

(2004) 07 BOM CK 0045

In the Bombay High Court

Case No : Appeal No. 546 of 1994 in Suit No. 18 of 1987 in Petition No. 69 of 1987

Zarina R. Irani and Another

APPELLANT

Vs

Shapur Jawanmardi and Others

RESPONDENT

Date of Decision : 20-07-2004

Acts Referred:

Succession Act, 1925 — Section 63

Citation : (2004) 4 ALLMR 408 : (2004) 6 BomCR 142 : (2005) 1 MhLj 293

Hon'ble Judges : R.M. Lodha, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : S.H. Karim, for the Appellant; Girish Desai, Geeta Shastri and Amit Shastri for Respondent Nos. 1(b) and 2, for the Respondent

Final Decision : Allowed

Judgement

R.M. Lodha, J.—Rustam Behram Irani died on 12th November, 1979. He is said to have executed his last Will and testament 12 days before his death on 30th October, 1979. This is what his widow Shirin Rustom Irani and one of the sons Jehangir Rustom Irani set up the case in the testamentary petition filed on 9th February, 1987. We shall refer the widow and the son Jehangir individually as well as collectively "the propounder". In the testamentary petition the propounder prayed for the Letters of Administration with the will annexed thereto of the property and credits of the deceased. However the two daughters Zarina R. Irani and Shemim F. Cutchhi of the deceased objected to the grant of the Letters of Administration and filed their caveat. In the affidavit in support of the caveat, inter alia various objections were taken that; (i) the Will dated October 30, 1979 was not executed by the deceased; (ii) the Will was forged and fabricated; (iii) the deceased at the relevant time suffered from carcinoma prostate gland and did not have testamentary disposition on the date the Will is said to have been executed and (iv) the Will was shrouded by suspicious circumstances. Some of grave suspicious circumstances highlighted in the

affidavit in support of caveat are that: (a) the will surfaced for the first time after seven years after the caveat filed the suit in for administration of the estate of the deceased, (b) the contents of the Will were not correct and apparently appear to be fabricated; (c) the bequest was unnatural and (d) the scribe and the details of the person who prepared and drafted the Will were not disclosed. The caveat also set up the case that there was nothing to indicate that the Will was attested by Dr. G. J. Lobo. According to the caveator-daughters, the son in collusion of witness P. J. Siganporia prepared the Will after the death of the deceased.

2. The testamentary petition, thus, was converted into suit.

3. The learned trial Judge, on the basis of the pleadings framed five issues. The propounder examined the widow Shirin (PW1), Phiroze Siganporia (PW2) and the son Jehangir (PW3). The caveat-defendants examined Juliet Tellis (DW1), Donata Fernandes (DW2), Shemiam F. Cutchhi (DW3), Joseph F. D'Silva (DW5) and the other son Shapoor Jawanmardi (DW6). The statements of Dr. A. K. Karekar, Registrar, Maharashtra Medical Council, Bombay and Dr. Ravindra V. Karanjekar, Tata Memorial Hospital, Bombay were also recorded in support of the record produced by them.

4. The learned trial Judge after hearing the parties, concluded that: (i) the Will propounded by the propounder was executed by the deceased-testator and bears his signature; (ii) the said Will was executed by the deceased-testator while in good state and health mental as well as physical; (iii) the Will was valid and properly executed and properly attested; (iv) the deceased-testator at the time of execution of the Will was possessed of testamentary capacity to understand the execution of the Will and contents therein and that (v) the alleged Will was the last Will and testament of deceased testator. Accordingly, the learned trial Judge vide his judgment dated June 17, 1994 granted to the propounder as the legatees the Letters of Administration with the Will annexed thereof of the property and credits of the deceased-testator.

5. The daughters caveat-defendants upset thereby has preferred this appeal.

6. To complete the narration of facts it may be noticed here that during the pendency of the appeal, the widow Shirin died. The cause title of the appeal was amended and the other legal heirs of the widow were also brought on record.

7. We heard Mr. S. H. Karim, the learned counsel for the appellants and Mr. Girish Desai, the learned counsel for the respondent No. 1(b) and 2 extensively.

8. Mr. S. H. Karim, the learned counsel for the appellants submitted that the propounder failed to prove the due execution and attestation of the Will dated 30th October, 1979. He contended that the evidence of P. J. Siganporia (PW2) was artificial and unnatural and was not sufficient to prove the execution of the Will. According to him, it was imperative for the propounder to plead and aver about the due execution and attestation of the Will but in the petition, there is no

such averment of execution and attestation of the Will. The learned counsel submitted that the Will was shrouded by several suspicious circumstances and the propounder having miserably failed to explain by reliable evidence the suspicious circumstances, the Will cannot be held to be genuine as last testament of deceased. Mr. Karim contended that the propounder failed to establish that the deceased was in sound and disposing state of mind to make and execute the Will. He would contend that there was no evidence to show that the attesting witnesses put their signatures on the Will in the presence of the deceased or in the presence of each other. Referring to Rule 382 of the Bombay High Court (O.S.) Rules, the learned counsel submitted that in the petition the propounder has not explained the delay in filing the petition more than three years after the date of the death of the deceased. He also submitted that the deposition of the propounder PW1 and PW3 is not at all believable. PW1 even denied that the deceased was suffering from carcinoma prostate glands. The learned counsel referred to Sections 2, 59 and 63 of the Indian Succession Act, 1925 and Sections 45, 47, 67, 68 and 72 of the Evidence Act, 1872 and submitted that the propounder failed to discharge the burden of proof of due execution and attestation of Will. In support of his submission that the propounder has to prove due execution and attestation of Will and remove all suspicious circumstances to satisfy the conscience of the Court, Mr. Karim relied upon various decisions namely, H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, , Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another, , Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others, , Vijayben Vashram Vs. State of Gujarat and Others, , Kalyan Singh Vs. Smt. Chhoti and Others, , Kanakku Veetil K.P. Sankarankutty Menon Vs. Malathy Amma and Others, and Guro (Smt.) Vs. Atma Singh and Others, . That for want of any pleading regarding attestation of Will, no proof can be accepted, Mr. S. H. Karim, placed reliance upon the two judgments of the learned Single Judge of this Court in Rangu Vithoba and Others Vs. Rambha Dina and Another, and P. Ramchandran Nair v. Smt. Suparna Tapan Das, 2003(3) All MR 638. The learned counsel, thus, submitted that the findings of the learned Single Judge were erroneous and the judgment passed by the learned Single Judge deserves to be set aside.

9. Mr. Girish Desai, the learned counsel for the respondent No. 1 (b) and supported the judgment of the learned Single Judge. According to him, the due execution and attestation of the Will of the deceased is proved by the evidence of Phiroz Sigantoria, PW 2 who was known to the testator and family members for several years who identified not only the signature of the testator but also that of the co-attesting witness Dr. Gilbert Lobo (since deceased). The learned counsel submitted that PW2 has been categorical about the contents of the Will having been explained to the testator in Gujarati language admittedly known to the testator and the testator's own confirmation and approval of the contents of the Will. Thereafter, the testator signed and executed the Will and asking the attesting witnesses to attest the same and accordingly, the attesting witnesses attested the said signature of the testator in his presence and also of each other

on the day of its execution and so also the place, date and time thereof. Mr. Girish Desai would submit that the deposition of PW 2 also proves the fact of the testator executed the Will voluntarily and of his own volition after understanding the contents thereof and thus, the due execution of the Will is proved by the propounder. He submitted that the allegations of forgery, inducement, testamentary incapacity to execute, the Will being in realm of fact with the special knowledge of challenger of the Will, the burden to prove the same is squarely on such challenger and the caveat-defendants miserably failed to discharge the said burden. In response to the circumstances levelled as suspicious by the learned counsel for the appellants, Mr. Girish Desai submitted that the evidence of PW 1 and PW 3 explains the said circumstances. However, he emphasised that the allegation of suspicious circumstances has to be tested on preponderance of probabilities and in that backdrop if the evidence of the defendant DW3 is examined, it would be seen that she has not been candid to the Court and her conduct also disproves the case of suspicious circumstances set up by the caveat. He submitted that according to DW3 Shamim, after 1987, she called upon Dr. Gilbert Lobo and procured from him Exhibit 6. She, therefore, knew who Dr. Lobo was by 28th March, 1987 after becoming aware of the existence of the Will having been attested by Dr. Lobo. She however, denied being aware of Dr. Lobo's and Siganporia's affidavits proving the Will. Besides that, Mr. Desai submitted that nothing prevented her from ascertaining from Dr. Lobo about his role in the execution of the Will. Her explanation that she did not want Dr. Lobo to be put on guard, according to Mr. Desai, is against the normal human behaviour of confronting a party to whom an incorrect fact is attributed. The learned counsel submitted that the court is not supposed to microscopic examine the execution and attestation of the Will. As regards the testator's mental and physical condition and alertness, the learned counsel submitted that no medical evidence has been adduced by the defendants to prove that carcinoma prostate gland made the testator invalid mentally as well as physically and unable to comprehend the things. The learned counsel submitted that there was nothing unnatural in the testator giving away his estate to his wife (PW1) and his bakery business to be shared equally amongst the wife and the son. The testator had 38% of share in the partnership business and he had made the provision that the partnership business would be shared equally amongst the propounder. The other son Shapur had already settled in Iran and the daughters were well established in the life. Thus, the learned counsel submitted that the propounder has proved the due execution of the Will by the testator and that the said Will was the last Will duly executed by him out of his own free will and volition. The learned counsel would submit that the learned Single Judge was satisfied based on evidence on record that the Will sought to be propounded by the propounder was genuine one, duly executed by the testator of his own free will and volition and after fully understanding the contents thereof. Mr. Girish Desai relied upon the citations namely; Smt. Sushila Devi Vs. Pandit Krishna Kumar Missir and Others, , Seth Beni Chand (Since Dead) Now by L.Rs. Vs. Smt. Kamla Kunwar and Others, , Smt. Deokali Vs. Nand Kishore and others, , S.

Sundaresa Pai v. Mrs. Sumangala T. Pai, 2001(8) Supreme 474, Madhukar D. Shende Vs. Tarabai Aba Shedage, , Ramabai Padmakar Patil (D) through LRs. and Others Vs. Rukminibai Vishnu Vekhande and Others, and N. Kamalam (Dead) and Another Vs. Ayyasamy and Another, . Mr. Desai submitted that it is undesirable that the Judge should take upon himself the task of comparing signature without the help of other evidence to find out whether there has been forgery in the Will. In this connection, he relied upon the judgment of the Calcutta High Court in the case of J. C. Glastaun v. Sonatan Pal and Ors. 1925 Cal 485.

10. Before we deal with the diverse aspects that emerged during the course of arguments, it is well to refer to the principles and propositions expounded by the Supreme Court in the matter of proof of Will and the duty of the Court in consideration of the case where the execution of the Will is surrounded by suspicious circumstances. The decisions in this regard are many and the learned counsel cited quite a few decisions but reference to all of them is not necessary.

11. The classic case reviewing long line of earlier decisions is the case of U. Venkatachala Iyengar wherein the Supreme Court considered Sections 59 and 63 of Indian Succession Act and Sections 45, 47, 67 and 68 of the Evidence Act. The Supreme Court held that the Will has to be proved like any other document except as to the special requirements of attestation prescribed in Section 63 of the Indian Succession Act; the usual test of satisfaction of the prudent mind in such matters has to be applied; the propounder has to show by satisfactory evidence that the Will was signed by the testator; the testator at the relevant time was in a sound and disposing state of mind; he understood the nature and effect of the dispositions and put his signature to the document of his own free will. In cases in which the execution of Will may be surrounded by suspicious circumstances, the Supreme Court ruled that as a part of initial onus; it is for the propounder to remove any such legitimate doubt in the matter. In paragraphs 18, 19, 20, 21 and 22, the Supreme Court held thus -

18. What is the legal position in the matter of proof of Wills? It is well known topic for decision in Courts and there are a large number of judicial pronouncements on the subject. The party propounding a Will or otherwise making a claim under a Will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. u/s 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions

prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by Will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a Will. This section also requires that the Will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the Will set up by the propounder is proved to be the last Will of the testator has to be decided in the light of these provisions. Has the testator signed the Will? Did he understand the nature and effect of the dispositions in the Will? Did he put his signature to the Will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of Wills. It would prima facie be true to say that the Will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of Wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes Wills from other documents. Unlike other documents the Will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his Will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and testament of the departed testator. Even so, in dealing with the proof of Wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the Will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not

remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the Will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the Will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged. Courts would be reluctant to treat the document as the last Will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the Will propounded, such pleas may have to be proved by the caveat; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the Will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

21. Apart from the suspicious circumstances to which we have just referred in some cases the Wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the Wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the Will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the Will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with Wills that present such suspicious circumstances that decisions of English Courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical Courts in England when they exercised jurisdiction with reference to Wills; but any objection to the use of the word "conscience" in this context would in our opinion, but purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the Court is the last Will of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on Wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the Will has to prove the due and valid execution of the Will and that if there are any suspicious circumstances surrounding the execution of the Will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles

would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parcq in *Harmes v. Hinkson* 50 Cal. W.N. 895; AIR 1946 P. C. 156 "where a Will is charged with suspicion, the rules enjoin a reasonable scepticism, not in obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth." It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect."

12. In *Rani Purnima Debi*, the aforesaid legal position was reiterated that the propounder has to prove the execution and attestation of the Will; that the testator was in a sound and disposing state of mind at the time the Will is said to have been executed and remove all suspicious circumstances surrounding the Will.

13. In *Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee* since deceased and after him his legal representatives and Others, , the Supreme Court stated that the onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where, however, there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the Will as genuine. Even where there are no pleas of undue influence, fraud and coercion or such circumstances giving rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the Will being unnatural, improbable or unfair or there might be other indications in the Will to show that the testator's mind was not free and in such a case, the Court would naturally expect that all legitimate suspicion is removed by the propounder before the document is accepted as the last Will of the testator.

14. In the case of *Jaswant Kaur*, the Supreme Court held that in cases where the execution of a Will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. An adversary proceeding then becomes a matter of the Court's conscience and the question that arises for consideration is whether the evidence led by the propounder of the Will is such as to satisfy the conscience of the Court that the Will was duly executed by the testator.

15. In the backdrop of this legal position, we shall first advert to the Will itself and set out briefly the provisions thereof. The Will is typed out on both sides of a single foolscap inferior type of paper. The Will consists of seven paragraphs. In the beginning it is recorded that it is last Will and testament of the testator cancelling all previous Wills, if any. The paragraph 2 mentions the necessity of making the Will, the testator being old and life may come to an end at any time.

The paragraph 3 records that the testator is a married person and his family comprise of (1) Smt. Shirin Rustam Irani (wife) nee Shirin Biabani Hassanabadi, (2) Shapur Rustom Irani (son), (3) Parvin P. Gardner (married daughter), (4) Shainim Katchi (married daughter), (5) Jehangir Rustom Irani (son), (6) Zarina Rustom Irani (married daughter) and (7) Nomai Rustom Irani (married daughter). The paragraph 4 states that the testator is the owner of the A-1 Bakery, situated at 89-B, Hill Road, Bandra, Bombay wherein he is a partner with Rustom Jamshed Irani (his son-in-law). It is also recorded in the paragraph 4 that testator is the tenant of the residential premises on the ground floor, 89, Warden Hall, Hill Road, Bandra, Bombay. Paragraph 5 of the Will records that during his lifetime he got married all his daughters who are living separately and his elder son Shapur is also living separately and he had given a cash of Rs. 10,000/- to him. His other son Jehangir is assisting him in his business and looking after him. Paragraph 6 mentions the testator bequeathing absolutely all his right, title, interest and claim in respect of the properties acquired by him from his personal income viz. (i) Residential block in the tenancy of the testator to be transferred in the name of his wife and in case of death of his wife earlier to him then in that event, the tenancy rights to be transferred in the name of his son Jehangir Rustom Irani; (ii) Bank Account to be operated by his son Jehangir Rustom Irani; (iii) His share in the partnership business of A-1 Bakery to be enjoyed equally by his wife and the son; (iv) Movable articles consisting of furniture and fixtures lying in the house to be enjoyed by his wife and his son Jehangir Rustom Irani and (v) Ornaments to be enjoyed by his wife and she will be entitled to give the said ornaments during her lifetime as deemed fit and proper. In paragraph 7, it is stated that all the expenses for performing last rites shall be borne by his son Jehangir Rustom Irani. Thereafter, he records that he has executed this Will in good senses and sound mind and without any coercion and/or force from any party including his family members. The Will is said to be signed by the testator and attested by two witnesses (1) Dr. Gilbert Lobo and (2) Phiroze J. Siganporia.

16. Whether the execution of the Will is satisfactorily proved? As already noticed above, three witnesses were examined by the propounder. The direct evidence is only of the attesting witnesses Phiroz J. Siganporia, PW2. His evidence is important. Is he reliable. Not so. He is said to be the friend of the deceased for decades and used to meet him practically every day until his death but he never entered the house of the deceased except on the day of the execution of the said Will. He would ordinarily meet the testator at 5 pm every day but on 29th October, 1979 the testator asked him to come to his place at 4 pm. He does not ask the deceased the purpose for which he is called at 4 pm though he has to leave his workplace early. He admitted that although his office hours were 7 am to 3 pm, he being the Deputy Weaving Master in Bombay Dyeing and Spinning Mills, was required to remain in the office upto 6 pm. He even did not know that the testator was suffering from carcinoma prostate gland. It is intriguing that a friend practically visiting the deceased every day for many years until his death

would not know of such a serious ailment. Can it be believed that a person suffering from Cancer would not tell his friend who has been visiting him every day about his illness. Though he claims to be one of the attesting witnesses to the Will and he had been visiting the deceased for many years, significantly he did not talk of the Will to any one after the death of the deceased including Jehangir, the son of the deceased whom he met. It is also intriguing that being the friend of the deceased and having allegedly attested the Will would not talk to the widow of the deceased testator about the Will for number of years until the year 1987. Though this witness claims to be a long time friend of the deceased-testator and would visit him almost daily when he was asked by the testator to sign the Will, initially his response was that he did not want to get involved by signing as a witness. He was not able to steer clear the doubt that the full address, name and the date below his signature was in his handwriting. He deposed that after he read over and explained the contents of the Will, the deceased took away the said Will from him and in his presence put his signature thereon in Gujarati. If that was so, the Will would not have mark (X) suggesting the place where the testator was required to sign. The deposition of PW2 suffers from inherent improbabilities. He is not worthy of the Court's faith. His evidence is unnatural. He attempted to say that he attested the signature of the deceased testator in his presence and also of the attesting witnesses each other on the day of its execution and so also the place, date and time thereof but failed miserably in his attempt.

17. The evidence of PW1 does not help the case of the propounder at all in proving the execution of the Will. She was not present when the Will is said to have been executed. She even did not know what that writing was that she said was handed over to her by her husband. She could not identify her husband's signature. She does not prove the execution of the Will at all. She was not candid before the Court. She even denied that her husband was suffering from Cancer. Can it be believed that she did not know about the serious illness of the deceased. First she said she did not talk about the writing before, or after the death of the deceased to anyone. Then in re-examination she stated that although immediately after the death of her husband she did not say anything about the writing but thereafter she disclosed about the writing to four persons viz., the son Jehangir, the daughter Parvin, Dr. Lobo and Siganporia. In this regard, Jehangir (PW3) and Siganporia say something else. The deposition of son Jehangir (PW3) with which we will deal immediately hereafter would show that he came to know of the said Will for the first time in 1987 viz. after more than seven years of execution of the said Will. The deposition of PW1, thus, is not relevant and worthy of acceptance.

18. The last evidence on behalf of the propounder is that of son Jehangir (PW3). Admittedly, he was not present when the said Will is said to have been executed. He also did not know as to when and where Dr. Lobo and P. J. Siganporia had put their signatures on the said Will. According to him, he came to know of the said Will from his mother when she gave that to him in the year 1987. The mother

(PW1) on the other hand in her re-examination said that although immediately after the death of her husband, she did not say anything about the writing but then she disclosed about the writing to four persons including PW3. This witness said that he did not know whether his sister Parvin was married to one Lilamwala. He also did not know whether his brother Shapur was married. He even did not remember that he filed written statement in the City Civil Court in the suit concerning partnership. Later on in his deposition he admitted that his brother Shapur got married after the death of his father. He was not aware whether his brother Shapur stayed with his parents in the month of March, 1979. Though he admitted that his father was suffering from carcinoma prostate gland, he would insist the Court to believe that his father was hale and hearty until he died. Having considered his entire deposition, we find that he is not straight forward witness and has not at all been candid and honest in his statement before the Court. He has a memory of connivance. His evidence, therefore, does not help in proving the execution of the Will.

19. Not only that the execution of the Will is not proved but also the Will is shrouded by grave suspicious circumstances and that puts big question mark to the genuineness of the Will. No evidence has been led as to who drafted the Will though it seems to have been drafted by the person knowing law. There is no evidence who typed it. The evidence lacks on these aspects.

20. Though the Will is said to have been executed on 30th October, 1979, it surfaced for the first time in the month of February, 1987. The caveat had filed the suit for Administration of Estate of the deceased on 12-1-1987 before this Court being suit No. 79 of 1987. In that suit on 14th January, 1987 after hearing the parties including the propounder the motion Judge ordered the propounder not to part with possession or create third party interest in the estate of the deceased. Until then the Will was not referred. It was thereafter that on, 9-2-1987 the propounder filed petition for Letters of Administration with the Will annexed. The evidence of PW1 and PW3 in this regard has already been considered by us and that does not inspire confidence. If PW1 is to be believed then the son Jehangir came to know of the Will if not immediately after it was executed on 30th October, 1979 but surely after sometime as according to her, she disclosed about the said writing to the four persons including her son Jehangir. On the other hand, the son PW3 deposed that he came to know about the Will for the first time in the year 1987. The fact that the Will surfaced more than seven years after the alleged execution is intriguing. It is not co-incidence that it surfaced only after the two daughters (caveat) had filed the suit for administration of estate before this Court. Rule 382 of Bombay High Court (Original Side) Rules provides that 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. There is no justifiable explanation for the delay of more than 7 years.

21. The contents of the Will indicate gross incorrect statements made therein could have been made only if the Will was not genuine. The Will mentions that during his lifetime he got married all his daughters who are living separately and his elder son Shapur was-also living separately and he had given to him in cash Rs. 10,000/-. The fact of the matter is and that is even admitted by the propounder Jehangir that on 30th October, 1979, his brother Shapur was not even married. Shapur married after the year 1979 and before the Will saw the light of the day in the year 1987. The Will also mentions the name of one of the daughters as Parvin Gardner. The evidence shows that at the time the Will was executed on 30th October, 1979 the said daughter Parvin's marriage with Behram Lilamwala continued. Mr. Desai, the learned counsel for the contesting respondents submitted that Parvin was married to one Mr. Gardner in the year 1970. In this connection, he sought to place reliance on the marriage certificate, marked "X". The said marriage certificate is not part of admissible evidence. There is no merit in the submission of the learned counsel for the propounder that the said marriage certificate is public document and the certified copy of the said certificate having been produced, no further proof was necessary. The reliance placed by the learned counsel for the respondents on The Indian Christian Marriage Act, 1872 is wholly misconceived and misplaced. There is nothing on record to show by legal evidence that Parvin was married to Gardner before 30th October, 1979. Parvin is supporting the case of the propounder and she could have been examined by them. The wrong description of one of the daughters in the Will by itself may not be sufficient to arouse suspicion but coupled with other suspicious circumstances, the incorrect description of the daughter Parvin Lilamwala as Parvin Gardner assumes importance particularly that somewhere in the year 1984, the daughter Parvin started living with Gardner and the Will surfaced in the year 1987. The Will mentions that the deceased got married all his daughters which again is factually incorrect as it is admitted case of the parties that the deceased, only got married his one daughter Zarina and all other daughters got married on their own. The Will also mentions that the deceased was the owner of the Bakery and his son-in-law was the partner but the fact of the matter is that the son-in-law had filed suit against the deceased in 1976 being BCCC Suit No. 5305 of 1976 and while contesting the said suit, the deceased had set up the case that his son-in-law ceased to be partner as he had retired. If the deceased had set up the defence in a case in the year 1976 that the son-in-law ceased to be the partner in 1976, there is something wrong somewhere that in the Will if executed by the deceased, he would have mentioned that his son-in-law is partner in the Bakery Business.

22. The name, date and address below the signature of attesting witness Phiroz Siganporia in the Will apparently does not seem to be in his (Siganporia) hand-writing- Exhibit T where the witness wrote his full address, signature and date shows that he has not written the name, address and date on the said Will.

23. And the gravest of the suspicious circumstance surrounding the Will and that is visible from the naked eye is that the signature of the deceased has been

traced. It does not require any hand-writing expert nor does it require any microscopic examination. That the signature of the deceased is forged, fabricated and manufactured is seen as the tracing impression of the deceased signature is apparent. What surprises is that such an important aspect could be overlooked by the learned Single Judge. The impression of the tracing speak for itself and is eloquent enough to lead to the conclusion that the Will has been manufactured after the death of the deceased and it was not for no reason that it surfaced after 7 years after the suit for administration of the estate was filed by the appellants. The reliance placed by Mr, Girish Desai, upon the judgment of the Calcutta High Court in .J. C. Glastaun is of no help. What Calcutta High Court held in the case of J. C. Glastaun was that it was undesirable that the Judge should take upon himself the task of comparing signatures in order to find whether there has been a forgery in a case, when there was nothing on record to show that the signature was alleged by any person to be forgery. As a matter of fact, in the present case, the learned trial Judge on visual comparison of the signature on the Will and the signatures appearing on other documents (most of which are xerox copies) held that all signatures were identical and were that of the testator. This course has been criticised by the learned counsel for the caveat-defendants and it was submitted that though u/s 73 of the Evidence Act, the Court is entitled to comparison of the disputed and admitted signature for coming to the conclusion but the rule of prudence and caution requires in the first place that experts opinion should be obtained for assistance and if such opinion is not available, then the Judge presiding over the Court must disclose in the judgment his knowledge of comparison of hand-writing or should mention that he has taken aid from some authoritative text book. The learned counsel for the caveat-defendants submitted that save and except saying that on comparison, the signatures are found to be that of testator, the learned trial Judge did not disclose in the judgment his knowledge of comparison of hand-writing nor did he mention that he took aid from authoritative text book. We do not intend to undertake the exercise of comparison of the signature but the impression of tracing of the deceased's signature on the said Will is apparent and that leads to the conclusion that the said Will is manufactured.

24. We, thus, find that various suspicious circumstances surrounding the Will have not been sufficiently explained by the propounder. The doubt remains in the mind of the Court. We remind ourselves of the classic statement of law made in the case of Jaswant Kaur (supra) that in cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What generally, is an adversary proceeding becomes in such cases a matter of the Court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the Court that the will was duly executed by the testator. The proof of execution of the said Will falls much short of that standard and does not satisfy our conscience that the Will was duly executed by the testator. The evidence by the propounder does not offer a cogent and

convincing explanation of the diverse suspicious circumstances surrounding the making of the Will. We, therefore, find ourselves unable to sustain the finding of the learned trial Judge that the Will propounded was executed by the deceased-testator and bears his signature and that the Will was valid and properly executed.

25. In what we have observed above, we do not deem it necessary to go into the aspect whether the Will was executed by the deceased-testator while in good state of health, mental as well as physical and that at the time of execution of the Will, the testator was possessed of testamentary capacity since we find that the said Will has not been proved to be executed by the deceased-testator. Analysis of the oral evidence of the parties in this regard is not necessary since the execution of the Will itself falls short of requisite proof.

26. Since in our view, the signature of the deceased has been forged, fabricated and manufactured as is apparent from the tracing, we thought of issuing notice to the respondent No. 2 to show cause why he should not be prosecuted for the criminal act of forgery but in view of the submission of Mr. Desai that the respondent No. 2 is already sixty-five years old and what has been held by us is sufficiently deterrent, we dropped the idea of such notice.

27. The appeal is, accordingly, allowed with costs. The judgment and decree dated June 17, 1994 passed by the learned trial Judge is set aside. The petition for Letters of Administration with the Will annexed of the property in credit of Rustom Behram Irani stands dismissed.

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