

(2016) 10 BOM CK 0080

In the Bombay High Court

Case No : Appeal No.56 of 2012 in Testamentary Suit No.78 of 1994

Jean Nusly Duggan

APPELLANT

Vs

Dr. Feroze Homi Duggan

RESPONDENT

Date of Decision : 27-10-2016

Acts Referred:

Succession Act, 1925 — Section 278, Section 59

Citation : (2017) 1 HLR 238

Hon'ble Judges : A.S. Oka and P.D. Naik, JJ.

Bench : Division Bench

Advocate : Mr. Sharan Jagtiani a/w Mr. Aditya Pimple a/w Mr. Ish Jain and Ms. Bindi Parikh i/b Kiran Jain & Co, for the Appellant; Mr. Shailesh Shah, Senior Counsel a/w Mr. Prakash Ganwani, Mr. Shanay Shah, Mr. J.S. Solomon, Ms. Soniya Putta, Mr. Rahul Soman i/b M/s.

Final Decision : Dismissed

Judgement

A.S. Oka, J.—By this Appeal, the appellant has taken an exception to the Judgment and Decree dated 3rd August 2011 passed by the learned Single Judge by which the Testamentary Suit filed by the respondent was decreed by the learned Single Judge.

2. The respondent filed a Testamentary Petition seeking grant of Letters of Administration. The petition was filed in respect of the alleged last Will and Testament dated 4th April 1993 (for short Rs. the disputed Will") of Lady Jeena alias Jena Jamhedji Duggan (for short "the testator"). The respondent claimed to be the sole residuary legatee under the disputed Will. The testator died at Mumbai on 2nd September 1993. It is alleged that the disputed Will was executed in the house of the testator situated at Lawnside, 6, Harkness Road, Mumbai 400006. Under the disputed Will, the testator appointed Mr. Jamshed Burjor Aga, Mrs. Raty Adi Nariman and Ms. Neena Kapadia as the Executors and/or Executrix. It is stated in the Testamentary Petition that all of them have renounced their right as executor/executrix. It is stated in the petition that the

testator had two sons and the surviving nextofkins according to Indian Succession Act, 1925 (for short "the succession Act") as applicable to Parsis were the respondent (grandson of the testator) and one Ms Farina Alexandre Folichichook being the granddaughter.

3. The present appellant is claiming to be widowed daughter in law of the testator. It is claimed that the testator had two sons Homi and Nusserwanji alias Nusly. Both the sons predeceased the testator. The respondent is the son of Homi. The appellant is the widow of Nusly. It is claimed that the said Nusly died in the year 1983.

4. Initially, the Letters of Administration were granted to the respondent. The Letters of Administration were revoked on a petition filed by the appellant. Thereafter, the present appellant filed a Caveat. In the affidavit in support of the Caveat, it was contended by the appellant that the testator was not in a sound state of mind when the disputed Will was allegedly executed. It was pointed out that she was hospitalised soon after the execution of the Will. It is contended that the Will has not been validly executed and there are several suspicious circumstances on record which create a serious doubt about the genuineness of the Will. It was contended that the Will was got executed by fraud and undue influence. In view of the Caveat being filed by the appellant, the Testamentary Petition was numbered as a Suit.

5. The issues were framed by the learned Single Judge of this Court on 8th August 2007 which read thus:

(I) Whether the Writing dated 4th April 1993 is the validly executed Will of deceased lady Jean Duggan?

(II) Whether the deceased Lady Jean Duggan was in sound and disposing state of mind at the time of execution of the said Writing dated 4th April 1994?

(III) Whether the Defendant proves that at the relevant time the testator of the Will was not in sound and disposing state of mind?

(IV) Whether the Writing dated 4th April 1993 has been obtained by fraud and undue influence as alleged in para 7 of affidavit in support of caveat?"

6. The respondent examined one Roshan Master who was alleged attesting witness of the disputed Will. The appellant examined herself. Apart from the appellant, Mrs.Bakul Kiran Khatau and Dr.Vishnu Chandra Kakkar were examined as witnesses by the appellant. The learned Single Judge by the impugned Judgment and Decree held that the disputed Will was duly proved and that at the time of execution of the disputed Will, the testator was in a sound and disposing state of mind. The learned Single Judge held that the appellant has failed to prove that at the time of execution of the disputed Will, the testator was not in sound and disposing state of mind. The learned Single Judge also held that the appellant failed to prove that the disputed Will was obtained by fraud and undue influence. The learned Single Judge, by the impugned Decree, directed the

Prothonotary and Senior Master to issue a probate of the disputed Will dated 4th April 1993.

7. The learned counsel for the appellant in support of the appeal submitted that in view of section 59 of the Indian Succession Act, 1925 (for short "the said Act"), the onus is always on the propounder to prove the sound and disposing state of mind of the testator and where existence of suspicious circumstances is shown, the onus is on the propounder to prove the Will by explaining the suspicious circumstances by leading cogent evidence. The learned counsel for the appellant relied upon the decision of the Apex Court in the case of *H. Venkatachala Iyengar v. B. N. Thimmajamma* AIR 1959 SC 443. He has taken us through the pleadings and notes of evidence. His submission is that the respondent failed to lead any evidence to discharge onus. He submitted that the respondent himself did not enter the witness box though the appellant, by filing a chamber summons, sought his presence for the cross-examination. He pointed out that the said chamber summons was opposed by the respondent and the learned Single Judge rejected the said prayer. He pointed out that there were several suspicious circumstances associated with the execution of the disputed Will. He pointed out that at the time of execution of the disputed Will, the age of the testator was 96 years. He also pointed out that three executors who were allegedly appointed under the disputed Will have renounced their right as executors. He pointed out that the only witness examined by the respondent accepted that Mr. Jamshed Aga who was one of the executors appointed under the disputed will played an instrumental role in the execution of the Will. He submitted that renouncement of executorship of the disputed Will by the said Jamshed Aga who was closely associated with the testator is also a suspicious circumstance. Thirdly, he pointed out that except for the minor bequests made by the testator in favour of the members of her staff, rest of the property has been bequeathed to the respondent who had no contact with the testator for several decades. He submitted that the evidence shows that after several years, he came to India and was with the testator in Mumbai in February and March 1993, just before the execution of the disputed Will. He submitted that it is obvious that the respondent who was in India just before the execution of the Will has played a major role in getting the Will executed. He pointed out that the manner in which the respondent obtained the custody of the Will is also suspicious. He urged that no evidence is adduced by the respondent for explaining the aforesaid suspicious circumstances. He submitted that the learned Single Judge was made aware of the said flaw in case of the respondent of not leading the evidence to explain the suspicious circumstances.

8. He invited our attention to the letter the dated 10th March 1993 (Exhibit P4) allegedly written by the testator to the respondent. He submitted that the only witness examined by the respondent has not referred to the said letter though affidavit of documents filed by the Constituted Attorney of the respondent refers to the said letter. He pointed out that when the appellant was shown the said letter, she recognised the handwriting of the said letter by stating that it was the

handwriting of the deceased testator. He submitted that the contents of the said letter have not been proved by the respondent and he has not proved that the letter was dispatched by the testator and was received by him. He submitted that in absence of the proof of contents of the said letter and the proof of delivery of the said letter, the same could not have been considered as an authentic evidence by the learned Single Judge. He pointed out that the condition of the health of the testator was very poor as she was required to be hospitalised for three weeks immediately after the execution of the Will. Inviting our attention to the evidence of the second witness examined by the appellant who was a friend of the testator, he submitted that the said evidence is not at all shattered in the cross examination. He pointed out that the said witness stated that the deceased was suffering from loss of memory and understanding to a great extent. The deceased was frail, weak and disoriented. The witness also deposed that the deceased testator failed to recognize her during the her last two visits in or around February 1993 in the house of the testator. He pointed out the evidence of the Medical Practitioner(third witness examined by the respondent). He pointed out that the said witness was brought to the house of the testator on the request of the Mr. Jamshed Aga on 10th January 1993 and on the last Sunday of February 1993. He stated that the said witness proved that the testator was suffering from loss of memory and in general, her health was poor. He stated that he was requested by Mr. Jamshed Aga to sign the Will as an attesting witness, but he refused to do so.

9. The learned counsel for the appellant also made submissions on the letter dated 13th September 1993 (Exh.PX1). He submitted that the respondent's Advocate had confronted the appellant by showing a copy of the letter at Exh.PX1. He pointed out that the learned Single Judge has accepted the case of the appellant that the said letter is required to be read in evidence. Inviting our attention to the finding recorded by the learned Single Judge that the respondent exercised influence upon the deceased testator for making the impugned will, he submitted that in view of the said finding which is not challenged by the respondent, the case of the undue influence will have to be taken as proved.

10. The learned counsel for the appellant submitted that it was bounden duty of the respondent to step into witness box and to offer himself for cross examination as he was aware of the material facts. He submitted that an adverse inference ought to have been drawn against the respondent for not entering into witness box. He submitted that the letter dated 10th March 1993 (Exh.P4) will have to be discarded as that there was no opportunity available to the appellant to cross examine the respondent on the said letter.

11. After taking the Court through the depositions of the witnesses, he made submissions on the testimony of the witnesses, he submitted that the issue No.2 is distinct from the Issue No.3. He submitted that the Issue No.2 is based on section 59 of the said Act.

12. His submission is that the learned Single Judge has not taken into

consideration the distinction between the two issues. He submitted that the evidence of the only witness examined by the respondent is not sufficient to discharge the burden on the respondent. He urged that the letter at Exhibit PX1 was admissible in evidence. It was produced in the cross-examination of the appellant in response to question no.88. In fact the learned counsel for the respondent confronted the appellant by showing a copy of the said document which was a part of the affidavit of Mr. Zaiwalla in Contempt Petition no.22 of 1999. He urged that the said letter supports the contention of the appellant about the state of mind of the testator on the date of the execution of the alleged will. He submitted that though it may not be conclusive, the failure to take endorsement of the doctor on the Will must be taken into consideration as the age of the testator was 96 years. He submitted that the burden to prove the issue No.3 on the appellant was required to be discharged only if the burden imposed by the Issue No.2 was discharged by the respondent. His submission is that the respondent ought to have led his own evidence or at least the evidence of Mr. Jamshed Aga who was actively involved in the execution of the disputed Will. He also dealt with the findings recorded by the learned Single Judge on non production of the hospital record of the deceased testator. He urged that the appellant never claimed that she was in possession of the hospital record. His submission is that the reference to the hospital record in the affidavit of documents was by way of mistake and therefore, no adverse inference can be drawn for non production of the said documents on record especially when she has explained as to how she obtained the hospital registration number. He submitted that the finding of the learned Judge that the second witness examined by the appellant could not have met the appellant on more than two occasions may not be correct. He submitted that while dealing with the evidence of the third witness examined by the appellant, the learned Single Judge was unnecessarily swayed by the fact that the Doctor has attended the residence of the testator on 10th January 1993 when there were riots in the city. He submitted that the learned Judge ignored that the said witness was residing in Mumbai at the relevant time at a place which is close to the place of residence of the testator. He submitted that there was no reason to reject the evidence of the third witness examined by the appellant. He submitted that the evidence of the third witness clearly shows that the deceased was suffering from loss of memory and understanding. He, therefore, submitted that the evidence of the witnesses examined by the appellant ought to have been accepted and as the respondent has not discharged the burden, the learned Single Judge ought to have dismissed the Testamentary Suit.

13. The learned senior counsel for the respondent has also made detailed submissions. While supporting the findings recorded by the learned Single Judge, he relied upon various decisions of the Apex Court. He submitted that if propounder of the Will proves the execution of the Will and that Will was made when the testator was in a sound state of the mind, then the onus on him stands discharged. He relied upon paragraph 9 of the decision of the Apex Court in the

case of *Madhukar D. Shende v. Tarabai Aba Shedage* (2002) 2 SCC 85, dealing with the onus and the burden of proof. He submitted that in a given case merely because it is established that the beneficiary under the disputed Will has actively participated in the process of making the Will, that itself is not sufficient to create any doubt either about the testamentary capacity or the genuineness of the Will. In this behalf, he relied upon the decision of the Apex Court in the case of *Pentakota Satyanarayana and others v. Pentakota Seetharatnam and others* (2005) 8 SCC 67. He submitted that once the Court is satisfied on the basis of the evidence that the testator with a free will and with a sound and disposing state of mind has made the Will, the Court cannot go into the question whether the disposition is fair. He submitted that exclusion of some of the natural legal representatives of the testator under the Will is not by itself sufficient to doubt the authenticity of the Will. He relied upon the decision of the Apex Court in the case of *Ramabai Padmakar Patil (dead) by L.Rs and others v. Rukminibai Vishnu Vekhande and others* AIR 2003 SC 3109. Dealing with the document at Exh.P4, he submitted that as the witness identified the handwriting of the testator in the said letter, the contents thereof are certainly admissible to the extent of the fact that the deceased testator had written the said letter. He relied upon the decision of the Apex Court in the case of *Bishvanath Rai v. Sachhidanand Singh* (1972) 4 SCC 707. Relying upon the decision of the learned Single Judge (A.S. Oka, J.), in the case of *Geeta Marine Services Pvt. Ltd. And another v. State and another*, 2009 All M.R. (Cri) 672, he urged that there is a consistent practise followed by the Courts in the State to mark the documents shown to a witness in the cross examination as exhibits. Marking of such documents as exhibits does not dispense with the requirement of the proof of execution, contents and genuineness of the documents in accordance with law. These submissions were made with reference to the documents marked as Exhibit PX1. He invited our attention to the oral evidence on record as well as the findings recorded by the learned Single Judge. He submitted that merely because the will was not read over to the testator at the time of execution thereof, there is no illegality attached and the Will does not become suspicious. He submitted that even assuming that there were suspicious circumstances, the burden explaining the suspicious circumstances was discharged. He submitted that non examination of Mr. Jamshed Aga is not at all fatal. He submitted that no fault can be found with the findings recorded by the learned Single Judge. He urged that if the findings are considered in its entirety, it becomes very clear that the learned Single Judge has recorded findings on all the issues.

14. The learned counsel for the appellant has rejoined by contending that the burden on the respondent has not been discharged. He relied upon certain precedents.

15. We have given careful consideration to the submissions. We have perused the notes of evidence and the documentary evidence on record. In the petition for Letters of Administration filed by the respondent, it is pointed that the testator died on 2nd September 1993 and she had executed the Will dated 4th

April 1993. It is stated that the Will was executed by her at her residence at Lawnside, 6, Harkness Road, Mumbai 400 006. As per the alleged Will, the bequests were made of very small amounts to three servants employed by the testator and her nephew. The Will provides that after making payment of various expenses and paying legacies to the four persons, one half of the residue of her entire estate was bequeathed to the respondent. The remaining half was ordered to be held by the executors in trust for grant-daughter of the deceased. It was provided that the grand daughter will be entitled to enjoy the income from the said half share till she attains 55 years and after she attains the age of 55, she will be absolutely entitled to receive the said share. It is further provided that if the granddaughter marries to a Russian gentleman named in the said Will, she would not be entitled to have any share whatsoever and the entire residual estate will be given to the respondent. It appears that the granddaughter married to the Russian gentleman named in the Will. As pointed out earlier, the present appellant is the daughter-in-law of the deceased (who is the widow of Nusly, a son of the testator). The respondent is the son of deceased Homi, another son of the testator. The alleged attesting witnesses are Late Mr. Nani Palkhiwala, Senior Advocate and Ms Roshan M. Master, Advocate.

16. Now, we turn to the deposition of the only witness examined by the respondent-plaintiff. The said witness is Ms Roshan Master who was an Advocate and Notary. As reflected from her affidavit in lieu of examination-in-chief, her age at the time of filing of the said affidavit in lieu of examination-in-chief was 70 years. She stated that she was enrolled as an Advocate in the year 1961. She stated that she knew Mr. Nani Palkhiwala as his office was located on the fourth floor at Bombay House Fort, Mumbai 4000 023. She stated that since April 1969, she worked as an assistant of Mr. S.R. Vakil, Advocate whose office was located on the ground floor of the same building Bombay House. Paragraphs 3 to 8 of her deposition read thus:

"3. I knew and I was well acquainted with Lady Jena Jamshedji Duggan. I became acquainted with Lady Jena Jamshedji Duggan in the offices of Mr. N. K. Petigara and Mr. S. R. Vakil in M/s. Mulla and Mulla and Craigie Blunt & Caroe, Advocates and Solicitors. Lady Duggan used to visit Mr. Nani A. Palkhiwala and Mr. S. R. Vakil often in their offices at Bombay House, Fort, Mumbai - 400 023 in connection with her charitable works. I became more acquainted with Lady Duggan in the offices of Mr. Nani A. Palkhiwala and Mr. S.R. Vakil in Bombay House after April 1969.

4. At the beginning of April 1993, Mr. Nani A. Palkhiwala requested Mr. S. R. Vakil to depute me to accompany Mr. Nani A. Palkhiwala to the residence of Lady Duggan for attesting her Will. Accordingly, I went with Mr. Nani A. Palkhiwala to the residence of Lady Duggan at Lawnside at Malbar Hill on 4th April 1993. On reaching the residence of Lady Duggan at Lawnside, Malbar Hill around noon or 4th April 1993, Mr. Nani A. Palkhiwala and myself were met by Lady Duggan. Mr. Jamshed Burjor Aga, who was known to Mr. Nani A. Palkhiwala was also present

at this meeting. At this meeting, Lady Duggan produced a type written document and informed us that the said writing was her Will and signed the same and requested Mr. Nani A. Palkhiwala and myself to attest her signature thereon. I have taken inspection of the original writing dated 4th April 1993 deposited in this Hon''ble Court (referred to hereafter as "the said writing") in the office of this Hon''ble Court on 20th December 2006.

5. On 4th April 1993, I was present together with Mr. Nani A. Palkhiwala at the residence of Lady Jena Duggan at Lawnside, 6, Harkness Road, Mumbai 40006 when Mr. Jamshed Burjor Aga was also present and at that time, I and Mr. Nani A. Palkhiwala saw Lady Duggan set and subscribe her name at the foot of the said writing and declare and publish the same as her last Will and Testament. Thereupon, at the request of Lady Duggan, Mr. Nani A. Palkhiwala and I set and subscribed our respective names and signatures at the foot of the said writing as witnesses thereto in the presence of the said Lady Duggan. All three of us, namely, Lady Duggan, Mr. Nani A. Palkhiwala and myself were present at the same time on 4th April 1993 at the residence of Lady Duggan when Lady Duggan set and subscribed her signature on the said writing as executing party and Mr. Nani A. Palkhiwala and myself signed the said writing as witnesses thereto. I say that the signature subscribed at the foot of the said writing, namely, Rs. Jena J. Duggan" is in the handwriting of Lady Jena Duggan. I say that the signature at the foot of the said writing, namely, Rs. Jena J. Duggan" was made by Lady Jena J. Duggan in my presence and in the presence of Mr. Nani A. Palkhiwala on 4th April 1993. I say that the two signatures Rs. N.A.Palkhiwala" on the said writing are in the handwriting of Mr. Nani A. Palkhiwala and were made by him in the presence of Lady Jena Duggan and myself on 4th April 1993. I say that the signature Rs. Roshan M. Master" on the said writing is in my handwriting and was made by me on 4th April 1993 in the presence of Lady Jena Duggan and Mr. Nani A. Palkhiwala.

6. On 4th April 1993 when Lady Jena Duggan subscribed her name and signature to the said writing, the words Rs. Fourth" and Rs. April" had been added in ink by Mr. Jamshed Burjor Aga in his handwriting in the line beginning with the words "IN WITNESS WHEREOF" as also on the docket of the said writing.

7. I say that when Lady Jena Duggan subscribed her signature on the said writing on 4th April 1993, she was of sound and disposing mind, memory and understanding and made and published the same as her Will of her free will and pleasure. I say that from the behaviour and talk of by Lady Jena Duggan with Mr. Nani A. Palkhiwala and me and Mr. Jamshed Burjor Aga on 4th April 1993, it was clear to me that Lady Jena Duggan was in a sound state of mind, memory and understanding and executed the said writing voluntarily.

8. After executing her Will on 4th April 1993, Lady Duggan retained the said original Will with herself. At the time of execution of her Will by Lady Jena Duggan on 4th April 1993, except Lady Duggan, Mr. Nani A. Palkhiwala and myself and Mr. Jamshed Burjor Aga, no other person was present. Prior to the

demise of Lady Duggan, I was not acquainted with Dr. Feroze Duggan or his mother Mrs. Aban Duggan."

17. Her further examination-in-chief was recorded by the learned Single Judge. When the original Will was shown to her, she identified the signature of the testator. She stated that she along with the other attesting witness Mr. Nani Palkhiwala as well as the said Jamshed Aga were present at the time of execution. She stated that the date on the Will was put by the said Jamshed Aga. In paragraph 4 of her further examination-in-chief, she stated that health of the testator was normal when she signed the Will. She stated that the testator spoke to them and she enquired about the health of Mr. S.R.Vakil. She stated that in presence of the testator, she along with Mr. Nani Palkhiwala attested the Will. She stated that the testator put her signature on the Will in presence of herself and Mr. Nani Palkhiwala. In the cross examination, she stated that except at the places mentioned in the affidavit in lieu of examination-in-chief, (the office of Mr. Nani Palkhiwala and Mr. S. R. Vakil) she had not met the testator at any other place. She stated that she was not aware of the hospitalization of the testator in the year 1993 though Mr. S.R. Vakil had casually mentioned about it. The answers given by the witness in paragraphs 7 to 9 of the cross-examination are very material which read thus:

"7. On 4.4.1993, I reached the residence of Lady Jena J. Duggan at about 11.30 a.m with N.A.Palkhiwala. We were there for about half an hour. When I went with Mr. Palkhiwala, we did not meet Lady Jena in the main hall. But after crossing the main hall, one side room was there in which we met her. She was sitting on the chair. At the time when the Will was attested by me, I was not knowing that Lady Jena was 96 years old, but I was knowing that she was quite old. I personally did not handle legal matters of Lady Jena Duggan.

8. When we went to residence of Lady J. Duggan at about 11.30 a.m on 4.4.1993, Mr. Jamshedji Aga received us and took us to the room where Lady Jena J. Duggan was sitting. After expressing some pleasantries, she told us that we were called to witness her Will. Before that, I was not knowing for what purpose I was called. However, Mr. N. A. Palkhiwala was knowing about the purpose of his visit i.e for attesting her Will. Lady Jena Duggan herself produced the subject Will and said that we both have to witness her Will.

9. She signed the subject Will in our presence and thereafter we attested the same as witnesses to the said Will."

(emphasis added)

18. In paragraph 10 of her cross-examination, she accepted that she has not taken any part in the preparation of the Will. She stated that the Will was not prepared by the testator in her presence and even the attesting Witnesses did not read the Will. When the witness was confronted with her affidavit filed in support of the Testamentary Petition, she stated that the mention of presence of the said Mr. Aga was not made therein as the affidavit in support is filed in the

prescribed form. In paragraph 12, she denied the correctness of the suggestion that on 4th April 1993 when the Will was allegedly executed, the testator was in bad health and was not in a position to recognize anybody. She denied the correctness of the suggestion that she along with Mr. Nani Palkhiwala did not attest the Will. We must note here that the evidence of the witness is not at all shaken in the cross-examination.

19. The appellant in her affidavit in support of the caveat denied the execution of the alleged Will. It was contended that the testator was not of sound mind when she executed the alleged Will. It was pointed out that from 19th April 1993 to 15th May 1993 the deceased was hospitalised in Breach Candy Hospital in Mumbai in a serious condition with history of being in delirious condition, lapsing into Coma and other factors. It was further contended that the testator was unable to recognise her relatives and friends and was incapable of arriving at an independent decision at the relevant time. Moreover, she had become frail due to ill health, she was unable to walk and therefore, she was required to use a wheel chair. It is alleged that she was required to be fed by a food pipe.

20. In the affidavit in support of the caveat, it was alleged that the respondent has taken active part in purported execution of the Will. It is alleged that entire exercise of making the alleged Will was conducted by the respondent or at his instance by Mr. Noshir Talathi, who was a Director of Benzer Interiors Private Limited. It is alleged that the alleged Will is void. It is further alleged that on account of illness as well as mental and physical disability of the testator, she came under total control of the respondent and/or the said Noshir. It is alleged that they decided to exclude all other heirs to the estate of the testator. It is pointed out all the three executors appointed under the disputed Will have renounced their rights as executors. It is contended that the Will contains inconsistent statements and the same is unnatural. We are referring only to the material contentions raised in the affidavit in support of the caveat. One of the contentions raised in the affidavit is that during the last phase of the life of the testator, she had shown marked improvement in her attitude towards appellant as she was the only member of the family in Mumbai who could contact the testator and enquire about her health.

21. Now we turn to the affidavit in lieu of examination-in-chief of the present appellant. She stated that the testator had two sons Nusserwanji @ Nusly and Homi. It is pointed out that the respondent is the son of the first wife of Homi. Homi died in the year 1985 and Nusly died on 31st May 1983. As stated earlier, the appellant is the widow of the said Nusly who claims to be the sole legatee under the Will dated 2nd February 1978 of her husband. She stated that after she married to Nusly on 26th July 1976, she started residing at Lawnside (the place of residence of the deceased). It was pointed out that the respondent and his mother left India and settled in U.K and were not residing in India since the year 1959. In fact, the respondent and his mother were British Nationals holding British passports. She stated that somewhere in February or March 1993, the

respondent visited India after lapse of 32 to 35 years. As the testator was not keeping a good health, it is alleged that during his visit, the respondent with the help and assistance of the said Mr. Jamshed Aga planned a conspiracy to grab the estate of the deceased. It is alleged that the said Mr. Jamshed Aga was able to exercise enormous influence on the deceased and in fact all her papers and bank documents were always in the custody of the said Jamshed Aga. It is alleged that the testator did not give any instructions for making the disputed Will and that the disputed Will is not prepared as per her wishes. It is alleged that during the relevant period, she was prevented from having an access to the room of the testator.

22. Paragraphs 14 to 17 of the examination-in-chief of the appellant are important which read thus:

"14. I say that the said Lady Duggan died at Mumbai on 2nd September 1993. Prior to her death the said Lady Duggan who was about 96 years old was not of sound mind and was keeping indifferent health and had lost her memory and physical and mental faculties since long. The said deceased lady Duggan was under constant medical treatment of Doctors. I know that Dr.Majmudar was giving Medical Treatment to Lady Duggan.

15. Much prior to April 1993, the said Lady Duggan was unable to understand the contents of any documents or effect thereof. The deceased due to various ailments was unable to physically discharge any work. The deceased was not having sound and disposing mind and memory and was unable to act voluntarily and to understand or give instructions much less for preparing Will. The deceased was unable to even recognize me when I used to visit her. Similarly the deceased was unable to recognise her relatives and friends who use to visit the deceased at Lawnside and was incapable of arriving at any independent decision. The deceased Lady Duggan on many occasion become unconscious. The deceased became frail due to ill health and as a result of which the deceased was not able to consume food in normal course and hence was being fed with food pipe. I say that Lady Duggan was not at all keeping good health in the year 1993 and I will lead evidence of independent witness if necessary.

16. Mrs.Bakul Khatau was a frequent visitor of the deceased Duggan who was her friend. The said Mrs.Khatau during her visits to Lawnside informed me that the deceased Duggan was unable to recognise her as friend when visited and was unable to remember anything.

17. I say that the deceased Lady, Duggan due to continuous medical problem was admitted and hospitalised from 19th April 1993 to 15th May 1993 in Breach Candy Hospital under registration No.1535/93 code no.2341 in a serious condition with the history of being in delirious condition lapsing into coma and other factor indicating that she had lost her physical and mental faculty since long. I have made inquiries with Breach Candy Hospital whether any record of Lady Duggan's Medical treatment given is available to which I was informed that

the same was destroyed. I used to visit her in Hospital."

(emphasis added)

23. In the further part of examination-in-chief, she stated that after her marriage with Nusly, her relationship with the testator got soured. After demise of her husband, the relationship became cordial and she used to visit deceased testator during her illness at Lawnside as well as in the hospital. She further stated that the conspiracy was hatched by the respondent during his visit in February/March 1993. Thereafter, the respondent's mother came to India in December 1993 and stayed till April 1994. The respondent visited India in March/April 1994. It is alleged that there were meetings between him and One Noshir Talathi.

24. She further stated that in the month of May/June 1994, the respondent received 2,00,000 UK Pounds from the said Noshir Talathi. It is alleged that the said amount was paid with the intention of grabbing the Lawnside property on the basis of the alleged Will.

25. We have also perused the material portion of the cross examination of the appellant made by the learned Counsel for the respondent. The witness accepted in the cross examination that till the death of her husband, her relationship with the testator had deteriorated and thereafter, they started talking to each other. The witness accepted that she had filed a suit in the City Civil Court against the testator who in turn had also filed a suit against her and that both the said proceedings were hotly contested. Thereafter, she was cross examined on her statements regarding alleged conspiracy between the respondent and the said Mr. Jamshed Aga. She stated that one Ms. Neena Kapadia who was named as an executor is a part of the conspiracy. She stated that she came to know about the conspiracy when she read the letter annexed to the petition which was served upon her may be in June 1994. In response to the question No.88, the witness stated that she prepared a copy of the letter dated 13th September 1993 on the basis of the copy of the said letter annexed to the petition served upon her. The said typed copy of the letter dated 13th September 1993 was marked as Exhibit PX1. Thereafter, there was further cross examination on the theory of conspiracy. She was cross examined on the letter at Exhibit PX1. She was shown the affidavit dated 1st December 1997 filed in Contempt Petition No.22 of 1997. She admitted that a copy of the letter at exhibit PX1 annexed to the said affidavit does not bear any date. She stated that the date appearing in Exhibit PX1 was in the handwriting and she has not written the same. She stated in the cross examination that some time in April 1993, the testator was ill and was hospitalised. She was brought to home for a period of 10 days and thereafter, she was again hospitalised. She stated that she used to visit the hospital in night and private nurses appointed were aware about her visit. Later on, she stated that on some occasions, she used to visit even in the afternoon. The witness admitted that when she visited the hospital to visit the testator, she has not seen any record of the hospital. She stated that the discharge card was given to her by the nurse who was present at the house of the testator but she does not

recollect her name. She admitted that she had given the registration code number of the hospital in the present proceedings. She stated that she has given the particulars on the basis of the record of the hospital. She stated that she got the registration number from the office of the Breach Candy hospital where the testator was hospitalised. She claimed that the said information was obtained by one lady Lila who was married and settled abroad. She stated that she was not aware about the whereabouts of the said Lila. She accepted by way of reply to the question No.158 that she had no opportunity to see any record of the hospitalization of the testator. The appellant was also cross examined on the affidavit of documents. Item No.10 of the said affidavit of documents was the record of Breach Candy Hospital of medical treatment given to the deceased testator in April 1993. The appellant accepted that she did not possess the said record. She accepted that item No.10 of her affidavit of documents was in relation to the record of the Breach Candy Hospital. She stated that she never had the said record of the hospital. She admitted that she has made an incorrect statement in the affidavit of documents regarding the custody of the record. She accepted that she has only the registration number and not any record. She accepted that she did not make any effort to procure the said documents mentioned in the affidavit of documents. She stated that the mistake occurred in the affidavit of documents because she was just discharged from the hospital. She further stated in the cross examination that the disputed Will may have been prepared by Mr. Jamshed Aga or under his instructions, but she is not sure about it. She stated that the statement is based on the letter marked as Exhibit PX1. In the cross examination, she stated that she used to see the testator every day. She stated that the testator used to pass by her room every day. She stopped passing by her room after some time and thereafter, the Cook used to take instructions from her. She accepted the correctness of the suggestion that as the testator stopped passing by her room, she concluded that the testator was not physically or mentally fit to make the Will. She stated that she was relying upon the deposition of Mrs. Bakul Khatau. She stated that before she filed the suit in the City Civil Court, her relationship with the testator was very cordial.

26. In response to a question, she stated that the respondent obstructed her access to the testator in February or March 1993. She admitted that except for complaining to her sister, she did not complain to anybody about the said conduct of the respondent. She accepted that in April 1993, the respondent was not in India. She admitted that in a suit filed by the testator in the City Civil Court, she was restrained by the said Court from going to the premises where the testator used to reside. Referring to Mrs. Bakul Khatau, another witness examined by her, she stated that Mrs. Khatau used to stay near the place of residence of the testator and used to visit the testator. She stated that Mrs. Khatau was a socialite. In response to the question No.224 and 225, she answered that before filing her affidavit in lieu of examination in chief, she was in ICU for four days and thereafter, in a ward for eight days. She stated that she was discharged on 2nd or 4th January 2008. She stated that she did not make

any efforts to get any documents mentioned in Item No.10 in affidavit of document as she was not well. She stated that when she asked casually someone else to get the documents, she was informed that the hospital does not keep such an old record for such a long time. She admitted that when the affidavit of documents was filed, she did not know whether the documents were available with the hospital. She stated that she was not aware on that date whether the documents were destroyed by the hospital. Her attention was invited to her statement in paragraph 17 of the affidavit in lieu of examination-in-chief in which she stated that she made inquiries with the Breach Candy Hospital about the availability of the record and she was informed that the record was destroyed. She stated that this statement is not correct. She admitted that the suit filed by her in the year 1983 against the testator was earlier in the point of time than the suit filed by the testator against her in the same year. In response to the question No.271 when she was called upon to disclose the names of her witnesses, she stated that she may examine Mrs.Khatau and a Doctor whose name she was not presently knowing. In response to the question whether she was proposing to examine Dr.Mazmudar, she stated that the said Doctor has declined to depose. She stated that her statement about the physical and mental condition of the testator is based on her understanding and on the basis of what is disclosed to her by Mrs.Khatau and the servants. She stated that she is not aware where the said servants were at present. The appellant was shown an inland letter dated 10th march 1993 addressed to the respondent. She accepted that handwriting in the said letter was of the testator and the letter was addressed to the respondent. The said letter was taken on record in her cross-examination and was marked as Exhibit P4. She reiterated that her statement that the testator was unable to recognize her when she used to visit her was correct. She stated that notwithstanding the order of injunction of the City Civil Court against her, she used to go and meet the testator. She stated that after the father of the respondent died, she used to go to meet her and the testator used to send for her. From her evidence, a serious doubt is created about her personal knowledge of the condition of the deceased on the date of the execution of the alleged Will.

27. The appellant examined Mrs.Khatau by filing her affidavit in lieu of examination in chief which runs only into 2 pages. In the affidavit, the witness stated that she used to meet the deceased testator at weddings and Navjotes as well as in various clubs and Halls. She stated that the deceased testator had invited her to her house on few occasions and she has visited her house. She stated that after February 1993, for quite some time she did not see the deceased testator. On enquiry, she learnt that the deceased testator was unwell. Thereafter, she visited the deceased testator at her residence on couple of occasions to enquire about her health. She stated that when she visited the deceased testator, she was unable to recognise her. She stated that the deceased testator was not keeping good health and to some extent was suffering from loss of memory and understanding. She stated that her physical and mental faculties

were very poor. Paragraphs 3 to 7 read of her affidavit in lieu of examination-in-chief read thus:

"3. I say in or about that after February 1993 for quite some time I did not see deceased Lady Jena Duggan.

4. On inquiring I heard about the ill health of deceased Lady Jena Duggan and thereafter on couple of occasions visited her at her residence at Lawnside to enquire about her health.

5. I say that during my visits to Lawnside, I found that deceased Lady Jena Duggan was not keeping good health and to some extent suffering from loss of memory and understanding and also her physical and mental faculties looked very poor. I say that in spite of my repeated efforts deceased Lady Jena Duggan was unable to recognise me in my said visit.

6. I say that I am aware that deceased Lady Jena Duggan died at advanced age of about 96 years in September 1993.

7. I say that during my visits to Lawnside I saw and met the Defendant Jean Duggan who was on couple of occasions present when I met deceased Lady Jena Duggan."

(emphasis added)

28. In the cross examination, the witness Mrs.Khatau stated that she knew the testator from late 1980"s. She stated that when she used to go to Willingdon Club, she used to see the testator along with some of her friends. She stated that she met her several times at Willingdon Club and Cama Hall. She stated that in response to the question as to how many times the deceased testator invited her to her residence, the witness stated that it must be on 5 to 6 occasions. She stated that when she visited the house of the testator, she was led to the testator by the servants. She stated that she did not see the testator in US Club after February 1993 for a month. She stated that she visited the Lawnside residence of the testator in March 1993. She stated that after February 1993, she visited her residence on two occasions. She stated that she met her and knew the appellant from the year 1991. In response to the question No.28, she stated that when she met the testator in March 1993, she noted that she was not in good condition and was little bit disoriented. She reiterated that in March 1993, when she met the testator, she was not recognised by the testator. She accepted that she did not attend the funeral or condolence meeting of the deceased testator.

29. The third and the last witness examined by the appellant is Dr.Vishnu C. Kakkar. In the affidavit in lieu of examination-in-chief, Dr.Vishnu Kakkar stated that he holds degrees of M.B.B.S And M.D (Medicine) and he has been practicing as a Physician and Cardiologist at Kemp's Corner, Mumbai. He stated that his house in Mumbai was nearby the place of residence of the testator. He stated that he has been the owner of Race horses and was a member of the Committee of Royal Western India Turf Club for more than a decade. He stated that he knew

the testator who used to meet him during the visits to the clubs and race course and other functions. He learnt from Mr. Jamshed Aga in January 1993 that the testator was not keeping a good health. He further stated that in March 1993 on two occasions, on Sundays on the request made by the said Jamshed Aga, he examined the testator. He suggested investigations and treatment to avoid transient Ischemic attack. He stated that in the first week of April 1993, he was again requested by the said Jamshed Aga to visit the place of residence of the deceased testator and to examine her. He found that the investigations as advised by him were not carried out. Paragraphs 19 to 26 of his affidavit in lieu of examination-in-chief read thus:

"19. I say that since the investigations and treatment instructed by me was not carried and in view of the fact that, in my opinion, Lady Duggan was incapable of understanding any matter and act on her own free will, I refused to visit Lawn Side and attest the document as requested by Jamshed Aga.

20. I say that the person suffering from the aforesaid would look normal and it would be difficult for an ordinary person or a family member to recognize and diagnose the condition of such a person.

21. I say that from medical experience and clinical examination of Lady Duggan, I came to the aforesaid conclusion that since times prior to January 1993, Lady Duggan had a loss of memory and was incapable for understanding and conducting her affairs at her own free will.

22. I say that such a patient who is incapable of understanding and conducting her affairs at her own free will would not remember the nature of activities or act committed by her or incapable of expressing herself freely.

23. I say that such a person would be easily influenced by any person closer to the person.

24. I say that during my visits to Law Side I could not noticed presence of the Defendant in room when I examined Lady Duggan. I say that the said Jamshed Aga was present during my said two visits and examinations of Lady Duggan. I have not noticed any other person except a servant or a nurse employed during my said visits. I do not remember names of any other person except Jamshed Aga who was present during my said visits.

25. I know and meet the Defendant who was also used to visit race course on many occasions. I had no other contact with the Defendant except that I saw her during my visits to Lawn Side in the other part of the Lawn Side.

26. I say that it is only in December 2008/January 2009 the Defendant approached me and requested me to give evidence in the matter which I agreed to as I have attended and examined Lady Duggan as aforesaid."

30. In paragraph 27, he stated that he does not have any record regarding his visits to the place of residence of the deceased testator. He stated that his fees

were paid by the said Jamshed Aga but he does not have any record. Dr.Kakkar was subjected to a detailed cross examination. He stated that he used to attend his clinic on 5 days. On everyday, 25 to 30 patients used to be examined by him. He accepted that he must have examined 500 patients every month in the year 1993. He clarified that all 500 cases may not be different. He stated that he filed an affidavit in lieu of examination-in-chief on the request made by the appellant and he met the appellant only once in Pune in February 2009. He claimed that when he visited the bungalow of the testator, the appellant was standing on the right side of the bungalow. The witness in reply to the question No.45 stated that in 1993, when he saw the appellant, he was not aware that she was the person by the name Jean Duggan. He was confronted with the statements in paragraph 25 of the affidavit in lieu of examination-in-chief wherein he has stated that he used to meet the appellant who also used to visit the race course on many occasions. In response to a question, he stated that he had met the appellant who used to regularly visit the race course earlier. He stated that when he used to meet her prior to January 2009 and early February 2009, he did not know that the person he was meeting, or he new was Mrs Jean Duggan. He stated that he had glanced at the evidence of the appellant and other witness. In response to the question No.67, he stated that in the month of January 1993, he was requested by the said Mr. Aga to visit the residence of the testator. He stated that to the best of his recollection, it was 10th January 1993, as there were morning races which he recollected and he was requested by the said Mr. Aga to visit Lady Duggan. He stated that there was a special race in the afternoon on that day by the name Ram Niwas Ruia Trophy. He stated in the cross examination that when he visited the place of residence of the deceased testator, she was likely to get transient ischemic attack(TIA). He stated that the object of asking for investigation to be done was to enable him to come to the conclusion and without investigation and reports as suggested by him, the second visit would have been futile.

31. The said witness was extensively cross examined on his statement about the visit to the place of residence of the testator on 10th January 1993. In the cross examination, he stated that the request was made prior to 10th January 1993 by the said Mr. Aga at the race course. He stated that the request was made in the afternoon of 3rd January 1993. He stated that he recollected the same as it was one week prior to Ramnarayan N. Ruia Gold Cup. He stated that on 3rd January 1993, there were ordinary races and there were no graded races on that day. He stated that on 10th January 1993, he received a call at his residence from the said Mr. Aga. He stated that the last race and meeting of stewards was over at 1.30 p.m on 10th January 1993 and he visited the residence of the testator around 2.30 p.m. He stated that the said Jamshed Aga was already present at the residence of the testator. He stated that the request for second visit was made on the Friday before the last Sunday of February 1993 when Mr. Jamshed Aga met him in his Consulting Room. He stated that he reached the house of the testator for the second visit around 8.30 p.m. or 9.00 p.m. In response to the

question as to how he could examine the testator as he came directly from the race course, the witness stated that he always carries medical equipment in his car including the Cardiogram machine. The witness was extensively cross examined on the races held on 10th January 1993.

32. We may note here that the certain questions which ought not to have been permitted were asked before the Court Commissioner in the cross examination of Dr. Kakkar. For example, a question was asked to the said Doctor as to who was favourite to win Ruia Cup in the year 1993. He was even confronted with the articles on the result of Ram Nivas Ruia Gold Cup.

33. In paragraph 5 of the affidavit in lieu of examination-in-chief, the witness had stated that till few years back he was residing in Pushpa Vihar at Colaba, Mumbai and he had a house at Pune which he used to visit off and on. In the cross examination, the witness stated that he was staying in Pushpa Vihar till 2003. He stated that he was not practicing as a Physician and Cardiologist in Pune and was practicing in Mumbai. He stated that during his first visit in January 1993, he was reintroduced to the testator by the said Jamshed Aga by telling her full name. He stated that he wished her but there was a blank look on her face. He stated that he perused the papers which were available and took history from the said Jamshed Aga and the nurse who was present. He stated that apart from the said Jamshed Aga, a nurse and ayah were present when he examined the testator. In the cross examination, he also disclosed the tests which he had suggested as the said tests would have assisted him in confirming his clinical diagnosis of TIA. He stated that the testator was heading for TIA. He stated that during his second visit for examining the testator, he was with her for one hour. He stated that his conclusion that the testator had a loss of memory and was incapable of understanding and conducting her affairs was on the basis of the history available and direct questioning. He denied the correctness of the suggestion that as TIA is a temporary condition, loss of memory is also temporary and it cannot be progressive. He stated that during his first visit, he recorded his observations and along with Cardiogram strip, he handed over the same to the said Jamshed Aga. He stated that he recollected that there were two family doctors attending to the testator. One was Dr.Majmudar. He stated that he learnt about the said family doctor from the said Jamshed Aga. He stated that Dr.Majmudar was the family physician. He stated that at the time of his second visit to examine the testator, he referred to his earlier notes and handed over the same to the said Jamshed Aga. He stated that his second visit, he did not make any note. When he was confronted in the cross examination with the earlier statement that he used to examine 500 patients in a month, he stated that the home visits are not regular events, and therefore, the home visits made to attend to the dignitaries and special category patients were always vivid in his mind and memory. He stated that the visit to the testator was a special visit.

34. In the light of the evidence adduced by the parties, now we will have to consider the issues which arose for consideration before the learned Single

Judge. We have already quoted the issues in earlier part of the Judgment. There are large number of decisions cited by both the parties dealing with the proof of execution of the Will. In case of H. Venkatachala Iyengar (supra), entire law on the subject has been considered by the Apex Court. Paragraphs 18 and 19 are material which read thus:

"18. What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say 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. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

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."

(emphasis added)

35. As far as the appreciation of evidence is concerned, in paragraph 22, the Apex Court observed thus:

"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 Parc in *Harmes v. Hinkson* [(1946) 50 CWN 895] "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."

(emphasis added)

36. As stated earlier, according to the case of the respondent, there were two attesting witnesses to the Will. The first attesting witness was Mrs. Roshan Master who is an Advocate and Notary. In the affidavit in lieu of examination-in-chief and in particular paragraph 1 she stated that she was enrolled as an Advocate in

the year 1961 and that since 1981, she has been appointed as a Notary Public. In paragraph 2, she stated that she worked as an Advocate Assistant in M/s.Mulla and Mulla & Craigie Blunt & Caroe, Advocates and Solicitors till March 1969. She stated that she was working under Mr. N. K. Petigara and Mr. S. R. Vakil who were the senior partners of the said firm. She stated that from the year 1969, she started working as an Advocate Assistant to Shri S. R. Vakil whose office was on the ground floor of the Bombay House, Fort, Mumbai. During this period, the office of Mr. Nani Palkhiwala, Senior Advocate (since deceased) was located on the fourth floor of the Bombay House, Fort, Mumbai. She stated that since September 1999, she is having her office in a building opposite the Bombay House, Fort, Mumbai. In paragraph 3, she has stated that she became acquainted with the testator in the office of N.K.Petigara and S.R.Vakil. There is no cross examination of the witness on this statement as well as on the statement in paragraph 3 that the testator used to visit the office of Mr. Nani Palkhiwala and Shri S. R. Vakil in Bombay House in connection with her charitable work. In paragraph 4 of the affidavit in lieu of examination-in-chief, she stated that in April 1993, Shri Palkhiwala personally requested Shri S.R.Vakil to depute her to accompany him to the residence of the testator for the execution of a Will. In the affidavit in lieu of examination-in-chief, as quoted above, she has stated as to how she along with Mr. Palkhiwala reached the residence of the testator and as to how in presence of the said Jamshed Aga, the Will was executed. She also stated that the date was put on the Will by the said Jamshed Aga. In clause 5 of her affidavit in lieu of examination-in-chief, it is stated that the said witness along with Mr. Nani Palkhiwala in presence of the testator and in presence of each other attested the Will. The witness identified the signatures of the testator, her own signature and the signature of Mr. Palkhiwala. We have already quoted what was brought on record in the cross examination which in fact reiterates what is stated in the examination-in-chief. In paragraph 8 of the cross examination, the witness stated that the testator was sitting on a chair in a side room in her house. She stated that she along with Mr. Palkhiwala reached the residence of the testator at 11.00 a.m and were in the house for half an hour. She specifically stated that the testator told them that they were called to witness her Will. She stated in paragraph 8 of the cross examination that Mr. Nani Palkhiwala was already knowing of the purpose of their visit. She stated that the testator herself produced the Will. In the affidavit in lieu of examination-in-chief, in paragraph 4, the witness stated that the testator appeared to be normal as she talked to them. She stated that the testator also enquired about the health of Shri S.R.Vakil. When the affidavit in lieu of examination-in-chief was filed on 28th August 2007, the age of the witness Roshan Master was 70 years. She was practicing law for a period of 46 years by that time. The witness was associated with Mr. S. R. Vakil, the senior Partner of M/s.Mulla and Mull & Craigie Blunt & Caroe, a well known firm of Attorneys and Advocates. There is no reason to disbelieve her version that she had met the testator in the office of Mr. S. R. Vakil and Mr. Nani Palkhiwala. The request came to her to remain present for attesting the Will from the eminent personality like

Mr. Nani Palkhiwala, the Senior Advocate of a great repute. There is no serious challenge in the cross examination to the fact that she accompanied Mr. Nani Palkhiwala to the house of the testator on 4th April 1993 when the testator executed the Will in her presence and in presence of Mr. Nani Palkhiwala. The witness has stated that the testator looked normal. She exchanged pleasantries. She enquired about the health of Mr. S. R. Vakil. She was sitting on a chair. This version of the witness Mrs. Roshan Master certainly inspires confidence. There was no reason for the person of her standing in the legal profession to depose falsely. There is no suggestion given in the cross examination which indicates that there was some reason for her to depose falsely. It is not the case of the appellant that the said attesting witness was related either to the testator or to any of the beneficiaries under the Will or that the witness had any concern whatsoever with the heirs of the deceased. She had no connection with the testator or her family. As stated above, when the evidence was recorded, Mr. Nani Palkhiwala was no more. It is impossible to accept that the two senior members of the Bar out of which one was Mr. Nani Palkhiwala would attest a Will if the testator was not even in a position to talk or was not in a position to recognize anyone or was not in a disposable state of mind.

37. There is some argument advanced about the failure of the respondent to enter the witness box. The respondent was not in India when the alleged Will was executed. There is also an argument that Mr. Jamshed Aga should have been examined as a witness as he was present at the time of execution of the Will. Only surviving attesting witness was examined by the respondent. Therefore, non examination of the said Jamshed Aga is not sufficient to draw adverse inference.

38. The age of the testator is certainly a relevant factor in the present case. However, only because she was 96 years old, it cannot be presumed that she was not in a sound and disposing state of mind. Another argument canvassed was that the respondent who was a beneficiary has taken a leading part in giving instructions for preparation of the Will and therefore, Letters of Administration ought not to have been granted unless the evidence removes suspicion and the evidence proves that the testator had approved the Will. We must note here that the testator was frequently visiting the offices of Mr. Nani Palkhiwala and Mr. S. R. Vakil who were senior members of the Bar of some repute and therefore, it is obvious that advice of eminent members of the Bar was readily available to the testator. Moreover, the respondent was not in India at least for a period of one month before the execution of will. If the testator would have been forced to execute the Will, she would have disclosed it to Mr. Palkhiwala.

39. A contention raised regarding non examination of the respondent especially in the light of the contents of the letter marked as Exhibit P4. An argument is canvassed that as the respondent did not step into witness box, he could not be confronted with the said letter. Even assuming that the said letter cannot be read in evidence, the respondent has discharged the burden on him to prove that the

testator was in a disposable state of mind and that the testator had executed the disputed Will.

40. We have perused the letter marked as Exhibit PX1. Assuming that the same can be read in evidence, in the said letter, the respondent has stated as to why in 1977, the testator had disinherited him. He has stated that the testator disinherited him due to his marriage. However, the marriage ended in divorce in 1984. He has stated in the said letter that he received invitation from the testator after gap of several years. He stated that in February/March 1993, the testator informed that she is proud of his achievement. In the said letter, he has stated that he discussed the execution of Will with the testator. In paragraph 2 of the letter, it is stated that after he returned to England after February/March 1993 visit, he was in touch with the testator on phone. He stated that on phone, the testator told him that she has given him everything which he had asked for. The respondent stated in the letter that he told the testator that it was her wish and he was grateful for that. On the basis of the said letter, the contention is that the deceased testator had discussed the execution of the Will with the respondent and that she had asked what the respondent wanted. If the contents of the said letter are taken as proved, the same will establish that the testator was in a sound mental condition at the relevant time. Even assuming that what is stated in the letter is correct, it does not make the will illegal as there was nothing wrong with the testator discussing the issue of the execution of the Will with her only grandson especially when her both sons were no more.

41. Coming the evidence of the appellant, her case is that in February/March 1993, the respondent visited India after gap of more than 30 years. At that time, the testator was not keeping good health and her health was deteriorating. In the examination-in-chief, she stated that the testator was under constant medical treatment of Doctors and Dr.Majumdar was giving medical treatment to her. She has stated that much prior to April 1993, the testator was unable to understand the contents of any document. She was not in a sound disposing state of mind. She was not able to recognise her and other relatives. She stated that the deceased testator was in Breach Candy Hospital from 19th April 1993 to 15th May 1993 and she died on 2nd September 1993. In the examination-in-chief itself, the appellant admitted that after her marriage, her relationship with the deceased testator became strained which became cordial after the death of her husband. Perusal of the cross examination of the said witness shows that both the deceased and she herself had filed suits against each other in the year 1983. When she was confronted with the suggestion that in the suit filed by the testator, there was an injunction order passed against her restraining her from entering any part of the house of the testator except a bedroom, godown, servant's room and garage, the response of the respondent was that she did not remember whether such injunction was granted. She was confronted with the suggestion that she filed an Appeal against the said order. Her response was that she does not remember. Another suggestion was given that in the suit filed by the testator, there was a Decree passed against her. Even to this question, her

answer was "may be. I do not remember".

42. As regards the medical condition of the deceased testator is concerned, she claimed that she had a personal knowledge about the medical condition of the testator. On this aspect, the answers given by her to two questions is very relevant. The said questions and answers are very relevant which read thus:

"Q.239 Do you recall that Lady Jena Duggan filed a suit bearing No.6182 of 1983 against you in the City Civil Court on 6th October 1983 and you filed suit bearing No.4531 of 1983 on 28th July 1983 ?

Ans. I do not recall the dates.

Q.240 Do you recall the year in which the suits were filed ?

Ans. I recall it was in the year 1983.

Q.241. Do you agree that your suit 4531 of 1983 filed on 28th July 1983 was earlier in the point of time to the suit filed against you by Lady Jena Duggan?

Ans. Yes.

Q.242 What was the relief claimed in the suit that you filed in the City Civil Court?

Ans. I do not remember.

Q.243 Do you remember why you required to file the said suit?

Ans. I think it was because she locked me out of the house.

Q.244 Can you elaborate on your answer that she locked you out of the house?

Ans. She did not permit me to even enter the gate."

43. While appreciating her evidence, the aforesaid portion of her cross examination assumes importance as the witness admitted that even in March/April 1993, the order of injunction was operative. As pointed out earlier, the appellant's knowledge about the physical condition of the deceased testator was based only on the fact that earlier, the testator used to pass by her room and that she stopped passing by her room. Though the appellant had relied upon the medical record of the Breach Candy Hospital, the appellant could not produce the same. The appellant stated in the cross examination that she was intending to examine Mrs.Bakul Khatau and one Doctor whose name she could not disclose. However, she admitted that she had requested Dr.Majmudar to depose but he declined. It is pertinent to note that Dr.Majmudar, a family physician, was admittedly treating the deceased. In fact, her death certificate was also issued by the said Dr.Majmudar. No attempt was made by the appellant to examine Dr.Majmudar. In fact the said doctor refused to depose in her favour.

44. As regards the second witness Mrs.Bakul Khatau, she claimed that she was acquainted with the deceased testator due to the fact that she had met her in Willingdon Club and Cama Hall. In the cross examination she stated that the

deceased testator had invited her to her residence on 5 to 6 occasions. Her first visit was in 1990-1991. She stated that there was a big gap between each of these 5 to 6 meetings with the testator at her residence. In the examination-in-chief, she stated that after February 1993, for quite some time, she did not see the deceased testator. She further stated in the examination-in-chief, that she knew about the ill health of the testator and she visited her residence to enquire about her health on couple of occasions. She stated that during her visits to the residence of the deceased testator, she found the testator was not keeping a good health and she was to some extent suffering from loss of memory. She stated that she was unable to recognise her. It is pertinent to note that in examination-in-chief, she has not even stated in which month of 1993 after February 1993, she met the testator. We must note here that in April and May 1993, the testator was hospitalized and thereafter, she was alive till September 1993. Even accepting what the witnesses stated in her examination-in-chief is correct, it is impossible to record a finding that at the end of March 1993 or in the first week of April 1993, she had met the testator at her residence as that is not the case specifically made out in her examination-in-chief at all. In the cross examination, she claimed that she met the testator in March 1993 when she was unable to recognise her. In the face of the convincing and reliable evidence of the attesting witness, it is not possible to accept the testimony of the said witness.

45. Now coming to the evidence of Dr.Vishnu Kakkar, he was not a Medical Practitioner who was regularly treating the deceased. Though he claimed that he visited the place of residence of the deceased in April 1993, there is no record maintained by the Dr.Kakkar about his visit. In fact, he claimed that he examined the deceased testator on two occasions. It is true that his evidence could not have been discarded by the learned Single Judge on the ground that on 10th January 1993 when there were riots in the city, Dr.Kakkar could not have come all the way from Pune to examine the testator. In fact, there was no material to show that at that time, Dr.Kakkar was residing in Pune. The evidence will have to be discarded for two reasons. Firstly, Dr. Majmudar, a general practitioner who was regularly attending to the deceased testator was not examined and in fact he refused to depose on the request made by the appellant. Secondly, Dr.Kakkar could not produce any record to show that he had examined the testator as claimed by him. The witness admitted that he used to examine 500 patients in a month. Though he claimed that he knew the testator having met her at the race course, in the answer to question No.164, he stated that during his visit to the residence of the testator for examining her, he was introduced by the said Jamshed Aga to the testator. Dr.Kakkar stated that during his second visit, he did not make any notes. His explanation for not keeping the record was that he was keeping the record only of his regular patients. There is one more aspect. When the appellant was specifically questioned in the cross examination on the name of the Doctor whom she was proposing to examine as a witness, the appellant was unable to disclose the name of Dr.Kakkar.

46. In our considered view, it is very difficult to rely upon the testimony of Dr.

Kakkar who claims to have examined the testator on only two occasions and hold that the testator was not in a proper mental and physical condition on the date on which the disputed Will was executed and that, she was not in a sound and disposing state of mind. There is no record available to prove that Dr.Kakkar had examined the testator on two occasions.

47. In paragraph 7 of the affidavit in support of the Caveat, the contention raised is that writing dated 4th April 1993 has been obtained from the deceased testator by playing a fraud and undue influence. The respondent was in India in February and March 1993. Even assuming that the testator discussed the issue of execution of the Will with the respondent, the Will has been executed on 4th April 1993. The respondent was not in India in April 1993. It is brought on record that the testator had a close contact with Mr. S. R. Vakil and Mr. Nani Palkhiwala and she used to very often visit their offices. Therefore, the said contention raised in paragraph 7 of the affidavit in lieu of examination-in-chief cannot be held as established. Merely because the appellant has been disinherited under the Will, the same does not become a suspicious circumstance as in the facts of the case, the appellant had filed a suit against the testator which was pending. In fact, the deceased testator was forced to file a suit against her and to apply for injunction against the appellant.

48. There is some justification in the contentions raised by the learned counsel for the appellant as regards certain findings recorded by the learned Single Judge. But we have examined the evidence and have recorded our own findings.

49. In paragraph 138 of the Judgment, the learned Single Judge has observed that the respondent undoubtedly persuaded the deceased to give him at least a part of the estate. The respondent left India on 3rd March 1993. The learned Single Judge observed that the testator had best legal acumen available to draft the Will. The docket of the Will shows that it is drafted by M/s.Kanga and Company, Advocates and Solicitors. The learned Single Judge found that M/s.Kanga and Company were the Advocates representing the testator in the litigation against the appellant. In fact, the finding recorded in paragraph 138 is that the respondent-plaintiff has played no role in actual preparation and execution of the Will. Merely because the testator did not read the will in presence of the attesting witnesses, no doubt is created about the execution of the disputed Will.

50. Taking the overall view of the matter, we are of the considered view that the respondent-plaintiff discharged the burden on him under the Issue Nos.1 and 2 but the appellant failed to discharge the burden on her under the issue Nos.3 and 4. Though we may not agree with all the findings recorded by the learned Single Judge, on the comprehensive analysis of the evidence on record, there is no error in the final conclusion reached by her. However, instead of granting a probate, Letters of Administration with will annexed will have to be issued to the respondent.

51. Accordingly, we pass the following order:

(I) Appeal is hereby dismissed with no order as to costs;

(II) Ad interim/interim relief which is operative till today shall stand extended by a period of two months from today.