



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**TESTAMENTARY AND INTESTATE JURISDICTION**  
**TESTAMENTARY SUIT NO. 20 OF 2004**

Yashwantilika Narottamdas Dalal alias  
Yashwantilika Narottamdas Mathuria – Dalal  
alias Yashwantilika N. Dalal alias Yashwantilika  
Mathuria – Dalal alias Y. N. Dalal Gabuben N.  
Mathuria alias Gabuben Narottamdas Mathuria ...Deceased

1. Shri. Mahesh Kishandas Shroff  
(Malabar Hill) of Bombay Hindu Inhabitant,  
residing at Jai Bhawani Apartment, 3, Ratilla  
Thakkar Marg, Malabar Hill, 5th Floor,  
Walkeshwar Road, Mumbai-400 006,  
being one of the Executors named in the  
Last Will and Testament of the deceased abovenamed.

2. Mr. Himanshu Arvind Mehta  
Indian Inhabitant of Mumbai, residing at  
33, Vidhani Cottage, 244, Walkeshwar  
Road, Mumbai-400006

3. Mr. Tejas Dipak Shroff  
Indian Inhabitant of Mumbai, residing at 37,  
Hari Niwas, Plot No. 52, 'C' Road,  
Churchgate, Mumbai-400020, both being  
Additional Executors appointed under the  
Provisions of the Will of the deceased  
Abovenamed. ...Plaintiffs

**Vs.**

1. Jaisukh Nagardas Bhuta  
of Mumbai, Indian Inhabitant, residing at

Nagindas Mansion, Shahid Bhagatsingh Road, Bajaj Road, VileParle (West), Mumbai-400056 being one of the Executors named in the last Will and Testament of the deceased abovenamed.

2. Jayaben Ishwardas Vora  
Indian Inhabitant, residing at 701, 3B, Green Acres, Lokhandwala Complex, Andheri, Mumbai-400053, being one of the Executors named in the last Will and Testament of the deceased abovenamed

3. Smt. Sushila H. Mehta  
of Mumbai Inhabitant, residing at 307-B, Govardhan Nagar, Borsapada, Kandivali (W), Mumbai – 400 067

4. Kamlesh M. Goradia  
having his residential address at 54/57, B/53, Ridhisidhi Apartment, 1<sup>st</sup> Floor, R. A. Kidwai Road, King Circle, Mumbai – 400 019.

5. Ketan M. Goradia  
having his residential address at Ravi Park Co-op. Hsg. Soc., Plot No.329, Room No. B-21, Road No. R. S. I. 32, Sector No.3 Near Sai Baba Mandir, Charkop Kandivali (W), Mumbai

...Defendants

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Mr. Shailesh Shah, Senior Advocate a/w Nilesh Modi, D. Banerji and P. Mahadeira i/by Rustanji and Ginwalla for the Plaintiffs.  
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CORAM : ARIF S. DOCTOR, J.  
RESERVED ON : 13TH FEBRUARY, 2025  
PRONOUNCED ON : 5TH MARCH 2025

**JUDGMENT:-**

1. The present Testamentary Suit is filed for probate of what the Plaintiffs propound as being the Last Will and Testament of one Yashwantilika Narottamdas Dalal (*"the Deceased"*) who passed away on 16th April 2002. The Suit is opposed by the Defendants who have filed their respective caveats setting out the grounds/reasons as to why the probate of the will propounded by the Plaintiffs ought not to be granted.

2. Before adverting to the rival contentions, it is useful for context to set out the following, viz.

- i. The Deceased is stated to have owned an immovable property situated at Mahatma Gandhi Road, Ghatkopar, Mumbai (*"the said property"*) which comprises 4 floors. The Deceased had, on 1st January 1996 incorporated a Company called Yashwantilika Hospital Pvt. Ltd. (*"the Company"*) *inter alia* for the purpose of setting up and running a hospital on the said property.
- ii. As already noted above, the Deceased passed away on 16th April 2002 leaving behind the document dated 12th December 1996 as her last will and testament (*"the said Will"*), which was in the Gujarati language. A

translated copy of the said Will *inter alia* sets out that (a) the Deceased had named six executors (b) the desire/wish of the Deceased was to construct a hospital on the said property (c) that in the event construction of the hospital was not completed during the lifetime of the Deceased, then the Company was required to complete construction of the hospital and said property was to be transferred to the company which was to run the hospital. The said Will also provided that the Company would make a provision that premises admeasuring 225 sq. ft. to 300 sq ft. would be provided to the caretaker of the Deceased, one Dinesh Rathod and his family. Clause 5 of the Will also provided for the appointment of additional executors in the manner more particularly set out in the said clause.

iii. After the demise of the Deceased, as per Clause 5 of the said Will, Plaintiff No.3 was appointed as additional executor. Thereafter, since the Original Plaintiff Nos. 2 to 5 passed away Plaintiff Nos. 2 and 3 i.e. one Mr. Himanshu Mehta and Mr. Tejas Shroff were appointed by Plaintiff No.1 as executors vide Order dated 1st July 2022 in Interim Application No. 1657 of 2022.

iv. The father of the Deceased i.e. one Narrotamdas had two brothers namely Kalyandas and Maganlal. The captioned Testamentary Petition was

opposed by Defendant Nos. 1 and 2 who were two of the six executors named in said Will as also by Defendant No. 3 who is the Granddaughter of Maganlal and Defendant Nos. 4 and 5 who were the Grandsons of Kalyandas, each of whom had filed their respective caveats. A summation of the opposition to the grant of probate in respect of the said Will as taken in the caveats is essentially on the ground that the Will is forged and fabricated and that the Deceased had left a prior will dated 13th May 1995 (*"the prior will"*). Defendant Nos. 1 and 2 thereafter filed Testamentary Petition No. 132 of 2006 seeking grant of probate in their favour in respect of the prior will. Testamentary Petition No. 132 of 2006 was opposed by the Plaintiffs and was thus that the said Testamentary Petition was converted to Testamentary Suit No. 65 of 2006.

3. The Plaintiffs on 3rd May 2006 filed Notice of Motion No. 46 of 2006 which was disposed by consent vide an Order dated 7th December 2006. By the said Order Parties *inter alia* agreed that till the captioned Testamentary Suit was pending (i) the fixed deposits which were in the joint names of the Deceased and the Plaintiff No.1 and/or Defendant No.1 were to be deposited in this Court which in turn was to be deposited in a nationalised bank (ii) the Court Receiver, High Court, Bombay was to take inventory of the silver utensils left by the Deceased and sell the same after conducting a valuation (iii) the Court Receiver was to deposit the sale proceeds from the sale of silver utensils in a fixed deposit in a nationalised bank (iv) the valuer from the panel was to take the

inventory and carry out valuation of the jewellery left behind by the Deceased in Deposit Locker No.L/1211 with one Vora Safe Vaults Pvt. Ltd; (v) after inventory of the jewellery was taken by the valuer, the said locker was to be closed and sealed by an officer of this Court and Defendant No.1 was to handover the keys of the said locker to the Prothonotary and the Senior Master of this Court.

4. This Court after considering the Testamentary Petition and contentions raised by the Defendants in the respective Affidavits in support of their respective caveats framed the following Issues:

*“(i) Whether the Plaintiffs prove that the Will dated 12th December 1996 propounded by the petitioners/plaintiffs is the last Will and Testament of the deceased Smt. Yashwantilika Narottamdas Dalal?”*

*“(ii) Whether the petitioners/plaintiffs as the proving executors/ trustees named in the said Will are entitled to be granted Probate in respect of the said Will dated 12th December 1996 of the deceased abovenamed and if so, what order?”*

*“(iii) Whether the Caveators/Defendants prove that the Will dated 12th December 1996 propounded by the petitioners/plaintiffs is false or fabricated or not genuine Will of the deceased?”*

*“(iv) Whether the Caveators/Defendants prove that the deceased had not put her thumb impression on the said Will dated 12th December 1996 voluntarily or that the same had not been executed on 12th December 1996 and was executed by the deceased after being influenced by the petitioner/plaintiff nos. 1 and 2 as alleged in paragraph 10 of the Affidavit-in-support of the Caveat filed by the Caveators/ Defendants?”*

*(v) What order?"*

5. The Plaintiffs led the evidence of both attesting witnesses namely, Mr. Thakorbbhai Desai ("*PW1*") and Mr. Ramanlal Sanghavi. The Defendants led the evidence of the caretaker of the Deceased, Mr. Dinesh Rathod ("*DW1*"). PW1 and DW1 had subjected themselves to cross examination. Mr. Ramanlal Sanghavi could not be cross examined since he passed away after filing his Affidavit of Evidence.

6. Defendant Nos. 1 and 2 also passed away on 14th May 2021 and 20th November 2011 respectively. This Court then vide two separate Orders dated 1st July 2022 discharged the caveats filed by Defendant Nos. 1 and 2 and dismissed Testamentary Suit No. 65 of 2006. By an order dated 14th September 2006 passed in Notice of Motion 2298 of 2004, this Court held that Defendant No. 3 had no caveatable interest and thus, the caveat filed by Defendant No. 3 was dismissed and set aside.

7. Thereafter, Defendants Nos. 4 and 5 did not take any steps to participate in the present proceedings, and it was thus that this Court vide order dated 10th October 2022 gave them the last opportunity to appear. Pursuant to the said Order, the Court directed that if Defendant Nos. 4 and 5 failed to appear, the Suit would proceed with hearing of present Suit. As per the Order dated 14th

February 2023, since neither Defendant Nos. 4 and 5 nor their Advocates appeared, the matter was fixed for final hearing.

### **Submission on behalf of the Plaintiffs**

8. Mr. Shah Learned Senior Counsel appearing on behalf of the Plaintiffs in jointly dealing with Issue No.1<sup>1</sup> and 2<sup>2</sup> at the outset submitted that Testamentary Suit No. 65 of 2006, was dismissed by this Court on 1st July 2022. Mr. Shah thus submitted that given the dismissal of Testamentary Suit No. 65 of 2006, the only Will of the Deceased was the Will dated 12<sup>th</sup> December 1996 i.e. the Will which was propounded by the Plaintiff in the present Suit.

9. Mr. Shah then pointed out that the said Will had, as per Section 63(c)<sup>3</sup> of the Indian Succession Act, 1925 ("Succession Act"), been duly attested by two attesting witnesses both of whom had filed their respective Affidavits of Evidence. He then pointed out that while a valid Will was required to be attested

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1 (i) *Whether the Plaintiffs prove that the Will dated 12th December 1996 propounded by the petitioners/plaintiffs is the last Will and Testament of the deceased Smt. Yashwantilika Narottamdas Dalal?*

2 (ii) *Whether the petitioners/plaintiffs as the proving executors/ trustees named in the said Will are entitled to be granted Probate in respect of the said Will dated 12th December 1996 of the deceased abovenamed and if so, what order?*

3 63(c) *The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.*



by two attesting witnesses, such will was required to be proved in the manner more particularly set out in Section 68<sup>4</sup> of the Indian Evidence Act, 1872("Evidence Act") which provided that the evidence of any one of the attesting witnesses could be led to prove due execution. Mr. Shah then pointed out that the Plaintiffs had, in order to prove due execution of the said Will, had led the evidence of Mr. Thakorbhai Desai (PW1) who was one of Attesting Witnesses since the other Attesting Witness, namely Mr. Ramanlal Sanghavi had passed away after the filing of his Affidavit of Evidence.

10. Mr. Shah then invited my attention to the Affidavit of Evidence of PW1, and pointed out that PW1 had *inter alia* set out that (i) the Deceased was in a sound state of mind at the time the said Will was executed (ii) that the Deceased had affixed her left hand thumb impression on said Will in their presence and (iii) that both the attesting witness had also affixed their signatures on the said Will in the presence of each other and in the presence of the Deceased. He pointed out that PW1 had also identified his own signature, the signature of the other attesting witness, and had deposed that he had seen the

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**468. Proof of execution of document required by law to be attested.**—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

*Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied*

Deceased affixing her left hand thumb impression on said Will. Mr. Shah then took me through the cross examination of PW1 and pointed out that the same did not in any manner contradict what was stated by PW1 in his Affidavit of Evidence. It was thus he submitted that due execution of the said Will was proved by the evidence of PW1.

11. Mr. Shah, then even though none appeared on behalf of the Defendants, very fairly pointed out that one of the suspicious circumstances cited by the DW1 in his Affidavit of Evidence and Defendants in their respective Affidavits in support of Caveat was the fact that the Deceased despite being able to read, write and sign in Gujarati, had affixed her thumb impression on the said Will. He pointed out that this so called suspicious circumstance was dealt with and dispelled by PW1 in his cross examination wherein PW1 had specifically answered as follows:

*"Q. 158) Will you please tell us, what transpired at the residence of the deceased between 12:00 noon to 3:00. p.m. on 12h December 1996?"*

*A. Execution of the Will the entire process.*

*Q. 159) Will you please narrate, what do you mean by "the entire process"?*

*The Witness states that he desires to answer in Gujarati.*

*Per Commissioner:* *I have requested the Witness to answer in English if possible.*

*Counsel Mr. Ganwani states that the Witness should be allowed to answer in Gujarati.*

*Per Commissioner:* *Since there is no Translator, I requested the Witness to*

*answer in English.*

*The Witness now states that he will answer in English.*

*A. Ramanlal Sanghvi gave me the draft of the Will to read out to the deceased. I started reading in Gujarati. The deceased asked me to read slowly that she can understand the contents. I accepted her request and completed entire reading of the Will. Ramanlal Sanghvi asked the deceased "Is it alright? Is it according to your desire and all your desire are included in the Will?". The deceased said "Yes. OK". Thereafter, the deceased was asked to sign the Will. On that request, she said "my hand is shaking. Take my left-hand thumb impression." Thereupon she put her left hand thumb impression and I was asked to sign as a Witness. Ramanlal Sanghvi requested the deceased again to sign the Will as she can ("jevi thai tevi karo"). On that request, she signed faintly on the last page. Ramanlal Sanghvi asked her to sign on all papers where she had given her left-hand thumb impression. After that Ramanlal Sanghvi signed the Will as a Witness second and I signed first. After that Ramanlal Sanghvi went out to phone notary to come to Shanti Bhuvan, Ghatkopar at the deceased's bungalow. Within half an hour he arrived. Ramanlal Sanghvi asked him to do the necessary stamping and signatures. Thereupon, Mr. Shah, Notary took out stamps from his port-folio and seal and applied the stamps and seals and his rubber-stamp. on all the papers. Thereupon almost all the procedure was over and tea was served. At about 3 O'clock all dispersed.*

*Witness Volunteers:* *The Notary had some register like book, he wrote something in the book and asked the deceased to sign. This was left to be stated above."*

Basis the above, he submitted that the contention that the thumb impression of the Deceased as affixed on the said Will was well and sufficiently explained and therefore could not in any manner be said to be a suspicious circumstance. He thus submitted that Issue Nos.1 and 2 must therefore necessarily be answered in

the affirmative since the Plaintiff has proved due execution and had also dispelled the so-called suspicious circumstances

12. Mr. Shah then submitted that Issue Nos.3<sup>5</sup> and 4<sup>6</sup> came to be framed in view of the common stand taken by Defendants in their respective caveats. He thus submitted that he would deal with Issue Nos 3 and 4 jointly. Mr. Shah then pointed out that the caveats filed by Defendant Nos. 1 and 2 stood discharged vide an order dated 1st July 2022, since both the said Defendants had passed away. He similarly pointed out that the caveat filed by Defendant No.3 was also dismissed vide Order dated 14th September 2006 on the ground that Defendant No. 3 did not have any caveatable interest. Mr. Shah then pointed out that Defendant Nos. 4 and 5 who were the only contesting Defendants had themselves not led any evidence in support of the stand taken in their respective Affidavits in Support of their Caveats nor had they appeared in the Suit after the cross examination of DW1 had concluded.

13. He then pointed out that even otherwise, these Issues would have to be answered in the negative, since none of the Defendants had submitted

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5(iii) *Whether the Caveators/Defendants prove that the Will dated 12th December 1996 propounded by the petitioners/plaintiffs is false or fabricated or not genuine Will of the deceased?*

6(iv) *Whether the Caveators/Defendants prove that the deceased had not put her thumb impression on the said Will dated 12th December 1996 voluntarily or that the same had not been executed on 12th December 1996 and was executed by the deceased after being influenced by the petitioner/plaintiff nos. 1 and 2 as alleged in paragraph 10 of the Affidavit-in-support of the Caveat filed by the Caveators/Defendants?*

themselves to cross examination. He submitted that Defendant No. 1 was alive while the cross examination of DW1 was over, yet he chose not to step into the box to prove the allegations made in the Affidavit in Support of Caveat. Mr. Shah submitted that considering the nature of the allegations made by the Defendants it was incumbent upon the Defendants to have submitted themselves to cross examination which they had failed to do.

14. Mr. Shah also pointed out that the only evidence led by the Defendants was of DW1, who he submitted was an interested witness and who had deposed under the influence of Defendant No.1. In support of his contention that DW1 was an interested witness, he pointed out that DW1 was presently occupying four rooms in said property wherein the Deceased used to reside. whereas under the said Will, the Deceased had made provision of an area of around 225 to 300 sq. ft. for DW1 which was far less than the area which DW1 was presently occupying. Mr. Shah then in support of his contention that DW1 had deposed under the influence of Defendant No.1 and also was an interested witness, invited my attention to the following answers given by DW1 in his cross examination :

*“Q 10. At the time when Deceased was alive, was she occupying all four rooms on the third floor?”*

*Ans. Yes.*

*Q 11. After her death, who is occupying the said four rooms?*

*Ans. At present, they are being occupied by me.*

*Q 12 Are you paying any rent and /or compensation for occupying the said four rooms?*

*Ans. No*

**Witness Volunteers:** *One of the rooms is closed.*

*Q 17. From where did you get the copy of this Will?*

*Ans. I photocopied the Will when it was made and I kept it with me. I read that same photocopy.*

*Q 18. Did the photocopy of the Will which according to you you read, contain signatures on it?*

*Ans. Yes. It contains signatures like the Will dated 12th December, 1996 shown to me.*

*Q 19. After reading the Will, what did you do with the copy of the Will?*

*Ans. I gave it to Mr. Jaisukhlal Bhuta.*

*(Attention of the witness drawn to Clause 9 of the Will.)*

*Q 22. Is it correct that you are aware that under Clause 9 of the Will, the Deceased had made provision for you of premises admeasuring 225 sq.ft. to 300 sq.ft.?*

*Ans. Yes*

*Q 23. Is it correct that you had agreed with the Deceased that on her death, you with your family would shift to premises No.12 behind Shanti Bhavan Bungalow and once permanent accommodation was provided to you and your*

*family, you would permanently shift to the said accommodation?*

*Ans. Yes*

*Q 24. Is it correct that during the life time of the Deceased, you were provided with a permanent accommodation at C/7/5 at Barve Nagar, Bhatwadi, Ghatkopar (West)?*

*Ans. Yes.*

*Q 25. Is it correct that the said Barve Nagar Premises are admeasuring approximately 300 to 325 sq.ft. carpet area?*

*Ans. Yes*

*Q 26. Is it correct that the said premises were acquired by Mr. Mahesh Shroff and Mr. Pravin Dalal sometime in the year 2000?*

*Ans. Yes, but I am not sure of the year.*

*Q 27. Is it correct that you have let out the said Barve Nagar premises to one Mr. Verma?*

*Ans. Yes.*

*Q 28. According to you, what is the rent / compensation being paid by Mr. Verma to you?*

*Ans. He is paying me Rs.8,000/- per month.*

*Q 30. Who has prepared this affidavit?*

*Ans. Defendants' lawyer has prepared this affidavit.*

*Q 31. Did you give instructions to Defendants' lawyers for preparing this affidavit?*

*Ans. Yes.*

*Q 32. How did you contact Defendants' lawyers?*

*Ans. I contacted the Defendants' lawyers through Mr. Jaisukhlal Bhuta.*

*Q 33. Did Mr. Jaisukhlal Bhuta approach you for filing this affidavit?*

*Ans. Yes.*

*Q 34. Did Defendants' lawyers show you the draft of this affidavit before engrossing the same?*

*Ans. Yes.*

*Q 35. Was the draft sent to you at your residence or you went to Defendants' lawyers' office?*

*Ans. I do not remember but I read the draft.*

*Q 36. Since the affidavit is in English, how did you read it?*

*Ans. The draft shown to me was in Gujarati and that is how I could read it.*

*Q 37. When you read the draft, was Jaisukhbhai Bhuta also there?*

*Ans. Yes.*

*Q 38. Do you still have the draft in Gujarati with you?*

*Ans. Yes*



*Q 39. Can you produce it?*

*Ans. Yes. I am producing a photo copy. I do not have the original.*

*Per Commissioner: Witness provides a photocopy of the draft in Gujarati.*

*Q 42. Have you been to the residence of Mr.Jaisukh Bhuta?*

*Ans. Yes.*

*Witness volunteers: There was some relation between Jaisukhbhai's sister and the Deceased. I am not sure of the relation but I used to visit his house very often with the Deceased.*

*Q 43. Even after the death of the Deceased, did you continue to visit Mr. Jaisukh Bhuta?*

*Ans. Yes*

*Q. 61 Is it correct that today as also on 7th February, 2018 you came to Court for giving evidence with Mr. Jaisukh Bhuta?*

*Ans. Yes.*

*Q. 62 Is it correct that even today before the evidence started, you had a detailed talk outside the Court Room with Mr.Jaisukh Bhuta?*

*Ans. Yes.*

*Q. 63:- Approximately in which year did you visit Bombay High Court for the first time?*

*Ans. This is the first time I have visited the Bombay High Court i.e. 7th February, 2018.*

*(Shown Para 6 of the Affidavit dated 2nd September, 2013 and more specifically sentence beginning with the words "I say that I have seen the original of the Will ..... in the captioned matter.").*

*Q. 64 I put it to you that in view of your answer to Q.63, your statement shown to you to the effect that you had seen the original of the Will dated 28th August, 2013 during the course of the search is incorrect.*

*Ans. I disagree."*

Basis the above answers Mr. Shah submitted that there could be no manner of doubt that DW1 was an interested witness who was acting at the behest of DW1. He further pointed out that the evidence of DW1 showed that he was given a residential premises by the Deceased during her lifetime as contemplated under the said Will and that DW1 was admittedly earning rental income from the said premises. He submitted that it was also admitted by DW1 that he was additionally in occupation of four rooms in said property after the demise of the Deceased. He thus submitted that DW1 being an interested witness in the present matter, his testimony cannot be relied upon. He also submitted that the issue raised regarding the thumb impression of the Deceased on said Will beside the signature, was explained by PW1 in his evidence which had remained intact. Hence, the evidence led by DW1 could in no manner assist the Defendants in proving Issue Nos. 3 and 4.

15. Mr. Shah then submitted that since the Defendants, had after alleging fabrication of the said Will, undue influence and coercion, failed to lead any evidence in support of these contentions as also failed to offer themselves to be cross examined, an adverse inference ought to be drawn against the Defendants. In support of this contention, that in the facts of the present case, a negative inference must necessarily be drawn against the Defendants, he placed reliance upon the judgment of the Hon'ble Supreme Court in ***Vidyadhar vs Manikrao & Anr***<sup>7</sup> from which he pointed out that the Hon'ble Supreme Court had held as follows:

*"17. Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbakhsh Singh v. Gurdial Singh and Anr. . This was followed by the Lahore High Court in Kirpa Singh v. Ajaipal Singh and Ors. AIR (1930) Lahore 1 and the Bombay High Court in Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh AIR (1931) Bombay 97. The Madhya Pradesh High Court in Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat also followed the Privy Council decision in Sardar Gurbakhsh Singh's case (supra). The Allahabad High Court in Arjun Singh v. Virender Nath and Anr. held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab & Haryana High Court in Bhagwan Dass v. Bhishan Chand and Ors. , drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box."*

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<sup>7</sup> AIR 1999 SC 1441

16. Mr. Shah reiterated that (i) the Plaintiffs had led the evidence of PW1 who was an attesting witness to the said Will to prove due execution of the said Will (ii) the Defendants had neither led any evidence of a handwriting expert to prove the allegation of forgery and/or the allegation of fabrication of the said Will (iii) the Defendants had led absolutely no evidence in support of the contention that the said Will had been executed by the Deceased under undue influence and/or coercion (iv) the Plaintiff had, through the evidence of PW1 dispelled the contention that there were any suspicious circumstances surrounding the execution of the said Will and (v) an adverse inference under Section 114(g) of the Indian Evidence Act was required to be drawn against Defendant Nos. 4 and 5. Basis this, he submitted that Issues No. 3 and 4 could only be answered in the negative and that Probate of the said Will must necessarily be granted to the Plaintiffs.

### **Reasons and Findings**

17. After having heard Mr. Shah at length and also having perused the record which is before me, I find that the Plaintiffs have successfully established that the said Will is the last will and testament of the Deceased and that the Plaintiffs are entitled to the grant of probate of the said Will. I say so for the following reasons :

A. *First*, the Plaintiffs have filed the Affidavits of both attesting witnesses.

However since one of the attesting witnesses, namely Mr. Ramanlal Sanghvi passed away, the Plaintiff has, proved due execution of the said Will through the evidence of the other attesting witness, namely Mr. Thakorbbhai Desai (PW1). The evidence of PW1 in my view clearly establishes that the Deceased had duly executed the said Will. None of the answers given in cross examination in any manner contradict what has been stated in the Affidavit of Evidence of PW1 nor do they in any manner shake the credibility of PW1. *Also*, given that Defendant Nos. 4 and 5 have chosen not to appear in the matter after the conclusion of the cross examination of DW1, nothing has been brought to my attention to show how the said Will was not executed in accordance with Section 63(c) of the Succession Act. Thus in my view, in this factual backdrop, the Plaintiffs have satisfactorily discharged the initial burden which is cast upon a propounder of a Will to prove due execution.

B. *Second*, as already noted above none of the Defendants have themselves led any evidence in support of the case pleaded in their respective Affidavits in Support of their caveats. Thus in my view the judgement of the Hon'ble Supreme Court in the case of ***Vidyadhar*** would squarely apply and an adverse inference under Section 114(g) of the Evidence Act would have to be drawn against the Defendants. This is further compounded by the willful failure of Defendant Nos. 4 and 5 to appear and contest the

matter after the cross examination of DW1 was completed, despite being granted time by this Court. Thus in my view, Issue Nos. 1 and 2 would have to be answered in the affirmative and are accordingly so answered.

C. *Third*, the only evidence led by the Defendants to support the contention of the existence of suspicious circumstances surrounding the said Will is the evidence Dinesh Rathod i.e. DW1. In my view the evidence of DW1 must be disregarded for two reasons, *first* that it is as plain as daylight that DW1 is an interested witness, since despite the fact that the Deceased had in the said Will bequeathed DW1 with premises admeasuring of 300 to 325 sq. ft., DW1 continues to be in occupation of four rooms in said property which are far in excess of what has been left under the said Will and which property DW1 has admitted, in his cross examination, is being rented out by him. *The second* is that even assuming DW1 was not an interested witness, I find the evidence of DW1 to be entirely lacking in credibility, since DW1 has in his Affidavit of Evidence *inter alia* deposed that he had seen the Original of said Will on 28th August 2013 during the course of a search conducted by the Advocates of Defendant Nos. 1 and 2 (which cannot be taken outside the Court premises unless an Order was obtained to that effect, which in the present case was not obtained) while, on the other hand, DW1 has in his cross examination admitted that he had visited this Court for the first time on the date on which the cross examination was conducted i.e 7th February, 2018. Therefore it was not

possible for the DW1 to have seen the original of the said Will unless he had visited the Court premises on the date of inspection of the documents. *Additionally*, the presence of DW1, who was not a party to the Suit, during the inspection of the document was explained neither by DW1 nor by any of the Defendants. It is thus that the evidence of DW1 to my mind cannot be relied upon as the same is plainly false and contradictory.

D. *Fourth*, since the burden to show the existence of suspicious circumstances was on the Defendants, it was incumbent upon the Defendants to have led evidence in support of the same. As already noted, the Defendants have not personally led any evidence but have solely relied upon the evidence of DW1, which I have already noted cannot be relied upon for the aforesaid reasons. *Additionally*, I find that the answers given by PW1 in the cross examination have sufficiently explained the reasons as to why the Deceased had also affixed her thumb impression on the said Will, thus dispelling any suspicion surrounding the same. Hence, I find that Issue Nos. 3 and 4 would have to be answered in the negative and are accordingly so answered.

E. *Fifth*, I must also note the conduct of the Defendants in contesting the present Suit is completely lacking in bonafides. As already noted above, none of the Defendants themselves have led any evidence in support of the case pleaded in their respective Affidavits in support of their caveats.

The caveats filed by Defendant Nos. 1 to 3 were also dismissed. Insofar as Defendant Nos. 4 and 5 are concerned, they did not even appear to contest the Suit after the cross examination of DW1 was completed. In this contest it is useful to note the Order dated 22th October 2024 which recorded thus :

*“ 1. Heard the learned Counsel for the Plaintiff.*

*2. None appears for the Caveators.*

*3. The fact that the Caveators have not been appearing in the matter and diligently contesting Suit, has been recorded in the orders dated 10th October 2022 and 14th February 2023.*

*4. The learned Counsel for the Plaintiff submits that pursuant to the aforesaid orders, the Caveators have been duly served and affidavit of service has been filed.*

*5. By an order dated 14th February 2023, the Suit was directed to be listed for final hearing.*

*6. None appeared for the Caveators.*

*7. In these circumstances, the Court is constrained to hear and finally decide the Suit as evidence has already been recorded.”*

Thus, given the above I find that Defendant Nos. 4 and 5 have filed their respective caveats solely to block the issuance of probate in favour of the



Plaintiffs without having even the slightest semblance of a case on merit to oppose the grant of probate in favour of the Plaintiffs. It is for this reasons, I find that an order of costs under Section 35 of the Code of Civil Procedure, 1908 must follow, since the conduct of Defendant Nos. 4 and 5 clearly in my view amounts to an abuse of the process of law as held by the Hon'ble Supreme Court in the case of *Charu Kishore Mehta vs. Prakash Patel*<sup>8</sup>.

18. Hence, I pass the following Order:-

- i. Probate of the last Will and Testament dated 12th December 1996 of the Deceased, Yashwantilika Narottamdas Dalal, be issued to the Plaintiffs as per due process subject to compliance of all office objections and requisitions.
- ii. Considering the fact that Plaintiff No.1 is almost 88 years of age, the issuance of the Probate is expedited.
- iii. The Prothonotary and Senior Master is directed to withdraw the amount/s deposited with The Kapol Co-operative Bank Ltd. pursuant to the Order dated 5th May 2006 passed in Notice of Motion No. 46 of 2006 and the amounts invested in Fixed Deposit/s

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<sup>8</sup> 2022 SCC Online 1962

pursuant to Order dated 7th September 2006 and pay/handover the entire proceeds to the Plaintiffs within eight weeks from the date that a copy of this order is uploaded.

- iv. The Court Receiver, High Court, Bombay is directed to pay/handover the sale proceeds of silver utensils invested in Fixed Deposit/s lying to the credit of the present Testamentary Suit No. 20 of 2004 to the Plaintiffs after deducting his costs, charges and expenses within a period of six weeks from the date that a copy of this order is uploaded after which Court Receiver shall stand discharged without taking accounts.
- v. The Prothonotary and Senior Master is directed to comply with prayer clause (e) of Notice of Motion No. 46 of 2006 in the above Suit in terms of the Order dated 7th September 2006 and appoint an Officer of this Court to open (and if necessary break open) the Safe Deposit Locker No.L/1211 standing in the name of the Deceased with Vora Safe Deposit Vaults Pvt. Ltd., Bajaj Road, Opposite, Amrut Baug, Vile Parle (West), Mumbai 400 056 and take an inventory of the contents thereof and in the presence of the valuer and the Plaintiff Nos.2 and/or 3 and thereafter, to handover the contents of the locker to the Plaintiff No.2 and/or 3 on behalf of

the Plaintiffs in their capacity as executors of the said Will of the Deceased and once the locker is empty, to surrender the locker to the Vora Safe Deposit Vaults Pvt. Ltd.

- vi. Defendant Nos. 4 and 5 each shall pay a cost of Rs.5,00,000 (Rupees Five Lakhs Only) to the Plaintiffs within a period of eight weeks from the date that a copy of this order is uploaded.
- vii. In the event cost is not paid within the aforesaid time, then the Plaintiff shall be at liberty to (a) recover the same by executing this order as per the provisions available in law as also (b) by seeking to recover the said costs as arrears of land revenue.
- viii. The Captioned Testamentary Suit is accordingly disposed of, in view thereof pending Interim Application and/or Notice of Motion if any shall stand disposed of.

**(ARIF S. DOCTOR, J.)**