Bombay High Court
Ganpatrao Khandero Vijaykar vs Vasantrao Ganpatrao Vijaykar on 29 June, 1931
Equivalent citations: (1932) 34 BOMLR 1371
Author: Wadia
Bench: Wadia
JUDGMENT Wadia, J.

1. This is a petition for probate of the last will and testament of Sonabai, wife of Rao Saheb Ganpatrao Khanderao Vijayakar, who is the first petitioner. She died at Bombay on November 28, 1930, and her will is dated July 18, 1930. The 2nd petitioner is the son-in-law of the deceased and the first petitioner, being the husband of their predeceased daughter Sundrabai. The petitioners are the executors of the will. Sundrabai died in 1925 leaving a son Vasudeo, who is still a minor. The caveator, Vasantrao, is the only son of the deceased and the first petitioner. In the affidavit in support of his caveat he alleges that the will propounded by the petitioners is not the will of his deceased mother, that the signature on the will is not her signature and that she never understood nor approved of its contents, as she was demented and of a weak and inert mind since April 1928 down to the date of her death, He further alleges that the will was executed under the undue influence of the petitioners or either of them.

2. The will is in the Marathi language except for the attesting clause which is in English. It has been attested by Shapurji Edalji Bamji and Moreehwar Vinayak Pradhan, two advocates of this Court. According to the evidence led on behalf of the petitioners, the first petitioner and his deceased wife were at Lonavla in or about June 1930, and the 1st petitioner was at the time operated upon in the Lonavla hospital in his right hand. At that time the deceased conceived the idea of making her will, and accordingly she wrote out in her own hand certain heads of instructions for the preparation of her will. Thereafter she asked her husband the 1st petitioner after he had recovered to make a fair copy of the same as she herself wrote in a bad hand, but her husband said that he would do so on their return to Bombay. I may here mention that the 1st petitioner stated at first in his evidence that his wife actually made a draft in her own hand, and that on returning to Bombay he copied it out word for word ; but subsequently he said that his first statement was a mistake, and that what he did in Bombay was to make out a draft will according to the heads of instructions written out by his wife in Lonavla by following the same as closely as possible. He submitted the fair draft of the will to one Narayan Jayakar, a managing clerk in the office of Messrs. Little & Co., solicitors, and he said that Mr. Jayakar made one or two verbal alterations in the draft, The will was thereupon engrossed by the 1st petitioner for execution. At the same time he wrote out his own will, and he gave both wills to his deceased wife for safe custody. Thereafter lie and his wife went by previous appointment to the office of Mr. Bamji in the afternoon on July 18,1930, for execution of both the wills, Sonabai produced her own will from the fold of her "sari". Mr. Bamji found that there was no attestation clause at the end, and he accordingly dictated one in English to the 2nd petitioner. The deceased then signed the will as Sonabai Ganpatrao, and it was duly attested by Mr. Bamji and Mr. Pradhan. The will was not read out to her in Mr. Bamji's office, nor was she asked whether she had read it. It is, however, not usual to read out the contents of a will before attesting witnesses. Moreover, it is written in the Marathi language, and it is clear from the evidence that the deceased could read and write well in Marathi, and there is no reason to believe that the will was not read by her at some time

before it was brought to Mr. Bamji's office for execution. The will is written out on one side of several foolscap papers. Each paper is initialled in the left corner at the end by the two attesting witnesses, and the blank spaces at the back have been crossed out and intialled by the attesting witnesses, The date on the will in Marathi was filled in by the 1st petitioner in Mr. Bamji's office at the time. There is also an endorsement at the foot of the will which has been signed by the 1st petitioner and attested by the same witnesses, Immediately after the execution of the will, the let petitioner's will was atso executed in Mr. Bamji's office and attested by the same witnesses, There is a similar indorsement at the foot of the will which is signed by the deceased Sonabai, and her signature has also been attested. All this happened about 3 p. m. in the afternoon on July 28, 1930, in Mr. Bamji's office, and he has made an entry in respect of the attestation in his diary.

3. As I have said before, the will has been challenged by the caveator. He alleges that the will is not that of the deceased nor does it bear her signature, that since April 1928, she was not of the sound disposing mind necessary for the validity of the will, and that she had not sufficient capacity to deal with or appreciate the dispositions of her property by her will. Counsel for the caveator in his argument cited several cases, English and Indian, regarding the execution and proof of wills in cases where the will is challenged, but the important principles are now well settled and may be thus summarised :-

(1) Generally speaking, the law presumes sanity, and where the will is not challenged, it is enough for the purpose of establishing the will that it was duly executed by the testator, that he was not a minor, and was otherwise capable of making a will under the law by which he was governed.

(2) If the testator's sanity is disputed, the burden of proof lies upon the person propounding the will to prove affirmatively that the testator was of sound mind at the date of its execution, and that he knew, understood and approved of its contents (see Balkrishna v. Gopikabai (1905) 7 Bom. L.R. 175).

(3) If the insanity of the testator before the date of the will is once established, the burden of proof lies on the person propounding the will to show that it was made after the testator's recovery or during a lucid interval. If, however, it is not established, or habitual insanity does not exist, the burden of proving actual insanity at the date of the execution of the will shifts to the person impeaching the will (See Halsbury, Vol. XXVIII, p. 533), (4) If the person propounding the will takes an appreciable benefit under it, that is an element of suspicion, of more or less weight according to the facts of each case, and the burden lies upon him to show that it is the will of the testator, and no probate can issue unless the Court is satisfied that the person propounding the will has led sufficient evidence which on a close and careful examination removes that suspicion, The same rule also applies to other circumstances which create suspicion in the mind of the Court (see Barry v. Butlin (1838) 2 M.P.C. 480, Vellasawmy Servai v. Sivaraman Servai (1929) 32 Bom. L.R. 611, P.C., and Mallappa v. Tipava .

(5) If there is sufficient evidence to displace the suspicion, and the will has been made and is apparently in proper form, and the evidence of the attesting witnesses is trustworthy, it does not lie in the mouth of any party to say that the testator ought not to have made such a will, and to attempt

to re-create another for him. (See Suna Ana Arunachellam v. Ramaswami Chetty (1916) 18 Bom. L.R. 408, p. c.), (6) In order that a will may be found good it is not necessary that the testator should have been in perfect state of health and that his mind should have been so clear as to enable him to give complicated instructions for his will. It is sufficient if, when the will was read out to him and explained to him, or also as I take it, when he reads it himself, he was capable of understanding that his instructions in the main had been carried out (see Gordhari das v. Bai Suraj (1921) 33 Bom. L.R. 1068).

4. It is the caveator's contention that the will propounded by the petitioners is not his mother's will and that it does not bear her signature. I will deal with the question of the signature first. The will has been attested by two advocates of this Court who have given evidence and sworn that they both saw the testatrix sign the will in their presence, They are both reliable and independent witnesses, and I am not prepared to accept the suggestion that they have perjured themselves, I accept their evidence, and the fact that one of them shares his chambers with the 2nd petitioner and the other belongs to the same community as the testatrix does not in the least detract from its value. Counsel for the caveator suggested that the handwriting of the signature is not that of the testatrix. According to the Indian Evidence Act the ordinary methods of proving a disputed handwriting are :- (a) under Section 47 by calling a person or persons acquainted with the handwriting of the person by whom the disputed document is alleged to have been written or signed, (b) under Section 45 by calling an expert qualified to express an opinion on the disputed handwriting, or (c) by a comparison of some or more of the admitted or proved specimens of handwriting or signature of the person with the handwriting on or signature of the disputed document alleged to have been written or signed by him. Such comparison must be made in accordance with the terms of Section 73 of the Act. Counsel for the caveator said that there was a marked difference between the signature on the will and some of the admitted signatures on documents which have been exhibited, and he wanted to call an expert in handwriting in support of his contention, I have myself carefully examined the signature on the will as well as on the other documents, and I find no appreciable difference between them. I say " appreciable ", because it is a matter of common knowledge that no two signatures of one and same person are exactly alike. I did not, therefore, think it necessary that the Court's time should be further taken up by calling expert evidence. It was also pointed out to me that the signature on the will is not the full signature of the deceased, her full signature being Sonabai Ganpatrao Vijayakar. The will, however, begins by giving the name of the testatrix as Sonabai Ganpatrao, and the will is signed accordingly. It was also suggested that the will was subsequently got up. This is a suggestion which like many others made by the caveator rests merely in allegation and has not been proved, I hold that the signature on the will is genuine.

5. [After discussing the evidence as to the alleged insanity of the testatrix the judgment proceeds as follows :-] I have already expressed my opinion before that on the evidence led before me I am satisfied that the will propounded by the petitioners is the last will and testament of the deceased. A reference was made to the decision of the Appeal Court in Mallappa v. Tipava , but in that case there were many elements which created suspicion, one of which was that the will itself contained a false statement which the testater could not have made.

6. The will is also challenged by the caveator on the ground that the petitioners or either of them exercised undue influence on the deceased. In order to prove this allegation it is necessary for the caveator to prove that the petitioners were in a position to dominate her mind. The only allegation made in evidence was that the 1st petitioner could get her to do as he liked by threatening her with another branding. Such an allegation was never even put to the 1st petitioner, There is no evidence before me that the deceased was acting under compulsion, and she did not appear to the attesting witnesses to be acting in that manner. As was observed in by Sir Gorell Barnes in Spiers v. English [1907] P. 122, 124 the plea of undue influence ought never to be put forward unless the party who pleads it has reasonable grounds upon which to support it. No grounds have really been made out by the caveator. It was pointed out by their Lordships of the Privy Council in Bur Singh v. Uttam Singh (1910) L.R. 38 I.A. 13, 22 : s.c. 13 Bom. L.R. 59 that it is necessary not merely to show that the person propounding the will had the opportunity to exercise undue influence, but clear evidence must be led to prove that such influence was exercised. The undue influence in the case before me is only an insinuation on the part of the caveator and has not been proved. Taking all the evidence, documentary and oral, into consideration, there is sufficient evidence for the Court to come to the conclusion that the testatrix knew what she was doing and was capable of making a will and understanding the dispositions of her property which she made thereunder. The will, therefore, in my opinion, is established, and ought to be admitted to probate.