

(2013) 07 BOM CK 0136

In the Bombay High Court

Case No : Appeal No. 643 of 2012 in Testamentary Suit No. 29 of 2007 in
Petition No. 79 of 2007

Wilma Levert Canuao and Others

APPELLANT

Vs

Allan Sebastian D'Souza and Another

RESPONDENT

Date of Decision : 01-07-2013

Acts Referred:

Evidence Act, 1872 — Section 68, 69
Succession Act, 1925 — Section 63

Citation : (2013) 5 ABR 202 : (2014) 2 ALLMR 207 : (2013) 5 BomCR 507 :
(2014) 3 MhLj 1

Hon'ble Judges : S.C. Gupte, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : J.M. D'Silva, for the Appellant; D.V. Merchant instructed by y S.M. Associates, for the Respondent

Judgement

D.Y. Chandrachud, J.—Admit. Learned counsel for the Respondents waives service. The appeal is taken up for hearing and final disposal, by consent and on the request of the learned counsel. This appeal arises from a judgment of a learned Single Judge holding that the last will and testament of Sebastian John D'Souza, the testator, dated 20 March 1989 is proved and be probated.

2. The testator died on 5 September 1999. The two Respondents who are the original Plaintiffs are his sons. The testator was survived besides his two sons, by six daughters, three of whom, the Appellants, had lodged caveats in response to the Testamentary Petition seeking probate of the will alleged to have been executed by the testator on 20 March 1989. Under his will, the testator directed his executors and trustees to pay a sum of Rs. 30,000/- to each of his daughters and an amount of Rs. 1.00 lakh to his wife. The residue was bequeathed to his two sons who are appointed as executors. Pauline, the wife of the testator, died on 20 July 1994.

3. The following issues were drawn up:

1. Whether the Plaintiffs prove that they are entitled to probate of the last Will and Testament of the deceased?
2. Whether the Plaintiffs prove that the deceased left the duly executed last Will and Testament?
3. Whether the Defendants prove that the signature on the Will is not that of the deceased?
4. Whether the Defendants prove that the Will is not genuine and valid for the reasons set out in paragraphs 7 and 8 of the affidavit in support of the caveat?
5. What relief and order ?

4. There were two attesting witnesses to the will of the testator. Both of them were solicitors and advocates. One of them, Jaswant Chimanlal Shah was a partner in the firm of M/s. Shah and Sanghavi and had filed an affidavit dated 18 December 2006 in the testamentary petition. He died on 9 May 2008 before he could be examined in evidence. The second attesting witness Kantibhai R. Thakkar was also a solicitor who was working with M/s. Shah and Sanghavi, but he too had died in 1993. The will was sought to be proved by leading the evidence of five witnesses:

- (i) Paresh Shah, a partner of M/s. Shah and Sanghavi and the son of one of the attesting witnesses (Jaswant Shah) who was a solicitor in the same firm;
- (ii) Sudhakar Kawthekar, a Clerk with M/s. Shah and Sanghavi;
- (iii) Yashwant Datey, a Graphologist;
- (iv) Dr. Narayan Kamat, a Medical Practitioner; and
- (v) Bonaventure Dominic Misquitta, a nephew of the deceased.

The First Appellant Wilma Levert Canuao and the Third Appellant Mary Basil Karzai deposed in evidence on behalf of the Appellants.

5. The learned Single Judge by the judgment which is in appeal, held that the will had been duly proved and directed that probate shall issue.

6. In support of the appeal, the following submissions have been urged by Counsel:

- (i) None of the witnesses who deposed in evidence had seen the testator signing the will;
- (ii) No medical certificate of a doctor certifying the soundness of the mind of the testator was produced;
- (iii) The propounder of the will has not entered into the witness box and was not examined;
- (iv) Under Rule 382 of the Rules framed by this Court on the Original Side, a

petition for the grant of probate ought to have been filed within a period of three years from the date of death of the testator. Though the petition was filed over seven years after the death of the testator, no explanation has been tendered for the delay.

7. On the other hand, it has been urged on behalf of the Respondents that:

(i) Section 63 of the Succession Act provides for the manner in which a will has to be executed. Section 69 of the Evidence Act relates to the proof of a will, if no attesting witness can be found;

(ii) Both the attesting witnesses had died and hence the will was proved primarily by leading the evidence of PW-2 Paresh Shah, a partner in M/s. Shah and Sanghavi. The evidence of Paresh Shah is corroborated by the evidence of the clerk in the firm;

(iii) In the present case there were no suspicious circumstances attendant upon the execution of the will nor is there any allegation of undue influence or fraud either in the affidavits filed in support of the caveats or in the course of the evidence;

(iv) As a matter of fact, the evidence of the Third Appellant is to the effect that the deceased had suffered no major illness in his life.

In the circumstances, the fact that the deceased was in a sound and disposing state of mind has not been controverted or challenged;

(v) The provisions of Section 382 of the Rules framed by this Court on the Original Side have been interpreted in a judgment of a learned Single Judge of this Court in Vasudev Daulatram Sadarangani Vs. Sajni Prem Lalwani, as not providing for a period of limitation. The Supreme Court has held in Kunvarjeet Singh Khandpur Vs. Kirandeep Kaur and Others, that the observation in the judgment of this Court to the effect that Article 137 of the Limitation Act would not apply, is incorrect. However, the Supreme Court has held that in proceedings for the grant of probate or letters of administration, what is sought is a recognition from the Court for the performance of a duty which is a continuing cause of action and which can be exercised at any time after the death of the deceased so long as the right to do so survives and the object of the trust either exists or remains to be executed.

8. Section 63 of the Succession Act, 1925 specifies the manner in which a will has to be executed. Clause (c) of Section 63 requires attestation of a will by two or more witnesses each of whom has to have seen the testator sign or to have received from the testator a personal acknowledgement of the signature. Each of the two witnesses must sign the will in the presence of the testator but it is not necessary that more than one witness should be present at the same time. Section 68 of the Evidence Act specifies the requirements for adducing proof of the execution of a document which is required by law to be attested. u/s 68, if a document is required to be attested by law, it cannot be used as evidence unless

one attesting witness has been called for proving the execution of the document, if an attesting witness is alive. Section 69 deals with a contingency where no attesting witness can be found. In such a situation, Section 69 requires proof that the attestation of one attesting witness at least is in his handwriting and that the signature of the person executing the document is in the handwriting of that person.

9. Now in the present case, both the attesting witnesses had died. Jaswant Chimanlal Shah died on 9 May 2008 while the other attesting witness who was also an Advocate in the same firm of Solicitors, M/s. Shah and Sanghavi, had died some time in 1993. On behalf of the Respondents, evidence was adduced of Paresh Shah, the son of late Jaswant Chimanlal Shah. The witness is also a solicitor and works in the same firm as his father. The witness stated that upon perusing the file pertaining to the will of the testator, he had found a few documents which were relevant to the case. These documents were:

(i) A note in the handwriting of his father who recorded the instructions of the testator of the manner in which his estate would devolve. The witness identified the handwriting of his father on the note;

(ii) A draft of the will which was prepared under the instructions of the testator. The draft contained changes in the handwriting of his father. The witness stated that the draft appeared to be a final draft since it bore the endorsement in his father's handwriting of "Eng + 1" together with the initial of Mr. Jaswant Chimanlal Shah and the date. The abbreviation "Eng", it is common ground, meant engrossment. The handwriting was identified by the witness;

(iii) The file also contained a note of Mr. Jaswant Chimanlal Shah on his letter-head dated 12 November 1999 stating that the will of Pauline D'Souza and the testator were read out in the presence of the parties as noted and this endorsement was also in the handwriting of Mr. Jaswant Chimanlal Shah which was identified by the witness;

(iv) A typewritten note dated 12 November 1999 recording that the wills of Pauline and the testator have been read out and prepared and initialed by him. The witness identified the signature on the will executed by the testator as attesting witness to be that of his father Jaswant Chimanlal Shah.

10. In the course of the cross examination, nothing material was elucidated to shake or cast a doubt upon the veracity of the evidence of Paresh Shah. The witness during the course of the cross-examination stated that he was not present at the time when the will was executed nor had he assisted his father in drafting the will. The witness, however, explained the note of instructions prepared by his father in his own handwriting recording the instructions of the testator to the effect that each of his daughters would be given a bequest of Rs. 30,000/-, his wife Rs. 1.00 lakh while his sons would receive a bequest in equal proportions. The evidence of Paresh Shah, a partner in the firm of M/s. Shah and Sanghavi inspires confidence and his narration, based on the files which were

preserved in the office pertaining to the execution of the will, would be in the natural and ordinary course of things. For the purposes of Section 69 of the Evidence Act and having due regard to the fact that both the attesting witnesses were dead, an inference was capable of being legitimately drawn that the attestation of one attesting witness in his handwriting was proved. The evidence of Paresh Shah, who identified the signature of his father-one of the attesting witnesses-is clear in that regard.

11. The submission which has been urged on behalf of the Appellants is that M/s. Shah and Sanghavi were the Advocates of the deceased testator over a considerable length of time and it is conceivable that Jaswant Chimanlal Shah may have signed on the will as an attesting witness after the death. Such an inference is preposterous. As a matter of fact, no such case has been put to the witness.

12. Section 69 of the Evidence Act also requires proof that the signature of the person executing the document is in his handwriting. The second witness, Sudhakar Kawathekar joined Shah and Sanghavi in 1980 as a peon and deposed that he was promoted as an office clerk in 1987. The witness continued to work in the same firm. He deposed that the testator used to visit the office of M/s. Shah and Sanghavi for his legal work and on 20 March 1989 when he visited the office, he was informed by Mr. Jaswant Shah that the testator has visited the office for execution of his will. The witness stated that he had seen the deceased-testator, put his signature on the last page of the will and placed his initials on the other pages and that both the attesting witnesses had witnessed the execution of the will together. The submission of the learned counsel for the Appellants is that the witness did not produce any document to show that he was employed with M/s. Shah and Sanghavi. We do not find any substance in this contention nor is there any reason to disbelieve the testimony of the witness. His employment with M/s. Shah and Sanghavi was not disputed nor was there any line of cross-examination on that aspect. Again, it was sought to be urged that since the witness was assigned the duties of registering documents, there was no reason why the firm of solicitors would not have advised the testator to register the will. The difficulty in accepting the submission is that it proceeds purely on the basis of conjectures. As a matter of first principle, a testamentary disposition does not require to be registered. The witness was not questioned on the circumstances in which the will was not registered. The mere fact that the will was not registered is not sufficient to raise a doubt on the authenticity of the document particularly in view of the fact that registration of a will is not a mandate of the law.

13. The evidence of Paresh Shah and of Sudhakar Kawathekar fulfills the mandatory requirements of Section 69. The evidence of Paresh Shah has duly proved that the attestation of the will by Jaswant Shah was in his handwriting. The evidence of Sudhakar Kawathekar proves that the signature of the person executing the document was in the handwriting of that person.

14. Proof in regard to the signature of the testator on the document was also sought to be adduced by leading the evidence of a Graphologist, Yeshwant Datey. Now the position in law is that the opinion of a handwriting expert is, at the highest, an opinion. As observed by the Supreme Court in *Smt. Bhagwan Kaur Vs. Shri Maharaj Krishan Sharma and Others*, , the evidence of a handwriting expert unlike that of a finger-print expert is generally of a frail character and its fallibilities have been quite often noticed. Having regard to this principle, we have considered the evidence on the record, independent of the evidence of Graphologist, Yeshwant Datey, and have come to the conclusion that there is no reason to discard the testimony both of Mr. Paresh Shah and Mr. Sudhakar Kawthekar, whose evidence has gone largely unchallenged.

15. The issue as to whether the testator was in a sound and disposing state of mind is one on which, as the evidence would indicate, there is little controversy. At the outset it must be noted that the Third Appellant who was one of the caveators specifically admitted in the course of her evidence that her father did not suffer from any major illness and that at no point of time was he even admitted to any hospital. The witness, however, stated that towards the end, his health had become a little weak and he was unable to understand things. The will was executed over ten years prior to the death of the testator. As a matter of fact, it merits emphasis that no ground was raised in the affidavit-in-support of the caveat disputing that the testator was in a sound and disposing condition of mind.

16. The Respondents, in support of the mental condition of the testator led the evidence of Dr. Narayan Kamat. He deposed that he was a doctor by profession and that when he commenced practice in 1976, his clinic was located at Anjelin D'mello Chawl. Subsequently in 1996, he shifted his practice to a new clinic which was in the same vicinity and at a walking distance of two to three minutes from the residence of the testator. The witness stated that though he had treated the testator for minor ailments such as cold, cough and fever, based on his interaction, he found him to be of a sound and disposing state of mind at all times until his death. He stated that he had observed that the deceased testator would go for a walk every day till his death. The witness sought to rely upon a certificate dated 15 September 2010. Since the certificate was issued well over a decade after the death of the testator, that part of the evidence would have to be ignored. On behalf of the Appellants the testimony of Dr. Narayan Kamat was sought to be challenged in these proceedings by urging that he was not an M.B.B.S. qualified doctor but possessed a qualification granted by the Maharashtra Faculty of Ayurveda and Unani Systems of Medicine. However, it merits emphasis that beyond asking the witness a question about what the abbreviations in his qualifications stood for, the line of inquiry was not further followed. In the circumstances, it would be impossible to allow the Appellants to impeach the medical qualifications of Dr. Narayan Kamat in these proceedings, particularly in the absence of any cross-examination on the issue. We have taken due note of the fact that the witness stated that the testator had not informed

him of having made a will nor had he examined the testator on the date on which the will was executed. Ultimately in a matter such as the present, the test that has to be applied is as regards the satisfaction of the judicial conscience of the testator being in a sound and disposing state of mind. The testator was 68 years of age when the will was executed and the record indicates that he was not suffering from any mental condition or from any condition that would have rendered him incapable of making a testamentary disposition. On the contrary, there is on the record the deposition of one of the caveators, who is one of the daughters of the testator, to the effect that the deceased did not suffer from any major illness during his lifetime and that he was not even admitted to a hospital for any illness.

The submission of the Appellants is, therefore, purely conjectural which it would be impossible to accept.

17. On behalf of the Appellants it has been sought to be urged that in the present case, the petition for the grant of probate must fall since the propounder of the will namely, the First Respondent, did not step into the witness box. A considerable amount of emphasis was placed on this circumstance particularly on the ground that the petition for the grant of probate was filed more than seven years after the death of the testator. Now, insofar as the question of delay is concerned, Rule 382 of the Rules framed by this Court on the Original Side provides as follows:

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.

Rule 382 was interpreted in a judgment of Mr. Justice B. Lentin speaking for this Court in *Vasudeo Daulatram Sadarangani* (supra). The learned Single Judge held that there is no warrant for the assumption that the right to apply for the grant of probate as envisaged in Article 137 of the Schedule to the Limitation Act necessarily accrues on the date of the death of the deceased. The Court held that such an application is to seek the permission of the Court to perform a duty created by the will or for a recognition as a testamentary trustee and the right to apply is a continuous right which is capable of being exercised so long as the object of the trust exists or any part of the trust, if created, remains to be executed. The conclusions of the learned Single Judge were summarised as follows:

(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.

18. This judgment of the learned Single Judge of this Court fell for consideration before the Supreme Court in *Kunvarjeet Singh Khandpur* (supra). The Supreme Court held, following the decision in *The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma*, , that Article

137 of the Limitation Act, 1963 is applicable to a petition for grant of letters of administration. The Supreme Court, however, observed that in such proceedings the application merely seeks recognition from the Court to perform a duty and, because of the nature of the proceedings, it is a continuing right. The judgment of this Court in *Vasudeo Daulatram Sadarangani* (supra) was specifically adverted to in the judgment of the Supreme Court and it has been held that while conclusion (b) above laid down in the judgment of the Single Judge of this Court is not correct, the principle in (c) above reflects the correct position in law. Consequently it is a well settled principle that an application for the grant of letters of administration or a petition for the grant of probate seeks, in substance and in effect, the permission of the Court to perform a legal duty created by the will or for recognition as a testamentary trustee. This necessarily involves a continuing cause of action and so long as the right to do so survives and the object of the trust remains to be executed, the cause of action would not be barred by limitation.

19. Finally it may be also noted that in the judgment of the learned Single Judge in *Sadarangani* (supra) it was held construing the provisions of Rule 382 that while any delay beyond three years after the death of the deceased would arouse suspicion, such delay, while it has to be explained, cannot be equated with an absolute bar of limitation. Moreover, once the execution and attestation of will are proved a suspicion based on delay would no longer operate. In the present case, we have come to the conclusion that the execution and attestation of the will has been duly proved. In the circumstances, we decline to accept the

contention that the delay should result in the dismissal of the suit.

20. For these reasons, we hold that the learned Single Judge was not in error in coming to the conclusion that the will of the testator has been duly proved and in directing that probate should be granted. There is no merit in the appeal. The appeal shall accordingly stand dismissed. There shall be no order as to costs. On the conclusion of the judgment, counsel for the Appellants seeks a stay of the operation of this judgment. The judgment of the learned Single Judge was delivered on 18 September 2012 and no stay has operated since then. In the circumstances, having come to the conclusion that the learned Single Judge was not in error in granting probate, it would not be appropriate to accede to the request for stay. The request is rejected.