
(2016) 12 BOM CK 0124

In the Bombay High Court

Case No : Testamentary Suit No. 102 Of 2012 In Testamentary Petition No. 726 OF 2012

Suresh Manilal Mehta

APPELLANT

Vs

Varsha Bhadresh Joshi

RESPONDENT

Date of Decision : 02-12-2016

Acts Referred:

Succession Act, 1925 — Section 59, Section 63

Citation : (2017) 1 AIRBomR 487 : (2017) 2 BCR 439

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

Bench : Single Bench

Advocate : Mr. Satish Shah, with Ms. Pallavi Dalal, i/b Ms. Kanchan Pamnani, Advocate, for the Plaintiff; Mr. A.R. Pai with Mr. Devendra Avhad and Mr. Tejas Luniya, Advocates, for the Defendant

Final Decision : Disposed Off

Judgement

G.S. Patel, J.—A. Introductory

The Plaintiff is the executor of a Will dated 16th March 1977 said to have been left by one Rameshchandra Jamnadas Dalal ("Ramesh"). The beneficiaries of the Will are Ramesh's wife, Nayana, since deceased; their son, Sanjay; and their daughter, Varsha, the Defendant. As the following judgment will show, the opposition to the probate entered by Varsha is limited.

2. I have heard both Mr. Pai for the Defendant and Mr. Shah for the Plaintiff at some length and, with their assistance, considered the material on record. In my judgment, and for the reasons that follow, I have not been able to find a tenable basis for the opposition. I have decreed the Suit and allowed the Petition for probate.

3. Mr. Pai has taken a plea of limitation, on which a separate issue was framed, and I propose to address that before I proceed to a consideration of the evidence and the other issues. On this issue, too, I have found for the Plaintiff and against

the Defendant.

B. The Dalal Family

4. Ramesh died on 12th August 1979, a little over two years after he made his Will. He died young, at the age of 48. It seems that Ramesh was not doing very well in his cotton and other businesses when he died. He left a fairly modest estate with substantial debts. The family then lived in a flat on the third floor of building known as Babulnath View at Babulnath, Mumbai 400 007, between the Babulnath Temple to the east and the city's Chowpatty Beach to the west. The flat, too, was (and is) by no means a luxury apartment, admeasuring only about 800 sq ft. At the time when Ramesh died, Sanjay was about 16 years old. Varsha was a couple of years younger.

C. The will dated 16th March 1977

5. The Will in question is a typewritten four-page document with a docket. The date "16th" is handwritten on the docket and on page 4. We find Ramesh's signature against the execution clause on page 4. Below this are the signatures of the two attesting witnesses, Uma Motilal Dalal ("Uma") and Gita v. Aroskar, née Gita Motilal Dalal ("Gita"). Uma and Gita were sisters. They were Ramesh's paternal cousins, the daughters of his father's brother, Motilal Karsondas Dalal. Uma died before she could give evidence of execution of the Will. Gita gave that evidence. One peculiar feature of the Will is that the witnesses' and Ramesh's signatures also appear on page 2 but not on pages 1 or 3. There are handwritten corrections on pages 1 (in Clause 2), page 2 (in Clause 7), and a typewritten correction on page 4 (in Clause 9). Ramesh has initialled in the margins of the document against each of these corrections. He has also initialled against the handwritten date "16th" that appears on page 4.

6. The Will appoints Ramesh's wife Nayana, one Manubhai Gokuldas Shroff (Motilal Dalal's son-in-law; he was married to Uma and Gita's sister, Vasantika) and Ramesh's friend Suresh Manilal Mehta (the Plaintiff/Petitioner) as Executors and Trustees. The second capacity is of some consequence to the later provisions. A peculiar feature of Clause 1 of the will - the one that appoints executors - is an unambiguous expression by Ramesh of his desire that no member of his own father's family, that of Jamnadas Karsondas Dalal, or Jayantilal Maniklal or Bhaidas Maniklal or their families be in any way engaged with the executors or trustees. These persons are not to "intermeddle" with his estate. The evidence before me does not indicate why such a clause was necessary or what the historical context to this might have been. What we can gather, however, from this clause read with Clause 4, which contains a direction to the executors and trustees to act in consultation with and under advice from his paternal uncle Motilal (the attesting witnesses' father), is that there was some discord or distancing between Ramesh and his own father. Clause 4 in fact makes a further provision that should Motilal die before Ramesh, his executors would consult Ramesh's cousin, Motilal's son, Sanat (the attesting witnesses'

brother). As we shall see, this forms the basis of Mr. Pai's submission that Motilal's family "dominated" this Will.

7. In Clause 2 of the Will Ramesh says that he carries on business in the name and style of M/s. Dalal & Dalal and, with Mr. Parmanand Jamnadas Kapadia, in the firm of M/s. Dalal & Kapadia. Parmanand is directed to assist the executors in realising Ramesh's partnership dies and making up of accounts and the division of the partnership assets. Clause 3 recites that Ramesh was one of the directors of Gem Paper Mills (P) Ltd. The clause directs the executors to transfer these shares with the assistance of one Pankaj Kapadia to Ramesh's wife, Nayana.

8. Clause 5 contains the usual bequest allowing the executors to spend on the funeral and death ceremonies without being required to render accounts.

9. Clauses 6 to 9 are the principal bequests. Clause 6 requires the executors and trustees to set apart an amount of Rs. 15,000/- and to invest this in Varsha's name in shares or debentures or deposits etc. This amount of Rs. 15,000/- with accrued interest is to be given to Varsha on her marriage. A proviso to that clause says that Varsha's marriage expenses are to be incurred by Nayana from the share that she, Nayana, receives from the residuary estate.

10. Then comes Clause 7, and, given the wording of this clause, I think it is best to set it out in its entirety.

"7. The rest and residue of my estate whether moveable or immoveable in present or in future whatsoever and wheresoever situate to which I may be entitled or which I may have the power to dispose off or which may become a part of my estate (hereinafter for brevity's sake called my Residuary Estate) I DEVISE AND BEQUEATH to my wife Nayana absolutely to the extent of 70% of my Residuary Estate to my son Sanjay to the extent of 30% of my Residuary Estate absolutely if my son is a Twenty-one years of age at the time of my demise, AND I DECLARE that if I shall die before the said Sanjay attains the age of Twenty-one years, then my Executors and Trustees shall hold Sanjay's share in my Residuary Estate UPON TRUST during the minority (i.e. under the age of Twenty-one) of my son Sanjay and apply the whole or any part at the discretion of my Executors and Trustees, of the annual produce and income of the said trust premises for or towards the maintenance education or benefit of my said son Sanjay, or to pay the same for that purpose to his guardian or guardians, without seeing to the application thereof AND TO ACCUMULATE the surplus (if any) of the same annual produce and income by investing the same and resulting income thereof during my said son Sanjay's minority in any investments in which trust funds may be authorised by law to be invested in augmentation of my said son Sanjay's share in my Residuary Estate, but with the power to apply the accumulations of the preceding year or years AND WITH POWER also to my Executors and Trustees in their discretion to apply any part of the capital of the said trust premises for the advancement of my said son Sanjay during his minority in such manner as they may think fit, AND I DECLARE that in case and

when my said son Sanjay shall attain the age of Twenty-one years my Executors and Trustees shall pay to him for and during his life time and down to his demise Sanjay's share being 30% of my Residuary Estate. BUT if my said son Sanjay shall die in my life time or after my deceased, but before attaining the age of Twenty-one years, then to give Sanjay's share of my Residuary Estate to my wife Nayana absolutely, but if my wife Nayana were to die in my life time or in the life time of my son Sanjay, then on the demise of my said son Sanjay, to give Sanjay's share of my Residuary Estate to my daughter Varsha absolutely."

11. The remaining clauses 8 and 9 are straightforward and do not require further elaboration. Clause 9 is the kind of "safety" or "immunity" clause typical of documents drawn up by lawyers; and this is indeed so, for the evidence is clear that the Will was drawn up by Uma, then a practicing Advocate, later a solicitor.

12. Clause 7 referred to above contemplates multiple situations. It does not make any specific mention of the Babulnath View flat or any other specific asset. The whole of the clause deals with the residuary estate. Nayana receives 70% of this estate absolutely. Sanjay is to receive 30% of the residuary estate provided he is 21 years old at the time of Ramesh's death. If not, the executors are to hold 30% of the residuary estate in trust for Sanjay during the period of his minority. On his attaining the age of 21, the executors are to give him his 30% of the residuary estate "down to his demise". These words are important because they cover the next situation contemplated in that clause, which is that if Sanjay was to die before attaining the age of 21 (whether in Ramesh's lifetime or after his death), then Sanjay's 30% share in the residuary estate was to be given to Nayana absolutely. Further, if Nayana herself was to die in Ramesh's lifetime or during Sanjay's lifetime before his attaining 21, then on Sanjay's passing, his 30% share of the residuary estate would go to Varsha. It is true that the last phrase does not speak of Sanjay attaining 21, but that is the only rational interpretation, given the preceding clauses, which make the vesting in Sanjay absolute on his 21st birthday.

13. The consequence of this is that Varsha is entitled under Clause 6 to an absolute bequest of Rs. 15,000/- plus accumulations and to have her marriage expenses met out of Nayana's legacy. Varsha would acquire an interest in the residuary estate only in the event of all the alternative scenarios actually coming to pass: Sanjay dying before the age of 21; and Nayana dying in Ramesh's lifetime or in Sanjay's lifetime; and Ramesh himself passing away. In short, Varsha would take in the residuary estate only if both her parents and her brother were no more and if her brother did not take absolutely, i.e., he died before turning 21.

14. I am unable to accept the submission made by Mr. Pai that this clause confers on Sanjay only a limited life interest of residence in the flat. Varsha's bequest in Clause 7 is at best a conditional bequest, one that would take effect only upon the occurrence of specified conditions. Those conditions did not come to pass. Nayana survived Ramesh. Sanjay was about 16 when Ramesh died. The

trustees, therefore, were to hold his 30% share in the residuary estate in trust till he turned 21. Sanjay attained that milestone without mishap, and, therefore, became entitled to his legacy of 30% in his father's residuary estate.

D. The Probate Proceedings & Caveat

15. The Petition itself was filed only on 4th April 2012, a good 33 years after Ramesh died, and this is the first point of attack from Mr. Pai, on the question of delay and limitation. I will analyse and consider the submission a little later in this judgment, but I note it here in the chronology.

16. Two dates are necessary for completeness. Sanjay was born on 22nd September 1961 and attained the age of 21 on 22nd September 1982. Varsha was born two years later on 17th July 1963. She turned 18 in July 1981, and was married on a short while later on 3rd February 1984, a few months before her 21st birthday.

17. Nayana died on 16th June 2009. The first-named executor Mr. Manubhai Shroff died on 1st May 2012, about a month after this Petition was filed on 4th April 2012. In the meantime, Varsha had filed a partition Suit No. 3068 of 2011 on 31st December 2011. Varsha was served with a citation in the present proceedings. She entered a Caveat on 23rd July 2012 and filed an Affidavit in Support of that Caveat. The Affidavit did not originally contain the amendment added as Rider I below paragraph 4. In this, she says that Ramesh suffered from several health problems and she enumerates these: heart disease, diabetes, high blood pressure, hypertension and kidney problems. She says that he did not seem to be in a sound mental capacity to validly execute a Will. She then says that during her mother's lifetime all accepted that Ramesh had died intestate. She raises a plea of delay and limitation and says that she filed a dispute in 2009 challenging the transfer of the Babulnath View flat to Nayana's name. In paragraph 10, she says that the signature on the Will is not Ramesh's and in paragraphs 13 and 14, she alleges that this signature is a forgery.

E. Issues

18. On these pleadings, issues were first framed on 27th January 2014. An Additional Issue came to be framed on 27th March 2015. Issues as finally framed are reproduced with my findings against each of them:

Sr.No.

Issues

Findings

a.

Whether the plaintiff proves that the Will dated 16th March 1977 is validly executed and signed by Shri Ramesh Dalal (deceased) and deserves to be probated?

Yes

a-1

Whether the Defendant proves that at the time of alleged Will, the Testator was not of sound and disposing state of mind, memory and understanding?

No

b.

Whether the defendant proves that the Will dated 16th March 1977 is invalid, forged, fabricated and / or made up?

No

c.

Whether the defendant / caveatrix proves that deceased died intestate?

No

c-1.

Whether the Defendant proves that the Suit is barred by Limitation?

No

d.

What order? What relief?

Suit decreed

F. Overview of the Evidence

19. The Plaintiff led his evidence and that of Gita Aroskar, the surviving attesting witness. The Defendant examined herself. No evidence was led of any handwriting or forensic expert. The Defendant did, however, lead the evidence of four other witnesses: one Dr. (Mrs.) Shobhana Arora, a relative of the family and a practicing physician (DW2); Advocate Viraf Patwa, who had issued a notice on behalf of Nayana (DW3); one Jitendra Shah, the Chairman of the Babulnath View CHS Limited (DW4); and one Dr. Yusuf Matcheswalla from the J.J. Group of Hospitals (DW5). I will consider the evidence of each of these witnesses in turn in relation to the issues to which they are relevant.

20. As to the documentary evidence, several documents were led in evidence by both sides. The Plaintiff's documents run from Exhibit "P1" to Exhibit "P34". The Defendant's documents run from Exhibit "D1" to Exhibit "D13". There were additional documents disclosed during the trial but these were not marked in evidence and I have, therefore, not considered these. Once again, I will refer to the documents to the extent necessary while discussing the evidence. Not all of these documents are relevant to all the issues. The original Will was marked in

evidence as Exhibit"P32".(1)

(1). Compiled record, pp. 408-412.

21. As regards the issues, the burden of proving Issue No. a (the due execution of the Will) is on the Plaintiff. I would imagine that the Plaintiff must also show, at a minimum, that the deceased was of sufficient dispositive capacity at the time of the instrument, though Issue No. a-1 places on the Defendant the burden of proving lack of testamentary capacity. The burden of proving Issue No. b (whether the Will is invalid, forged, fabricated or made up), and Issue No. c-1 (limitation) is on the Defendant. Issue No. c (whether the deceased died intestate) seems to me to be redundant, for if Issue No. a is answered in the affirmative, and Issue No. a-1 in the negative, Issue No. c must automatically be answered in the negative. Conversely, if Issue No. a is answered in the negative, or Issue No. a-1 is answered in the affirmative, then the Will is not proved and Issue No. c will automatically stand answered in the affirmative.

G. RE: Issue No c-1 : Limitation

22. This is an issue that was framed at a late stage. I believe it is necessary to address it at the forefront because it goes to the root of jurisdiction. It is not in dispute that the Petition was filed some 33 years after Ramesh died. Nayana, though named as an executor, did not seek probate to her husband's Will during her lifetime. She died on 16th June 2009. Sanjay filed a Petition for probate to Nayana's Will. A citation was served on Varsha. She entered a Caveat and that Testamentary Petition was renumbered as Testamentary Suit No. 75 of 2010. In that Caveat, Varsha contended that the Petition for probate to Nayana's Will was not maintainable without probate to Ramesh's Will, since Nayana's estate devolved on her only under Ramesh's Will; and, therefore, without Ramesh's Will being proved, Nayana would get no right to any part of Ramesh's Will whether as a residuary legatee or otherwise. (2)

(2) This is the purport of Sections 129 to 131 of the Indian Succession Act, 1925. The second bequest to Varsha could not take effect unless the first bequest to Sanjay failed on account of Sanjay's death before attaining the age of 21. If that event did not happen, the bequest to Varsha did not take effect

23. Mr. Pai says that such a long delay in seeking probate is itself a sufficiently suspicious circumstance to warrant the dismissal of the Suit, especially if there is no explanation for this delay. The second submission is that application for probate being covered by Article 137 of the Limitation Act, the Petition itself is barred. The right to apply for probate arose at the very latest when Sanjay turned 21. The Suit is filed well beyond the three-year period specified in Article 137 and, therefore, probate should be refused.

24. Mr. Pai is careful to clarify that he does not suggest that the starting point of limitation for the purposes of a probate Petition is the date of death of the Testator. What he suggests is that the determination of the starting point of

limitation is case-specific and fact-dependent, and, in this case, given the nature of the bequest in Clause 7, must start on the date when Sanjay attained the age of 21.

25. Mr. Pai's submission is that the intervening event of the application by Sanjay for probate to Nayana's Will is entirely inconsequential. In his submission, Article 137 of the Limitation Act, 1963 will apply. This provides for a period of limitation of three years from the date when the right to apply accrues. Article 137 of the Limitation Act, 1963 reads thus:

Description of suits

Period of limitation

Time from which period begins to run

137

Any other application for which no period of limitation is provided elsewhere in this division.

Three years

When the right to apply accrues.

26. Mr. Pai submits that it is incorrect as a matter of law to say that there is no period of limitation at all for an application for probate (or letters of administration or a succession certificate). In the particular facts of this case, having regard to the contents of the Will, and in particular Clause 7, that application for probate to Ramesh's Will had to be made not later than three years from the date when Sanjay turned 21. According to him, it is this date that is the trigger-event for limitation for probate to the Will. The various eventualities provided in the Will are all pegged to Sanjay's attaining the age of 21. That was on 22nd September 1982. That is the date of "distribution" of the trust created during Sanjay's minority, and the date when his legacy vested in him. Therefore, the Petition should have been brought, Mr. Pai says, within three years of that date. In consequence, without probate, there could be no vesting in Sanjay, and Sanjay could not have enjoyed the property nor claimed any right to 30% of Ramesh's residuary estate (including importantly the Babulnath View flat) without having in his hands a probate. He points out that it is only on grant of probate that Sanjay as a beneficiary would gain any interest or title in any part of that estate. He bases this on a reading of Sections 211, 213 and 227 of the Indian Succession Act, 1925:

211. Character and property of executor or administrator as such.-(1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

(2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh, Jaina or

Parsi, or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

213. Right as executor or legatee when established.- (1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed.

(2) This section shall not apply in the case of Wills made by Muhammadans or Indian Christians, and shall only apply-

(i) in the case of Wills made by any Hindu, Buddhist, Sikh or Jaina where such Wills are of the classes specified in clauses (a) and (b) of section 57; and

(ii) in the case of Wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962, where such Wills are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where such Wills are made outside those limits, in so far as they relate to immovable property situated within those limits.

227. Effect of probate.- Probate of a Will when granted establishes the Will from the death of the testator, and renders valid all intermediate acts of the executor as such.

27. Paragraph 11 of the Petition sets out the reasons for not seeking probate earlier. Four reasons are given. First, that the estate was negligible and that there were insufficient funds for the family and the household. Second, there were no disputes amongst the heirs. Third, that the executor had administered the estate in accordance with the Will. Fourth, that it became necessary to file the Petition only when Varsha filed her partition Suit No. 3068 of 2011.

28. Mr. Pai also points to Rule 382 of the Bombay High Court (Original Side) Rules, which reads thus:

"R. 382. Delay in application.- In any case where an application for probate or letters of administration or succession certificate is made for the first time after the lapse of three years from the death of the deceased, the reason for the delay shall be explained in the petition. Should the explanation be unsatisfactory, the Prothonotary and Senior Master may require such further proof of the alleged cause of delay as he may deem fit."

29. It is, therefore, his submission that read together, Article 137 of the Limitation Act and Rule 382 make it clear that any delay beyond three years from the date of death of the deceased (a) needs to be explained and (b) in view of Article 137 might sometimes result in the petition being barred. On the second aspect, Mr. Pai is quick to emphasize again that the starting point of limitation is not the date of death of the testator, but this depends on the facts of each case.

30. In *Vasudev Daulatram Sadarangani v. Sajni Prem Lalwani*, AIR 1983 Bom 268. Lentin J sitting singly considered precisely this, i.e., whether Article 137 was applicable to the applications for probate, letters of administration or succession certificate. In this compact judgment, In the law report, paragraphs 1 to 12 are left out. the question addressed was whether the three-year period was to be computed from the date of deceased's death. Lentin J. held that there is no warrant for the assumption that this right to apply accrues on the date of death of the deceased. He held that an application for probate (or letters of administration or succession certificate) is to seek the Court's imprimatur to perform a duty created by a Will or for recognition of the application as a testamentary trustee. Then come the following observations:

The right to apply may therefore accrue not necessarily within 3 years from the date of the deceased's death but when it becomes necessary to apply, which may be any time after the death of the deceased, be it after several years. Of course it need hardly be emphasised that delay in making the application must rightly give cause for suspicion and greater the delay the stronger would be the suspicion. The Petitioner must explain the delay, as for instance in *Kalidas Chuckorbutty v. Ishan Chunder Chuckrebutty*, (1904) 9 Cal WN 49 (PC), where the delay was explained by the fact that there was no very urgent necessity for taking out probate, the estate itself being of trifling value. For that matter, provisions for explaining delay in making the application beyond 3 years of the deceased's death is to be found in R. 382 of the High Court Rules. The 3-year period is presumably on the assumption that the necessity to make the application would ordinarily arise within that time. If the necessity arises thereafter, delay must, as stated earlier be explained to the satisfaction of the Court. Delay cannot be equated with the absolute bar of limitation. Once execution and attestation of the Will are proved, the suspicion of delay in making the application no longer operates. *Mahindra v. Mahaluxmi Bank*. In para 10 of the petition the Petitioner has explained that the cause of the delay was the filing of the partition suit by the caveatrix, which is still pending. The only reply in the caveatrix's affidavit is a bare averment that this cannot be a ground for condonation. It is obvious that the Petitioner did not find it necessary to exercise the continuous right vested in him by law to make the present application until the caveatrix filed her suit on 18th Jan. 1977.

15. Reliance was placed by Mr. Dalapatrai on the observations in *Kerala State Electricity Board v. T. P. Kunhaliumma*, (AIR 1977 SC 282)(which was a case under Section 16(3) of the Telegraph Act claiming enhanced compensation), that the words "any other application" in Article 137 would be a petition or any application under any Act. Those observations must be read in the light of the facts in that case, which have nothing to do with the exercise of a continuous right of an executor seeking the Court's permission to perform the duties cast on him by the Will."

(Emphasis added)

31. In paragraph 16, Lentin J summarised his conclusions:

"(a) under the Limitation Act no period is advisedly prescribed within which an application for probate, letters of administration or succession certificate must be made;

(b) the assumption that under Article 137 the right to apply necessarily accrues on the date of the death of the deceased, is unwarranted;

(c) such an application is for the Court's permission to perform a legal duty created by a Will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed;

(d) the right to apply would accrue when it becomes necessary to apply which may not necessarily be within 3 years from the date of the deceased's death.

(e) delay beyond 3 years after the deceased's death would arouse suspicion and greater the delay, greater would be the suspicion;

(f) such delay must be explained, but cannot be equated with the absolute bar of limitation; and

(g) once execution and attestation are proved, suspicion of delay no longer operates."

(Emphasis added)

32. The Supreme Court seems to have considered this expressly in *Kunvarjeet Singh Khandpur v. Kirandeep Kaur & Ors.* (2008) 8 SCC 463 : AIR 2008 SC 2058. This arose from an application before a District Court for Letters of Administration with Will annexed after an earlier Probate Petition was withdrawn. The Supreme Court considered inter alia the view expressed by Lentin J in *Vasudeo Sadarangani*. It held that Article 137 applied to such applications. After setting out the conclusions summarised by Lentin J in paragraph 16 of *Vasudev Sadarangani*, the Supreme Court held that the second conclusion drawn by Lentin J was incorrect and that conclusion (c) was the correct position in law. Conclusion (c) clearly accepts that an application such as one for probate, letters of administration etc. is "a continuous right which can be exercised at any time after the death of the deceased so long as the right to do so survives." The other conclusions remained untouched, including, importantly, those in (a), (d), (f) and (g).

33. This view was reiterated by the Supreme Court in *Krishna Kumar Sharma v. Rajesh Kumar Sharma.* (2009) 11 SCC 537 : AIR 2009 SC 3247. In this case, the Supreme Court referred to its decision in *Kerala State Electricity Board, Trivandrum v. TP Kunhaliumma*, (1976) 4 SCC 634 : (1977) 1 SCR 996 : AIR 1977 SC 282, a decision considered by Lentin J in *Vasudev Sadarangani*. There is also a reference to the 2008 decision of the Supreme Court in *Kunvarjeet*

Khandpur, 8 in which, as we have seen, Lentin J's conclusion (c) was reaffirmed. In Krishna Kumar Sharma that summary was once again set out, and the Supreme Court once again reaffirmed that the right to apply for probate, etc. is a continuing right.

34. It is not necessary to refer to the other authorities from other High Courts cited by Mr. Pai in this regard. The inescapable conclusion that follows is this: the view that Article 137 would have no application at all in any case to any application for probate, letters of administration or succession certificate is incorrect. However, neither of the two Supreme Court decisions in Kunvarjeet Khandpur (2008) or Krishna Kumar Sharma (2009) set the law to say that the date of death of the deceased would invariably provide the starting point of limitation. To the contrary, both decisions confirm that the right to apply is a continuing right so long as the right to do so survives.

35. The clue lies in a reading of Section 57 of the Indian Succession Act, 1925:

"57. Application of certain provisions of Part to a class of Wills made by Hindus, etc.- The provisions of this Part which are set out in Schedule II shall, subject to the restrictions and modifications specified therein, apply-

(a) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such Wills and codicils made outside those territories and limits so far as relates to immovable property situate within those territories or limits; and

(c) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of January, 1927, to which those provisions are not applied by clause (a) and (b):

Provided that marriage shall not revoke any such Will or codicil".

36. Thus not all Wills are compulsorily required to be taken to probate (or letters of administration). It is only those Wills that are made in the designated towns - usually Presidency towns - or that deal with immovable property in those designated towns that must compulsorily be probated. In a case where a Will is made outside Mumbai (say in Pune or Nashik) and makes no disposition of any immovable property in Mumbai or other designated town, that Will would not require probate. An executor under that Will would have a continuing right to apply for probate. He may need to do so only on the occurrence of a certain event; for instance, on a suit being filed impeaching that Will, or where, for the proper completion of a disposition of immovable property, probate is necessary to pass or vest title from the testator through the executor to the beneficiary.⁽⁹⁾ An identical Will, on the other hand, made in Mumbai or pertaining to property in Mumbai would compulsorily have to be probated, irrespective of whether there

was an actual need for it or not. We could, without straining credulity, conceive of other scenarios as well. Take, for instance, a case where the estate includes no immovable property in any of the notified towns or areas, and there are two Wills of different dates, one made at a lawyer's office in Mumbai and the second, later Will, at the testator's residence outside Mumbai; and let us assume that there is a dispute about which Will is the last one, with two contesting groups each propounding one of the two rival Wills. Here, the testator is the same. The estate is the same. The family is the same. The Wills are different. It cannot be that the three-year limitation from the testator's death would apply to one of those two Wills, the one made in Mumbai, but not to the other Will, the one made outside Mumbai. The date of death of the deceased cannot, therefore, conceivably provide a starting point of limitation, for in two otherwise identical situations separated only by an accident of geography, there would be different starting points of limitation. This is inconsistent. The only consistent view, therefore, as the Supreme Court said, is that the right to apply is a continuing right. The application must be made within three years of the time when the right to apply accrues.

(9) Again, Section 211 is relevant, for sub-section (1) clearly says that the property of the deceased person "vests" in the executor or administrator as such executor or administrator; and that the executor or administrator is the deceased's legal representative for all purposes. The exception in sub-section (2) saves all holdings of joint property that pass by survivorship (as opposed to, say, a tenancy-in-common)

37. It is not even Mr. Pai's case, in all fairness, that even in the present litigation it is the date of Ramesh's death that provides point of limitation. His case, most emphatically placed, is that this starting point will vary and in the facts of this case will be the date with Sanjay turned 21. He draws a distinction between Article 137 and Article 113, which is another residuary article that speaks of the right to sue in cases of any other suits for which no specific limitation is provided. An application for probate or letters of administration is not a suit, and there is no lis strictly so called. It is, as Lentin J said, an application for the imprimatur of the Court. There is no question, therefore, of a right being infringed such as would provide the starting point of limitation in the case of "right to sue".

38. It is difficult, however, to accept Mr. Pai's submission that the right to apply ceased to be a continuing right on Sanjay's 21st birthday and that the executor had to apply for probate within three years of that date. A conjoint reading of Sections 57, 211 and 213 of the Indian Succession Act, 1925 only tells us that the complete vesting in Sanjay of any legacy and the passing of title under any testamentary instrument would remain inchoate without proof of the Will in its solemn form. As the executor named in the Will could apply for probate at any time so long as the right to do so survived. There is no reason why this right would end within three years of Sanjay's 21st birthday.

39. There is another perspective that militates against Mr. Pai's submission. If he

is correct, then it would necessarily mean that if the last surviving executor died without applying for probate three years after Sanjay turned 21, then Sanjay could never seek to prove the Will as a beneficiary by filing an application for letters of administration with Will annexed. This would be the logical result of Mr. Pai's argument. This results in an inherent contradiction, for it means that Sanjay's own right to obtain Letters of Administration with Will Annexed would commence only on the date of death of the last surviving executor; for, so long as there was one executor alive who had not renounced executorship, Sanjay could not apply for Letters of Administration of the Will. Therefore, the executors and Sanjay would both have different starting points of limitation though both would be seeking to prove the same Will. Therefore, the right to apply could never be traced to Sanjay's 21st birthday.

40. For these reasons, I am unable to accept Mr. Pai's submission on the issue of limitation. Issue No. c-1 is, therefore, answered in the negative.

H. Re: Issue No (a) : Due Execution

41. The only evidence to be considered here is that of the surviving attesting witness, Gita, PW2. She filed an Evidence Affidavit.⁽¹⁰⁾ In this, she deposed that she had a Master of Sciences degree from Bombay University, was currently retired, and used to work as a tourist guide with the Government of India Tourist Office in Mumbai. She then deposed that her sister, Uma, was a solicitor, and that they were Ramesh's paternal cousins, the daughters of his father's brother. She said that both sisters knew Ramesh since birth, were well acquainted with him and visited his house often during his lifetime. In March 1977, according to Gita, Ramesh spoke with her on the telephone and asked if she would be willing to attest a Will he intended to execute. Ramesh told her that Uma had drawn up the Will on his instructions, and that Uma too had already agreed to attest its execution. Gita agreed to be the other witness, and Ramesh asked her to come to his house at Babulnath View on 16th March 1977. On that day, she and Uma were both present at the Babulnath View house. Nayana, too, was present. Ramesh read the engrossed (ledger paper) Will. In the presence of Nayana, Uma and Gita, Ramesh signed the Will. He signed in full on the second page and on the fourth page, and initialled, according to her, pages 1, 2 and 4. He was, she said, quite normal and in a sound mind when he executed the Will. At Ramesh's request, and after he signed it, both Uma and Gita signed it as witnesses, in that sequence. Both signed on the last page and on the second page. In her affidavit, Gita identified the signatures and initials. She also then identified the handwritten portions (the addresses, initials and handwritten date) and said that the document at Exhibit "B" to the Petition was a true and accurate copy of the Will the execution of which she and Uma had attested.

(10) Compiled Record, pp. 62-65. I will consider the evidence of PW2, Gita Aroskar, first since, in view of Section 68 of the Evidence Act, 1872, the Will - being a document required by law to be attested - could not itself be received in evidence without the evidence of at least one of the attesting witnesses to it. In

Walter D'Souza v. Anita D'Souza & Ors, (2015) 2 ABR 90, I held that, for this reason, and notwithstanding the provisions of Order 18, Rule 3A of the Code of Civil Procedure, 1908, the evidence of the attesting witness must always be led first. That decision was rendered after the evidence in this matter began with the evidence of the Plaintiff as PW1.

42. Gita was cross-examined on commission.(11) To a question about her father, Motilal's, business, she responded saying he was in the cotton business at first, and then in the share market.(12) She also said that she was about 34 years old at the time when the Will was executed,(13) and that Uma was about three years younger.(14) She also said that Manubhai Shroff, the first named executor in Ramesh's Will, was her own brother-in-law, her deceased sister's Vasantika's husband.(15) Uma's office was in the Fort area;(16) she was a partner of Mr. Rusi Sethna.(17) At the time of the Will, she had not yet qualified as a solicitor. (18) She then said that it was Sanjay who asked her to give evidence,(19) and that he said this was now necessary since Varsha was contesting the Will.(20) She could not recall the time of day when the Will was executed,(21) but this is hardly surprising given the very considerable time gap between the date of the Will and her evidence.

(11) Compiled Record, pp. 117?132.

(12) Cross-examination of PW2, Qn. 13, p. 119.

(13) Cross-examination of PW2, Qn. 23, p. 120.

(14) Cross-examination of PW2, Qn. 24, p. 120.

(15) Cross-examination of PW2, Qns. 27?28, p. 120.

(16) Cross-examination of PW2, Qn. 29, p. 120.

(17) Cross-examination of PW2, Qn. 30, p. 120.

(18) Cross-examination of PW2, Qn. 98, p. 131.

(19) Cross-examination of PW2, Qns. 34?36, p. 121.

(20) Cross-examination of PW2, Qns. 37?38, p. 121.

(21) Cross-examination of PW2, Qns. 41?42, p. 122.

43. The rest of the cross-examination on this aspect of the matter does nothing to shake the witness's credibility. Gita frankly admitted to being unaware of the contents of the Will when it was executed,(22) and having no knowledge of Ramesh's instructions to Uma.(23) Naturally, she did not know if a draft of the Will was "read out" to Ramesh,(24) but this is wholly irrelevant and, in any case, it is not anybody's case that Ramesh could not read the Will for himself. There are then at least two questions that wholly beyond the pleadings in the Affidavit in Support of the Caveat and without any foundation being laid in that Affidavit: Gita was asked if it was her family that dominated Ramesh's Will; she said she

did not know, a perfectly candid answer.(25) She was then asked if she agreed to be a witness only because Uma had also agreed. To this Gita said Ramesh had only asked her to be a witness and nothing further.(26) These answers do not impact the due execution of the Will at all, but they do highlight one of the major perils of our system of allowing cross-examination on commission. These are questions that a trial court would rightly have disallowed, and the objection to those questions was correctly taken. Given that cross-examinations on commission tend to sprawl, it is not humanly possible to sift through every line of cross-examination, especially when there are multiple witnesses, to decide whether each and every question should be permitted or not. Often, too, deciding one objection has a cascading effect further on in the cross-examination of that witness or even in that of later witnesses. The only recourse, therefore, is to consider while evaluating the evidence as a whole whether any heed at all ought to be paid to such testimony. It would not do, in my view, to fall back on the line of reasoning that "parties went to trial" on such questions. Indeed they did not, and the questions enter the record only because of the imperfections in the trial procedure. No party should be prejudiced by this. Otherwise, if all manner of questions, irrespective of their foundation in pleadings, were to be allowed in this fashion, it would make a mockery of the process of framing and settling issues and narrowing the controversies to be decided. In a case like that before the Supreme Court in *Nagubai Ammal & Ors. v. B Shama Rao & Ors.* AIR 1956 SC 593. where a plea (in that case of *lis pendens*), though not specifically pleaded, was very much integral to the trial, the Supreme Court said the rule operates to prevent a party being caught unawares, not where both sides are fully conscious of the issue and have gone to trial on it.

(22) Cross-examination of PW2, Qn. 64, p. 125.

(23) Cross-examination of PW2, Qn. 66, p. 125.

(24) Cross-examination of PW2, Qn. 67, p. 126.

(25) Cross-examination of PW2, Qn. 71, p. 126.

(26) Cross-examination of PW2, Qn. 72, p. 126.

44. In any case, as I have noted, this does not help the Defendant at all. The subsequent cross-examination is also of no assistance, because it does not touch upon or damage the testimony about the execution of the Will. Questions as to why the Will was not registered (which is not compulsory),(28) and whether Gita herself was aware of its contents(29) do not affect her testimony as to due execution.

(28) Cross-examination of PW2, Qns. 99?100, p. 131.

(29) Cross-examination of PW2, Qn. 64, p. 125.

45. There is then a question that is decidedly peculiar, not only because of its framing but also because this too is unsupported by the slightest pleading:

Q. 96 I put it to you that the Will was sent over to you at your residence by Umaben, which you returned after signing to Umaben.

Ans. It is absolutely false to say so.

(Emphasis added)

46. There is always a problem in phrasing a question thus in cross-examination. From the perspective of onus, a question placed like this assumes importance because it then falls to the cross-examining party to establish the correctness of the suggestion put to the witness if the witness responds either in the negative or is noncommittal and cannot answer one way or the other. I find it is a mistake far too often made nowadays to "put a suggestion" in this fashion - "I put it to you ?" or "is it not correct ?" - and to leave it at that, as if there is no consequence or sequitur. This is an error. When a suggestion is made like this, and the cross-examiner makes a positive suggestion or asks if a particular thing is or is not correct, the party cross-examining takes on himself the onus of proving the correctness of the suggestion. If the witness agrees, the cross-examiner need do nothing further. But if the witness refutes the suggestion, or cannot either confirm or deny it, then the cross-examiner must prove the correctness of it. His failure to do so must inevitably result in a conclusion being drawn that the suggestion is not merely unproved, but is untrue. Here, for instance, the affirmative suggestion is that Gita was not at Ramesh's house; that she did not see him sign it; that she did not witness it; and that she signed it later, at her residence. These are said to be things that Varsha knows and is in a position to prove. No attempt at all is made to prove any of these things. The result, therefore, is not only that the suggestion made is unproved, but that it is false.

47. There is one other aspect of the matter, and this pertains to a document under Varsha's signature, a letter dated 10th December 1983 from Varsha to the three executors.(30) In this, she admits having received an amount of Rs.15,000 from Ramesh's estate and gives details of the cheque number. The document makes specific mention of Ramesh's Will, twice, and even gives its date. In her evidence, Varsha denies knowledge of it and says she signed it in blank. But this is not credible, for there is no denial of the deposit having been made. The counterfoil, slip book acknowledgement and passbook are all in evidence. (31) This payment was made about two months before Varsha's marriage in February 1984; she turned 20 on 17th July 1983. Suresh Mehta, the Plaintiff, PW1, asserts that all this was done and handled by Nayana during her lifetime.(32) No case was put to him that Varsha's signature was taken in blank.

(30) Exhibit P-26, Compiled Record, p. 336.

(31) Exhibits P-13, P-14 and P-16 respectively at pages 272-273, 274-275 and 277 respectively.

(32) Cross-examination of PW1, Mehta, Qn. 106, p. 102.

48. It is difficult to understand what is to be made of Mr. Pai's submission that keeping such "detailed records" is "unnatural" or how this in any way impeaches the Will. In his arguments, both written and oral, Mr. Pai attempted a submission that Varsha was treated as a "pariah" and was more or less ostracized by her father and mother at the instance of the Motilal Dalal family, and he points to the pronounced tilt in the Will towards Motilal's family and the involvement of his daughters and the mention of his son, Sanat. But there is no evidence of this of any such pressure. There is certainly no pleading to that effect, and, in any case, all of this is to no discernible end, for not one member of Motilal's family derived a shred of benefit from this Will.

49. Mr. Shah, on the other hand, points out that this is not a solitary instance. When Varsha moved the Cooperative Court in 2009, she said clearly that the flat was bequeathed to her mother and brother. The relevant pleading was marked in evidence.(33) She mentions the 70% and 30% bequests in Clause 7 of the Will in paragraphs 3 and 5 of her application to the Cooperative Court. This is never explained. Further, on 20th July 2009, her lawyer wrote to the Babulnath View Society (34) also referencing the Will's dispositions That is repeated in the response to the Society's reply, of 9th October 2009.(35) This continued in the application for interim relief (36) and in the appeal. (37) That is not all. When Suresh Mehta, PW1, the Plaintiff was cross-examined, he was specifically asked if the changes to the society share certificate were done in consultation with him; he said yes; (38) and then a case was put to him that these changes were made in keeping with the alleged Will. (39)Whatever be Varsha's case on the due execution today, there is no doubt that she knew of it in 2009. In fact, Varsha's stand has been consistently inconsistent: in 2009, she knew of the Will, but challenged the flat transfer. In 2010, she opposed probate to Nayana's Will saying that no probate had been obtained to Ramesh's Will; and in 2011, she filed a partition suit, alleging that Ramesh died intestate.

(33) Exhibit P-27, pp. 337?359.

(34) Part of Exhibit P-27, supra, at pp. 353?354.

(35) Part of Exhibit P-27, supra, at pp. 356?356.

(36) Part of Exhibit P-27, supra, at pp. 357?358.

(37) Exhibit P-28, pp. 360?386.

(38) Cross-examination of PW1, Qn. 43, p. 85.

(39) Cross-examination of PW1, Qn. 45, p. 86.

50. There is no other evidence on the due execution of the Will. Issue No. (a) must, therefore, be answered in the affirmative.

I. Re: Issue No. (a-1) : Lack of Testamentary Capacity

51. I begin again with the evidence of PW2, Gita. In her affidavit in lieu of

examination-in-chief, she deposed to Ramesh's health, saying he was in a disposing state of mind.(40) Questions 46 to 51 and 97 in her cross-examination are directed to Ramesh's state of health:

(40) Affidavit in lieu of Examination-in-Chief of PW2, paragraph 5, p. 63.

Q.46 Was the deceased suffering from any ailment?

Ans. To my knowledge, yes.

Q.47 What was he suffering from

Ans. Diabetes. (Witness is shown the copy of the death certificate of the deceased.)

Q.48 I put it to you that the deceased was suffering from multiple ailments.

Counsel for the Plaintiff objects to the aforesaid question on the ground that the question is irrelevant.

Ans. I am not aware.

Q.49 I put it to you that the deceased also suffered from kidney problems. Counsel for the Plaintiff objects to the aforesaid question on the ground that the question is irrelevant.

Ans. I have no knowledge.

Q.50 Do you the doctor from whom the deceased was taking treatment for diabetes? Counsel for the Plaintiff objects to the aforesaid question on the ground that the question is irrelevant.

Ans. I have no knowledge.

Q.51 I put it to you that, for a period of 5-6 years prior to his death, the Deceased, in addition to multiple ailments was suffering from acute depression and was not in a proper frame of mind.

Counsel for the Plaintiff objects to the aforesaid question on the ground that the question is vague as regards the "proper state of mind". Ans. He was always cheerful and normal whenever we met.

Q.97 I put it to you that Rameshbhai on account of his illness was not in a mental frame to understand anything at the time of executing the Will.

Ans. I do not know. However, at the time of my signing as a Witness to the Will, Rameshbhai was cheerful and normal.

(Emphasis added)

52. Again, as in the case of the suggestion put to her on the due execution, questions 48, 49 and 51 were framed as suggestions to PW2: she was being asked to confirm or deny the correctness of what was being put to her, and an

affirmative case was placed that Ramesh had multiple ailments, kidney problems and acute depression. In answer to Q.97, Gita quite candidly says she has no idea about any hidden or invisible condition, but only reaffirms what she perceived, that at the time when she witnessed the Will (which, as we have seen, is proved), Ramesh was cheerful and normal. The caveat, on the basis of the death certificate,(41) speaks of hypertension, diabetes and various ailments. None of these are such as would rob a testator of testamentary capacity.

(41) Ex. P1, p. 216.

53. The evidence of the Plaintiff, Suresh Mehta, PW1, is also material.(42) He knew Ramesh since 1969 or 1970. Both were members of the Lions Club, and Ramesh served as Treasurer when Mehta was its President in 1974?1975. They were close friends.(43) Mehta was his confidante and agreed to act as an executor at his request. Mehta had met Manubhai Shroff in 1969 or 1970 as well. (44) He also says that at the time of the Will, Ramesh was in good health.(45) In cross-examination, Mehta admitted that Ramesh was diabetic.(46) As with PW2, a suggestion was put to Mehta that for some years before his death, Ramesh suffered from heart disease, high blood pressure, hypertension, diabetes and was in a depression and not in a sound state of mind. This again was put as an affirmative case. It was denied.(47) It was never proved.

(42) Affidavit in lieu of Examination-in-Chief of PW1, pp. 43?61.

(43) Affidavit in lieu of Examination-in-Chief of PW1, paragraph 4, p. 44.

(44) Affidavit in lieu of Examination-in-Chief of PW1, paragraph 5, p. 44.

(45) Affidavit in lieu of Examination-in-Chief of PW1, paragraph 7, p. 45.

(46) Cross-examination of PW1, Qn. 28, p. 83.

(47) Cross-examination of PW1, Qn. 164, p. 113.

54. Varsha herself was cross-examined in Court. She did not know whether her father was an office bearer of the Lions Club, but volunteered that he used to attend club meetings.(48) She also said he used to commute to his office for work by car and, later, by taxi or in a car pool.(49) Varsha filed two Affidavits in lieu of Examination-in-Chief.(50) In these, she makes no deposition about Ramesh's health. She says she was married off young and claims that this was under pressure from Motilal Dalal's family,(51) a matter wholly irrelevant to the issues at hand.

(48) Cross-examination of DW1, Qn. 16, p. 151.

(49) Cross-examination of DW1, Qns. 37?39, p. 158.

(50) Defendant's Evidence Affidavits, pp. 134?141 and 142?145.

(51) Defendant's first Affidavit in lieu of Examination-in-Chief, paragraph 6, p. 135.

55. Varsha then led the evidence of one Dr. (Mrs) Shobhana Arora, DW2.(52) Dr. Arora was Nayana's first cousin: their mothers were sisters. She has an MBBS degree. It is she who says that when she visited the Dalal home on Sundays in 1975?1976, she found Ramesh not to be in a "proper state of mind" and unable to "think well enough to do normal activities effectively". She claims he was confused when confronted with any problems including his business and financial affairs, which landed him in difficulties.(53) Incidentally, this contradicts Varsha's testimony in her first Evidence Affidavit, where she says that the family was financially very well off.(54) It is Dr. Arora who claims Ramesh had dementia, (55) and that she told Nayana about this. Dr. Arora also says that for the last five or six years before his death, Ramesh suffered from diabetes, cardiac problems, hypertension and kidney ailments, an allegation also to be found in the amended Affidavit in Support of the Caveat.

(52) Affidavit in lieu of Examination-in-Chief of DW2, pp. 163?165.

(53) Affidavit in lieu of Examination-in-Chief of DW2, paragraph 6, p. 164.

(54) Affidavit in lieu of Examination-in-Chief of DW1, paragraph 9, p. 136.

(55) Affidavit in lieu of Examination-in-Chief of DW2, paragraph 7, p. 164.

56. Dr. Arora is, not incidentally, the daughter of Jayantilal Maneklal,(56) the very person about whom there is a specific direction in the Will that he is not to be consulted or allowed to intervene in the family's affairs.

(56) Cross-examination of DW2, Qn. 25, p. 171.

57. Dr. Arora was cross-examined in Court.(57) She confirmed that she is a general practitioner.(58) She also confirmed that Ramesh was never her patient; that she never treated him for any of his ailments; that she never prescribed any medication for him; and never conducted a clinical examination but only ever took his blood pressure.(59) When asked the basis of her assertion in paragraph 6 of her evidence affidavit that Ramesh could not attend to his normal activities, her only response was that if she went there and said she was going to take his blood pressure, he would often go away and do something else till reminded she was waiting for him.(60) This is hardly evidence of lack of testamentary capacity, and the entire scenario Dr. Arora paints is bizarre: the testator's wife's cousin comes a-visiting on a Sunday, and promptly declares that she will take his blood pressure. He demurs and quietly absents himself, trying to stay as far away from this unsociable and gratuitous offer for as long as he can. From this I am asked to conclude that he lacked the ability to understand what he was doing and to comprehend his "normal" actions. Evidently, I cannot; quite the reverse, in fact. His actions seem to me to be not just entirely "normal" , but perfectly understandable, and with which one can only sympathize. I should have been altogether more persuaded of his lack of capacity had he agreed to subject himself to Dr. Arora's random and unsolicited ministrations, such as they were.

(57) Compiled Record, pp. 166?175.

(58) Cross-examination of DW2, Qn. 5, p. 168.

(59) Cross-examination of DW2, Qns. 14?18, p. 169.

(60) Cross-examination of DW2, Qn. 19, pp. 169?170.

58. There is then the evidence of Dr. Yusuf Abdulla Matcheswalla, DW5, who filed an evidence affidavit in response to a summons.(61) He was given no medical documents at all. He has several degrees and is the Honorary Professor of Psychiatry at Grant Medical College and JJ Hospital, and Head of Psychiatry at GT Hospital. He gave evidence as an expert. On the basis of the affidavits filed in these proceedings and bits and pieces of culled evidence,(62) Dr. Matcheswalla rendered his "expert" opinion that Ramesh had a condition of dementia.(63) He was careful, though, to say that he had no personal knowledge about Ramesh, or his mental or physical condition.(64) Dr. Matcheswalla was cross-examined in Court.(65) When asked whether his view that Ramesh had dementia was based only on the testimonies of the Defendant, DW1, and Dr. Arora, DW2, Dr. Matcheswalla said that he had not, in fact, conclusively opined that Ramesh was suffering from dementia but indicated that on the basis of the testimony of the two persons, the condition was indicative of dementia.(66) The evidence is worthless, and Mr. Shah is quick to point out that in 2015 when he made the Affidavit, Dr. Matcheswalla was 57 years old; and that this would mean that at the time when Ramesh made his Will, Dr. Matcheswalla would have been a teenager of 19. The interesting aspect of Dr. Matcheswalla's evidence, though, is that he tells us that dementia is a defined, definable, known and specific medical condition, not one to be lumped together with "depression" or "not behaving normally." There is no evidence of any clinical diagnosis of dementia at any time, or of any treatment for it of any nature.

(61) Compiled Record, pp. 197?210.

(62) Affidavit in lieu of Examination-in-Chief of DW5, paragraph 3?10, pp. 198?201.

(63) Affidavit in lieu of Examination-in-Chief of DW5, paragraph 16, pp. 202?203.

(64) Affidavit in lieu of Examination-in-Chief of DW5, paragraph 17, p. 203.

(65) Compiled Record, pp. 211?215.

(66) Cross-examination of DW5, Qn. 14, pp. 214?215.

59. This is the entirety of the evidence of Ramesh's alleged lack of testamentary capacity. All we have, therefore, is (a) an unsubstantiated allegation with no proper foundation and no mention in the evidence in chief from Varsha that her father was in a depression (not the same as dementia) and did not know what he was doing; (b) Dr. Arora's assertion, based on Ramesh's unwillingness to have her take his blood pressure, that he was disoriented; and (c) the purest (and self-admitted) speculation from Dr. Matcheswalla about Ramesh's dementia at a time when Dr. Matcheswalla was only 19 years old. There is no medical history. There

is no evidence of medication. There is no evidence that he was in such a persistent non-sentient, non-cognizant condition that, when he made his Will, Ramesh knew not what he did.

60. The explanations to Section 59 of the Succession Act make it clear that certain impediments such as hearing, speech or sight impediments do not constitute testamentary incapacity. For our purposes, Explanation 3 is crucial. This speaks of persons who are, to use the unfortunate expression of the statute, "insane". I will read this to include any one or more of the well-known medical mental health disorders that are known to medical science today. What Explanation 3 says is that even if a person ordinarily suffers from any such established pathology, one that renders him or her momentarily incapable, he or she may still validly make a Will during an interval of lucidity. Consequently, it is never enough merely to say, for instance, that a Testator suffered from this or that ailment. It is unreasonable to expect a Testator to be in a most complete and perfect state of health. Few ever are. That perfection of health is most emphatically not the mandate of the law, as the Privy Council noted in *Judah v. Isolyne Shrojbashini Bose & Anr*, AIR 1945 PC 174, a view consistently followed later. The law does not require every testator to be in perfect physical or mental condition, or to be possessed of "sound and disposing mind and memory" in the highest degree. Were it so, few would be able to 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.⁽⁶⁸⁾ There is an irreconcilable irony to making such submissions: a person may not, the argument suggests, validly make a Will if he or she suffers from hypertension or diabetes, but a judgement on that case may be perfectly validly delivered by one who does.

(68) *Gordhandas Nathalal Patel v. Bai Suraj & Ors*, AIR 1921 Bom 193 (DB) : (1921) 33 Bom LR 1068 *Ganpatrao Khandero Vijaykar v. Vasantrao Ganpatrao Vijaykar*, 1932 (34) Bom LR 1371 : AIR 1932 Bom 588; *Kanwar Sain v. State & Ors*, AIR 1976 Del 11; *Sh KC Bajaj and Ors. v. Sudershan Kumari and Anr*, 149 (2008) DLT 694; *KL Malhotra v. Sudershan Kumari & Anr*, 149 (2008) DLT 783; *Desh Raj Gupta v. State and Ors*, 2010 (119) DRJ 138; *Har Narain v. Budh Ram*, 1991 (21) DRJ 94; *Chittaranjan Narottamdas Negandhi v. Hemkala and Ors*, 2016 (4) MhLJ 819.

61. There is no evidence of lack of testamentary capacity. Issue No. (a-1) is answered in the negative.

J. Re: Issue No. (c) : Whether the defendant Proves the deceased died in Testate

62. Since the answer to Issue (a) is affirmative (the due execution is proved) and to Issue (a-1) is negative (the lack of testamentary capacity is not shown), Issue No (c) must be answered in the negative; and it is.

K. Re: Issue No (b) : Forgery

63. Varsha led no evidence in support of this. No handwriting expert was examined, and there is no forensic material on record.

64. In her cross-examination, she was cross-examined on her assertion that the Will was forged. She was asked why she said so. Her answer was that she felt there was a difference in signature.(69) She did not know who had forged the Will,(70) or when.(71) When asked if she was accusing Sanjay of this forgery, her answer was "possibly".(72) Were the two attesting witnesses also parties to this forgery? Mr. Shah asked. "Perhaps, " replied Varsha.(73)

(69) Cross-examination of DW1, Qn. 50, p. 160.

(70) Cross-examination of DW1, Qn. 51, p. 160.

(71) Cross-examination of DW1, Qn. 53, p. 160.

(72) Cross-examination of DW1, Qn. 54, p. 161.

(73) Cross-examination of DW1, Qn. 55, p. 161.

65. This, then, is the whole of the evidence on "forgery". Varsha does not dispute the very many documents adduced with her father's signature, and produces none of her own to show a different one.

66. Issue No. (c) is answered in the negative.

L. Conclusions and Order

67. Before concluding, I must note that Varsha led the evidence of two other witnesses, one Vivek Patva, Advocate, on the question of some correspondence he addressed to the society on Nayana's behalf; and one Jitendra Shah, the erstwhile Chairman of the Society. The evidence is entirely tangential and is related only to questions of the flat. It does not in any way touch upon the only issue before me, which is proof of the Will in its solemn form. In fairness, neither Mr. Pai nor Mr. Shah has attempted a submission that this evidence is in any way determinative.

68. This is, it is well-settled, a jurisdiction of circumspection, not suspicion. One assesses the Will from the testator's perspective, and the test is to see if suspicious circumstances are sufficiently answered. The appeal is to a judicial conscience, one that, as we know, always makes allowance for a less-than-perfect handling, for human frailties and the foibles of an ordinary man. The test is not of absolute exactitude or great precision.(74) The initial burden is always on the propounder.(75) There is a delay, yes; it is considerable, certainly. But has it been explained? The answer must, I think, be in the affirmative, and nor is the delay, sizeable though it is, enough to dislodge the Will. That judicial conscience on which so much depends remains neither shaken nor stirred.

(74) H Venkatachala Iyengar v. BN Thimmajamma & Ors, AIR 1959 SC 443.

(75) Venkatachala Iyengar, supra; Zarina R Irani & Anr. v. Shapur Jawanmardi & Ors, 2004 (6) Bom CR 142.

69. As a result of the foregoing discussion, I must hold that the Will dated 16th March 1977 of Ramesh Jamnadas Dalal is duly proved in its solemn form.

70. The suit is decreed. The caveat is discharged. The Petition will proceed to probate, which is to be issued expeditiously and, in any case, within four months from the date when this order is uploaded (excluding the stay period mentioned below). Drawn up decree dispensed with. The Registry will act on an authenticated copy of this order, and it will not insist on proof afresh of service of the citation nor on a drawn up order discharging the caveat.

71. The originals documents tendered by the parties are to be returned on these being substituted by true copies authenticated as such by their respective advocates.

72. At Mr. Pai's request, the issuance of probate is stayed for a period of six weeks from the date when this order is uploaded.

73. I must thank Mr. Shah and Mr. Pai for their considerable assistance in the matter, and Mr. Shah will pardon me for making special mention of Mr. Pai. He is yet young at the Bar and though this was perhaps one of his earliest final hearings in a contested trial action, he conducted his case in the most exemplary fashion, with admirable restraint and dignity, placing his submissions with care, circumspection and precision.