

(2013) 01 BOM CK 0138

In the Bombay High Court

Case No : Testamentary Suit No. 76 of 2006 in Testamentary Petition No. 18 of 1996

Charulata @ Renuka Haresh Lulla

APPELLANT

Vs

Gul Khanchand Gidwani and Others

RESPONDENT

Date of Decision : 23-01-2013

Acts Referred:

Succession Act, 1925 — Section 61

Citation : (2013) 2 ALLMR 261 : (2013) 7 BomCR 367 : (2013) 2 MhLj 161

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : S.K. Chaurasia, for the Appellant; A.G. Damle a/w. and Mr. Rupesh Lanjekar for Defendant Nos. 1(a), 1(b) and 1(c), for the Respondent

Judgement

Mrs. Roshan Dalvi, J.—The above petition is filed for issue of letters of administration with the will of the deceased Dr. Nari Kriplani annexed thereto. The plaintiff was known to the deceased as the daughter of the friend of the deceased. The wife of the deceased had predeceased him. He had no issues. His parents and sisters had also predeceased him. He had no brothers. The plaintiff was issued letters of administration with the will of the deceased annexed thereto. Thereafter original defendant herein filed her caveat. She was the daughter of the aunt of the deceased. Hence she was the only heir of the deceased. She has been allowed to challenge the letters of administration granted. She has filed her affidavit-in-support of her caveat. She claimed that the will was executed by practicing fraud upon the deceased exercising undue influence upon the deceased and has been executed by misrepresentation under undue influence of the plaintiff. The original caveatrix having expired, her heirs have been brought on record and have defended the plaintiff's suit.

2. Based upon the aforesaid pleadings Justice Dharmadhikari framed the following issues on 4th November, 2009 which are answered as follows:

3. The plaintiff examined herself. She has also examined the attesting witness to

the will. The defendants have examined defendant No. 1(b). These witnesses have been cross-examined. The validity or genuineness otherwise of the will would have to be seen from their oral evidence alone. Whether or not the deceased executed the will upon a fraud being practiced on the deceased or under the misrepresentation constituting undue influence of the plaintiff would have to be seen from the facts of this case read along side the law in that behalf.

ISSUE NO. 1:

4. The plaintiff has deposed that the deceased had executed his will and had kept in his custody. There are 2 executors who are also attesting witnesses to the will. One is an Advocate. The other has deposed in this suit. Both the attesting witnesses were the patients of the deceased. They were being treated by the deceased. The plaintiff knew them as such patients since they came to the deceased for their treatment. Both the attesting witnesses were also appointed executors but have renounced their executorship. The plaintiff has deposed that Vasant Mehta, Advocate, who was one of the attesting witnesses, was her Advocate since that time. The plaintiff did not know when the will was prepared but knew that it was prepared by Vasant Mehta. The will remained in the custody of the deceased. She knew that it was lying in the residence of the deceased as she lived with the deceased since prior to the execution of the will and until his death.

5. The deceased was in a general good health though he was old and feeble. He would go out but along with somebody. He was taken to the doctor 2-3 times as he was suffering from prostate problems but he otherwise treated himself.

6. The evidence of the attesting witness shows how the will was executed at the residence of the deceased. Both the attesting witnesses know the deceased. They were present together and saw the deceased executed the will. They attested the will in his presence one by one. The attesting witness identified all the signatures on the will.

7. In his cross-examination he has deposed that he knew the deceased since 1985 as he was his patient. He also knows the other attesting witness as he used to visit the deceased. The witness has spoken only about the aspect to his knowledge. He had earlier not seen the other witness sign. Hence he has stated that he could not identify his signature earlier. He only saw him sign on the will and hence could identify his signature only from the will and from the time thereafter. He could not recollect the date of the will. He deposed that he was called at the time of the preparation of the will. The deceased had dictated the will in the presence of 3-4 persons. He did not know who was taking down the dictation. Thereafter the deceased called Vasant Mehta as well as himself to execute the will. They all had signed on the will. No doctor was called to certify his position but the witness has deposed that he was in sound state of mind and memory and understanding. Although he was old he was in a good condition. This evidence has duly proved the execution and the attestation of the will when

the deceased was in a sound state of mind. Hence Issue No. 1 is answered in the affirmative.

ISSUE NO. 2:

8. The caveatable interest of the original caveatrix was seen. Hence her caveat was accepted. The caveatable interest of defendant No. 1(c) is specifically not challenged. Hence issue No. 2 does not come up for consideration.

ISSUE NO. 3:

9. The letters stated to have been issued by the society are not proved by examination of authors of the letters. Hence issue No. 3 is answered in the negative.

ISSUE NOS. 4 & 5:

10. To see whether the will was genuine or was fraudulent and signed under influence of the plaintiff through misrepresentation, one must understand the position of the deceased and the relationship of the deceased with the plaintiff as also the ceavtrix/original defendant.

11. The evidence of the plaintiff has shown that the deceased lived alone over a length of time with his maid. She moved to Hong Kong after which the deceased lived completely alone in his flat. Thereafter the plaintiff moved from Baroda to Mumbai to live with the deceased. She moved from Baroda to Mumbai to manage the affairs of the deceased as he had trouble in managing his affairs like food, house keeping, banking and dealing in shares.

12. The deceased was an Advocate as also a homeopathic doctor. The deceased was an intimate friend of the plaintiff's father since prior to the partition of India. They were both practicing Advocate initially in Pakistan and then in Bombay High Court. The deceased medically treated the entire family of the plaintiff as their doctor. The plaintiff was being treated since she was 10 years old by the deceased.

13. The plaintiff was married. Her husband had expired since 1980. She lived with her family in Baroda. Her children were then 21 and 19 years old. Her elder son lived in Baroda with her in-laws. Her younger son came with her to live in Mumbai. She permanently shifted to Mumbai after October, 1993. The deceased executed his will on 25th August, 1994. The deceased expired on 5th October, 1994. Hence she lived with the deceased in his flat in Mumbai for about one year before he expired.

14. The plaintiff's evidence has also shown that the deceased had nominated the caveatrix in the society record in respect of his residential flat in Dayal Villa. Thereafter the deceased requested the society to add the plaintiff's name as a nominee. The deceased also added the plaintiff's name in his bank account. The plaintiff has produced the bank passbook of the deceased in Indian Overseas Bank, a nationalized bank, showing the plaintiff's name as the second holder.

The deceased had executed a leave and license agreement on 24.06.1994 with one Hiroo Shahani. That was hardly 4 months prior to his death. Hence the deceased had no close relative. He lived alone. The plaintiff was his intimate friend's daughter. She had come to live with the deceased. The caveatrix never lived with the deceased. That is not even the case of the defendants. Caveatrix/original defendant visited the deceased. The deceased had nominated her in the society's record. There is no other document showing her to be the joint owner with the deceased. She has not produced any bank account, bank locker, share certificate etc. Her nomination was superseded by the plaintiff's nomination after the plaintiff came to live with the deceased. The fact that she came to live with the deceased is not disputed. In fact, it is contended that the plaintiff came with an ulterior motive to live with the deceased and whilst she lived with the deceased for about one year she got the will prepared and got it signed by the deceased without the deceased having desire to make that will.

15. First paragraph of the will shows that before its execution when the deceased was not well, the caveatrix and her husband came from Nashik and took his signature on a document which he suspected was a will. He told them many times to return the document which was not returned. He revoked that will. He appointed the 2 executors and bequeathed all his properties to the plaintiff who lived with him and had cared for him. The fact remains that the deceased had himself sought change of nomination in the society's record in respect of his residential flat during his own lifetime. The share certificate of the society has not been produced by either of the parties. The nomination made in favour of the plaintiff has not been proved. However the fact that the plaintiff lived with the deceased is the grievance of the defendants.

16. Since the original defendant was the only heir of the deceased, it would have to be seen whether but for the plaintiff's undue influence or misrepresentation and fraud, the deceased would have executed the will in favour of the original defendant. She lived in Nashik. She never cared for the deceased.

17. It is the plaintiff's case that she never even cared to challenge the will of the deceased. She has been put up by the licensee of the deceased, Hiroo Shahani and his wife Jyoti with whom the plaintiff had litigations in respect of the premises licensed to them by the deceased.

18. The cross-examination of defendant No. 1(b) shows that he came to the Court from Ahmedabad. He attended the Court with Jyoti Shahani whom he knows since the last 30 years. He did not even know his own Advocate. He had not paid his own Advocate's fees.

19. Under these circumstances his substantive evidence would have to be seen. He deposed about the mental condition of the deceased. He met the deceased in the hospital. He deposed that the deceased was not able to see, talk or do anything. He was crying. The plaintiff and the others were in the hospital. The plaintiff remained in the hospital wherever he was.

20. Even if this was a fact his other cross-examination shows that his family did not really care to challenge the will but were put up by Jyoti Shahani.

21. Under these circumstances the deceased had no other to bequeath his properties than the plaintiff. The plaintiff, though an outsider, was known to the deceased as the daughter of his best friend. Even if the plaintiff moved to the residence of the deceased and behave kindly with the deceased for an ulterior motive, the deceased received her company and her assistance in the twilight of his years. That was all that he would have wanted. Of course, there was none to see whether the plaintiff actually took his signature under any misrepresentation. That has not been shown or proved. If the plaintiff won his confidence or kindness to be bequeathed his properties, the deceased could have executed the will himself albeit upon such behaviour. It would have to be seen whether ipso facto such behaviour would constitute such undue influence, misrepresentation or fraud as to vitiate the will. Wills obtained under fraud, coercion or importunity are dealt with u/s 61 of the Indian Succession Act which runs thus:

61. Will obtained by fraud, coercion or importunity - A Will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

(vii) A, being in such a state of health as to be capable of exercising his own judgment and volition, B uses urgent intercession and persuasion with him to induce him to make a Will of a certain purport. A, in consequence of the intercession and persuasion, but in the free exercise of his judgment and volition makes his Will in the manner recommended by B. The Will is not rendered invalid by the intercession and persuasion of B.

22. Halsbury's Laws of England Fourth Edition, Vol. 17, para 911 at page 479 shows what constitutes undue influence thus:

To constitute undue influence there must be coercion: pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made.

A person may exercise an unbounded influence over another, which may be a very bad influence, without its being undue influence in the legal sense of the word. Undue influence may be found against a person who had died before the execution of the will on the ground that the deceased was under that person's complete control until his death, and thereby rendered incapable of making a fresh will free from such undue influence.

23. Undue influence and fraud is also considered in Williams on Wills Ninth Edition, Volume 1, Chapter V, part III.

III. UNDUE INFLUENCE AND FRAUD

Undue influence means coercion to make a will in particular terms. The principle

has thus been stated by Sir. J.P. Wilde in Hall v. Hall. "Persuasion is not unlawful, but pressure of whatever character if so exerted as to overpower the volition without convincing the judgment of the testator, will constitute undue influence, though no force is either used or threatened".

The proof of motive and opportunity for the exercise of such influence is required but the existence of such coupled with the fact that the person who has such motive and opportunity has benefited by the will to the exclusion of others is not sufficient proof of undue influence. There must be positive proof of coercion overpowering the volition of the testator.

24. The principle of the ambit of undue influence which can be practiced upon a testator has been considered for the last more than a century in England and later also in the Indian cases. The authority under the said subject is the case of Hall Vs. Hall (1868) LR 1 P & D 481 which held thus:

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

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

25. [See also Bainbrigge Vs. Browne (1881) 18 ChD 188, Wingrove Vs. Wingrove (1885) 11 PD 81, Allcard Vs. Skinner (1887) 36 Ch D 145 CA, Hall Vs. Hall (1868) 1 P & D 481, Baudains Vs. Richardson (1906) AC, 169, Craig Vs. Lamoureux AIR 1919 P. C. 132].

26. The test case on the subject in India was the case of Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta, followed in Desh Raj Gupta Vs. State and Others, . That was the usual case of testator who lived with one of his sons and the other having lived separately. It was contended by the brother who lived separately that the brother who lived with the father had unduly influenced the father. It was observed that disinheritance of one son "by itself" cannot lead to any inference of undue influence on the part of the testator following the case of Hall Vs. Hall (supra).

27. Chief Justice Chagla held in the case of Arnold Dominic Rodricks Vs. Sunder Vinayak Navalkar and Another, that undue influence had to be proved by the person who alleged it. The Court cannot presume it. In that case the daughter who lived with the mother was bequeathed her estate. The son was disinherited. Reference in the will to the misery caused to her by a son which shattered her health was relied upon to show her free mind. Undue influence was ruled out. [See. H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, , Lakshmi Amma and Another Vs. Talengalanarayana Bhatta and Another, , Ajit Chandra Majumdar Vs. Akhil Chandra Majumdar, .]

28. The defendants have not made out any case of fraud. They have not shown such coercion practiced by the plaintiff upon the deceased as to make him sign on the dotted line under her influence. They have, therefore, not shown any such misrepresentation made by the plaintiff. The fact of the plaintiff living with the deceased which led the deceased to make a will in her favour shows the course of the behaviour of the plaintiff. The deceased himself with a free mind decided to give her his properties under the will. The deceased had no other closer, better relative to bequeath his properties unlike in the cases cited above in which close family members themselves were disinherited. How the defendants contend that the will does not have the genuine signature (which is a case of forgery) is not shown at all by any evidence whatsoever. Hence issue Nos. 4 & 5 are answered in the negative.

ISSUE NO. 6:

29. The last will and testament of the deceased dated 25th August, 1994 is declared to be validly executed. The suit is made absolute as prayed. The petition is also made absolute as prayed. Since the Letters of Administration with the will of the deceased annexed thereto were issued earlier, the plaintiff shall be entitled to act upon the said Letters of Administration as issued by this Court as confirmed this order.

30. The plaintiff shall be returned all the original documents including the Letters of Administration produced by the plaintiff during trial. Drawn up decree is dispensed with.