

(2021) 10 BOM CK 0096

In the Bombay High Court

Case No : Testamentary Suit No. 84 Of 2012 In Testamentary Petition No. 491 Of 2009

Keyur Madhusudan Shah

APPELLANT

Vs

Nikhil Madhusudan Shah And Others

RESPONDENT

Date of Decision : 21-10-2021

Acts Referred:

Citation : (2021) 10 BOM CK 0096

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

Bench : Single Bench

Advocate : Anosh Sequeira

Final Decision : Allowed

Judgement

G.S. Patel, J

A. OVERVIEW

1. The Plaintiff seeks probate of a registered Will dated 4th January 2007 of his father, Madhusudan Dahyabhai Shah ("Madhusudan"), who died on 1st May 2007. The Plaintiff is the sole executor and trustee appointed under the said Will

2. The Plaintiff is Madhusudan's elder son. His petition is opposed by his younger brother, Nikhil, the 1st Defendant, and their sister Hemangini, the 2nd Defendant. The Defendants filed their respective Caveats on 9th December 2009. Affidavit in Support of the Caveat of the 1st Defendant, File No. 2, pp. 67-74; Affidavit in Support of the Caveat of the 2nd Defendant, File No. 2, pp. 75-105. They claimed that the Will was forged, fabricated and executed under undue influence. Another surviving sister, Harsha, entered no opposition to the Petition.

3. After they filed their Caveats, the Defendants consistently remained absent, though repeatedly served notices by the Plaintiffs. Various orders of this Court have noted the Defendants' absence despite notice. Since the Defendants filed Caveats, the Testamentary Petition was renumbered as a suit. It had to be tried

as such. The Plaintiff was compelled to lead evidence, even though the Defendants were absent throughout. Ultimately, the evidence was closed. The Defendants have never cross-examined the Plaintiff's witnesses, never led evidence and never appeared to present any arguments.

4. For the reasons that follow, I have decreed the Suit, allowed the Petition and directed probate to issue.

B. FACTUAL BACKGROUND

5. Madhusudan and his wife Vijayaben had five children: Daksha Shah; Harsha Shah; Hemangini, the 2nd Defendant; Nikhil, the 1st Defendant; and Keyur, the Plaintiff. All three daughters were married. Daksha died before Madhusudan, who was, therefore, survived by his widow and four surviving children. Harsha did not oppose the Petition. Vijayaben died on 4th February 2011. She, too, did not oppose the Petition in her lifetime.

6. Madhusudan and Vijayaben both made their respective Wills on 4th January 2007. Both Wills have the same two attesting witnesses: Dr Mahesh J Kapadia, the family physician, and their neighbour, Sanjiv Jhaveri.

7. After Vijayaben died, the Plaintiff sought probate. This was uncontested and probate was granted on 21st November 2018. Exhibit "P3/7", File No. 3, pp. 149-154.

8. Before this Petition was filed in 2009, on 4th April 2008, the 1st Defendant applied to the Talati to have an agricultural property in Alibaug, of which he was the legatee under Madhusudan's Will, transferred to him. He relied on Clause 5 of Madhusudan's Will. The 1st Defendant sought the consent of the other heirs. They gave it. No one objected.

9. On 5th June 2009, the Plaintiff filed this Petition for probate. The two Defendants entered Caveats on 9th December 2009. The Petition was renumbered as a Testamentary Suit.

C. THE TWO CAVEATS

10. In the Affidavit in Support of his Caveat, the 1st Defendant denied the genuineness of Madhusudan's Will. 1st Defendant's Affidavit in Support of the Caveat, paragraphs 3-10, File No. 2, pp. 68-69. He said that before the Will was made, there was a meeting. The 2nd Defendant and the other sister, Harsha, were not present. According to the 2nd Defendant, Madhusudan orally told the Plaintiff to pay Rs 2 crores each to the 2nd Defendant and Harsha. The Will contains no such provision. Therefore, the 1st Defendant said, the Will did not reflect Madhusudan's true intentions. The 1st Defendant also alleged that Madhusudan suffered from Parkinson's, diabetes and heart conditions. He spent the last six months of his life in a wheelchair. He could not speak clearly. Therefore, according to the 1st Defendant, Madhusudan was not of sufficiently sound mind, memory and understanding when he made the alleged Will. Further,

the Plaintiff, his wife and children lived with Madhusudan and Vijayaben, and therefore exercised undue influence over Madhusudan. He also alleged that the date on page 7 of the Will and the page numbers on each page were in the handwriting of the Plaintiff. The 1st Defendant claimed that the Plaintiff had made a rubber stamp of the signature of the deceased and used it for bank transactions. Therefore, the 1st Defendant alleged, it was not possible for Madhusudan to sign and affix his thumb impression on the said Will. The bequests in the Will were allegedly unnatural.

11. In the Affidavit in Support of her Caveat, the 2nd Defendant broadly made the same allegations. She also alleged that the Will was forged and fabricated. 2nd Defendant's Affidavit in Support of the Caveat, paragraphs 11-12, File No. 2, pp. 78-79.

D. ISSUES

12. The Caveats having been entered, the Testamentary Petition was renumbered as a suit. On 16th August 2016, I framed issues. These are set out below with my finding against each.

Sr. No.

Issues

Findings

1.

Whether the Plaintiff proves that the writing dated 4th January 2007 was duly and validly executed and attested in accordance with law as the Last Will and Testament of the deceased, Madhusudan Dahyabhai Shah?

Yes

2.

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

Yes

3.

Whether the Defendants prove that the alleged Will was obtained by undue influence and coercion?

No

4.

Whether the Defendants prove that the alleged Will is unnatural?

No

5.

Whether the Defendants prove that the signature of the deceased is fabricated and forged?

No

6.

Whether the Defendants prove that the alleged Will is a fabricated and got up document?

No

7

What relief and what order?

Suit decreed.

13. The burden of proving Issues Nos. 1 and 2 was on the Plaintiff. Issues Nos. 3 to 6 were for the Defendants to prove.

E. EVIDENCE

14. Sanjiv Chandrakant Jhaveri, one of the attesting witnesses filed his Affidavit in lieu of Examination-in-Chief on 21st September 2016. Exhibit "P1/1", File No. 3, pp. 119-122 He was a neighbour. In paragraph 2 of his Evidence Affidavit, he said that he had known Madhusudan and his family for many years. In paragraph 4, he said that at the time of execution and attestation of the Will, he found Madhusudan to be of sound mind, memory and understanding and was fully aware of his actions. He believed that Madhusudan made the said Will of his own free will and pleasure. In paragraph 5, he noted that the numbering on all the pages and the date were already handwritten at the time of execution. Jhaveri saw Dr Mahesh Kapadia, the second attesting witness attest execution by signing on the last page of the Will. The two attesting witnesses and Vijayaben were present when Madhusudan signed the Will and put his thumb impression at the foot of each page and next to the word 'Testator' on the last page. Affidavit in lieu of Examination-in-Chief of Sanjiv Jhaveri, paragraphs 6-8, File No. 3, pp. 120-121.

15. Dr Mahesh J. Kapadia, the family doctor filed his Affidavit in lieu of Examination-in-Chief on 29th September 2016. Affidavit in lieu of Examination-in-Chief of Dr Mahesh Kapadia, File No. 3, pp. 123-126. Dr Kapadia deposed that he was well acquainted with Madhusudan and the family and has been their family doctor since 1985. He was also witness to an earlier will of Madhusudan, made on 22nd March 2003. In paragraph 5, Dr Kapadia deposed that on the date of execution of the present Will he examined Madhusudan and found him to be of sound mind, memory and understanding. Madhusudan was fully aware of his actions. Dr Kapadia believed Madhusudan made the said Will of his own free will and pleasure. In paragraph 6, he too said that the date of the Will and the page

numbers were already handwritten at the time of execution. He confirmed the signatures on the Will and the presence of Jhaveri, himself and Vijayaben at the time of execution and attestation.

16. The Plaintiff filed his Affidavit in lieu of Examination-in- Chief on 21st September 2016. Affidavit in lieu of Examination-in-Chief of Keyur Madhusudan Shah, File No. 3, pp. 127-134. In paragraph 5, he deposed that Madhusudan wanted to change an earlier Will dated 22nd March 2003 in which, too, the Plaintiff was appointed as the executor. On 4th January 2007, on Madhusudan's instructions, the Plaintiff cancelled out the words "December 2006" and wrote "4th January 2007" on page 7 and also wrote the page numbers on all the pages of the said Will. He further deposed that despite health concerns, his father was of sound and disposing mind, was fully aware of his actions and was competent to prepare and execute his last Will and Testament. Madhusudan made the said Will of his own free will and pleasure. The two Caveators in the present Testamentary Suit raised no objections to Vijayaben's Will, which was executed on the same day and occasion and was witnessed by the same two witnesses. The 1st Defendant had prepared an affidavit consenting to the probate to Vijayaben's Will. The Plaintiff was Madhusudan's nominee for the residential apartment where the Plaintiff and his family lived with Madhusudan and Vijayaben. He pointed out that the 1st Defendant himself had relied on Madhusudan's Will to get the Alibaug property transferred to his name under a specific bequest to that effect in the very Will he was challenging.

17. By an order dated 2nd February 2017, this Court took on record Jhaveri's Evidence Affidavit. Jhaveri was present in Court. He was administered oath. He confirmed the contents of his Affidavit and identified his signature. At that time, the Defendants were represented by their advocates, who said they had received no instructions. Their Advocate-on-Record sought a discharge. Between 16th February 2017 and 9th March 2017, the Evidence Affidavits of Dr Kapadia and the Plaintiff were taken on record. On 9th March 2017, nobody appeared for the Defendants to cross-examine any of the Plaintiff's three witnesses. The cross-examination of the two attesting witnesses was closed and the matter was adjourned to 30th March 2017 for the cross-examination of the Plaintiff. On that day, too, nobody appeared for the Defendants to cross-examine the Plaintiff and thus Defendants' cross-examination was closed. The Plaintiff closed his case. The Court adjourned the matter directing the Defendants to file the Evidence Affidavit of their first witness. The Defendants did absolutely nothing. On 21st April 2017, the Court closed the evidence of the Defendants and listed the matter on 22nd June 2017 for arguments.

18. Thereafter, the Defendants were repeatedly given notice. There are as many as six affidavits of service. The Defendants stayed away.

F. MAHDUSUDAN'S WILL

19. Madhusudan's Will is an eight-page typed document. His thumb impression

and signature appear at the foot of each page. On page 7, the typewritten date "December 2006" is scored out. The full date, i.e. the words "4th" and "January 2007" are written in hand. Madhusudan's signature and thumb impression are on the last page. Here, the two witnesses have also signed. Each has handwritten the date and written their name. Dr Kapadia affixed a rubber stamp with his address. Jhaveri handwrote his address.

20. The bequests in the Will are divided between the two sons, the Plaintiff and the 1st Defendant. The residential flat at Purab Apartments is left to the Plaintiff. The Alibaug property is left to the 1st Defendant, who is also bequeathed two rental office properties in Mumbai, an ancestral property in Gandhinagar, Gujarat, and some investments. The Plaintiff is also given a rental office in Mumbai and some investments. The Plaintiff is required to discharge debts of Rs2,21,62,000/-. The 1st Defendant's debt obligation is to the extent of Rs.8.43 lakhs. The Plaintiff and his family (his wife and their three children) are the residuary legatees.

G. RE: ISSUES NOS. 1 AND 2

21. The Defendants not having cross-examined any of the Plaintiff's three witnesses, and not having led any evidence of their own, it will have to be held that the Plaintiff has discharged his burden of proof.

22. Further, as regards Defendant No.1, it is a matter of record that he sought and obtained by consent the bequest to him of the Alibaug property under Clause 5 of the Will. The 1st Defendant cannot both receive a bequest and impugn the document under which that bequest is made. In *Shobhana Sahadev Shah & Ors v Sangeeta Porbandarwala & Ors*, 2017 SCC OnLine Bom 3947 : (2017) 2 AIR Bom R 595 : (2017) 3 Bom CR 155 I considered a very similar situation. I held:

90. The foundational doctrine is the principle against approbation and reprobation. Generally stated, a person may not simultaneously seek benefit under a document and repudiate or renounce it. This is a species of estoppel - an estoppel by conduct - and it is, therefore, both a rule of evidence and a rule in equity. In evidence, both the acceptance and repudiation must be shown to be clear and unequivocal. There cannot be slightest shred of doubt about either. The benefit must also be shown to be one such that but for the document the recipient would not have received it. Once this is established, as a matter of equity, the person receiving the benefit (one only available under the document and not otherwise) cannot repudiate or renounce the document itself. This stands to reason. Crucial to this is the establishing in evidence that the benefit is such that but for the document, the person taking under the document would not have received it at all, or, at any rate, would have received much less. Once it is shown that the benefit is not of this type, viz, that the person receiving it would have done so anyway even without the document, or would have received a much larger amount without the document, then no question of approbation and reprobation can be said to arise.

23. This principle will apply exactly to the present case as against Defendant No.1.

24. Issues Nos.1 and 2 are proved, and are answered in the affirmative.

H. RE: REMAINING ISSUES

25. The burden of proving the remaining issues was on the Defendants. They had to lead affirmative evidence in support of their pleaded contentions. Their failure to do so has an inevitable result. Issues Nos. 3 to 6 are not proved and are answered in the negative.

I. FINAL ORDER

26. The suit is decreed. The Petition succeeds. The Plaintiff is entitled to probate. The Registry will proceed to issue the grant as expeditiously as possible, and, in any event, within four weeks from today.

27. In the circumstances of the case, I believe an order of costs is warranted. The two Defendants have deliberately held up administration of the estate. This, despite their not having objected to - indeed, consented to - probate to Vijayaben's Will. The conduct of the 1st Defendant is especially egregious, given that he actually sought and took a legacy under the Will in question and then purported to challenge it, something he could not have done. The Plaintiff has needlessly been put to enormous delay, cost and trouble. There will be an order jointly and severally against the Defendants payable to the Plaintiff in the amount of Rs.2.5 lakhs, a sum I consider reasonable having regard to the likely litigation costs. The amount is to be paid in four weeks and, if not paid in that time, will carry interest at 9% per annum simple interest until payment or realization. The Plaintiff is entitled to a separate drawn up order or decree in these terms jointly and severally against the Defendants.