly pleaded. The 2nd Defendant has deposed to them. The Plaintiff has not cross-examined the 2nd Defendant on these aspects, and her case is proved. The Plaintiff's own attesting witness, PW2, has been unable to recognise the signatures. The Plaintiff has led neither his own evidence nor that of Pravin Mehta. The 2nd Defendant's case stands proved. In fact, the decision in *Ryali Kameswara Rao* is against the Plaintiff because it clearly states that the onus lies upon a plaintiff to satisfy the conscience of the Court that the instrument propounded is the last Will of a free and capable testator. The fact that the Plaintiff takes a benefit is a circumstance that generally excites the suspicion of Court and calls for vigilance in examining the evidence. The suspicion must be one that arises from the transaction.

39. I have considered the various circumstances cited by the 2nd Defendant to establish that the Will was unnatural and obtained by undue influence and pressure, which cast significant doubt on the veracity of the Will. Where such circumstances exist, the Plaintiff must explain them to the satisfaction of the Court. The Supreme Court held in *H. Venkatachala Iyengar v. B.N. Thimmajamma and Ors.*, AIR 1959 SC 443:

The presence of such suspicious and doubtful circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator.

40. There is one final factor to be considered. The 7th of January 1993 was during one of the darkest periods in this city's history. The 2nd Defendant has put on record a copy of the Justice Srikrishna Report. This was hardly necessary. That much of the city was under curfew and that this extended on some days to the northern suburbs is a historically established fact. The Defendants say the situation was so bad that they could not shift Vinodrai to a hospital;(47) they were able to do so only three or four days later. There is no cross-examination on this at all. She also says Vinodrai was comatose. Apart from general questions about the Justice Srikrishna Report and whether she knew there was a curfew that day, the 2nd Defendant was asked nothing. That report is on record. Paragraph 1.10 says that on 7th January 1993, violence and riots spread to several parts of the city. There was trouble in several places. The report mentions Gamdevi, very close to the Chandanbala Apartments flat, and suburbs as far away as Jogeshwari.(48) Paragraph 1.11 speaks of 8th January 1993, and this clearly says there were communal riots in many places including Gamdevi, Worli, NM Joshi Marg and Ghatkopar. There is, therefore, the high degree of improbability of Pravin Mehta ever bringing the Will - assuming that he had drawn it in the first place - from Ghatkopar to Malabar Hill. His evidence, though available (as is now evident from the Chamber Summons filed two days ago), was withheld.

(47) DW1, 2nd Defendant, Evidence Affidavit, paper book, p. 126.

(48) Paper book, p. 192.

41. The entire version propounded by the Plaintiff is unworthy of the slightest credence. Apart from the mismatching signature, there is the question of how such a Will ever came to be prepared and at whose instance and for whose benefit. Not only is the failure to cross-examine the 2nd Defendant on critical parts of the testimony fatal, but the suggestions put to her establish her case that the Will is unnatural. As to the question of undue influence, this arises only if it is proved that any such Will was executed in the first place. That is not proved.

42. Issue No. 3 is answered in the affirmative. Issue No. 4 does not survive.

Conclusion and Order

43. It is impossible to hold that in such circumstances the Will can ever be said to be proved. The Suit is dismissed. In the circumstances of the case, and given the conduct of the Plaintiff, the dismissal will be accompanied by an order of costs against the Plaintiff and in favour of the 2nd Defendant.