
(1992) 11 BOM CK 0021
In the Bombay High Court
Case No : Suit No. 28 of 1985

Mrs. Jerbanoo Khurshed Cursetji and Others

APPELLANT

Vs

Adi Khurshedji Cursetji

RESPONDENT

Date of Decision : 11-11-1992

Acts Referred:

Evidence Act, 1872 — Section 101

Succession Act, 1925 — Section 107, 75

Citation : (1993) 2 BomCR 67 : (1993) 95 BOMLR 374

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

Bench : Single Bench

Advocate : U.J. Makhija and Jimmy Avasia, Mulla and instructed by Mulla, for the Appellant; D.V. Merchant and A.S. Vakil, instructed by Manilal Hiralal and Co., for the Respondent

Judgement

D.R. Dhanuka, J.—This is a petition for probate in respect of Will and Codicils of late Dr. Khurshed J. Cursetji.

2. On or about 20th October 1983, Mrs. Jerbanoo Khurshed Cursetji alias Jer of Bombay, Mrs. Meher Rusi Dalal, Mr. Hormuzdiar Dinshawji Choksi and Mrs. Dinaz Hormuzdiar Choksi, filed Petition No. 770 of 1983, seeking probate of the last Will and Testament and three Codicils of Dr. Khurshed, J. Cursetji, referred to in the petition. Dr. Khurshed, J. Cursetji alias Dr. Khurshed Jehangirji C. alias Dr. Khurshed Jehangir Jameshedji Cursetji alias Dr. K.J.J. Cursetji alias Dr. Cursetji Khurshed J.J. alias Dr. Khurshed J.J. Cursetji is hereinafter referred to as "the Testator". The Testator died at Bombay on or about the 1st day of May 1983. The Testator left him surviving as his only heir and next-of-Kin according to Indian Succession Act applicable to Parsees, the following persons i.e. (1) Mrs. Jerbanoo Khurshed Cursetji, widow (2) Mrs. Meher Rusi Dalal, daughter (3) Mr. Adi Khurshed Cursetji, the son. The petitioners averred in the petition that the petitioners were executors of the said Will and codicils. Mr. Johanbux, J. Gandevia, one of the remaining executors has issued a letter (duly marked as an exhibit in this suit) supporting this petitioners. The Testator was a medical

practitioner. The petitioners have averred in the petition that on 22nd January 1968, the Testator had executed a Will duly attested by Mr. Rusi N. Sethna well-known Advocate and Solicitor of this Court. The testator was client of M/s. Romer Dadachanji Sethna, a firm of Advocates & Solicitors. By Clause 1 of the said Will, the Testator appointed the petitioner No. 1 his wife, petitioner No. 2, his daughter and petitioner No. 3 his friend as executrices and the Executor of the said Will. By Clause 3 of the said Will the Testator bequeathed all his estate and effects whatsoever and wheresoever situate subject to and after payment of funeral and testamentary expenses and debts, rates, taxes and duties and any legacies which he may bequeath by any codicil to the Will, to his wife, the petitioner No. 1 absolutely. By Clause 4 of the said Will, it was provided that in the event of petitioner No. 4 predeceasing the Testator or dying under circumstances in which it was impossible to ascertain who died first, the following provisions shall take effect :

"(a) I BEQUEATH to my son Adi absolutely :

(i) My dispensary at Kanahya Bhuvan, 554, Girgaum Road, Bombay 2, together with all furniture fixtures, fittings, drugs, implements, instruments, containers and all other effects and things therein and the tenancy rights of the premises wherein my said dispensary is situated :

and

(ii) all amounts from time to time lent and advanced by me to my son Adi either personally or in connection with his business of Mic Products Co."

By the said Will the Testator made bequests of residue of his estate subject to and after payment of funeral and other testamentary expenses, debts and liabilities and legacies bequeathed by the said Will or any codicil thereto in favour of his daughter petitioner No. 2, her heirs and administrators absolutely. No bequest was made by the said Will in favour of Mr. Rusi Dalal. On 3rd November 1970, the Testator executed a codicil to the said Will dated 22nd day of January 1968. The said codicil is brief and simple. By Clause 1 of the said codicil, the Testator appointed his brother Jamshed J. Cursetji as an additional Executor of the said Will. Clause 2 of the said codicils reads as under :

"2. I REVOKE the bequest made to my son Adi under Clause 4(a)(i) of my Will."

By Clause 3 of the said codicil the Testator confirmed the Will dated 22nd day of January 1968, in all other respects. As a result of the said codicil, bequest made in favour of his son Adi i.e. in respect of Dispensary premises together with furniture fixtures, fittings etc., was revoked by the testator. By the said codicil the testator did not revoke the bequest in respect of the amounts lent and advanced by the testator to his son Adi either personally or in connection with his business of Mic Products Co. as set out in Clause 4(a)(ii) of the said Will dated 22nd January 1968. The said codicil was attested by Shri Rusi N. Sethna, Advocate and Solicitor and his Stenographer one Mrs. N.P. Dastoor. On 14th May

1974, the Testator executed his second codicil to the said Will. By Clause 1 of the said codicil, the Testator modified the earlier provision regarding the name of executors under the said Will read with first codicil thereto. By the said Clause, the testator appointed one Mr. Gandevia and petitioner No. 4 as two more Executors of the Will and codicils. By Clause 2 of the said codicil, the Testator confirmed revocation of bequests made under Clause 4(a)(i) of the said Will. By Clause 3 of the said codicil, the testator made several small bequests as set out therein. By Clause 4 of the said codicil, the testator provided that in the event of his wife (i.e. the petitioner No. 1.) predeceased him or dying under circumstances in which it was impossible to ascertain whether she or the testator died first, the following provisions shall take effect :

By Clause 4(a) of the said codicil, the Testator bequeathed the dispensary of the Testator at 554, Girgaum Road, Bombay together with all the furniture fixtures therein etc., alongwith the tenancy rights in respect of the dispensary premises in favour of his daughter Mrs. Meher Rusi Dalal. By Clause 4(b) of the said codicil, the testator bequeathed his rented flat on 5th floor of Wadia Building with all the furniture and all its contents to his daughter the petitioner No. 2. At all material times the testator possessed 1/4th share, right, title and interest in the property known as "Mon Repos" situate at 55, Worli Sea face, Bombay. By Clause 4(c) of the said codicil the testator bequeathed his share in the said Worli property alongwith all furniture and belongings therein and the "" on the ground floor thereof in favour of his daughter the petitioner No. 2. The said second codicil was executed by the Testator. The said codicil was attested by Mr. D.P. Siganporia, Advocate and Solicitor of M/s. Vachha & Co. Bombay and one Shri B.C. Bengali, Advocate then working as an Assistant in the firm of M/s. Vachha & Co. On 9th April 1983, the testator executed the third codicil to the said Will dated 22nd January 1968. By Clause 1 of the said codicil the testator directed his executors that after probate of the said Will was obtained by them, the shares, securities and fixed deposit receipts forming part of his property shall be transferred by them to petitioner No. 1, petitioner No. 2 and the three grand children of the testator by name Miss Phiroza Rusi Dalal, Master Jehangir Rusi Dalal and Master Darius Rusi Dalal. By Clause 2 of the said codicil the testator bequeathed income, interest and dividends in respect of all the shares, securities and fixed deposit receipts in favour of petitioner No. 1 for her use and benefit during her life time. By Clause 2 of the said codicil it was further provided that after the death of the petitioner No. 1 the corpus of the shares, securities and fixed deposit receipts belonging to the testator shall be divided into four equal parts i.e. one part in favour of petitioner No. 2, another such equal part in favour of Miss Phiroza Rusi Dalal, third such equal part in favour of Master Jehangir Rusi Dalal and the fourth such equal part in favour of Darius Rusi Dalal. By Clause 3 of the said codicil, the testator confirmed his Will dated 22nd January 1968, the first codicil dated 3rd November 1970 and his second codicil dated 14th May 1974. The said third codicil was executed by the testator and was attested by Shri F.S. Sukhia, Advocate and Solicitor of M/s. Vachha & Co., Bombay and his

clerk Mr. S.L. Lewis. The said petition was duly supported by the affidavit of attesting witness.

(1) Shri Rusi N. Sethna, (being the attesting witness to the Will and first codicil) being affidavit dated 25th October 1983(2) Bhikhabhai Chimanlal Bengali dated 19th October 1983 and (3) the affidavit of Mr. F.S. Sukhia dated 15th October 1983 (being the attesting witness to the third codicil.)

3. On 29th August 1985, Mr. Adi (Ardeshir) Khurshed Cursetji, the only son of the testator filed a caveat challenging the petition for probate of the Will. On 3rd September 1985, the said caveator filed his affidavit dated 2nd September 1985, in support of the caveat. By the said affidavit, the caveator contended that the petitioners had not disclosed the entire estate of the deceased in as much as the deceased possessed large and valuable collection of old and rare books, curies and coins, stamps and gramophone records, which were not disclosed in Schedule I of Assets to the petition. The caveator contended that the consent of the executor Shri J.J. Gandevia was not obtained by the petitioners before filing of the petition for probate of the Will. The caveator contended that the petitioners had not come to the Hon"ble Court with clean hands as the petitioners were not fit and proper persons to be appointed as an executors to the knowledge of the testator. The caveator further contended in para 5 of the said affidavit as under :

"5. I say that the fact that the deceased abovenamed having appointed the 2nd petitioner as an Executrix, knowing her incapacity (the deceased himself being a practising doctor), itself shows that the deceased abovenamed was not of sound disposing state of mind."

By para 6 of the said affidavit the caveator contended that the said Will and three codicils had been executed by the deceased under undue influence, force, fraud and/or coercion. The caveator further stated in para 6 of the said affidavit as under :

"6. I say that my parents desired that the 2nd petitioner abovenamed must get married at all costs and finally get her married on or about 26th November 1967 to her husband, who precondition to the marriage was that the entire state of both my parents must go to him. Even after the marriage of the 2nd petitioner to her husband (on the condition aforesaid), her husband used to regularly threaten that if all his desires were not fulfilled to the last detail, he would abandon the 2nd petitioner abovenamed and my parents have always succumbed to his threats:. In the circumstances, I say that it appears that the deceased abovenamed had executed his said alleged Will and 3 codicils thereto under the undue influence, force, fraud, and/or coercion of the 1st petitioner and/or the 2nd petitioner"s husband."

By para 7 of the said affidavit, the caveator commented upon the revocation of bequests made in favour of caveator under the Will dated 22nd January 1968 by the first codicil dated 3rd November 1970 and contended that the said revocation

was apparently without any reason particularly as the caveator was the only son and the eldest child of his father. By para 7 of the said affidavit, the caveator contended that no real legacy had been left to the caveator and this fact by itself showed that undue influence, force, fraud and/or coercion had been practised upon the testator by the 1st petitioner and/or the 2nd petitioner's husband in getting the testator/deceased to execute his said alleged Will and 3 codicils thereto. By para 8 of the said affidavit the caveator contended that "the said Will and 3 codicils were not genuine documents and that undue influence, fraud, force, and/or coercion was brought to bear on the deceased abovenamed by the first petitioner and/or the 2nd petitioner's husband in getting the deceased abovenamed to execute the said alleged Will and 3 codicils thereto". In view of the filing of the said caveat and affidavit in support of the caveat, the petition was converted into a testamentary suit and numbered as Suit No. 28 of 1985.

4. In pursuance of an order passed by Kenia, J., on 23rd day of September 1988, on plaintiff's Chamber Summons No. 1064 of 1987, the evidence of plaintiff No. 1 Jerbanoo was recorded on commission by an Officer of this Court. The said evidence was admitted by the Court as if recorded by the Court at the trial of the suit. All the documents tendered before the Commissioner were directed to be exhibited. All the objection raised before the Commissioner were waived by the learned Counsel. An admitted compilation of documents is filed by the learned Advocates on record for Caveators.

5. At the trial of the suit the following issues were framed by the Court :

ISSUES :

(1) Whether the plaintiffs prove due execution of Will of Dr. Khurshed J. Cursetji dated 22nd January 1968 and the three codicils dated 3rd November 1970, 14th May 1974 and 9th April 1983, copies whereof are annexures "A", "B", "C" and "D" to Petition No. 770 of 1983 now converted into Suit No. 28 of 1985?

(2) Whether the Caveator proves that the deceased was not of sound disposing state of mind at the time of execution of the said Will and the said codicils as alleged in para 3 of the affidavit of the Caveator dated 2nd September 1985?

(3) Whether the said Will and three codicils were executed as a result of alleged undue influence and alleged coercion brought to bear on the testator by the 1st and 2nd petitioner as alleged in para 6 and 7 of the said affidavit of the caveator dated 2nd September 1985?

6. By an Order dated 9th July 1992, it was clarified that the caveator was restricted to factual averments made in respect of Issue No. 3 set out in para 6 and 7 of the said affidavit. To my mind the said averments constitute a valid plea of undue influence and coercion and Issue No. 3 framed by the Court need not be deleted. The Court shall restrict its assessment of evidence to the plea raised in the above referred affidavit in support of caveat. The said issue is required to be examined on merits alongwith other issues.

7. I shall first summarise the evidence led on behalf of the plaintiffs in relation to due execution and attestation of the said Will and the issues raised on behalf of the caveator is as to whether the Testator did not possess sound disposing mind at the time of execution of the said Will and the codicils. I shall discuss the relevant evidence on record together rather than dealing with the same in water tight compartments issue wise separately. Perhaps it is not practicable to do so.

8. The testator was a medical practitioner. The testator used to work as Chief Medical Officer of Life Insurance Corporation for number of years till about 1974-75. After his retirement from Life Insurance Corporation of India as Chief Medical Officer, the testator used to practice as Medical Practitioner. The testator did not have much practice during last few years. The testator appears to have attended various international conferences of medical practitioners held in Rome, Switzerland, Zurich and America. It is so stated by plaintiff No. 1 and there is no reason to disbelieve her testimony.

9. The petitioners have examined Mr. Rusi N. Sethna reputed Advocate and Solicitor of this Court in support of their plea that the above referred Will and the first codicil was duly executed by the testator and duly attested by witnesses as required by law. Mr. Rusi Sethna has given cogent and careful evidence before this Court and his evidence has remained unshaken in his elaborate cross-examination by the learned Counsel on behalf of the caveator. Mr. Sethna had himself prepared the draft of the Will on instructions of testator. Ultimately the Will dated 22nd January 1968 was itself prepared by Mr. Sethna on instructions of the testator. Mr. Sethna has deposed that the physical and mental condition of the testator was perfect at the time when he executed the said Will in presence of himself and Mr. M. Cawas Cama. I am convinced with the truth of the statements made by Mr. Sethna on oath. Mr. Sethna has produced several supporting documents from his office file like draft of the Will, fair draft of the Will and copy of forwarding letter dated 22nd January 1968, with which Mr. Sethna had forwarded the original Will together with a copy and his firm's memo of charges to the testator. Mr. Sethna has clearly stated in his evidence that the testator had gone through the said Will before he executed the same. Mr. Sethna has given similarly cogent and careful evidence in respect of preparation, execution and attestation of the first codicil by the testator in presence of Mr. Sethna and his stenographer Mrs. Dastoor. During the course of his cross-examination Mr. Sethna was asked by the learned Counsel to produce attendance notes in respect of preparation of the draft Will and Mr. Sethna expressed his inability to produce the same presumably because of lapse of time. Mr. Sethna was asked during the course of his cross-examination as to whether any other relative of the testator was present at the time when the Will was executed. Mr. Sethna said in his evidence that according to his practice followed by him, other relative of testator were not permitted to be present in his cabin at time of taking instruction for preparation of Will or execution thereof. Mr. Sethna was asked in his cross-examination as to where were Mr. M. Cawas Cama and Mrs. N.P. Dastoor. Mr. Sethna's reply was that Mr. Cawas Cama was about 90 years old

and had left his service with the firm of M/s. Romer Dadachanji Sethna & Co. shortly after May 1980. Mr. Sethna gave complete details regarding residential address of Mr. Cawas Cama. Similarly Mr. Sethna gave information to the Court during course of his cross-examination that Mrs. Dastoor, the Stenographer had also retired from the service of his firm but worked part-time whenever needed. Mr. Sethna was asked during his course of cross-examination as to whether he had office copy of the executed Will marked as Exhibit "A" in his office records. Mr. Sethna readily produced a copy of the executed Will as well as the copy of the executed codicils and gave elaborate details in reply to the questions asked to him during course of his cross-examination. It appears from the evidence of petitioner No. 1 that according to petitioner No. 1 she used to accompany her husband to the office of Rusi Sethna and the petitioner No. 1 was present at the time when the Will was executed by the testator. To this extent there is a minor discrepancy in the evidence of the petitioner No. 1 and Mr. Rusi Sethna. This discrepancy is of no consequence. Such minor discrepancy does not discredit truth of testimony of Mrs. Sethna. Even if petitioner No. 1 used to accompany the testator to Solicitor's office, the validity of the Will would not be affected thereby. There was no difference of opinion whatsoever between husband and wife. Most probably the decisions to make various bequests under the Will and alteration thereof by the codicils thereto were taken by testator in consultation with petitioner No. 1. Such consultation do not affect the validity of the Will. When a specific question was asked to Mr. Sethna during course of his cross-examination as to whether he was certain that the deceased had met him alone in connection with preparation of codicil, Mr. Sethna answered that he was reasonably certain in view of the practice followed by him all these years as deposed to by him. Mr. Sethna deposed that the testator was in fit condition of mind at the time of execution of the first codicil. Mr. Sethna was asked by the learned Counsel in cross-examination as to whether he knew the reasons as to why the testator executed the said codicil (i.e. the first codicil). Mr. Sethna was not permitted to disclose the confidential communication between him and his client in view of section 126 of the Indian Evidence Act, 1872. Soon after the execution of the first codicil, the testator had prepared a handwritten letter for being delivered to the caveator after his death explaining in substance some of the reasons for revocation of bequest earlier made in favour of the caveator. The said letter is proved and marked as an exhibit (i.e. exhibit "MM"). In connection with this letter when Mr. Sethna was asked as to whether he knew anything about the said letter, Mr. Sethna replied that he did not know anything about the said letter. The petitioner No. 1 duly identified signature of the testator on the Will and each of the three codicils. Even the caveator is not able to dispute the signature of the testator on the Will and each of the codicils. The petitioners have examined Shri Bhikhabhai Chimanlal Bengali, Advocate, (then working as assistant with M/s. Vachha & Co.) who had attested the second codicil in his capacity as an Advocate Assistant working with M/s. Vachha & Co., Mr. D.P. Siganporia was a partner in the firm of M/s. Vachha & Co. The said second codicil was executed by the testator in the office of firm of M/s. Vachha & Co. Advocates

and Solicitors on 14th May 1974. The said Mr. Bengali has in terms stated in his evidence that at the time when the second codicil was executed in the cabin of Mr. Siganporia, no one was present in the cabin, other than the testator, Mr. Bengali and Mr. Siganporia. Mr. Bengali in his evidence has deposed that at the time when the testator executed the said second codicil, the testator was in satisfactory condition physically and mentally. The evidence of Mr. Bengali remained unshaken. In his cross-examination Mr. Bengali was specifically asked the question as to whether someone had accompanied the deceased on 14th May 1974, when the second codicil was executed and attested. Mr. Bengali replied to the question by stating that someone had accompanied the testator at that time but that someone had waited outside the cabin and was not inside the cabin of Mr. Siganporia where the codicil was executed by Dr. Cursetji in presence of Siganporia and Mr. Bengali. The petitioner No. 1 has fully supported the evidence of these attesting witnesses by identifying the signature of the testator on the Will and each of the codicil. I accept the evidence of attesting witnesses and petitioner No. 1 on Issue Nos. 1 and 2 in respect of the Will and the first two codicils.

10. The petitioners examined one Mr. Samuel Lawrence Lewis, a Stenographer, then working with M/s. Vachha & Co. an attesting witness in respect of the third codicil. The said third codicil was attested by Mr. F.S. Sukhia the proprietor of M/s. Vachha & Co. and the said Mr. Samuel Lawrence Lewis. The said Mr. Sukhia has expired and was thus not available for giving evidence at the trial of the suit. The said Mr. Lewis gave elaborate evidence before this Court regarding execution of the 3rd Codicil dated 9th April 1983 at Bombay Hospital where the testator was under medical treatment. The said Mr. Lewis was working with M/s. Vachha & Co., as a clerk since the year 1969. The said Mr. Lewis had accompanied Mr. Sukhia to the Bombay Hospital in connection with execution of the said third codicil. I find the evidence of Mr. Lewis straightforward and truthful. Mr. Sukhia has mistakenly stated in his affidavit filed in this proceeding alongwith the petition that the said codicil was executed by the stator in his office. This was an erroneous statement of Mr. Sukhia. The learned cross-examiner confronted Mr. Lewis with the statement appearing in the said affidavit of Mr. Sukhia. Mr. Lewis reiterated that the said third codicil was executed at the hospital premises and stated in substance that the statement made by Mr. Sukhia in his affidavit filed in this proceeding regarding the place of execution of the said codicil was a mistaken statement. During the course of his cross-examination Mr. Lewis was specifically asked the question as to whether the deceased/testator was suffering from mental agony at time of execution of codicil and was in a bad shape at the time when the said codicil was executed. The witness replied that he did not notice any mental agony of the testator as a result of sickness or otherwise. The witness in terms stated that Dr. Cursetji was mentally alter at the time when the said codicil was executed. The caveater is trying to take undue advantage of erroneous statement of Mr. Sukhia in the said affidavit regarding the place of execution of the said codicil. Mr. Sukhia was very old. The conscience of the

Court is satisfied with due execution and attestation of third codicil as well. In my opinion the evidence of witness Lewis is truthful.

11. On the issue of due execution and attestation of the Will I have no hesitation in accepting the evidence of Jerbanoo Khurshed Cursetji and evidence of attesting witnesses Rusi N. Sethna, Bhikhabhai Chimanlal Bengali and Samuel Lawrence Lewis. The said evidence is reliable. I hold that Dr. Cursetji was of sound disposing mind at the time when he executed the Will and the said three codicils. It appears from the evidence of the caveator Adi Khurshed Cursetji that since 10/15 years the testator was not keeping very good health since last 10-15 years prior to his death. The caveator has in terms stated in his evidence at page 46 that the testator was suffering from Cancer since about 10 years prior to his death. In the next breath the caveator stated that it can be even 15 years prior to his death. One of the testicles of the testator was removed, by Dr. K.N. Dastur. It is possible that the testator was not in perfect health during the last 10 years prior to his death. No one is in perfect health at late stage in life. The question to be asked as to whether there is any material on record to show that the testator was unable to comprehend the meaning and contentions of the documents signed by him particularly when he was guided by Advocates of his choice. After carefully going through the oral and documentary evidence in this case I have reached the conclusion that the testator was mentally alert at the time when he executed the Will and each of the three codicils. The mental faculties of the testator were in fact at time of execution of the Will and each of the codicils. Merely because a person is admitted to hospital, it does not follow that he has lost all his physical and mental faculties. No such presumption can be drawn. The cases of execution of the Will or the codicils by the testator in hospital are not unknown. The deceased considered and reconsidered his decision during a span of about 15 years. The deceased cannot be considered as lacking in disposing capacity merely because the deceased appointed petitioner No. 2 as an executing or merely because one of the legacy earlier in favour of the caveator was revoked. It is obvious from the evidence that the deceased used to obtain expert legal advice from the Advocates and Solicitors of his choice from time to time. The Will and the codicils were prepared by well known firm of Advocates and Solicitors in the city of Bombay in ordinary course of their law practice. It is of considerable significance that the testator had written a letter to the caveator entirely in his hand which has been now marked as part of exhibit MM. It is obvious from the contents of the said letter that the said letter was written by the testator soon after execution of the first codicil dated 3rd November 1970. The petitioner No. 1 had deposed to at the trial that the said letter was entirely in the handwritten of the testator and the contents thereof are correct. The said letter was to be handed over to the caveator after the death of the testator. The said letter was ultimately forwarded to the caveator by M/s. Vachha & Co., Advocates representing the estate of the testator, with a forwarding letter dated 5th February 1985. If a Will is written entirely in the handwriting of the testator, law makes very-very strong presumption in respect of genuineness of the Will or

the codicil as the case may be. Similar would be the situation in the case of a handwritten letter of the testator written few days after execution of the Will and the codicil, confirming directly or indirectly the said documents. The contents of the said letter reveals the mind of the testator and leave no scope for conjunctures, speculation or suspicion. The testator stated in the said letter that he had executed his Will dated 22nd January 1968 and the codicil dated 3rd November 1970. The said letter is in conformity with the contents of the Will dated 22nd January 1968 and the codicil dated 3rd November 1970. The testator stated in the said letter that the testator was not bound to give any explanation to anyone as to how he dealt with his property because he had made every penny of it. The testator stated in the said letter that the testator had always helped the caveator as the caveator was his only son i.e. inter alia by handing over the entire amount received by the testator from his late father i.e. about Rs. 65,000/-. In the said letter, the testator stated that the testator had helped the caveator in respect of establishing his business of Mic Products Co. and constructing of a flat for, out of the passage of 3rd floor Kamal Mansion. The testator stated that the testator had provided jewellery worth Rs. 30,000/- to the wife of the testator besides wedding clothes and saris etc., at time of the marriage of the caveator. The later part of this letter states that the testator was very much hurt by reasons of strained relations and conduct of the caveator depicting lack of care, lack of respect for old parents etc. In the said letter the testator wrote as under :

I have never expected anything from you in return excepting your affection and respect.

Unfortunately in recent years you gave neither of them.

By the said letter the testator expressed his injured feelings and sentiments due to undesirable conduct of the caveator. Ultimately the testator stated in the said letter as under :

"All this distressed me and your mother very much and made us extremely unhappy and quite naturally I felt that it is only fair that the remaining part of my property should go to Meher who has loved us and respected us as a daughter."

12. Before I discuss other relevant evidence led on this subject matter, it shall be of some relevance to refer to deposition of Mr. Rusi Sethna proving the strained relation between the deceased and the caveator during the course of years. It appears to be the case of the caveator that there were no strain relations between the deceased- testator and the caveator. The caveator wants the Court to believe that the mind of the testator was poisoned by petitioner No. 1 and Rusi Dalal against the caveator and the testator did not make the said Will and the codicils with a free and open mind. On this aspect the question put to Mr. Sethna by the learned cross-examiner on behalf of the caveator is of considerable significance. It was put to Mr. Sethna as a case of the caveator as

under :

"Q. I put it to you that to your own knowledge relations between the deceased and Adi Cursetji were excellent right upto the time of death of the deceased. Is that not so?

A. I am aware that there were difference of opinion between father and son when Adi disposed Mic Products Co., along with tenancy rights belonging to the said concern. The deceased was very much upset. The deceased did not approve of Adi not doing any concrete work.?"

I accept this part of testimony of Mr. Sethna equally and truthfull.

13. The only particulars of alleged undue influence etc. given in para 6 of the affidavit in support of caveat is that Mr. Rusi Dalal had made a pre-condition to his marriage with the petitioner No. 2 that the entire estate of both the parents must go to him. In the said para of the said affidavit it is further alleged by the caveator that Mr. Rusi Dalal used to threaten the parents of the caveator to the effect that he would abandon the second petitioner unless the parents of the caveator succumbed to his threats. Neither the Will nor any of the codicils provided for any bequests in favour of Rusi Dalal. Mr. Rusi Dalal has not abandoned the second petitioner. The petitioner No. 2 and Mr. Rusi Dalal are living happily. Nothing has happened. There are three children of marriage of petitioner No. 2 with Mr. Dalal. The petitioner No. 2 and her husband Rusi Dalal have been living normal life as husband and wife. The allegations made in para 5 of the said affidavit appears to me to be imaginary and fictitious. The said allegations have remained unproved and indicate that the testator and petitioner No. 1 did not approve the conduct of the caveator in making unpleasant and unfair remarks against Meher and her husband. The testator must have been reasonably fed up with this attitude of the Caveator.

14. I shall now refer to the evidence of P.W. 1 Jerbanoo. P.W. 1 denied that Mr. Rusi Dalal had made any pre-condition of marriage or had given any threat to the testator or to petitioner No. 1 as alleged or any other threat. Mrs. Jerbanoo has deposed to that the deceased was of sound mind till the end. The plaintiff No. 1 is the major beneficiary under the Will. Perhaps the plaintiff No. 1 and the testator had acted in respect of preparation of the said Will and codicil in mutual consultation. The question which arises for the consideration of the Court is as to why the testator revoked the bequests made in favour of the caveator by his first codicil. In a way it would be right to state that it is ordinary human nature that both the children should be provided equally by the father. However, it is not, the universal rule. It depends upon the Will of the testator. The Court is not the testator. The Court does not make the Will in place of the testator. The Court is required to scrutinise such a Will with greater care. A Will not making provision in favour of one or the other of the children of the testator does not become invalid merely because of exclusion of one or other from the Will. I shall therefore, now proceed to analyse the evidence and ask myself as to whether there is

reasonable material before the Court to show that the relation between the testator and the caveator were strained at the material time and the testator of his own volition made a decision to revoke the bequests in favour of the caveator, by the first codicil and make bequests in favour of his daughter. The initial onus to satisfy the judicial conscience of the Court on this aspect is on the petitioner. The onus can shift on the caveator. In ultimate analysis the burden of proving issue of undue influence is on the caveator and in absence of any cogent evidence to prove use of undue influence on the testator, as alleged, the Court must uphold the Will once it is proved that the Will was duly executed and attested after due understanding of the document by the testator.

15. Jerbanoo in her evidence has stated that the behaviour of the caveator in later years was rather humiliating for the parents. Jerbanoo has stated in her evidence that the caveator started drifting away from the testator and petitioner No. 1 and when they met each other on the road, the caveator used to turn his face away from the petitioner No. 1. The petitioner No. 1 has stated in her evidence that at the time of the Golden anniversary and the Navjot ceremony of the two grand children. The caveator had not responded to the request of the testator and the petitioner No. 1 to attend the function. The petitioner No. 1 has given elaborate details regarding the strained relations between the testator and the caveator in her testimony. It is not disputed that the testator had 1/4th share in the Worli property. Jerbanoo has stated in her evidence that the caveator had prevented the testator from occupying the said Worli property or even visiting the same and the testator had felt very much hurt. Certain unpleasant incidents had taken place sometime prior to the death of the testator. Notices were addressed by M/s. Minocheher Hiralal & Co., to the testator and petitioner No. 1. Copies of these notices have been produced before the Court and marked as an exhibit. It appears to be the substance of the evidence on record that the caveator had himself instructed M/s. Minocheher Hiralal & Co., Advocates and Solicitors for Mr. Phiroz J.J. Cursetji to issue the notices to this parents and other relatives. As a matter of fact the caveator held power of attorney from Mr. Phiroz J.J. Cursetji. Phiroz had disputes with the testator. The question to be asked is as to whether all these material is not enough to clear suspicion of the Court, if any, and satisfy the Court so as to hold that the testator of his own free volition decided not to make any bequests in favour of caveator as he had rightly or wrongly felt hurt by conduct of the caveator. If the testator did not like his son in instructing solicitor to issue notices to him or if the testator felt hurt by reason of being not permitted to visit or enter upon his own property at Worli, was the testator at fault? The petitioner No. 1 has gone to the length of contending in her evidence that the testator was pushed out by the caveator from the Worli property and the testator had suffered serious shock as a result of this act of misbehaviour of the caveator as a result whereof the testator died. The testator felt hurt in several respects by reason of various acts of commission or omission on part of the caveator.

16. At this stage it shall be convenient to summarise relevant portion of the

evidence of the caveator. The caveator has stated in his evidence at page 43 that since the marriage of Meher with Rusi Dalal, relation of the caveator with his mother were strained. The caveator wants the Court to believe that the relations of the caveator with his mother were strained but the relations of the caveator with his father was quite cordial. Having regard to the facts of the case and in view of the handwritten letter of the deceased marked as Exhibit MM and other evidence on record I am satisfied that the evidence of the caveator is untrue and unreliable. In my opinion, the caveator had hurt both of his parents and the relations between the testator and the caveator were equally strained for 10-15 years, if not more. It is the case of the caveator in his evidence that till about 1980, the caveator and his wife used to go to his parents' place for dinner. Since then all visits at the residential place of parents were stopped by the caveator. Does it not indicate that the relations between the caveator and the testator were strained? It appears to me from the analysis of his evidence that the testator and his wife P.W. 1 had equal affection for petitioner No. 2 upto about the year 1970. The petitioner No. 2 had brain fever when she was at the age of 3 or 4 years. It is possible that the petitioner No. 2 does not possess ideally and completely developed brain. Even if it is so, the caveator cannot go on defaming his own sister and brother-in-law and exaggerate the matters. The conduct of the caveator in making all sorts of allegation against his sister and his brother-in-law is unfair. The conduct of the caveator in hurting his sister and brother-in-law must have created further bitter relations between the testator and the caveator. I find part of the evidence of the caveator as totally irresponsible. The caveator was shown the handwritten letter forwarded to me with covering letter dated 5th February 1985 marked exhibit "MM" once again in his cross examination and was asked question as to whether the said letter was in handwriting of his father. Jerbanoo has stated in her evidence that the entire letter was in the handwriting of the testator. The caveator replied that he did not know whether the letter was in the handwriting of his father-testator as he was not a handwriting expert and such letter was not written in his presence. The caveator was asked as to whether the caveator was familiar with his father's signature. The caveator replied that the caveator had not seen the documents written by his father and he will not be able to identify his handwriting. In my humble opinion, this part of testimony of the caveator is in nature of an attempt to hoodwink the Court and evade answering relevant questions. To my mind the caveator knows that the said letter is in handwriting of the testator and the caveator has attempted to evade answering question of the Court and the Counsel.

17. The case of the caveator regarding the alleged precondition of marriage alleged to have been imposed by Mr. Rusi Dalal regarding bequest of entire estate of both the parents of caveator in his favour appears to me to be totally imaginary. The testator has not made any bequest in favour of Rusi Dalal. The case of the caveator on this aspect appears to me to be absurd. If both the parents of Meher decided that Meher should be married to Rusi Dalal and petitioner No. 2 and her husband have been living happily for decades, why

should the caveator go on making unpleasant, unnecessary and improper allegations against his sister and brother-in-law. The caveator must have made these allegations during lifetime of the testator, and injured feeling and sentiments of the testator and petitioner No. 1.

18. The caveator has stated in his evidence that at the time of his marriage, Mr. Rusi Dalal had asked for an ownership flat in Dowry and his parents were required to provide an ownership flat situated at Tardeo Road. At page 63 of his evidence a question was put to the caveator in the following terms.

"Q. It put it to you that Mr. Rusi Dalal contributed Rs. 40,000/- out of purchase price of Rs. 65,000/- in respect of purchase of flat at Tardeo Court. It is not so?

A. I cannot say."

Further questions were put to the caveator by the learned cross-examiner appearing for the plaintiffs asking for details in respect of purchase of flat at Tardeo Court. The question was asked as to in whose name the flat at Tardeo Court was purchased? No answer was forthcoming. A specific case was put to the effect that the said flat was purchased in the joint name of Mrs. Meher Dalal, Rusi Dalal and petitioner No. 1. The caveator answered the suggestion of Counsel by stating that he could not say in what name the flat at Tardeo was purchased. In his evidence at page 44 the Caveator stated that his brother-in-law Mr. Rusi Dalal used to insist on being provided with a motor car and the testator was required to purchase a 2nd hand Ambassador Car and got the same transferred to the name of Mr. Rusi Dalal. During the course of his cross examination when he was asked the question to give atleast some details regarding purchase of motor car, or in respect of allegations pertaining to transfer of car to Mr. Rusi Dalal, caveator said that he was not in a position to furnish any information in this respect. This testimony of the caveator shows that the caveator has given all sort of evidence against his mother, sister and his brother-in-law and the caveator cannot be considered as a reliable witness. The evidence of caveator is vague.

19. To my mind it is not necessary to discuss the entire evidence led at the trial and the above discussion is enough to hold that the caveator has failed to prove his plea of undue influence or coercion made in his affidavit in support of caveat. It is impossible for the Court to hold that the petitioner No. 2 is not a suitable person to act as an Executor under the said Will. Mr. J.J. Gandevia had addressed a letter marked as Exhibit 3 consenting to the petition for probate being granted to the petitioners. When the attention of Shri D.V. Merchant, the learned Counsel for the caveator was invited to the said letter, Mr. Merchant was fair enough to concede that he did not press his objection to the petition on the ground of Mr. Gandevia having not joined petitioners in the petition. It is beyond my comprehension that Mr. Rusi Dalal had threatened to his parents to abandon his wife if his demands were not fulfilled. This allegation appears to me to be a figment of imagination of the caveator. Having regard to evidence led in this

case, I have no hesitation in recording this finding. Nothing like that has happened. There is enough evidence on record to show that Meher was married to Mr. Rusi Dalal in normal course. The caveator wants the Court to believe that his mother was very much prejudiced against the caveator as the caveator had married a girl not of the choice of his mother. I am not convinced with correctness of this allegation too. It is on record that petitioner No. 1 used to assist caveator and his wife in running of Bhelpuri-Snacks business in name of Mic Products for several years. The trouble between the parents of the caveator and the caveator arose after 1968-69.

20. It is contended on behalf of the caveator that the petitioners had not disclosed various assets in the Schedule and no probate should be therefore, granted in favour of the petitioners. The caveator has stated in his evidence that a plot of land bearing No. 53 forming part of Worli Hill Estate should have been included in the schedule to the petition for probate. It was however, admitted by the caveator himself that the said plot was already transferred to the name of Jerbanoo during the lifetime of his father. It is therefore, obvious to me that the said plot did not belong to the estate of the deceased at the time of his death. It was then alleged that the deceased possessed rare collection of valuable books, Gold coins, large quantity of curies, large collection of valuable stamps and large collection of long playing records and ordinary records. It has been stated by petitioner No. 1 in her evidence that all these items were gifted by the deceased in favour of his grand children during his lifetime. It was contended on behalf of the caveator that no gift tax was paid. I accept the evidence of P.W. 1 and reject the evidence of caveator on this aspect.

21. It was then contended on behalf of the caveator that the deceased had obtained Letters of administration in respect of estate of his deceased brother late Jamshed and his estate had remained unadministered. It was contended that the unadministered estate of late Jamshed ought to have been disclosed in Schedule III to the petition. It is not stated by the caveator as to what portion of the estate of Jamshed had remained unadministered and that specific items remained to be included in Schedule III to the petition. There is no merit in any of the pleas of the caveator.

22. Large number of authorities were cited by the learned Counsel for the petitioners at the bar. A few authorities were cited by Mr. Merchant, learned Counsel for the caveator. In defence to the Industry of Counsel, it is necessary to refer to at least some of the authorities cited at the Bar.

23. Shri Makhija, the learned Counsel for the plaintiffs relied upon the judgment of the Hon"ble Supreme Court in the case of Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta, . In this case it was held by the Apex Court as under :

"When once it has been proved that a Will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence is on

the party who alleges it."

It was also held in this case that every influence which was brought to bear on a testator could not be characterised as "undue influence". It was also held by the Court that it was open to a person to plead his case before the testator and to persuade him to make a disposition in his favour. It was held by the Apex Court that if the testator retained his mental capacity, and there is no element of fraud or coercion, the Will could not be attached on the ground of undue influence. In the ultimate analysis undue influence is required to be brought under the categories of fraud or coercion. In this case Venkatarama Ayyar, J., speaking for the Bench of the Hon"ble Supreme Court referred to well-known observation of Lord Penzance in *Hall v. Hall*, (1868) I.P.& D. 481 and approved the observations of Lord Penzance as under :

"In a word, a testator may be led, but out driven; and his Will must be the off spring of his own volition and not the record of some one else's".

The Hon"ble Supreme Court referred to section 61 of the Indian Succession Act and illustration (vii) in support of its view. The said statutory illustration (vii) provides that "If a testator in consequence of the intercession and persuasion, but in the free exercise of his judgment and volition, makes his Will in the manner recommended by "B". The Will is not rendered invalid by the intercession or persuasion of "B". Applying the ratio of this judgment to the facts of this case, Mr. Makhija contended that even if petitioner No. 1 or petitioner No. 2 had put forward their point of view before the testator, the Will could not be invalidated unless the Court reached the conclusion that the testator had not applied his own mind and free exercise of the judgment of the testator was in any way hampered or obstructed. It is open to the parties to persuade the testator to make the Will in a particular manner.

24. Shri Makhija rightly relied upon the judgment of the Hon"ble Supreme Court in the case of *Smt. Sushila Devi Vs. Pandit Krishna Kumar Missir and Others*, . This case dealt with the effect of non-bequests of property to children of the testator. Hegde, J., speaking for the Bench observed as under :

"If the bequests made in a Will appears to be unnatural the Court had to scrutinise the evidence in support of the execution of the Will with a great degree of care than usual."

If on such scrutiny the Will is proved to be the Will of the testator, it cannot be declared as invalid merely because of non-bequest in favour of one or other child of the testator.

25. Mr. Makhija has relied upon the judgment of the Privy Council in the case of *Motibai Hormusji Kanga v. Jamsetji Hormusji Kanga*, 26 Bom.L.R. 579, wherein the Hon"ble Mr. Justice Ameer Ali observed on behalf of the Privy Council that "A caveator who impugned a Will on the ground that it was obtained by the exercise of undue influence, excessive persuasion or moral coercion, has to make out his

case". It was further observed by the Privy Council as under:

"A man may act foolishly and even heartlessly; if he act with full comprehension of what he is doing the Court will not interfere with the exercise of his volition".

In the above cited case, The Privy Council observed that it was in evidence that the deceased had not been for sometime on good terms with his eldest son. It was held by the Court that the petition for probate was liable to be allowed as the allegations of undue influence made against the testator were not proved. In our case, the relation between the caveator and the testator were strained since about the year 1970.

26. Shri Makhija has also relied upon another judgment of the Privy Council in the case of AIR 1949 272 (Privy Council) . Sir Madhavan Nair speaking on behalf of the Privy Council observed that "undue influence in order to invalidate a Will must amount to coercion or fraud. It was observed by the Privy Council in this case that the burden of proving undue influence was not discharged by merely establishing that a person has the power to unduly overbear the Will of the testator. It must be shown that such a power was in fact exercised and that the Will was executed by exercise of such power. In this case, the Will was assailed by the caveator on the ground that the provision was made for the wife under the Will was totally inadequate. It was held by the Privy Council that the grounds set forth by the caveator were not sufficient to show that the tester was not of a sound or disposing mind or was under undue influence of his natural father while executing the Will.

27. Shri Makhija has heavily relied upon the judgment of P.B. Mukherji, J., delivered on behalf of Bench of the High Court of Calcutta in the case of Ajit Chandra Majumdar Vs. Akhil Chandra Majumdar, . The following proposition of law can be deduced from this case:

(1) "The onus probandi lies upon the party propounding a Will who must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator."

(2) The standard of proof to establish a Will is not an absolute or a perfect one but such as Will satisfy a prudent man;

(3) The burden of proving undue influence is not discharged by merely establishing that the person had power unduly to overbear the Will of the testator;

(4) The fact that the propounder was getting largest benefit under the Will by itself does not make the Will invalid in law. That circumstances is only a circumstance which should make the Court vigilant to examine the evidence with great suspicion but no more;

(5) The fact that the testator had deliberately preferred one son to others did not make the Will unnatural."

The testator is entitled to bequest all his property in favour of any one he likes and even to the exclusion of all his children. The Court is required merely to consider as to whether the Will represents the free decision of the testator and as to whether the testator had a sound disposing mind at the time of execution of the Will. Shri Makhija is fully justified in relying on the above referred authorities.

28. Shri Merchant the learned Counsel for the caveator relied upon the judgment of the Hon"ble Supreme Court in the case of H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, . In this case it was held by the Apex Court that it was for the propounder of the Will to clear the suspicion of the Court if the Will disclose any suspicious circumstances. If the Will is surrounded by suspicious circumstances, the propounder must lead initial evidence to prove mental state of the testator showing that the disposition in the Will were made by the testator acting on his free Will. It was held in this case by Gajendragadkar, J., speaking for the Bench of the Apex Court that the fact of the propounder taking prominent part in the execution of the Will and receiving substantial benefit under it that itself was general treated as a suspicious circumstances and it was for the propounder to remove suspicion of the Court by clear and satisfactory evidence. Relying on the evidence of P.W. 1 in this Court, Shri Merchant submits that P.W. 1 had taken prominent part in the execution of the Will and P.W. 1 was a major beneficiary under the Will. Shri Merchant submits that the petitioner had failed to clear the suspicion of the Court to prove cogent reason. I agree with the principles of law laid down in this case. I further held that having regard to the facts and circumstances of the case, exclusion of the caveator from the bequests cannot be considered as a suspicious circumstances and even if it is so considered, the suspicion, of the Court, if any, is more than cleared by the petitioners by leading satisfactory evidence at the trial. Shri Merchant has also relied on judgment in the case of Ram Piari Vs. Bhagwant and others, . In this case the Will was executed one day before the death of the testator. The properties were bequeathed in favour of sons of one of his two daughters. The other daughter was totally disinherited. Having regard to the facts of this case R.N. Sahai, J., speaking for the Bench of the Hon"ble Supreme Court held that the standard of scrutiny required to be applied in such a case was not applied by the High Court. This authority is mere case on facts of the case proved before the Court. In the present case the Will was executed in the year 1968 and the codicils were executed in the years 1970, 1974 and 1983. The testator applied his mind to the situation from time to time and took independent legal advice from Advocates and Solicitors of repute. It cannot be therefore, said that the testator acted in haste or did not comprehend the contents of the Will and the codicils or their true legal effect and was driven to adopt a particular case contrary to his own thinking or decision on the subject.

29. In the result I answer the issues as under :

Issue No. 1 -- In the affirmative.

Issue No. 2 -- In the negative.

Issue No. 3 -- In the negative.

30. I make the petition absolute and direct the Prothonotary and Senior Master, High Court, Bombay, to issue the probate as prayed for in favour of the petitioners expeditiously on the petitioners complying with usual office requisitions.

31. It is an unfortunate case where the relations between the parties have not improved even after the death of the testator and perhaps the caveator is not on visiting terms with his mother. Ordinarily I would have preferred to pass an order of no order as to costs having regard to relationship between the parties. After giving fuller consideration to the problem before the Court, I have come to the conclusion that costs must follow the event. I hope and pray that the litigation would not be pursued further. It is however left to the parties.

32. I therefore, direct that the caveator shall pay a sum of Rs. 10,000/- as cost of the petition to the petitioners.

33. The Prothonotary and Senior Master shall act on the basis of ordinary copy of this Order duly authenticated by the Associate of this Court.

34. Mr. Merchant applies for Stay of operation of this Order for some time. Mr. Makhija opposes. Application for Stay is refused.

35. Issue of certified copy is expedited.