

(2013) 08 BOM CK 0121

In the Bombay High Court

Case No : Testamentary Suit No. 13 of 1994 in Testamentary Petition No. 610 of 1993

Harish Vithal Kulkarni and Shivanand Vishwanath Warty

APPELLANT

Vs

Pradeep Mahadev Sabnis and Sudha Mahadev Sabnis

RESPONDENT

Date of Decision : 13-08-2013

Acts Referred:

Evidence Act, 1872 — Section 67, 68

Succession Act, 1925 — Section 63

Citation : (2014) 2 ABR 630 : (2013) 6 ALLMR 257 : (2013) 6 MhLj 713

Hon'ble Judges : R.D. Dhanuka, J

Bench : Single Bench

Advocate : P.R. Naidu, for the Appellant; Usha Purohit instructed by y M/s. Ganekar and Co., for the Respondent

Judgement

R.D. Dhanuka, J.—Plaintiffs who claim to be executors under the Will and testament dated 11th October, 1991, alleged to have been executed by the deceased Mahadeo Sabnis (hereinafter referred to as the said deceased) have filed testamentary petition inter alia praying for grant of probate in favour of the petitioners/plaintiffs having effect throughout the State of Maharashtra. The deceased had expired on 23rd April, 1992 leaving behind him Smt. Sudha Mahadeo Sabnis, widow of the deceased and Mr. Pradeep Mahadeo Sabnis, son of the deceased. On the date of the death of the deceased, both the said legal heirs were alive. On 8th October, 1993, defendant herein filed Suit (3354 of 1993) in this court inter alia praying for the letter of administration in respect of the estate of the said deceased. Mother of the defendant who was widow of the said deceased was impleaded as defendant in the said suit. It was alleged in the said suit that the deceased died intestate. Defendant had taken out Notice of Motion in the said suit (Notice of Motion No. 2403 of 1993) inter alia praying for appointment of the Court Receiver and injunction. By an order dated 15th October, 1993, passed by consent of the parties to the said suit, this court appointed Court Receiver in respect of the estate of the deceased. Plaintiff filed

notice of Motion in the said suit on 16th July, 1994 for their impleadment as party defendant in the said suit (3354 of 1999). This court allowed the said application and impleaded the plaintiff as party defendant to the said suit filed by the defendant. It is not in dispute that on the date of the filing of the said suit by the defendant, plaintiffs had not served citation on the defendant or on the widow of the said deceased. The citation came to be served on the defendant and the widow of the deceased on 20th January, 1994. Defendant lodged caveat in the testamentary petition on 9th February, 1994 and filed affidavit in support of the caveat on 16th February, 1994. In the said alleged Will dated 11th October, 1991, the deceased had alleged to have directed the executors to invest Rs. 1 lac each separately and to pay the same along with the interest thereon to two grand sons Master Nehal and Master Sahil, sons of the defendant herein at the time of their attaining the age of 21 years. The deceased had alleged to have issued directions for giving Rs. 1 lac for giving scholarships and prizes to the deserving students every year. The deceased had also alleged to have bequeathed Rs. 1 lac to North Kanara Goud Saraswat Brahmin Sangh, Laxmi Sadan, Vithalbhai Patel Road, Bombay 4 for social work. The residual properties were alleged to have been bequeathed to the institutions engaged in blind, deaf and dumb relief work such as Pragati Andh Vidyalaya, Badlapur, Blind Welfare Workshop, Bombay, Happy Home School for the Blind, Bombay, Institute for deaf and deaf-blind, Bombay etc. As far as defendant herein is concerned, it is alleged to have been stated in the said Will that the testator did not wish to bequeath any of the properties to defendant and/or his wife due to various reasons alleged in the said alleged Will. As far as widow of the deceased is concerned, it is alleged that he had paid sufficient amount to his wife during his life time and she had accumulated such amount and was sufficient for her maintenance. The testator has alleged to have directed the executors to realize and pay to his wife the amount with interest kept deposited with the State Bank of India, Shivaji Park Branch, Bombay 28 under Public Provident Fund Scheme 1968 having A/c. No. SBI/SP 4364 (L.F. No. 3412). The said alleged Will was witnessed by Mr. B.M. Shah and Mr. H.V. Kotadia. The age of the deceased mentioned in the said Will was 73 years. The said alleged Will is not registered.

2. Along with the testamentary petition, the plaintiffs herein filed affidavit of the widow of the deceased. In the said affidavit it was alleged that she was aware of the Will executed by the said deceased and that the plaintiffs were appointed as executors. In the said affidavit, she has alleged to have given no objection for issuance of probate in favour of the plaintiffs in respect of the said alleged Will. In the affidavit in support of the caveat, defendant disputed execution of the Will. It is alleged that the deceased never prepared and/or drafted and/or finalized and/or settled and/or executed any Will as alleged or at all. In Paragraph 3(a) of the said affidavit it was alleged that the said Will was got up, concocted, fabricated and forged. It was alleged that five years prior to his death and during the period when the said Will was alleged to have been executed by the deceased, the deceased had been suffering from acute asthma and had become

mentally and physically infirm and frail during the said period and such condition continued until his death. It is also alleged that the said purported Will is obtained by the plaintiffs and/or widow of the deceased by exercising undue influence. It is also alleged that the said Will was not outcome of the independent mental exercise and the act of volition by the deceased himself but the said Will was obtained by the petitioners or certain individuals fraudulently. On filing of caveat and affidavit in support, said testamentary petition was converted into the suit and was numbered as Suit No. 13 of 1994.

3. Based upon the aforesaid pleadings, issues came to be framed in this suit by Mr. Justice S.J. Vajifdar on 6th July, 2007 as follows and which are answered as follows:

ISSUES

FINDINGS

1. Whether the Plaintiff proves that Deceased viz. Mahadeo Gajanan Sabnis, died leaving his writing dated 11th October, 1991 (in short ?the said writing?) as his alleged last will as stated in Para No. 3 in the petition?

No

2. Whether the plaintiff proves that the Deceased"s said writing is duly attested as stated in para no. 4 in the petition/plaint by the witnesses as required by law?

No

3. Whether the Plaintiff proves that the Deceased at the time the said writing was executed, was of sound and disposing mind, understanding and memory?

Did not arise

4. The petitioner no. 1 has examined himself as well as one of the attesting witness Mr. Hasmukh Kotadia. The caveator has examined himself and Inspector of Post Offices - Public Grievances.

ISSUE NOS. 1 TO 3

5. Mrs. Purohit, learned counsel appearing on behalf of the defendant caveator submits that the alleged Will propounded by the plaintiff is fabricated. No such Will was executed by the deceased father of the defendant. It is submitted that on perusal of the alleged Will, it is clear that there are no initials on any pages of the said Will. It is submitted that though the Will was alleged to have been executed on 11th October, 1991, the same was produced for the first time in Court in 1994. Alleged Will was not even registered. Mr. Kotadia, the alleged attesting witness is father-in-law of plaintiff no. 1's daughter. It is submitted that though in one of the statement, plaintiff no. 1 has alleged that he has in his possession hand written copy of the Will, he did not produce the same on record of this proceedings. It is submitted that even in the alleged Will, it was stated that the deceased testator has not made any Will prior to the execution of the

said alleged Will. There is thus lacuna in the evidence of the plaintiff no. 1 on this issue. Learned counsel submits that the alleged signature of the testator as well as of the alleged attesting witness Mr. H.V. Katodia as well as alleged second witness was challenged by the caveator in affidavit in support of the caveat. Learned counsel would submit that there were no description of the property whether movable or immovable or any annexures in the alleged Will.

6. Mrs. Purohit, learned counsel appearing for the defendant invited my attention to paragraph 5 of the affidavit dated 13th March, 2009 filed by plaintiff no. 1 in which it was admitted that defendant was not aware of the Will because of the alleged quarrel between the said deceased and the defendant. Learned counsel invited my attention to paragraph (2) of the Probate Petition to show that according to the plaintiffs, the deceased at the time of his death had fixed place of abode at Bombay which was of Jagruti Co-operative Housing Society Limited, Lady Jamshedji Road, Mahim, Mumbai - 400 016. In para (4) of the petition, it is alleged that the said alleged Will was handed over to the plaintiffs by Smt. Sudha M. Sabnis, widow of the said deceased which resulted the delay. Learned counsel submits that the address of the deceased mentioned in paragraph (2) of the petition was also the address of the defendant and the widow of the deceased. It is submitted that thus even the plaintiffs did not dispute that the said deceased, the defendant herein and the widow were residing at the same address mentioned in the petition. Attention of this court is invited to paragraph (10) of the affidavit of the plaintiff no. 1 in reply to the Notice of Motion No. 2374 of 1994 in which it was alleged by him that the shares described in Ex. G had been lying with the plaintiffs during the lifetime of the deceased. Attention of the court is also invited to paragraph (6) of the affidavit dated 22nd November, 1994 in which it was alleged by the plaintiff no. 1 that the probate was not applied because the properties of the deceased were standing in the joint name of the deceased and the defendant. It is submitted that though the plaintiff participated in the alleged execution of the Will, neither the defendant nor the widow of the said deceased was informed about the alleged execution of the Will. In the said affidavit it is also alleged that the alleged Will was executed in presence of Smt. Sudha Sabnis, widow of the said deceased.

7. Mrs. Purohit, learned counsel appearing for the defendant submits that the cross examination of the witnesses examined by the plaintiffs is totally contrary to the deposition made in the affidavit in lieu of the examination in chief by plaintiff no. 1 and his witness. It is submitted that there are contradictions in the averments made in the petition, in various affidavit filed in interlocutory proceedings, affidavit in lieu of examination in chief and cross examination of the two witnesses which would demonstrate that the alleged Will was never executed by the said deceased and the plaintiffs as well as attesting witness who had filed affidavit had fabricated the said alleged Will of the deceased. In support of this submission, learned counsel appearing for the defendant invited my attention to the cross examination of the plaintiff no. 1. In the cross examination of the plaintiff no. 1 conducted on 9th July, 2010, the witness mentioned that the Will

was written by the deceased in his handwriting. It is submitted that the documents however produced by the plaintiff in this court as alleged Will of the said deceased was a typed copy and not any writing alleged to be in handwriting of the deceased. In paragraph (4) of the cross examination, witness admitted that the alleged Will was a document duly typed. Witness however volunteers that he was in possession of the document purported to be a Will scribed by the deceased in his handwriting in Marathi and said document was in his possession. The witness never referred to any such document in Marathi and never produced the same along with the petition or along with affidavit in lieu of examination in chief. The said alleged document was not even referred in the examination in chief of the two witnesses examined by the plaintiff.

8. My attention is invited to paragraph (2) of the cross examination of the plaintiff no. 1 conducted on 16th July, 2010 in which the witness admitted that Mrs. Sudha Sabnis was not knowing about the Will since beginning. In so far as shares were concerned, in cross examination, the witness had stated that the said shares were never in his custody and to his knowledge the deceased had handed over to advocate Mr. S.W. Kulkarni before his death. Mrs. Purohit laid emphasis on the evidence in cross examination of plaintiff no. 1 in paragraph (2) of the cross examination recorded on 16th July, 2010 in which the witness did not agree with the suggestion of the defendant that he had tendered his signature on that affidavit dated 22nd November, 1994, after reading it completely. The witness replied in the cross examination that the affidavit was given to him for his signature and he signed it as time provided for him to go through it and sign was barely one minute. The witness also did not agree with the suggestion of the defendant that the said affidavit was drafted on the basis of the instructions given by him. The witness volunteered that advocate Mr. S.W. Kulkarni had drafted the said affidavit as per his understanding of the matter and plaintiff no. 1 had not given any instructions to him in detail for the purposes of paragraphs of the said affidavit. He had given general information as to the various events that had taken place concerning the Will of the deceased and other aspects of the matter. The witness deposed that since he was attending the matter on the basis of the actual fact, he did not find any need to verify the contents of the said affidavit and to find out whether the said contents were in consonance with the facts.

9. In paragraph (3) of the cross examination, the witness answered that he was present when the deceased was executing the Will. Alleged attesting witness Mr. H.V. Katodia is father in law of the daughter of the plaintiff no. 1. Witness answered that after execution of the Will was over, he had not kept the original Will with him and the same was given to Mr. S.W. Kulkarni, advocate. Witness admitted that he had come to know about the death of the deceased testator on the very day when he died i.e. on 23rd April, 1992. Witness also admitted that when the deceased testator was alive, everything was going smoothly. Witness answered that he thought it fit not to disturb the family with the question of probate. He answered that it was mentioned in the Will that nothing should be

given to the defendant and everything should be given to the Charity. Witness has answered that it would lead to disturb the situation in the family of the defendant and his mother. Witness admitted that the Mrs. Sudha Sabnis did not handover the Will to him. It is deposed that the said Will was with advocate Mr. S.W. Kulkarni. Witness also admitted that contents of various portion of Ex. A to the affidavit dated 22nd November, 1994 filed by him in connection with Notice of Motion No. 2374 of 1994 were not correct. Witness once again admitted that Mrs. Sudha Sabnis was not aware of the Will. He however deposed that she was explained about the contents of the Will. Witness admitted that in the alleged Will, there was no list drawn that of movable and immovable owned by the deceased at the time of his death.

10. Mrs. Purohit, learned counsel appearing for the defendants also invited my attention to the cross examination of the attesting witness Mr. Hasmukh Kotadia which was recorded on 23rd July, 2010. The said witness admitted his relationship with plaintiff no. 1. Witness admitted that his business was nothing to do with his acquaintance with the deceased and he had no business relations with the deceased. When alleged attesting witness was shown, two signatures of the witnesses on the affidavit dated 17th March, 2009 filed by the alleged attesting witness, the witness answered that the signatures appearing on the place of verification was little different than the signature immediately underneath the affidavit. When witness was shown the signature appearing at Ex. 3 i.e. his alleged signature on the Will, the witness answered that the signature appeared on Ex. 3 (on the Will) is different from the signature appearing on Ex. 4 i.e. on the affidavit dated 17th March, 2009 filed by the same witness. The witness admitted in cross examination that he had not tendered his signature as a witness on any other Will executed by Mr. Sabnis. Witness answered that he did not remember whether Mrs. Sabnis was present at the time when the Will was executed.

11. Mrs. Purohit also invited my attention to the cross examination of the defendant by the plaintiff's counsel. In reply to question nos. 4 and 5, defendant answered that relationship of the defendant with the deceased father was normal and was always cordial. Witness also answered that till the date of death, the deceased father of the defendant was staying with him in his own flat at Mumbai. Witness denied the suggestion of the plaintiff's counsel that relationship between the defendant and his (father) was not cordial till the death. In reply to questions 10, 13, 17 and 20 of the cross examination of the defendant, the witness answered that there was no Will made by his father. Will was bogus and contained false statements. His father did not make any Will. Witness in reply to the suggestion put by the plaintiff's counsel that the defendant did not have any documentary evidence to show that what was stated in the Will was bogus or fabricated he answered that he had documentary evidence to show that what was stated in the Will was bogus and the same was attached to his affidavit of evidence.

12. Mrs. Purohit also invited my attention to evidence of Mr. S.T. Gamre, second witness of the defendant (DW-2) who was Inspector of Post Offices - Public Grievance. The said witness when was asked by defendant's counsel as to when the Pin Code 400 042 came into existence he answered that as per the record of the post office, the said pin code came into existence on 8th December, 1991. The witness produced the original copy of the trade circular issued by the Department of Posts, India dated 3rd December, 1991 by which various Departments of Posts were informed that the time scale delivery post office named "Bhandup East" Post Office with Pin Code 400 042 in account jurisdiction with Chembur Head Office will be opened in New Departmental Building on 8th December, 1991. The said circular was taken on record. Learned counsel also invited my attention to the cross examination of the said witness by the plaintiff's counsel. The only question asked to the witness by the plaintiff's counsel was as to whether if letter was sent without Pin Code prior to December 1991, it would be received, in reply to which the witness answered in affirmative. There was no other question asked to the said witness examined by the defendant.

13. Based on the evidence on record laid by the parties, Mrs. Purohit would submit that the alleged Will executed on 11th October, 1991 was ex-facie forged and fabricated. My attention is invited to para 3 of the alleged Will which reads as under:-

3. I appoint, (i) Shri Harish Vithal Kulkarni, residing at A 2, Vellard View, Tardeo, Main Road, Bombay 400 034, and (ii) Shri Shivanand Vishwanath Warty, residing at Warty House, Ashok nagar, Kanjur (East), Bombay 400 042, as the "EXECUTORS" of this Will. My Executors shall give effect to this my last Will after my death and I hereby give them full authority to that effect by this Will.

14. The learned counsel would submit that in paragraph (3) of the alleged Will, the address of the second executor Mr. Shivanand Vishwanath Warty was given with Pin Code 400 042 as on the date of execution of the alleged Will on 11th October, 1991. It is submitted that the witness Mr. S.T. Gamre, Inspector of Post Offices - Public Grievance examined by the defendant had produced the original copy of the trade circular and had deposed in his oral evidence that as per record, the said Pin Code 400 042 came into existence on 8th December, 1991. It is submitted that the plaintiff did not dispute the fact that the said Pin Code 400 042 came in existence on 8th December, 1991 i.e. much after the execution of the alleged Will on 11th October, 1991. It is thus, submitted that on the face of it, the alleged Will is forged and fabricated as the same could not contain the Pin Code which was not even in existence on the date of execution of the said Will.

15. Mrs. Purohit, learned counsel appearing on behalf of the caveator submits that the onus was on the propounder of the Will to prove due and valid execution of the Will and if there are any suspicious circumstances surrounding the execution of the Will, the propounder must remove such suspicion from the mind

of the court by cogent and satisfactory evidence. In support of this submission, learned counsel placed reliance upon the judgment of the Supreme Court in case of H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, and in particular paragraphs 19 to 22 which read thus:-

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious 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. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word "conscience" in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parcq in *Harmes v. Hinkson*, "where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth". It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect.

16. Learned counsel placed reliance upon the judgment of the Supreme Court in case of *Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others*, in support of her submission that in case of Will shrouded by suspicious circumstances, onus is on the propounder to clear such suspicion. Paragraph (9) of the said judgment reads thus:

9. In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple us between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the

court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will.

17. Learned counsel also placed reliance upon the judgment of the Delhi High Court in case of *Yashoda Gupta Vs. Suniti Goyal and Others*, in support of her submission that propounder has to remove suspicions. Paragraphs 101 and 118 of the said judgment reads thus:-

101. There are, Therefore, three things to be kept in mind, in cases such as this:-

- (i) The propounder of a Will has to prove its due and valid execution.
- (ii) If there are any suspicious circumstances surrounding the execution of a Will, the propounder must remove the suspicions by cogent and satisfactory evidence.
- (iii) The application of the above principles depends on the facts and circumstances of each case.

118. Considering the various authorities cited before me, it is quite clear that whether a Will is genuine or not has to be decided on the facts of each case. There is no mathematical equation to determine whether a Will is genuine or not. The authenticity of a Will depends on the circumstances surrounding its execution and the quality of the evidence that is led in respect of its genuineness.

18. Mrs. Purohit, learned counsel appearing for the caveator placed reliance upon the judgment of the Delhi High Court in case of *Dinesh Kumar Vs. Khazan Singh and Others*, that though in the oral evidence laid by the propounder, it was alleged that the deceased testator has executed another Will in Marathi, he did not prove the alleged earlier Will alleged to be in Marathi and thus there was clear lacuna in the evidence with regard to the Will propounded by the plaintiffs. Learned counsel placed reliance upon paragraph (7) of the said judgment of Delhi High Court in case of *Dinesh Kumar (supra)* which reads thus:-

7. The next submission of the counsel for the appellant is that the draft of the Will, which admittedly was in existence before the will was signed, was not produced. As I read the Will it is clear that it is drafted by some Advocate. The language is trite legal language and in the legal form. It is clear from the preamble starting with the words "Whereas" and then coming to the text of the Will with the words "Now, therefore". If the draft was prepared by the Advocate, the Advocate should have been examined. It was also necessary to prove that the contents of the draft were dictated or approved by the testatrix at the stage of the draft. In other words, the substance of the disposition should have been voluntarily decided by the testatrix. There is clear lacuna in the evidence in regard to this aspect of the draft.

19. Mr. Naidu, learned counsel appearing on behalf of the plaintiffs on the other hand submits that neither of the plaintiffs have been given any legacy under the Will in question by the deceased testator. It is submitted that the testator himself had given reasons in detail in his Will as to why defendant was excluded from any bequest. It is submitted that the plaintiffs did not produce hand written Will in this proceedings since defendant did not call upon the plaintiffs to produce the said Will. Learned counsel submits that there was no cross examination on several paragraphs of the affidavit in lieu of examination in chief filed by plaintiff No. 1. It is submitted that the attesting witness examined by the plaintiffs did not state in the cross examination that his signature was doubtful but merely stated that his signature was different. In so far as the share certificates of the deceased are concerned, it submitted that the same are already handed over to the Court Receiver pursuant to interim order passed by this court in Notice of Motion filed by defendant in a separate suit. It is submitted that it was not necessary for the testator to give detailed particulars of each and every estate of the deceased in the Will. All the details however, were furnished by the plaintiffs in the probate petition. It is submitted that the plaintiffs have not suppressed any details of any properties in the probate petition. It is submitted by Mr. Naidu that the signature of the deceased on the Will shall be compared with the signature on the application signed by the said deceased for opening the bank account with Bank of India which application form has been produced by the witness pursuant to witness summons issued by this court. It is submitted that it was not necessary for the testator to put his initials on each and every page of the Will. Mr. Naidu submits that no bequest was rightly made in favour of the defendant by the deceased.

20. In so far as the issue of pin code raised by the defendant is concerned, it submitted by Mr. Naidu that though one S.T. Gamre, Inspector of Post Office examined by the defendant produced original trade circular certifying that the pin code 400 042 came into existence on 8th December, 1991 i.e. subsequent to the execution of the alleged Will, the said pin code is irrelevant for the purpose of deciding the existence of the alleged Will. Mr. Naidu submits that he does not dispute that the said pin code number 400 042 came into existence on 8th December, 1991 and in the alleged Will, address of the second executor is mentioned with the said pin code, however, these facts are irrelevant in view of the fact that the said second executor named in the Will was not examined by the plaintiff as witness. It is submitted that the said witness Mr. S.T. Gamre examined by the defendant in his cross examination has admitted that if letter is sent without pin code prior to 8th December, 1991, it would be received. It is submitted by Mr. Naidu that once the execution of the Will is proved by the plaintiff No. 1 and also by the attesting witnesses, the court cannot draw any other inference and discard the said Will duly executed by the testator. Mr. Naidu submits that burden was on the defendant to disprove that the testator did not execute any such Will. It is submitted by Mr. Naidu that there were no particulars given in support of allegations of forgery by the defendant, though defendant

wanted to examine other witnesses to prove such allegations.

21. Mr. Naidu submits that since the plaintiffs have proved execution of the Will and also the fact that the testator was of sound and disposing mind at the time of execution of the Will in question, Suit No. 3354 of 1993 filed by the defendant for seeking letter of administration in respect of the estate of the deceased is not maintainable and deserves to be dismissed.

22. Mr. Naidu, learned counsel appearing on behalf of the petitioners placed reliance upon the judgment of this court in case of Mrs. Savita Dattatraya Karandikar of Bombay, Indian Inhabitant the Sole Executrix of the Will of the deceased abovenamed Vs. Nishikant Sadashiv Karandikar a Hindu, Indian Inhabitant, Mrs. Aparna Arvind Agnihotri a Hindu, Indian Inhabitant, Gajanan Sadashiv Karandikar a Hindu and Shekhar Sadashiv Karandikar (since deceased Smt. Meeta Shekhar Karandikar, Mrs. Swati Ranjeet Oak and Mrs. Priti Amit Vaidya), and in particular paragraph (14) in support of his plea that burden was upon the caveator to prove that the deceased was under undue influence or force. Paragraph (14) of the judgment of this court in case of Savita Dattatraya Karandikar (supra) reads thus:-

14. Apart from this, as noted, the other issues 2 and 3 whereby the burden was upon the defendants to support their case/defence that the testatrix in proper state of mind and mentally fit to understand the text of the Will and that the Will executed by the deceased was under undue influence, force or by misrepresentation, but nothing could be extracted even in this cross-examination. The attesting witness should have been tested from all these points to support the defence as raised, though specific pleas or affidavit referring to those averments were raised. Therefore, once the plaintiff proves the case that the Will in question has been executed by her in accordance with law, then the burden to disprove the same lies upon the defendants who raised these averments of undue influence, force and/or misrepresentation. As mere allegations or averments are insufficient. Because, in view of above, there is no suspicious circumstances raised and/or able to point out and/or could be extracted from this witness. If there are no suspicious circumstances and/or any doubt to the execution of the said Will, then the Court need to consider the evidence of defendants whether is sufficient to prove their case as per Issue Nos. 2 and 3.

23. Mr. Naidu also placed reliance upon the judgment in case of Kumud Subhash Jadhav vs. Padmakar Hiroo Jadhav and others reported in (2009) 4 Mh. L.J. 266 and in particular paragraph 25 in support of his submission that once it is proved by the attesting witness that the Will was duly executed by the deceased that was sufficient and court cannot discard the Will merely because the said Will was not registered and/or the Sub Registrar has not performed his job properly. Paragraph 25 of the said judgment reads thus:-

25. Learned Counsel Mr. Murthy had submitted that if one peruses the

endorsement as regards registration, it is clear that the sub-Registrar did not comply with the requirements contained in paragraph 23 of the aforesaid judgment. Even if for a moment is accepted that the sub-Registrar did not perform his job as was expected to be done in paragraph 23 of the aforesaid judgment, once it is observed that the Will is properly executed that is to say it is executed by the deceased and duly attested by the attesting witnesses that itself is sufficient and there is no reason to discard the Will merely because the sub-Registrar has not performed his job properly. To that extent, I am not inclined to accept the argument advanced by learned Counsel Mr. Murthy.

24. Mr. Naidu, learned counsel appearing for the plaintiffs also placed reliance upon the judgment of the Supreme Court in case of *Madhukar D. Shende Vs. Tarabai Aba Shedage*, and in particular paragraphs 8 and 9 in support of his plea that since plaintiffs had proved the execution of Will, this court shall not return a finding of "not proved" merely on account of certain assumed suspicion or supposition. Paragraphs 8 and 9 of the said judgment read thus:-

8. The requirement of proof of a will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case the court either believes that the will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the Jury in *R. v. Hodge* may be apposite to some extent. "The mind was apt to make a pleasure in adapting circumstances to one another and even in straining them a title, if need be, to force them to form parts of one connected hole; and the more ingenuous the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete." The conscience of the court has to be satisfied by the propounder of will adducing evidence so as to dispel any suspicious or unnatural circumstances attaching to a will provided that there is something unnatural or suspicious about the will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict -- positive or negative.

9. It is well-settled that one who propounds a will must establish the competency of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of "not proved" merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance.

25. Section 67 and 68 of the Indian Evidence Act, 1872 prescribe requirement and nature of proof which must be satisfied by the party who relies on the document in the court of law. In catena of decisions delivered by the Supreme Court and this court, it has been held that the Will has to be proved like any other document except as to the special requirements of attestation prescribed by section 63 of the Indian Succession Act. It has been held that unlike other documents, the Will speaks from the death of the testator and so when it is propounded or produced before the court, the testator who has already departed from the world cannot show whether it is his Will or not and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and testament of the departed testator. The propounder of the Will therefore, has to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in sound and disposing state of mind, that he understood the nature and effect of the dispositions and had affixed his signature on such document on his own free will. The propounder of the Will has to remove all suspicions when he is himself involved in the execution of the Will. The propounder of the Will has to prove the due and valid execution of the Will and if there are any suspicious circumstances surrounding the execution of the Will, the propounder must remove such suspicions from the mind of the court by cogent and satisfactory evidence.

26. On perusal of the Will in question, it is clear that under the said alleged Will, the testator had alleged to have nominated two executors (1) Mr. Harish Vithal Kulkarni and (2) Shivanand Vishwanath Warty. The complete addresses of both the alleged executors were also given in paragraph 3 of the said alleged Will. As far as Executor No. 2 i.e. Shivanand Warty is concerned, his address given was "Warty House, Ashok Nagar, Kanjur (East), Mumbai 400 042". It is not in dispute that Mr. Shivanand Warty was not examined by the plaintiff as witness though in

the affidavit in lieu of examination in chief of the defendant, the witness had categorically deposed that on bare perusal of the pin code number mentioned in the alleged Will, in Paragraph 3 it was clear that the said Will was fabricated. Defendant had examined Mr. S.T. Gamre (DW No. 2) who was inspector of Post office, Public Grievance. The said witness produced original copy of the trade circular dated 3rd December, 1991 issued by the department of Post, India by which various departments were informed that the time scale delivery post office named "Bhandup East" Post Office with Pin Code 400 042 shall be opened in new departmental building on 8th December, 1991. The said witness also deposed that as per record, the said pin code 400 042 came into existence on 8th December, 1991. Mr. Naidu learned counsel for the plaintiffs did not dispute the fact that the said pin code 400 042 came into existence on 8th December, 1991. The learned counsel however, led emphasis on the question asked in the cross examination of the said witness by the plaintiffs counsel in which the said witness had confirmed that if any letter was sent without pin code prior to 8th December, 1991 it would be received. On perusal of the said trade circular issued by the department of Post, which is not disputed by the plaintiffs and in view of the fact that the plaintiffs also did not dispute that the pin code no. 400 042 came into existence on 8th December, 1991, it is clear beyond reasonable doubt that the said pin code was not in existence on the date of execution of the alleged Will on 11th October, 1991. In my view the alleged Will relied upon by the plaintiff is thus on the face of it forged and fabricated. I am not inclined to accept the submission of Mr. Naidu, learned counsel for the plaintiffs that even if the pin code mentioned in the alleged Will was not in existence on the date of execution of the said alleged document, it was irrelevant for the purpose of deciding whether the said document existed or not. I am also not inclined to accept the submission of Mr. Naidu that since alleged second executor was not examined as a witness mention of such pin code which was though not in existence on the date of execution of Will, it would not prove that Will was not executed on the date mentioned on the Will.

27. In my view, since it is proved beyond reasonable doubt that pin code mentioned in the alleged Will was not existing on the date of its alleged execution, such fact cannot be ignored by this court while making enquiry whether will was executed validly or not. Merely because, the alleged second executor was not examined as witness by the plaintiff, court cannot ignore such crucial evidence on record and render finding that Will was validly executed on the date of its alleged execution. Such document could not have been executed on 11th October, 1991 when the said pin code number mentioned in the alleged Will was not in existence. The onus was on the plaintiffs to prove that the Will was validly executed which onus the plaintiffs have failed to discharge.

28. On perusal of the evidence of Mr. H.V. Kotadia who was alleged to be attesting witness to the said alleged Will, it is clear that the said witness when confronted with his signature on the affidavit dated 17th March, 2009 and his alleged signature on the Will, the witness answered that his signature appearing

of the Will was different from the signature appearing on the affidavit dated 17th March, 2009 filed by the said witness. The said witness also answered in the cross examination that he had not tendered his signature as witness on any other Will executed by the said deceased. It is thus clear beyond reasonable doubt that even the attesting witness examined by the plaintiff also found his signature on the Will different from his admitted signature on the affidavit filed by the said witness.

29. As far as the evidence of plaintiff No. 1 who was alleged to have been appointed as executor under the said alleged Will is concerned, on perusal of the cross examination of the said witness, it indicates that there are several contradictions in the affidavit in reply filed in Notice of Motion in suit filed by defendant, affidavit in lieu of examination of chief filed by the said witness and in cross examination. The said witness in his affidavit filed in Notice of Motion has deposed that the said alleged Will was executed by the deceased in the presence of his wife Mrs. Sudha Sabnis. In cross examination of plaintiff No. 1, he however, deposed that Mrs. Sudha Sabnis was not aware of the Will. When the said witness was confronted with various parts of his affidavit, the witness did not agree that he had tendered his signature on the affidavit after reading it completely. The witness answered that the said affidavit was given to him for his signature and had signed it as the time provided to go through the affidavit and sign was barely within one minute. The witness also denied the suggestion that the said affidavit was drafted on the basis of instructions given by him. The witness volunteered that Mr. S.W. Kulkarni had drafted the said affidavit as per his understanding of the matter. The witness had not given any instructions to Mr. S.W. Kulkarni advocate in detail for the purpose of said affidavit. It is stated that he had given detail information as to various events that had taken place concerning the Will of the deceased and other aspects of the matter and he did not find it necessary to verify the contents of the said affidavit and to find out whether the said contents were in consonance with the facts. In my view, plaintiff no. 1 and alleged attesting witness examined by plaintiffs are unreliable witnesses and their testimony cannot be accepted.

30. On perusal of the cross examination of plaintiff No. 1, it is clear that though in the affidavit filed in Notice of Motion, the witness had deposed that the Will was executed in presence of Mrs. Sudha, widow of the said deceased, in cross examination, however, he admitted that Ms. Sudha was not aware of the Will. In so far as custody of the shares of deceased are concerned, though in the affidavit witness deposed that the custody of these shares was with plaintiff, no. 1, however, in cross examination, he deposed that the said shares were handed over by the deceased to his advocate during his life time. The witness has also admitted in the cross examination that the relations between the deceased and the defendant were cordial. The defendant who examined himself also in cross examination maintained what was stated by him in his affidavit in lieu of examination in chief.

31. On perusal of the evidence it is clear that though plaintiff No. 1 in his cross examination deposed that the deceased testator had also executed document in Marathi, however, did not produce any such document in evidence. Even in the alleged Will propounded by the plaintiffs, it was mentioned that the deceased had not executed any other document and the said alleged Will was the last Will and testament. I am not inclined to accept the submission of Mr. Naidu, the learned counsel for the plaintiff that since the defendant did not call upon the plaintiffs to produce any such Will in Marathi, the plaintiff did not produce the same. It was for the plaintiff to produce such document, if any, if it was in existence. It is thus not possible to accept the submission of the plaintiffs that any such document was in existence. Even the attesting witness examined by the plaintiffs has in his cross examination deposed that he did not attest any other document. The evidence of the plaintiff No. 1 on this issue is thus contradictory and cannot be accepted.

32. In so far as submission of Mr. Naidu, that the deceased testator had disinherited defendant from any legacy in view of his strained relations with the testator as alleged to have been recorded in the alleged Will is concerned, in cross examination of plaintiff No. 1, the witness admitted that the relation of the deceased testator was cordial with the defendant. Even in the cross examination of the defendant by the plaintiffs, the witness deposed that his relations with his deceased father was all through out very cordial and normal. It is not in dispute that the deceased had only one issue out of the wedlock between him and Mrs. Sudha. It is also proved beyond reasonable doubt that the relations between the said deceased and the defendant were all through out cordial. Plaintiffs have stated in the testamentary petition that the last address of the deceased was that of his son's address. In my view in these circumstances, the deceased testator would not have disinherited his son from any legacy under the Will. Mrs. Purohit, the learned counsel for the defendant in my view is correct in her submissions that this is another suspicious circumstance to prove that the alleged Will was unnatural and such Will would not have been executed by the deceased.

33. In my view, Mrs. Purohit is right in her submission that though the Will was alleged to have been executed on 11th October, 1991 and though the deceased testator expired on 23rd April, 1992, plaintiffs did not inform the defendant or his mother about the said alleged Will till defendant filed suit in this court inter alia praying for administration of the estate of the said deceased. The alleged Will saw face of the light for the first time after October, 1993 though the deceased testator expired on 23rd April, 1992 though the plaintiff No. 1 was fully aware about the death of the deceased on the date of his death himself as admitted by him in his cross examination. This is another suspicious circumstance proved on record as far as execution of the alleged Will is concerned.

34. Mrs. Purohit, the learned counsel for the defendant is right in her submission that even wife of the deceased was disinherited by the deceased testator except

token amount. The entire property of the deceased is alleged to have been bequeathed in favour of various charities when the relations between the deceased and his wife were cordial. Delhi High Court in the case of Yashoda Gupta (supra) after adverting to the judgment of the Supreme Court in Kalyan Singh Vs. Smt. Chhoti and Others, has held that disinheriting wife runs counter to our societal values. In my view learned counsel for defendant is right that even this circumstance would also create suspicion in the mind of the Court and would demonstrate that such Will would never exist.

35. As far as the judgment of this court in Savita Karandikar (supra) relied upon by Mr. Naidu is concerned, it has been held that once the plaintiff proves that the Will in question had been executed by the testator in accordance with law then the burden to disprove the same lies upon the defendant to raise averments of undue influence, force or misrepresentation. It has been held that mere allegations or averments are insufficient. In my view since the plaintiffs failed to prove that the Will was executed by the deceased, the onus did not shift upon the defendant to prove contrary. The judgment relied upon by Mr. Naidu thus in the case of Savita Karandikar is of no assistance to the plaintiffs.

36. As far as judgment of this court in the case of Kumud Jadhav (supra) relied upon by Mr. Naidu is concerned, this court had considered the situation where it was proved in evidence that the deceased was not in favour of one of his relatives and who was accordingly disinherited from the estate. Considering the facts of this case, however, it is clear that the deceased had cordial relations with defendant and thus would not have disinherited his son from the estate. The facts in the case of Kumud Jadhav (supra) are clearly distinguishable with the facts of this case and the said judgment is of no assistance to the plaintiffs.

37. Mr. Naidu also placed reliance on the judgment of Madhukar Shende (supra) in which it has been held that if after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, the Court either believes that the Will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the Will was duly executed by the testator, then the factum of execution of Will shall be said to have been proved. Considering the facts of this case, it is clear that the alleged Will propounded by the plaintiff did not exist and was ex facie fabricated by the plaintiffs and the attesting witnesses. Evidence on record clearly proves beyond reasonable doubt that the alleged Will did not exist. The defendant has also established from the evidence produced on record that there were several suspicious circumstances which would indicate that the alleged Will did not exist and the same was fabricated.

38. In my view, the plaintiffs failed to prove that the deceased Mahadev died leaving his writing dated 11th October, 1991 as his alleged last Will or that the same was duly attested by the witnesses. In so far as issue No. 3 is concerned as to whether the plaintiffs prove that the deceased at the time of such writing was

executed was of sound and disposing mind, understanding and memory is concerned, since this court has taken a view that the plaintiff failed to prove that the alleged Will was executed by the deceased testator, the said issue does not arise and thus need not be answered. Issue Nos. 1 and 2 are accordingly answered in the negative. Issue No. 3 is not required to be answered.

39. Since the deceased testator died without leaving any Will, the estate of the deceased will have to be devolved on the basis of intestacy.

40. Testamentary Suit is accordingly dismissed with cost quantified at Rs. 25,000/- payable by the plaintiffs to the defendant within four weeks from today. Mr. Naidu, learned counsel appearing for the plaintiff seeks stay of operation of this order which is vehemently opposed by Ms. Purohit, learned counsel appearing for the defendants. Request for stay is refused.