

(2016) 03 BOM CK 0149

In the Bombay High Court

Case No : Testamentary Suit No. 26 of 1999 in Testamentary Petition No. 504 of 1998

Ms. Mahabanoo Navroz Kotwal

APPELLANT

Vs

Ms. Piloo Fali Bomanji

RESPONDENT

Date of Decision : 08-03-2016

Acts Referred:

Succession Act, 1925 — Section 59, 61

Citation : (2016) 5 BCR 723

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

Bench : Single Bench

Advocate : Mr. Rajesh Shah, with Ms. D. Shetty, Mr. N. Modi, Ms. H. Manek, i/b M/s. Rustamji & Ginwala, Advocates, for the Plaintiff; Mr. Shiraz Rustomjee, Senior Advocate, with Mr. M. Khandeparkar, i/b Ms. Janhavi Bejoy, Advocates, for the Defendants

Final Decision : Dismissed

Judgement

G.S. Patel, J.—A. Introduction

This probate action is unusual in many respects. For one thing, its size: the trial record alone is nearly 2000 pages, not counting the files of miscellaneous papers, interim applications and so on. There is the evidence of as many as eight witnesses, three for the Plaintiff and five for the Defendants. But beyond sheer volume, this case is decidedly more colourful than most. One of the Defendants' witnesses is the co-executor of the Will of which probate is sought; he gave evidence against his spouse, and there is a record of their own separate divorce action, even now pending. Multiple narratives weave in and out of these papers. They tell us of a moneyed Parsi widow, gnarled, infirm, with significant loss of physical faculties at the time she supposedly made her Will; in competing accounts, a lady who, in a more halcyon time, was either vivacious and au courant or a subdued, lonely, nearly illiterate shadow much given to playing the piano. There are accounts of attendant nurses and visiting relatives, lawyers,

doctors, and a November Saturday, the start of Mumbai's horse racing season when an earlier joint Will was said to have been made at the Mahalaxmi Racecourse. All of this might in other hands have been the stuff of some spirited fiction, possibly in the noir genre given the *dramatis personae*, but in the more dispassionate and arid terrain of law, it turns on only two issues: the Plaintiff's proof of testamentary capacity, and the Defendants' proof of undue influence.

2. I heard Mr. Shah and Mr. Rustomjee at quite considerable length. They took me through the record, each in his turn. Having considered all this material, their submissions and the authorities they placed for consideration, I have dismissed the suit. My reasons follow.

3. As is usual in such cases, the pleadings are minimal. The fullness of the story emerges from the evidence. I have, therefore, in this judgment adopted a slightly different approach. After setting out the rival cases on pleadings to the extent necessary, and the issues that came to be framed on these, I have first attempted to piece together an overall structure of narrative of the events as they unfolded. I have then examined the evidence against the issues framed and then proceeded to my conclusions and findings.

4. The references to documents in this judgment are references to their corresponding exhibit numbers in evidence. The record has been recompiled with serial paging, and I have, wherever possible, provided the required page numbers.

B. The Parties & Their Witnesses

5. Given the number of witnesses, and the fact that the original 1st Defendant died while the action was pending, a listing of the parties and their witnesses, and their kinship where it exists, might be useful (if somewhat dizzying):

(a) Nergish Keki Cassad ("Nergish"): the Testatrix, whose Will dated 7th February 1996 is sought to be proved. Nergish died on 5th November 1997. Her parents were Nariman Bomanji Bharthania and Kerbanoo Nariman Bharthania.

(b) Keki Pestonji Cassad ("Keki"): Nergish's husband. He died 16th December 1995, predeceasing Nergish.

(c) Jamshed Pestonji Cassad: Keki's brother.

(d) Mahabanoo Kotwal ("Mahabanoo"): the Plaintiff and PW3; Nergish's niece by marriage - the daughter of Nergish's husband's older sister, one Mani Nariman Modi.

(e) Mani Nariman Modi ("Mani"): Mahabanoo's mother and Keki's sister.

(f) Nairika Navroz Kotwal ("Nairika"): Mahabanoo's daughter, a legatee under the Will in question.

(g) Kaizaad Navroz Kotwal ("Kaizaad"): Mahabanoo's son, a legatee under the Will in question.

(h) Rohinton Rustomji Mehta ("Rohinton"): Nergish's cousin, her mother's sister's son.

(i) Fali Pirozshah Bomanji ("Fali"): Defendant No.1; Nergish's first cousin, her paternal uncle's son; since deceased. The Bomanji surname or family name seems to have been used interchangeably with the surname Bharthania or Bharthaniya.

(j) Piloo Fali Bomanjee ("Piloo"): Fali's widow; substituted as Defendant No.1(a).

(k) Parvin Rustom Tata ("Parvin"): Defendant No.2; the daughter of pre-deceased lineal descendant of Nergish's paternal grandfather.

(l) Harish Shroff: ("Mr. Shroff"): PW1; Advocate and Solicitor; partner of M/s Rustamji & Ginwala, later sole proprietor of M/s Harish Shroff & Co;

(m) Dr. Katie Sethna ("Dr. Sethna"): PW2; A practising psychiatrist; Mahabanoo's father's sister's daughter.

(n) Dhun P. Kothavala ("Kothavala"): DW1; a witness to a joint Will said to have been previously executed by Nergish and her husband Keki.

(o) Kermeen Bose ("Kermeen"): DW2; daughter of Fali and Piloo; Parvin's cousin. Parvin's father was married to Kermeen's father's sister.

(p) Dr. S.K. Dhingra ("Dr. Dhingra"): DW3; Medical Superintendent at the B.D. Parsee General Hospital, Mumbai.

(q) Dr. Navroz Kotwal ("Dr. Kotwal"): DW4; Mahabanoo's husband, named as a co-executor of the Will propounded.

(r) Minnie Erach Todywala ("Mrs. Todywala"): wife of one Erach Todywala, said to have been another witness to the previous so-called "joint Will". Mrs. Todywala was not tendered for cross-examination.

6. Since I have set out the relationships between the parties, their positions in the array in this suit, and also specified the manner in which I will refer to each in this judgment, I will not repeat these in the narrative that follows.

B. The Pleadings and the Will sought to be proved

7. Nergish died in Mumbai on 5th November 1997. She is said to have left a Will dated 7th February 1996. Ex. "P" original deposited in the High Court registry; photocopy, pp. 6-10. Mahabanoo, Nergish's niece, claims to be one of the two executors named in this Will. The other is Mahabanoo's husband, Dr. Kotwal. Mahabanoo is also a significant legatee under the Will. In the Petition, Fali and Parvin, later Defendants Nos. 1 and 2, were cited as other heirs. The Will was supposedly attested by Mr. Shroff and Dr. Sethna. The Will bears thumb impressions on all pages. On pages 1 to 4, the thumb impression is in the margin. There are initials, said to be of the witnesses, below these impressions. On the fifth page, which contains only the execution clause, there is another

thumb impression to the right of that clause. This is said, in a handwritten endorsement below that thumbprint, to be Nergish's left hand thumb impression. An abbreviated form of this endorsement also appears on the preceding pages below her thumb print. Nowhere on this document do Nergish's signature or initials appear.

8. In the Will, Nergish supposedly made the following provisions. First, she appointed Mahabanoo and Dr. Kotwal as her Will's Executors and Trustees. Under Clause 6, she bequeathed her holdings in Unit Trust of India to Nairika, Mahabanoo and Dr. Kotwal's daughter. In Clause 7, she purported to bequeath her residential Flat No.17, 3rd Floor, Lotus Court, J. Tata Road, Churchgate, Mumbai 400 020 and an accompanying garage No.7 ("the Lotus Court flat") to Mahabanoo and Kaizaad (Mahabanoo and Dr. Kotwal's son). There follows in Clause 8 a charitable bequest of 50% of shares in various companies which Nergish said she owned, or the sale value of these shares, to the B.D. Parsee General Hospital in memory of her parents. From the remaining one-half of her holdings in shares, 30% was left to Keki's brother, Jamshed and the remaining 20% to Nairika. In Clause 9 of the Will, Nergish expressly disinherited Rohinton (her cousin; her mother's sister's son), saying that he had filed a false litigation against her and Keki in the Small Causes Court about the Lotus Court flat. All the remainder was left to Mahabanoo under Clause 10. The Schedule of Assets annexed to the Petition lists the value of the estate (in 1998 when the Petition was filed) at a little over Rs.61 lakhs.

9. The Petition was filed on 10th June 1998. Though Dr. Kotwal was one of the two named Executors, the Petition was brought by Mahabanoo alone. In paragraph 5 of the Petition, she reserved Dr. Kotwal's right to come in and apply for Probate. Dr. Kotwal, for his part, filed an accompanying affidavit also dated 10th June 1998, R&P pp. 14-15 in which he said that though he was one of the named Executors, as Mahabanoo had reserved his right to come in and apply for Probate, he reserved to himself that right as well.

10. Citations having been served, Fali and Parvin filed a joint Caveat on 19th January 1999 R&P pp. 26-27 along with an Affidavit in Support of the same date R&P pp. 28-31. Fali then filed a further affidavit dated 12th November 1999. This seems to have been permitted at the time and is now part of the record R&P pp. 32-39. The Petition was then, under the Bombay High Court (Original Side) Rules, renumbered as a Suit, Fali and Parvin being arrayed as Defendants and the two Affidavits in Support of the Caveat being taken as their Written Statement.

11. In their two Affidavits, Fali and Parvin disputed the Will. The first affidavit contains virtually nothing by way of a substantive defence. All the defences appear in the second affidavit. Here, the Defendants say that, before marriage, Nergish lived with her parents at the Lotus Court flat that is bequeathed in the Will, i.e., Flat No.17. An only child, she was sheltered, over-protected, never took her own decision on any matter and was barely educated. Nergish married Keki

in 1955 and moved into the adjacent flat, viz., Flat No. 18 at Lotus Court. This was purchased by her father. Even after marriage, she spent most of her time in her parents' flat next door. After her parents passed, Keki kept Nergish from going out and restricted her movements. She was not allowed to meet her side of the family. In 1978, Flat No.18 was sold and the couple moved into Flat No. 17, Nergish's parents' flat (the Lotus Court flat of which she later made a bequest). After Nergish's father died, Keki supposedly took complete charge of all her family's holdings, and she is said to have been under his "total domination". In 1990, Nergish suffered a paralytic stroke due to a cerebral haemorrhage. She was hospitalized. She lost her speech, which became slurred. She could only make incomprehensible sounds. It was at this time that Keki's sister, Mani (Mahabanoo's mother), till then a resident of Navsari in Gujarat, started coming to Mumbai. At first, these were occasional visits but shortly after, Mani moved in to the Lotus Court flat; only ostensibly, say the Defendants, to care for Nergish. Thus, according to the Defendants, Keki and his sister Mani took full control of Nergish's wealth, assets and estate. All her jewellery, for instance, was in the custody of Keki and, later, in that of Mani and subsequently of Mahabanoo.

12. Nergish never recovered from her stroke. She remained almost vegetative for some years before she died. At the time even of Keki's demise about two years earlier on 16th December 1995, There is some controversy even about this date. Nergish was unfit of mind and infirm of body. After Keki's death, Mani and Mahabanoo ensured that Nergish was isolated from the family. Whenever Fali did visit, he found Nergish to be unresponsive. She could not communicate. She only made incoherent sounds and grunts to draw attention. She gave no sign she remembered any relatives or family. She could certainly not converse.

13. The Defendants say that Nergish therefore was not of a sufficiently sound and disposing state of mind, body and understanding to make any testamentary disposition. The thumb impression is denied as that of Nergish. The Defendants allege that Mahabanoo exercised undue influence on Nergish and took advantage of her uncomprehending and vegetative mental and physical condition.

C. Issues & Findings

14. On these pleadings, issues were struck on 17th January 2002 At p. 40. These are listed below, with my findings against each.

Issue No

Issue

Finding

1.

Whether the Plaintiff proves that the Deceased (Nergish Keki Cassad) executed a Will dated 7th February 1997?

No

2.

Whether the Plaintiff proves that the said Deceased was of a sound and disposing mind at the time of making of the Will?

No

3.

Whether the Plaintiff proves that the said Will was executed by the Deceased of her own free will?

No

4.

Whether the Plaintiff proves that the Deceased was in a position to give instructions to the Attorney for preparing the Will?

No

5.

Whether the Defendant proves that there was any undue influence or coercion on the Deceased into making the Will?

Yes

6.

What Order?

Suit dismissed

15. In the discussion that follows, I have taken Issues Nos. 1, 2 and 4 together as they all seem to me to relate only to Nergish's dispositive capacity. The burden of proof in each of these is on the Plaintiff. Issues Nos. 3 & 5 form the second dimension to the dispute, the question of undue influence, and here the burden lies partly on the Plaintiff (Issue No.3) and partly on the Defendants (Issue No.5).

D. Re: Issues Nos. 1, 2 & 4: Nergish's Testamentary capacity, and the execution of her Will

16. Read together, it seems to me that it is only Issue No.2 that needs answering. Issue No.1 is subsumed in Issue No.2, and Issue No.4 is not really an issue at all, for, answered on its own either way it cannot prove the due execution of the Will in its solemn form.

17. There are two distinct time periods to consider in any assessment of these four issues: the period prior to the date of the alleged Will, and that very day, 7th February 1996 itself. I must consider the evidence of her physical and mental

condition at both; for it is entirely possible in a given case that a Will may have been properly made during a time of adequate mental lucidity and physical wellness though these may not have been quite so pronounced at other times. Should I find, on the other hand, that there was a consistent and unchanging lack of sufficient mental and physical fitness for the purpose, then the resultant conclusion is inescapable.

18. Mr. Shah does not dispute that Nergish was infirm and incapacitated for some time prior to the making of the Will. Indeed he cannot, for his own witnesses' testimonies point to this, as we shall presently see. His case is that Nergish's condition was, however, not so grave that it impaired her mental faculties: she was sufficiently in possession of those to know the testamentary dispositions she did and did not want to make. It was only her physical condition that was problematic. Section 63(c) does not, Mr. Shah says, require a testator's signature. A thumb impression may do. In fact, in a given case, a testator may properly execute a Will by directing another person to sign on the testator's behalf. So long as that execution by the testator - by signature, impression or by another at the testator's direction - is done without coercion or undue influence and while of sufficiently disposing state of mind, memory and understanding, and duly witnessed, the Will must be held to be proved in its solemn form. Nothing in the law requires either a particular form of Will or that the testator must be in the pinkest of health; few of us are, Mr. Shah says, and the law is not unreasonable in its demands.

19. He turns first to the testimony of Mr. Shroff, R&P, pp. 41-68 a solicitor of about 40 years' standing at the time he gave evidence. He says that during the 1960s and 1970s, Nergish's brother-in-law, Dhunjisha (evidently Keki's brother), was a client of M/s Rustamji & Ginwala, a firm of Advocates & Solicitors of which Mr. Shroff was once a partner. In 1990, Mr. Shroff acted for Keki in the matter of the sale of some property at Davier. He also says that he had once prepared a "joint Will" for Nergish and Keki R&P, paragraph 6, p. 42. This was apparently executed some time in October 1995. This is the joint Will of the execution of which there was much later in the trial a very great deal of controversy Ex. P-2 in evidence. This document assumes some importance, if tangential: Mr. Shah says that the present Will under consideration is broadly in line with that earlier Will, while the Defendants argue that the earlier Will was itself altogether irregular, never proved and supposedly made in circumstances that the Defendants say are utterly bizarre. I will return to this document later.

20. Mr. Shroff says he received instructions from Nergish "through" Mahabanoo twice: once in 1995, to prepare a General Power of Attorney in favour of Mahabanoo that was executed on 20th December 1995, Nergish affixing her thumbprint to it Ex. P-1 in evidence. This was five days after Keki died, on 15th December 1995. and again a few short weeks later in January 1996, when he received instructions to draft a Will for Nergish along the lines of the previous Joint Will. He says he prepared this draft and sent it to Nergish, and that she

returned it to him "duly approved". He says that "it was pointed out to him", by whom we are not told, whether Nergish or Mahabanoo, that the specific clause about Rohinton Mehta had not been inserted. He says he was directed to do this, that he did so, and prepared the engrossment (i.e., the final document on green ledger paper).

21. In an earlier portion of his Affidavit Evidence, he says that he used to record conferences and meetings in his diary. He has entries for meetings on 15th June 1990, 28th June 1990, 10th July 1990 and 30th July 1990 for meetings he held with Keki and others. These entries have been marked in evidence. Exs. P-5 to P-8. He also has an entry for 20th December 1995 noting that he attended Nergish's residence Ex.P-10.

22. Mr. Shroff turns then to the date of execution of the Will and what happened on that date, 7th February 1996. He says he went to Nergish's residence at about 7 pm. He was there for about 45 minutes. He says he made a diary entry for that day, too Ex. P-9. In any case, the entry will only establish his attendance, and there is little dispute about that. What follows, however, is significant. Mr. Shroff says that when he arrived at Nergish's home, she was in the bedroom. She came out with a lady who was later introduced to Mr. Shroff as Dr. Katie Sethna (PW2), a consulting neuro-psychiatrist. Mr. Shroff claims that Nergish was "perfectly mobile" and walked to the dining room.

23. Then Mr. Shroff says that Dr. Sethna told him that she had examined Nergish in her (Nergish's) bedroom and found her testamentary capacity to be intact and that she was able to understand what she was doing. On its own, of course, this testimony is worthless and is hit by the rule against hearsay evidence. Mr. Shroff can at best depose to what he was told or what he heard, but not to its correctness. He goes on: Dr. Sethna informed him that Nergish's partial paralysis precluded her from signing the document. This, he says, he knew already since he had previously prepared a Power of Attorney for her and on which, too, she had placed her thumb print.

24. Now Mr. Shroff says, in paragraph 9, that he read out and explained the contents of the Will to Nergish. He says that she affirmed that this was in line with her wishes. How Nergish communicated this assent we are not told. He then says that "she placed her thumb impression" in the margin of the pages and against the execution clause on page 5. This statement clearly implies that Nergish did so voluntarily and unassisted. Mr. Shroff then says that after Nergish "executed" the Will, he and Dr. Sethna signed it as witnesses. They initialled each page. He made the endorsement below Nergish's thumb print on page 5 and, in an abbreviated form, on pages 1 to 4. Mr. Shroff identifies the signatures, initials and handwriting on all these pages as his and Dr. Sethna's, and then says in paragraph 11 that at the time Nergish was of disposing mind and understanding and, to the best of his belief, made and published her Will freely. Last, he says he was paid his fees by Nergish and produces a receipt.

25. After a brief additional examination-in-chief during which Mr. Shroff's documents were marked, he was cross-examined. That cross-examination is revealing. Mr. Shroff admits that, as far he knew, Nergish was only conversant in Gujarati, and that he had never seen her sign, and had only ever seen her use her thumb impression. He does not know, for instance, if she could sign at all Qns. 7-9, pp. 57-58. When asked in what language Nergish conveyed to him that the Will accorded with her wishes, Mr. Shroff only says that she nodded. Qn. 10, p. 58. He does not know of her coherence either. Importantly, he says that the only persons present were himself, Nergish, Mahabanoo and Dr. Sethna. In answer to Q.21, Mr. Shroff says that he sent the draft Will to Nergish "through" Mahabanoo; and, in answer to Q.20, that it was Mahabanoo who gave him a copy of the earlier (joint) Will. The draft, too, was returned by Mahabanoo, and it was she who told Mr. Shroff that Nergish had approved it; and, further, that it was Mahabanoo who told him to insert the missing paragraph or clause about Rohinton. Qns. 23-24, p. 61. He also confirms that it was Mahabanoo who said that the residue of the estate should go to her, Mahabanoo. Qn. 26, p. 61. Again, in relation to the bequest to the Parsee General Hospital, it was Mahabanoo who gave instructions to Mr. Shroff. Qn. 27, p. 62. We come then to a section of this cross-examination that is most interesting indeed. Here, in response to Questions 40 to 44, R&P, p. 65. Mr. Shroff agrees that Nergish was paralysed, but does not know from when or which part of her body was affected. He presumed she could not sign; and then he says he cannot depose to her ability to speak as he "hardly had any conversation with her". When asked if he had any conversation with Nergish at all, he only answers that she nodded when he read the Will over to her.

26. To my mind, this is problematic enough as far as it goes. This is no evidence at all of sufficient mental capacity or of Nergish having even remotely understood what it was she was doing. Everything points to Mahabanoo having a complete hand in the preparation of the Will and of dictating its direction. Matters are considerably worsened by the evidence of the Plaintiff's next witness, PW2, Dr. Sethna. She says in her Evidence Affidavit R&P, pp. 69-73 that her brother Dr. Kekobad Mody was treating Nergish; and that she knew Mahabanoo was related to Nergish. Dr. Sethna says that on 7th February 1996, Mahabanoo called her to say that Nergish wanted to make her Will, and requested Dr. Sethna to "examine her as a Psychiatrist and certify her testamentary capacity to make her Will."

In itself, this one sentence has catastrophic consequences to the Plaintiff's case. It points unequivocally to a lack of testamentary capacity; the Plaintiff's knowledge of it; and, too, the Plaintiff's almost complete dominion by then over Nergish's estate and affairs.

27. Dr. Sethna goes on. At 6:45 pm, she went to Nergish's Lotus Court flat. Nergish was in the bedroom. Dr. Sethna went in. They exchanged "some greetings". Does this mean Nergish could converse? Mr. Shroff's evidence points to the contrary. Dr. Sethna does not expand on this in her examination-in-chief.

She says that on examination, she found Nergish to be generally in good health; and then she says this:

The deceased informed me that she wanted to make a Will. I found out that she knew by and large the extent of her properties and she knew who her natural heirs were and also she knew to whom she wanted to leave her properties. Although, the deceased had evidence of right side paralysis and partial affectation of speech, I found her testamentary capacity to be intact. I accordingly, made out a certificate on my letterhead certifying that the testamentary capacity of the deceased was intact.

28. Then Dr. Sethna says Nergish came to the dining table, and Dr. Sethna accompanied her there. She (Dr. Sethna) was introduced to Mr. Shroff. Dr. Sethna told Mr. Shroff that due to Nergish's "partial paralysis", Nergish could not sign. To this, Mr. Shroff "advised" that Nergish could affix her thumb impression, which Dr. Sethna says Nergish did on each page and against the execution clause. Then follow the usual confirmations of the witnesses' signatures and Dr. Sethna's closing comment that Nergish was of sufficient dispositive capacity.

29. This evidence, even with cross-examination, is very problematic. Nergish apparently had a conversation with Dr. Sethna; but to Mr. Shroff, a person with whom one can safely presume some decipherable speech was necessary, she only nodded. Dr. Sethna says she "advised" Mr. Shroff that Nergish could not sign; but Mr. Shroff says he already knew this, since he had previously made just such a thumb-impression-only document for her, the earlier Power of Attorney.

30. Under cross-examination, this evidence all but collapses. Dr. Sethna admits to being Mahabanoo's first cousin (their parents were siblings). Qn. 12, p. 78. She says she knew Nergish by sight alone, i.e., that she had never previously examined her or ascertained her condition, and that Nergish was never previously her patient, and that she had never examined her before; Qn. 2, p. 76; Qn. 14, p. 78; Qn. 15, p. 79. she had never even spoken with her before. Qn. 20, p. 79. When asked if it was true that Nergish could not speak coherently and could only make sounds, Dr. Sethna asserted that she could speak words, single words or two words together, but could not form large sentences. Qn. 18, p. 79. Then we come to the matter of the actual alleged execution of the Will. This is what Dr. Sethna has to say:

Q. 28) At the time of the examination of the deceased, did you know what properties belonged to the deceased?

Ans) I did not know, but the deceased told me.

Q. 29) What did she tell you?

Ans) She said a single word, "Flat", she said a single word "Paisha".

Q. 30) Is that all that she told you about the properties?

Ans) Yes.

Q. 31) Is it correct that you had at that time no way of knowing whether the deceased had knowledge of all the properties owned by her?

Ans) There was no way that I could have known.

Q. 32) At the time of your examination of the deceased, did you know who were the heirs of the deceased according to Parsi law?

Ans) I asked her a question in Gujarati, whether she had any relatives. She said she had relatives, but she did not elaborate.

Q. 33) Would it be correct to say that you could not have ascertained and did not ascertain whether the deceased knew as to who were her heirs?

Ans) Well, she said that she had relatives, but then she shook her head as if to say that she did not want to leave them anything.

Q. 34) Since you did not have the Will at the time of the examination of the deceased, would it be correct to say that you did not ascertain whether the deceased knew the contents of the Will?

Ans) I did not know at that time.

Q. 35) Similarly would it be correct to say that you did not ascertain whether the deceased understood the contents and effect of the Will?

Ans) After I finished the examination, Mr. Harish Shroff read the Will to her. There was the will I suppose with them and he read it to her and she nodded very vigorously that she agreed with what was stated in the Will.

(Emphasis added)

31. "Nodded very vigorously" "single word "flat"" "single word "paisa"". On this, we are asked to believe that Nergish knew sufficiently what it was precisely she was doing on that day. Leaving aside Dr. Sethna's acerbic and possibly questionable understanding of what a dispositive capacity requires, there are two further questions and answers that are telling. She was asked if she ascertained Nergish's capacity by putting questions to her. The response was in the negative; that Dr. Sethna ascertained Nergish's capacity by her "behaviour and the little speech that she had". Qn. 47, p. 84. A little later, questioned whether she (Dr. Sethna) had tried to find out why the Will was required to be explained to Nergish after it was read out to her, Dr. Sethna said that "it was explained very perfunctorily".

32. The Plaintiff, Mahabanoo, made two Evidence Affidavits, dated 4th October 2012. R&P, pp. 89-98 and 18th October 2012. R&P, pp. 99-105. Mahabanoo says she was close to Nergish, who was her aunt and that her mother Mani took care of both Nergish and Keki. In paragraph 11 of her first affidavit, she says servants were hired to take care of both Nergish and Keki, including a part-time cook. Then she says that Nergish could say only a few words; one had to be very close to her to hear what she was saying; but since Mahabanoo was attached to her

and visited her regularly, she could decipher Nergish's speech. Later, Mahabanoo says that, acting on Nergish's instructions, she contacted Mr. Shroff, gave him a copy of the earlier joint Will, instructed him to prepare a Will for Nergish along those lines and later, got the draft approved by Nergish. She says that Nergish pointed out the missing clause about Rohinton which Mahabanoo relayed to Mr. Shroff. As to 7th February 1996, Mahabanoo contradicts Dr. Sethna in at least one material particular: she says that Mr. Shroff knew Nergish could not sign (meaning, therefore, that there was no occasion for Dr. Sethna to "advise" Mr. Shroff about this). When Mr. Shroff was reading the Will (there is no mention of it being explained), Mahabanoo was in the kitchen preparing tea and snacks. When she came out, she saw Mr. Shroff asking Nergish to put her thumb impression to the Will. In cross-examination, Mahabanoo insists that her mother and the house help could understand Nergish. Qn. 61, p. 117. Apart from her say-so, there is no evidence of this. In cross-examination, Mahabanoo denies that any portion of the Will was on her instructions, and insists that she only conveyed Nergish's instructions to Mr. Shroff. She confirms that there were no others present at the time, the servants having been given time off at that time of day.

33. Mr. Shah's submission is that there is no suggestion in the cross-examination that Mahabanoo and her mother did not care for Nergish. To the contrary: they engaged servants and domestic staff, paid bills, managed bank accounts and therefore it is safe to conclude that Mahabanoo enjoyed Nergish's confidence. Beyond this, he says, there is absolutely nothing to indicate that there was any kind of undue influence; and, as to her testamentary capacity, in his submission Dr. Sethna's evidence is unshaken and shows no material error.

34. Of the witnesses whose evidence was led by the Defendants, on these issues as to testamentary capacity and of the actual execution of the Will, three witnesses are important. The first of these is Kermeen, DW2, the daughter of the original 1st Defendant, Fali and his wife Piloo, now Defendant No.1(a). The second is Dr. Dhingra of the Parsee General Hospital, and the third is Dr. Kotwal, Mahabanoo's estranged husband. Kermeen speaks not only of Nergish's condition in later years, but of her background as well. Affidavit, paragraph 8, p. 171. She says that Nergish had little schooling and "very low mental acumen"; that she had led a sheltered life in an orthodox home where a female child's education was considered unimportant. She was helpless and docile and dominated by Keki. Her orthodoxy would not have allowed her to do something like make a fresh Will during the mourning period following her husband's demise. Later, in paragraph 15, she says that Nergish did not do any housework. She never went shopping. Her daily routine involved a prolonged bath, the odd visit to a Fire Temple and occasional evenings at the Radio Club. Other than this, she could do next to nothing. She was wholly incapable of independent thought and certainly not of planning the disposition of her estate. Even in good health, she only understood Gujarati and did not speak or comprehend much English. In 1990 or thereabouts, Nergish suffered an acute paralytic stroke. She spent

nearly four months in either the Breach Candy Hospital or at the Parsee General Hospital. Kermeen claims to have visited her at Bacha's Nursing Home at Marine Lines in early November 1990 and later at the Parsee General Hospital as well. She says Nergish was in the Parsee General Hospital from 22nd November 1990 to 15th February 1991. These dates are confirmed by Dr. Dhingra, DW3, who was summoned to produce documents. He brought with him hospital registers. He was cross-examined, but nothing very much turns on his cross-examination. I will, therefore, proceed on the footing that Nergish was hospitalized. The fact that she did suffer a stroke and was at least partially paralysed as a result is not in dispute.

35. Returning to Kermeen's evidence, she says in paragraph 20 R&P, p. 174 that following her stroke, Nergish's speech was slurred and only a few who attended to her regularly over a long period could understand what she was saying. Her right side was affected and her right hand was unusable. By 1994 or 1995, her condition had deteriorated. She was incoherent by then and reduced to making sounds. She appeared to be wholly disoriented. She made sounds to draw attention to her most basic needs for food or for aid with bodily functions. She had suffered further strokes and was almost immobile. She had to be carried from her bed to her chair. She could not hold up her head. She was, to all intents and purposes, in a vegetative state R&P, paragraphs 22 and 23, p. 175.

36. This is strongly worded and unsparing. Predictably, Kermeen was subjected to a prolonged cross-examination R&P, pp. 182-246, running into nearly 173 questions. For all its length, this cross-examination was not particularly effective: in many cases, it succeeded in eliciting a confirmation and a reaffirmation of her case. For instance, she maintained that Nergish was orthodox and always lacked any great acuity; Qn. 51, pp. 195-196; Qn. 56, p. 197 that she had a very low level of education; Qn. 52, p. 196 made no independent decisions Qn. 55, p. 197 or even did the household chores or shopping. Qn. 55, p. 197 Kermeen was confronted with some certificates from the Trinity School of Music to counter this allegation, but this is hardly sufficient for our purposes.

37. I turn lastly to the evidence of Dr. Kotwal, DW4, Mahabanoo's estranged husband. I approach this evidence warily and with great unease. In late 2011 or early 2012, Dr. Kotwal filed for divorce. That divorce proceeding in the Parsi Chief Matrimonial Court is still pending, with Mahabanoo having filed a Counter Claim. It is most acrimonious indeed. I have had the somewhat dubious distinction of having presided over part of that trial; the animosity was plain to see. The struggle seems to be chiefly over property and money. In this case, there is some evidence of a dispute between Dr. Kotwal and Mahabanoo relating to certain UTI bonds and allegations of forgery by Dr. Kotwal. There is also the added complication of his having been named an executor of Nergish's Will and of not having renounced executorship; but, on the contrary, of having reserved his right to come in and apply for Probate. He was summoned to give evidence and this, Mr. Shah says, is proof enough of illicit motive and connivance between

Dr. Kotwal and the Defendants; there is no other reason for Dr. Kotwal to have given evidence in the way he did. In his Affidavit in lieu of Examination-in-Chief, R&P, pp. 268-273. Dr. Kotwal said a very great many things. Not all were admissible or to his knowledge. Some were directed to be excised; and further questions were ultimately allowed in Appeal. He offers some sort of explanation in paragraph 11 about why he yet filed an affidavit reserving his right to come in and apply for Probate, and he is by no means so innocent or gullible as to have been unaware of his rights. That explanation is unconvincing. But he also says something important in the last part of paragraph 6 of his Affidavit of Evidence, R&P, p. 271 and this is vital on the aspect of the events of 7th February 1996. He says:

I say that on 07.02.1996 Mahabanoo phoned me at my clinic and asked me to bring Mr. Harish Shroff to Lotus Court later that evening. On reaching Lotus Court along with Mr. Harish Shroff I saw Mahabanoo seated across her dining table with her cousin (father's sister's daughter) Dr. Katie J. Sethna. For the first time I saw Dr. Sethna in the Lotus Court Flat of Nargis and Keki Cassad. In a few minutes Nargis was brought to the dining table supported by her ayah and nurse and made to sit next to Dr. Sethna. Mr. Harish Shroff seated himself next to Mahabanoo. Mahabanoo asked me to go and sit on a sofa a few feet away from the dining table. Mr. Shroff showed Nargis a paper supposedly a copy of the Joint Will and told her that "I have prepared your Will on the basis of this paper handed to me by Mrs. Mahabanoo Kotwal." Thereafter Mr. Shroff proceeded to seek Nargis's approval when Nargis was simply motionless. Thereafter either Mr. Harish Shroff or Mahabanoo reached across and proceeded to take Nargis's hand and place her thumb impression on the new Will after which Mr. Shroff and Dr. Sethna endorsed their respective signatures.

38. There is no point in adding emphasis to any of this. It is clearly critical. For the first time in the narrative, we have evidence of persons other than Nergish, Dr. Sethna and Mr. Shroff present at the time: we now have Dr. Kotwal, an ayah and a nurse all said to be present. No one else says this. We have evidence of Mahabanoo saying that she had got a Will prepared for Nergish. Finally, we have evidence of something utterly damning, of either Mr. Shroff or Mahabanoo, the Plaintiff (not Dr. Sethna), taking Nergish's hand in one of theirs and placing her thumb impression on the Will sought to be propounded.

39. This evidence absolutely had to be assailed. It had to be destroyed in its entirety. If even a portion of it remained unchecked, the consequences to the Plaintiff would be calamitous across the board, on all issues.

40. Dr. Kotwal's cross-examination was taken in Court, before me. R&P, pp. 276-295. A very large part of that cross-examination was devoted to an attempt to establish that Dr. Kotwal's testimony was motivated. Another segment focused on the previous Joint Will. The only questions put to Dr. Kotwal on paragraph 6 which I have extracted above are these: R&P, pp. 289-290.

38. Q. (Shown paragraph 6 of the evidence affidavit, page 4, portion beginning with the words "I say that on 07-02-1996... respective signatures.") Other than your bare word, have you any material on record to establish what you have said in the portion of your affidavit that is now shown to you?

Ans. My word is enough.

39. Q. Since you said that you were present on 7th February 1996, did you inform Mr. Harish Shroff that the signatures of Mr. Kothawala and Mr. Todywala had been obtained on Exhibit "P2" at the Racecourse?

Ans. I would have thought that Mahabanoo would have informed him. I had no reason to inform Harish Shroff myself. Mahabanoo always told me not to interfere.

41. This is all. There is nothing at all put to Dr. Kotwal about the others he said were present (the ayah and the nurse), a statement that directly contradicts Mahabanoo's testimony that the domestic help were given the time off; or to contradict his assertion that he, too, was present at that time on 7th February 1996. There is not a suggestion put to him in regard to his evidence that either Mr. Shroff or Mahabanoo took Nergish's hand and placed her thumb impression on the document. I confess that I am unable to comprehend why this cross-examination was quite so listless. There is very little here to lead me to believe that Dr. Kotwal's credibility is so shaken as to render this evidence worthless. Indeed, the further cross-examination causes the Plaintiff even more damage. He was asked this:

53. Q. When you visited Lotus Court, did you see Nergish reading newspapers?

Ans. No, never.

56. Q. Did you or Mahabanoo, or both of you, taking Nergish out shopping?

Ans. Nergish was in no condition to be taken shopping.

42. This, too, is damaging to the Plaintiff; and then, in response to questions 59 and 60, when it is suggested to him that he is deposing falsely on account of his matrimonial disputes with Mahabanoo and to deprive her of her "shelter" at Lotus Court, Dr. Kotwal emphatically denies the suggestion.

43. It is in this context that I must see Mr. Shah's submission that the due execution of the Will and Nergish's testamentary capacity both have been sufficiently established. I find it exceedingly difficult to come to any such conclusion on this material. It is of very little consequence, in my view, that the Will has a charitable bequest; there is also, on the other hand, a very substantial bequest to Mahabanoo and additional ones to her children. As I have noted, there is now a fair deal of doubt about who was present on 7th February 1996; Dr. Kotwal's evidence on this remains untested. There is also overwhelming evidence of Nergish's physical and mental incapacity and of her limited education and cloistered background and life. Mahabanoo herself says she is

unaware of Nergish's schooling. There is very little evidence of literacy and no effective cross-examination of Kermeen on her evidence of Nergish's life and state before her stroke. There is also nothing at all to show a severance of ties with other family members; and in this I will ignore as largely inconclusive the evidence in the form of photographs by either side taken at various functions, and, too, the generalised statements of paying visits and so on. What is not, however, in any manner of doubt is Nergish's condition, one that steadily worsened, following her stroke. By the end of 1995, I think it is reasonable to conclude that she had no cognitive abilities remaining to her and was indeed vegetative. Even Dr. Sethna does not attribute to her any great ability of speech. Mahabanoo contradicts herself: on the one hand, she says that being close to Nergish, she could understand her and "read" her wishes. But at the time when the Will was supposedly explained and read over to Nergish by Mr. Shroff, Mahabanoo says she was in the kitchen. How then might she have known of Nergish indicating her understanding to Mr. Shroff and Dr. Sethna? And how would either of them have comprehended Nergish's comprehension, if any? Dr. Kotwal speaks of the ayah and the nurse, two who Mahabanoo says were off duty at the time. Perhaps; but that is certainly most convenient to the Plaintiff and, given Nergish's condition, hardly credible. What is critical here is, however, what is not mentioned. Mahabanoo tells us, as does Kermeen, that Mahabanoo's mother, Mani Mody, had more or less moved in to Nergish's flat and was, to all intents and purposes, her primary care-giver. If that was so, where was Mani in the evening of 7th February 1996? Not one who was present at that time tells us; and, of those present, Dr. Kotwal, Dr. Sethna and Mr. Shroff could not have known. Only Mahabanoo could have known; and she does not say.

44. The previous Joint Will dated 26th October 1995, Ex. "P-2", p. 316. is used to lend probability to the present Will sought to be propounded. Aban and Homa Petit, both well known figures in the city's Parsi community, were legatees with discretion to donate to the Parsee General Hospital. This has been removed in the final Will. On this, DW1 was Kothavala, whose evidence is more than a little bizarre: Kothavala says he signed the document on 26th October 1995 on the third floor of the Members' Enclosure at the Mahalaxmi Racecourse. He says he did this at Mahabanoo's instance and on her assurance that the signatures on those documents were those of Keki and Nergish. It is true that a Will has no fixed form and no predetermined venue; but the noisy effervescence at Mumbai's Mahalaxmi Racecourse on a racing day is hardly the kind of place one would expect to have been used for a document of some gravity and solemnity. Now if the Plaintiff wished to rely on this previous Will, one might have reasonably expected her to summon the witnesses to it; she did not. They came as witnesses for the Defendants, and it is easy to see why. To the present Will, the value of the previous Will is insignificant; to the question of undue influence, it is far more material, especially given Kothavala's testimony.

45. Let me return for a moment to the Will itself. It is supported by the evidence of Mahabanoo, Mr. Shroff and Dr. Sethna. There are no other witnesses led by

the Plaintiff. Mahabanoo's own evidence is, as we have seen, evasive and self-contradictory. Mr. Shroff's testimony points to her very considerable involvement in the preparation of the Will, something that is further contradictory. Both attesting witnesses claim to have communicated fairly elaborately with Nergish, of her being of sound mind, comprehending the full extent of her estate, the identity of her heirs and the persons to whom she wanted to leave her assets, providing detailed instructions, being perfectly mobile and so on to the end of the chapter. But all this disintegrates in cross-examination. Now we have an image of an old and enfeebled lady, incoherent, unable to use her right hand on her own and wholly unable to communicate. The sum total of her communication is two words: "flat" and "paisa". Mr. Shroff himself never spoke with Nergish. He moves from no conversation at all at page 57 to hardly any conversation, and then Nergish's understanding of what she was doing is said to have been gleaned from a nod; or a vigorous nod. I cannot lose sight either of the fact that Dr. Sethna is Mahabanoo's cousin. Then we come to the evidence of Dr. Kotwal, which I have already analysed. I expected a far more thorough cross-examination. There is, indeed, no challenge to his testimony, one that puts the Plaintiff's entire version in doubt. Let us put all aside and consider only this: how did Nergish communicate her understanding of her actions? All we have before us is some testimony of a nod. Let us assume even that; for Dr. Sethna says she did have a conversation with Nergish and it was about property. Nergish told her, she says. How was this done? How could this be done? It was not even possible, even on Dr. Sethna's showing. Then comes the all-important Question 29 in Dr. Sethna's cross-examination.

Q. 29) What did she tell you?

Ans) She said a single word, "flat". She said a single word, "Paisa".

46. That is all. That is the whole of it. That is the "conversation". That is the extent of Nergish's communication of her estate. From the perspective of classical cross-examination, this was a remarkably adventurous question to pose. The cross-examiner was running a very great risk indeed, for any answer was possible. Counsel then seems to have taken the plunge: Dr. Sethna was given a chance to correct course. She was asked if this was all that she was told about the properties. "Yes", she replied; and was then asked if it was correct that she, Dr. Sethna, had at that time no way of knowing if Nergish had knowledge of all the properties she owned. Dr. Sethna agreed; there was no way she could have known, she said. It may be argued on this that all this establishes Dr. Sethna's truthfulness; but I do not question that. I do however question the legal validity of these responses. Combined with her testimony that the explanation of the Will was very perfunctory and the lack of any mention in her examination-in-chief of the Will ever being read out or explained, what emerges, clearly and beyond a shadow of doubt, is that Nergish was in absolutely no condition to convey her understanding of anything, and that she had no understanding at all of what she was being made to do.

47. Mr. Shah is undoubtedly correct in saying that the law does not require every testator to be in peak physical and mental condition, or to be possessed of "sound and disposing mind and memory" in the highest degree. Were it so, few would make testaments at all. It is not even necessary for a testator to be in the same state as once he used to be, for even this would disable most in the inevitable decline of life. Enfeeblement with age and a degree of debilitation is to be expected. So long as the testator has enough to discern and discreetly to judge the matters that enter into a rational, fair and just testament, that is surely enough. *Kanwar Sain v. State & Ors.*, AIR 1976 Del 11; *Gordhandas Nathalal Ptel v. Bai Suraj & Ors.*, AIR 1921 Bom 193 (DB) Indeed, the very decision that Mr. Shah then cites, *A.E.G. Carapiet v A.Y. Derderian*, AIR 1961 Cal 359 usually referenced (and usually wrongly 2015 (1) BomCR 361) on the issue of the need of "putting one's case" is against him on this aspect of the matter:

16-19. The question of a sound mind is a dominant question in a court of probate. Numerous decisions of high authorities have laid down from time to time tests by which to judge a sound disposing mind. It is not an absurd test. Nor is it the test of a perfectly healthy and perfect mind. Indeed most of the wills are not made by persons young and vigorous and glowing in health. The test of a sound disposing mind is in law a workable test. It means in plain language an appreciation of the fact that the man is making a will, an appreciation of the contents of that will and an appreciation of the nature of disposition that he is making having regard to the claims of affection and family relationship and claims of the society or community to which he belongs. It is not a hypothetical nor an impracticable test. It is not the test of a psychologist or a psycho-analyst or a psychiatrist who in the modern age is prone to consider all human mind to be inherently unsound by nature and abnormal. Nor is it the too Scientific test which would satisfy the highest technical medical examinations. Some idea of what this sound disposing mind in testamentary law is, can be gathered from Section 59 of the Succession Act and the statutory Explanations thereunder. In Explanation 2 of Section 59 of the Succession Act it is expressly stated that persons who are deaf or dumb or blind are not thereby incapacitated for making a will if they are able to know what they do by it. Similarly under Explanation 4 of Section 59 of the Succession Act no person can make a will while he is in such a state of mind whether arising from intoxication or from illness or from any other cause that he does not know what he is doing. The illustrations make it clear that a mere perception of what is going on in the immediate neighbourhood and an ability to answer familiar questions but without competent understanding as to the nature of his property or the persons who are kindred to him or in whose favour it would be proper that he should make his will, will not be enough proof of a sound mind within the meaning of Section 59 of the Succession Act. These Statutory Explanations are not intended to be exhaustive but they give practical illustrations to explain a sound disposing mind.

(Emphasis added)

This seems to me to apply squarely to the facts of this case.

48. Mr. Rustomjee is, I think, correct in his reliance on Section 59 of the Indian Succession Act, 1925 and the illustrations to it:

Section 59 - Person capable of making Wills Every person of sound mind not being a minor may dispose of his property by Will.

Explanation 1. A married woman may dispose by Will of any property which she could alienate by her own act during her life.

Explanation 2. Persons who are deaf or dumb or blind are not thereby incapacitated for making a Will if they are able to know what they do by it.

Explanation 3. A person who is ordinarily insane may make a Will during an interval in which he is of sound mind.

Explanation 4. No person can make a Will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.

Illustrations

(i) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the persons who are of kindred to him, or in whose favour it would be proper that he should make his Will. A cannot make a valid Will.

(ii) A executes an instrument purporting to be his Will, but he does not understand the nature of the instrument, nor the effect of its provisions. This instrument is not a valid Will.

(iii) A, being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property makes a Will. This is a valid Will.

49. Illustrations (i) and (ii) apply to the case at hand. In the case of a testator in such a condition as was Nergish, the initial burden on the propounder of that Will is very heavy; the more so, when the person receiving a benefit played a leading part in the making of that Will. *H. Venkatachala Iyengar v. B.N. Thimmajamma & Ors.*, AIR 1959 SC 443. All suspicious circumstances must be removed, and an active interest and participation in the making of the Will is indeed suspicious. *Ram Piari v. Bhagwant & Ors.*, (1990) 3 SCC 364.

50. An interesting decision cited by Mr. Rustomjee comes from the Supreme Court of Sri Lanka: *Meenadchipillai v. S. Karthigesu & Ors.*, (1958) 61 NLR 320 : 19587 SCC Online 58 Here, too, arose the question of the testator's apparent lack of the ability of speech and an alleged understanding by others of the testator's intentions despite that impediment. The Court observed:

Another circumstance of suspicion is the testator's condition at the time of

execution of the will. One feature of his condition, which has been admitted by all who saw him at that time, was his inability to speak. All he could do, apparently, was to nod his head. The witnesses have chosen to interpret the fact that he nodded his head three or four times to mean that he assented to the three or four questions that were addressed to him by the Notary. Nothing more seems to have passed between the testator and the witnesses on that occasion. The question arises whether it is satisfactory to construe the nodding of his head as a sign or approval. Whether the testator heard all that the Notary said, and also understood what he heard, is by no means clear. His hand trembled so much that he could not hold the pen which was offered to him. The Notary and the petitioner say that the testator showed his thumb and they interpreted this to mean that he wanted his thumb impression taken. When all these matters are taken with the proved fact that the testator died within seven hours, the exact condition of the testator is left in grave doubt.

51. Nergish's testamentary capacity is not established. The making of the Will is not proved.

E. Re Issues Nos. 3 and 5

52. The question of undue influence, the burden of which is on the Defendants, is actually wholly unnecessary in view of the preceding discussion; but since it is taken together with the question of Nergish's volition, I will proceed to answer it. On this aspect of the matter, there are a few broad indicators: Dr. Kotwal's unchallenged testimony that either Mr. Shroff or Mahabanoo took Nergish's hand and placed her thumb print on the Will is perhaps the least important of them. What we do know, however, from the Plaintiff's own witnesses is that it was she, and she alone, who throughout communicated with Mr. Shroff. She says she did so on Nergish's instructions, but given Nergish's condition, that she was capable of communicating any instructions or wishes even to Mahabanoo required far more proof than is made available to us. Mahabanoo speaks of her and her mother's closeness to Nergish; of Mahabanoo's mother we learn next to nothing. She remains a figure in the shadows. But this so-called closeness is perhaps itself somewhat hollow. Mahabanoo did not attend Keki's funeral. Qn. 48, p. 195. She says she was at work. She claims Keki died on 15th December 1995. Within just a few days, Nergish was said to be "screaming" to have a Power of Attorney made. Paragraph 14, examination-in-chief, p. 94. By 20th December 1995, the Power of Attorney was complete, with Nergish's thumb print on it. The Power of Attorney itself is on record. Ex. "P-1", pp. 304-315. It is on Rs.50/- non-judicial stamp paper. That stamp paper was purchased in the name of N.K. Cassad, Nergish. The date of purchase is 16th December 2015. The difficulty with Mahabanoo's testimony is that she seems to have worked backward from the date of this stamp paper to arrive at the date of Keki's death. His death certificate, however, shows that he died on 16th December 1995, not 15th December 1995. This is the oddest of circumstances, and it also shows that though she was away on work and could not attend Keki's funeral, she had time

enough to relay or give instructions regarding this Power of Attorney. This Power of Attorney is said to have been needed to deal with the awkward relative, Rohinton. But that, too, seems incorrect: consent terms with Rohinton were filed in 1997, only two years later. In response, Mahabanoo says in cross-examination that this Power of Attorney was not in fact meant to handle the situation with Rohinton at all, Qn. 84, p. 121 but only generally. This completely jettisons her version in examination-in-chief.

53. Three documents: the earlier Will; the Power of Attorney; and the present Will; and over all three there looms the figure of Mahabanoo Kotwal, the Plaintiff. It was she who asked for the earlier joint Will to be attested (at the races, no less). It was she who said that the signatures on it were of Keki and Nergish. It was she who gave instructions for a Power of Attorney to be prepared to Mr. Shroff. It was she who acted on it. It was she who allegedly relayed instructions for the present Will to Mr. Shroff. It was she who conveyed the approval of the draft. It is she who claims to have been, with her own mother, Nergish's principal care-giver. It is on her behalf that most telling suggestion is put to her estranged husband, that he has come to depose only to deprive her of her shelter. And it is she who is the single largest beneficiary in real terms of the bequests in the Will. It is impossible in these circumstances not to conclude that the Will sought to be propounded is not proved to have been made by Nergish of her own volition; and, further, that there is proof enough of the exercise by Mahabanoo of undue influence on Nergish at a time when she was utterly within Mahabanoo's control and powerless to resist her.

54. As to undue influence, Mr. Shah is again correct in saying that the burden lies on the Defendants who allege it, and to invalidate the Will, must amount to coercion or fraud. Its existence must be factually established by evidence. It must be shown that it was actually exercised. *Mt. Gomtibai v. Kanchhhedilal & Ors.*, AIR 1949 PC 272. But again, this is against Mr. Shah on the facts of this case; and this case is also not one of those of "mere" influence, or of a party pleading his case before a testator. *Naresh Charan Das Gupta v. Paresh Charan Das Gupta*, AIR 1955 SC 363 Nor is it a case of Mahabanoo merely being in a position to exercise undue influence without evidence of her having actually done so. *Totaram Maharu v. Ramabai & Ors.*, AIR 1976 Bom 315.

55. Mr. Rustomjee is, on the other hand, correct in citing Section 61 of the Succession Act and some of its illustrations:

Section 61 - Will obtained by fraud, coercion or importunity

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

Illustrations

(i) ...

(v) A, being of sufficient intellect, if undisturbed by the influence of others, to make a will yet being so much under the control of B that he is not a free agent, makes a Will dictated by B. It appears that he would not have executed the will but for fear of B. The Will is invalid.

(vi) A, being in so feeble a state of health as to be unable to resist importunity, is pressed by B to make a Will of a certain purport and does so merely to purchase peace and in submission to B. The Will is invalid.

56. Both illustrations may validly be applied to the present case. In addition, every single one of the probanda in paragraph 7 of the Supreme Court's decision in *Surendra Pal & Ors. v. Dr. Mrs. Saraswati Arora & Anr.*, (1974) 2 SCC 600 applies to this case.

7. The propounder has to show that the Will was signed by the testator; that he was at the relevant time in a sound disposing state of mind, that he understood the nature and effect of the dispositions, that he put his signature to the testament of his own free will and that he has signed it in the presence of the two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But there may be cases in which the execution of the Will itself is surrounded by suspicious circumstances, such as, where the signature is doubtful, the testator is of feeble mind or is overawed by powerful minds interested in getting his property, or where in the light of the relevant circumstances the dispositions appear to be unnatural, improbable and unfair, or where there are other reasons for doubting that the dispositions of the Will are not the result of the testator's free will and mind. In all such cases where there may be legitimate suspicious circumstances those must be reviewed and satisfactorily explained before the Will is accepted. Again in cases where the propounder has himself taken a prominent part in the execution of the Will which confers on him substantial benefit that is itself one of the suspicious circumstances which he must remove by clear and satisfactory evidence. After all, ultimately it is the conscience of the court that has to be satisfied, as such the nature and quality of proof must be commensurate with the need to satisfy that conscience and remove any suspicion which a reasonable man may, in the relevant circumstances of the case, entertain.

(Emphasis added)

57. What the Plaintiff had to show was full comprehension, and it mattered not if the Will was foolish or heartless. The evidence in this case, however, points in the other direction. It is impossible to resist the conclusion that the Defendants have established undue influence as well.

F. Conclusion & Order

58. To summarize: on Issues Nos.1, 2 and 4, taken together, I must find against the Plaintiff. The Plaintiff has not proved that Nergish executed the propounded

Will, or that she was possessed of sufficient dispositive capacity at the time she was said to have executed it. I have also found that the Plaintiff has not proved that Nergish was in any condition to give any instructions to her attorney and that any instructions given to prepare that Will were given by the Plaintiff, Mahabanoo.

59. As to the second set of issues, viz., Issues Nos. 3 and 5, the Plaintiff was required to prove Issue No.3, that Nergish made the Will freely and of her own volition. It was only if she did so that the Defendants would be required to prove Issue No.5, whether Nergish was subjected to undue influence in the making of the Will. I have found that the evidence does not establish Nergish's free Will and volition to the extent required by law, and have therefore answered Issue No. 3 in the negative. I have also found, having regard to the manner of execution of the Will and the circumstances that preceded it, that the Defendants have been able to establish undue influence.

60. Consequently, the action fails. The suit is dismissed. There will be no order as to costs.

G. Envoi

61. Finally, something not often done but essential in this case:

mea maxima culpa. It has been nearly a year since I reserved judgment. The fault is mine, in letting other cases intervene. I must, of course, thank Mr. Shah and Mr. Rustomjee for their very considerable assistance in this matter, but to the parties I offer both apology and thanks for their gentle patience. I should note that I did hesitate for some time in delivering this judgment on account of the pending matrimonial cases between the Plaintiff and her husband, Dr. Kotwal. In fact, I once even put it to the parties if I should defer this judgment till at least the trial in that action was complete. The only reason for this was my reluctance to be forced to a finding for or against one of them and which might have had some bearing on the trial in the divorce action. Both sides took instructions, and finally asked me to proceed.