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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION**

TESTAMENTARY SUIT NO. 12 OF 2006

IN

TESTAMENTARY PETITION NO. 623 OF 2005

CLEMENT SOARES,
of Mumbai Indian Christian Inhabitant, the
sole Executor of the Will of the deceased
above named residing at Aldona House, Flat
No. 3, 74, Rebello Road, St. Sebastian Colony,
Bandra (West), Mumbai 400 050

... PLAINTIFF

~ VERSUS ~

1. **JULIANA FARIAS,**
2. **FR LEOPOLD SOARES,**
(Through his C.A. Mrs. Juliana Farias),

Indian Christians, residing at

- 1) St. Xaviers High School, Post
Box No. 21, Nehru Nagar, Nashik
Road 422 101, Maharashtra

and

- 2) 5, Sadashiv Smruti, 4th Road,
TPS-III, Santacruz (East),
Mumbai 400 055

...DEFENDANTS



WITH
TESTAMENTARY SUIT NO. 19 OF 2008
IN
TESTAMENTARY PETITION NO. 217 OF 2007

CLEMENT SOARES,
of Mumbai Indian Christian Inhabitant, the
sole Executor of the Will of the deceased
above named residing at Aldona House, Flat
No. 3, 74, Rebello Road, St. Sebastian Colony,
Bandra (West), Mumbai 400 050

... PLAINTIFF

~ versus ~

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TPS-III, Santacruz (East),
Mumbai 400 055

...DEFENDANTS

APPEARANCES

FOR THE PLAINTIFF **Mr. Shailesh Shah, Senior Advocate, i/b**
M/s. S.K. Srivastav & Co.

FOR THE DEFENDANT **Mr. Raphael D'Souza.**



CORAM: G.S. PATEL, J

DATED: 23rd November 2016

ORAL JUDGEMENT:

JUDGEMENT STRUCTURE

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A. INTRODUCTION

1. This judgement disposes of both Testamentary Suits. They were heard together. Although Affidavits in lieu of Examination-in-Chief were filed separately in each, and the two cases deal with separate Wills, the cross-examination was taken together, and the witnesses were common to both. Testamentary Suit No. 12 of 2006 seeks probate to the last Will and Testament dated 22nd January 1999 of one Eliza Anthony Soares (“**Eliza**”). Testamentary Suit No. 19 of 2008 seeks probate to the last Will and Testament also dated 22nd January 1999 of Eliza’s husband, Anthony Xavier Soares (“**Anthony**”). Both Wills are registered. The only ground of opposition to both Wills is that the Plaintiff, one of the children of Eliza and Anthony, and also the sole Executor (and the largest beneficiary) in each Will, procured the Wills by exercising undue influence on his parents. I heard Mr. Shah for the Plaintiff and Mr. D’Souza for the Defendants at some length. After considering the evidence and the material on record, I have decreed both suits. My reasons follow.

B. FACTUAL BACKGROUND

2. Anthony and Eliza Soares had four children, three sons and a daughter. The daughter, Juliana, was the third child. The two elder sons were Patrick and Leopold (the 1st Defendant). The youngest child was their son Clement, the Plaintiff and the sole Executor of both Wills.



3. Anthony and Eliza Soares made their home in what was then the quiet and leafy suburb of Bandra. They owned a plot at 74, Rebello Road, St. Sebastian Colony in Bandra, and on this stood a structure called Aldona House. This appears to have had more than one floor, and separate apartments on each. At least one of these was tenanted. Patrick lived alone in one apartment; he was unmarried. Clement and his wife lived with Anthony and Eliza in their apartment. Juliana moved out of Aldona House after her marriage. Leopold took holy vows in 1967, becoming a Jesuit, and the conditions of his order required him to move out of Aldona House to quarters provided by the Society of Jesus. Anthony and Eliza also owned property in Aldona, Bardez, Goa.

4. By all accounts, the family was reasonably well off. Anthony had carefully husbanded his resources and assets. Eliza was previously a teacher. By 1999, Anthony led a life of retirement. Eliza continued to work, giving private tuitions in mathematics and science to 10th standard students, something she continued doing for the next several years till 2003.

5. On 22nd January 1999, both Anthony and Eliza made their Wills. Both Wills were registered later that very day. At that time, Eliza was about 76 years old, but seems to have been in good health. There is no evidence of the kind of debilitating physical or mental impairment the Defendants claim. Anthony was 85 years old then, and he, too, seems to have been active and alert. Both Anthony and Eliza lived for several years after they made their Wills: Eliza died on 11th March 2005 and Anthony died on 1st December 2006.



6. On 6th August 2005, Clement filed Testamentary Petition No. 623 of 2005 for probate to Eliza's Will. Leopold and Juliana opposed, entering a joint caveat and Affidavit in Support dated 3rd February 2006.¹ The suit was renumbered as Testamentary Suit No. 12 of 2006. After Anthony died, Clement filed for probate to Anthony's Will on 17th February 2007. Again, Leopold and Juliana opposed by filing a common caveat and Affidavit in Support dated 21st January 2008,² and this Petition was renumbered as Testamentary Suit No. 19 of 2008.

C. THE TWO WILLS IN QUESTION

7. I will turn first to the dispositions in Eliza's Will.³ This is a typewritten Will. Eliza appointed Clement as the sole Executor of the Will. She said that she had a 50% share in Plot No. 74 and in Aldona House. The remaining 50% belonged to Anthony. She also said she held an interest in House No. 189 at Aldona, Bardez, Goa including a land and cottage and, in addition, had savings bank accounts, fixed deposits and other investments and some jewellery. She bequeathed her interest in Aldona House to Clement. She noted that Patrick, her eldest son, lived in a portion of this property. The bequest to Clement was subject to Patrick's right of residence, a life interest. The Goa property was left to Patrick and Clement in equal shares. As regards the movables, they were bequeathed to Anthony, and, failing him, were to be divided between her children such that

1 Vol. A, *p.* 38.

2 Vol. A, *p.* 83.

3 Vol. A, *pp.* 11-14.



Patrick and Clement would each take 30% and Leopold and Juliana 20% each. Eliza left all her jewellery to Juliana. The Will was witnessed by one Dr. Mark D'Souza, a physician and a relative of the family, and by one Mr. Hermiterio Xavier Mathias Fernandes.

8. Anthony's Will, made on the same date,⁴ contained substantially the same provisions. He too appointed Clement as his sole Executor. He also bequeaths his share in the Aldona House to Clement subject to Patrick's life interest of residence in a portion of that house. Anthony left his share in the Goa property to Patrick and Clement in equal shares. Anthony had no jewellery, but did have investments in bank deposits and these were divided between his four children in the same proportions, with Patrick and Clement each taking 30% and the remaining 40% being divided equally between Leopold and Juliana.

D. THE CAVEATS

9. The Caveats in both matters are also largely common. In opposing the grant of probate to Eliza's Will, Juliana and Leopold say that Clement and his wife obtained Eliza's Will by undue influence, misrepresentation and coercion. They also contend that that Eliza asked Leopold to prepare another Will but that this was never executed. In opposition to Anthony's Will, Leopold and Juliana take very nearly the same objections.

4 Vol. A, pp. 55-58.



10. There are, however, certain statements in both Caveats to which I must make specific reference. The allegation in paragraph 3 of the Affidavit in Support of the Caveat in the Petition for probate to Eliza's Will says that it was Eliza's desire that all four children should have equal shares in the family house. The Defendants say that Clement had lost heavily during the Harshad Mehta scam and used his father's savings to pay off his debts; that Eliza was ill and was treated for multiple sicknesses such as diabetes, high blood pressure, heart ailments and cerebral stroke, and was treated frequently at both Nanavati Hospital and Lilavati Hospital. It is in this background it is said in paragraph 5 that Clement took undue advantage of Eliza's illness and got her to execute the Will.⁵ According to Juliana, she was told by Leopold that Eliza told him (Leopold) that she (Eliza) wanted to make another Will and that she had signed the present one under coercion from Clement. Eliza alleges that Leopold then got a Will prepared and gave it to Clement for execution. This, too, Juliana knows only from Leopold. This is of some consequence because in her Evidence Affidavit Juliana later says that Leopold told her this fresh Will was given not to Clement but to Eliza herself. There is, however, a curious statement made in paragraph 5 of this Caveat:

"5. I say that as to her jewellery, I being the only daughter she had bequeathed the same to me."

I will consider the effect of this statement and whether or not it constitutes an admission when I turn to an analysis of the matter.

5 Vol. A, p. 40.



11. In the Caveat opposing the grant of probate to Anthony's Will, there is again a repetition of the same allegations. Here it is said that Anthony was seriously ill having been treated for diabetes, high blood pressure and chest problems at Raheja Hospital and Lilavati Hospital. He was seriously ill and immobile to a great extent. It is not said clearly as to for what period of time he was in this condition, even if this is true. Paragraph 6 of this Caveat contains more or less the same allegations as paragraph 5 of the allegations made in the previous Affidavit. Throughout it is alleged that the father being old and infirm was not in a position to understand what he was doing.

E. ISSUES

12. On 17th October 2008, issues were settled in both matters.⁶ The two sets of issues that were settled on 17th October 2008 and my findings are listed below against each.

I. ISSUES IN TESTAMENTARY SUIT NO. 12 OF 2006

| Sr. No. | Issue | Findings |
|----------------|--|-----------------|
| 1. | Whether the Plaintiff proves that the Will dated 22nd January 1999 annexed to the Petition is executed by the deceased Eliza Soares? | Yes |

⁶ Vol. A, *p.* 44 for the issues in Testamentary Suit No. 12 of 2006 and *p.* 89 for the issues in Testamentary Suit No. 19 of 2008.



| Sr. No. | Issue | Findings |
|---------|---|--------------|
| 2. | Whether the Defendants prove that both the father and mother of the Plaintiff and Defendants were under the influence, control and management of the Plaintiff and his wife as alleged in paragraph 4 of the Affidavit in Support of the Caveat? | No |
| 3. | Whether the Defendants prove that the Plaintiff by misrepresentation, coercion or undue influence got the Will/Testament executed by the deceased and got it registered as alleged in paragraph 5 of the Affidavit in Support of the Caveat? | No |
| 4. | Whether the Defendants prove that the deceased has instructed the Defendant No. 1 to prepare another Will and the same was given by the 1st Defendant to the Plaintiff to get it executed and registered as alleged in paragraph 5 of the Affidavit in Support of the Caveat? | No |
| 5. | Whether the Defendants prove that the deceased had bequeathed her estate to her husband first and then to her four children in equal shares as alleged in paragraph 6 of the Affidavit in Support of the Caveat? | No |
| 6. | What orders? | Suit decreed |



II. ISSUES IN TESTAMENTARY SUIT NO. 19 OF 2008

| Sr. No. | Issues | Findings |
|---------|---|----------|
| 1. | Whether the Plaintiff proves that the Will dated 22nd January 1999 annexed to the Petition is executed by the deceased Anthony Xavier Soares? | Yes |
| 2. | Whether the Defendants prove that both the father and mother of the Plaintiff and Defendants were under the influence, control and management of the Plaintiff and his wife as alleged in paragraph 4 of the Affidavit in Support of the Caveat? | No |
| 3. | Whether the Defendants prove that the Plaintiff by misrepresentation, coercion or undue influence got the Will/Testament executed by the deceased and got it registered as alleged in paragraph 5 of the Affidavit in Support of the Caveat? | No |
| 4. | Whether the Defendants prove that the deceased has instructed the Defendant No. 1 to prepare another Will and the same was given by the 1st Defendant to the Plaintiff to get it executed and registered as alleged in paragraph 6 of the Affidavit in Support of the Caveat? | No |
| 5. | Whether the Defendants prove that the deceased had a desire to bequeath his estate equally to all his 4 children as | No |



| Sr. No. | Issues | Findings |
|---------|---|--------------|
| | alleged in paragraph 8 of the Affidavit in Support of the Caveat? | |
| 6. | What orders? | Suit Decreed |

F. ORAL AND DOCUMENTARY EVIDENCE

13. The Plaintiff led the evidence of both attesting witnesses and then a senior priest or functionary from the Society of Jesus. There is an order of 12th December 2008 that gave the Plaintiffs the liberty to lead evidence in rebuttal and this is how the evidence of Fr Vernon D’Cunha of the Society of Jesus was led as PW3. The Plaintiff himself did not give evidence.

14. The Defendants led the evidence of Juliana who was cross-examined. Leopold began giving evidence but then did not present himself for completed cross-examination. I will consider the effect of this as well.

15. The documents in question are not many. In fact the principal document is the record of certain proceedings in the Court of Small Causes against a third party, one of the tenants or occupants of Aldona House.

16. In both cases, the burden of proving issue No. 1 is on the Plaintiff while the burden of proving other issues is on the Defendant. I will, therefore, discuss the first issue in both cases



together, *i.e.*, Whether the Plaintiff proves the due execution of the two Wills?

G. RE: ISSUE NO. 1

17. PW1 was the first attesting witness, Mr. Hermitero Fernandes.⁷ He was about 78 years old at the time when he filed his Evidence Affidavits dated 12th June 2008. He deposed that he knew Eliza and Anthony, and that on 22nd January 1999 at about 9.00 a.m., he was present along with the other attesting witness, Dr. Mark D'Souza, at Aldona House, Flat No. 1. At that time, PW1 says he saw both deceased sign their Wills and inscribe their signatures at the foot of each of the pages of the Will. The deceased also put the date just above the signature. Thereafter, PW1 and the second attesting witness signed the Will as witnesses. He then deposes that in the afternoon of that very day, 22nd January 1999, the Will was registered at the Office of the Sub Registrar of Assurances, Andheri, Mumbai Suburban at the Bandra Office. At that time, both the deceased Testator and the Testatrix and both witnesses were present before the Sub Registrar.

18. PW1 was cross-examined partly in Court. I find from the cross-examination, which, as I have noted is common to both cases, that an attempt was made to suggest that there was only one document that was signed.⁸ This is no part of the case pleaded in the

7 Examination-in-chief, Vol. B, *pp.* 100–102 and 104–106.

8 Vol. B, *p.* 116.

Caveat. This attempt did not succeed because the witness clearly said that both Wills were signed on that date.⁹ At this stage, I must refer to a suggestion put to PW1 regarding the persons present at the time of execution of the two Wills.

“Q. Is it correct that on 22nd January 1999 at 9.00 a.m., you along with Eliza and Dr. Marks were the only persons who were present?

Ans. Anthony was also present.

Q. Can you tell how long it took for completion of the work of execution of the Will?

Ans. I cannot remember.”

The suggestion clearly, therefore, is that the Plaintiff was not present at the time of the execution of the Wills. Apart from the fact that this has a material bearing on the case of undue influence and about that case not being proved, this suggestion does not in any way damage the Plaintiff’s case about the due execution of the Will.

19. What is important however is the manner in which the question is put. The witness was not asked who was present, or to name those present. A specific case was put to him asking him to confirm that the Plaintiff *was* in fact present at that time. The framing and phrasing of the question clearly suggest, therefore, that the Defendants *knew for a fact* that the Plaintiff was present at that

9 Vol. B, p. 117.

time. When a question is put like this, the party cross-examining then takes on himself or herself the burden of proving the correctness of the suggestion. There is an increasing tendency to place questions like this — “I put it to you ... ” or “is it not correct ...” — without heed to the consequences. This is an error, and there is no legal basis for the supposition that these ‘suggestions’ are innocuous or their consequences irrelevant. When a party ‘puts’ a positive case to a witness, makes a positive suggestion or asks if a particular thing is not correct, then the party cross-examining takes on himself or herself the onus of proving the correctness of the suggestion. If the witness agrees, the cross-examiner need do nothing further. But if the witness refutes the suggestion, then the cross-examiner must prove the correctness of it; and his failure to do so is again not without consequence.

20. Consider for a moment the foregoing question, which I will reproduce again on its own:

Q. Is it correct that on 22nd January 1999 at 9.00 a.m., you along with Eliza and Dr. Marks were the only persons who were present?

The suggestion is that the Defendants *know* and are in a position to prove that Eliza, Fernandes and Dr. Marks were the only ones present at 9:00 am, and that Anthony was not present; *i.e.*, that Anthony was elsewhere. The Defendants do nothing further in this regard, and therefore the conclusion against the Defendants are inescapable: either that they kept back evidence specially within



their knowledge, or that the suggestion is false. This would not have been the consequence had the question been differently phrased:

Q. On 22nd January 1999 at 9.00 a.m., were you along with Eliza and Dr. Marks the only persons who were present?

Here, the cross-examiner and the Defendants would have taken no onus on themselves. The question is merely a query to the witness, who might say yes or might say no. There would have been no impact on the Defendant's had the question been placed in this fashion. The result is that the Defendants are, at the very least, unable to prove their assertion that Anthony was not present at 9:00 am on 22nd January 1999; the evidence from the Plaintiffs is not just unshaken; it is reaffirmed.

21. A further question was then put to PW1 to the effect that it was the Plaintiff, Clement, who took Fernandes, Eliza and Anthony to the sub-Registrar's Office. Though PW1 answered in the negative,¹⁰ this question is directly contrary to the previous suggestion of Anthony's absence, and the discrepancy is never explained. Again, this question suffers from the same vice: it suggests that the Defendants are in a position to establish and prove Clement's presence at the sub-Registrar's office. No attempt is made in that direction. Fernandes then added that he did not recollect the name of the person who took himself, Eliza and Anthony to the Registrar's Office and whether PW2, Dr Mark D'Souza, accompanied them. He, however, denied the suggestion

10 Vol. B, p. 121.



that PW2 was not present at the time when execution of the Wills was admitted. This is a third instance of the same form of unsubstantiated and unproved suggestion being put to the witness. Fernandes added that the sub-Registrar read the Wills to Anthony and Eliza.¹¹

22. I turn now to the evidence of PW2, Dr. Mark D'Souza, a practising physician.¹² His examination-in-chief is broadly consistent with that of PW1. It is the cross-examination, however, that is of interest.¹³ In this cross-examination, Dr. Mark D'Souza deposes that he has an independent practice and is attached to two Hospitals, the Holy Spirit Hospital, Andheri and the Holy Family Hospital at Bandra. He also says that Eliza was his father's sister, his maternal aunt, and that he lived close by, no more than three or four kms. from the Soares's residence.¹⁴ He then says that Eliza visited his clinic and personally asked him to come to her house on 22nd January 1999 to witness the execution of her Will.¹⁵ As to her state of health, he specifically deposes that Eliza was able at that time to walk about three kms. to visit him at his residence.¹⁶ He goes on to say that at that time she was still very much active and gave tuitions to 10th standard students, while Anthony, though older, was quite assertive even at that age. The cross-examination is brief and nothing further is elicited in it by the Defendants.

11 Vol. B, *p.* 121.

12 Vol. B, *pp.* 136-138 and 140-142.

13 Vol. B, *pp.* 144-149.

14 Vol. B, *p.* 145.

15 Vol. B, *p.* 146.

16 Vol. B, *pp.* 147-148.



23. Then there is the question of the Defendants' evidence, but this does not touch upon the due execution of the Will although attempts are made to suggest that both the Testator and Testatrix lacked the necessary testamentary capacity. The evidence of Leopold Soares is that Eliza was seriously ill and was treated for multiple sicknesses such as diabetes, high blood pressure, heart ailments and was medically treated both at private nursing homes and at Nanavati Hospital and Lilavati Hospital since 1984. He says that Anthony was old and immobile to a great extent since 1996 and was incapable of conducting himself of his own free will. This is of course followed by an allegation of undue influence, but I will turn to that presently. As to the actual physical and mental state, there is no direct evidence in the examination-in-chief. The evidence of PW2 is too much the same effect.¹⁷ However, in her examination-in-chief, PW2 Juliana makes a set of very peculiar statements. The first of these is to be found in paragraph 15 of her examination-in-chief.¹⁸

"15. I say that my father and mother were financially self sufficient throughout their lives with income including that from rents from three flats, pensions, interest from bank investments, savings and private tuitions my mother gave to school children. The papers and documents including their Income Tax Returns, and Bank Records which are in possession of Mr. Clement Soares, the Plaintiff/Petitioner herein and can be produced when required with the directions of this Hon'ble Court."

17 Vol. B, *pp.* 170-174.

18 Vol. B, *p.* 173.



(Emphasis added)

24. This itself is evidence of mental capacity. If there was any doubt about this, it is put to rest by the contents of paragraph 19 of that examination-in-chief.¹⁹

“19. I say that it is pertinent to note that in each of the respective Wills of my mother and father, identical statements of joint equal ownership of the property at Goa have been made. I further say, that at the purported time the said Wills were signed, i.e., 22 January 1999, the said Goa property was in possession of a third party and a twenty year old litigation for possession in the Goa Court, was in progress. **My father and mother, being of sound mind, when they allegedly made their respective Wills, were definitely aware of the fact that the Goa property was owned exclusively by my father.** Therefore, I say that the false statement in my parent’s Wills that she owned 50% of the Goa property was at the sold instance of the Plaintiff/Petitioner, who in the grip of full confidence of the success of his coercive activity got careless.”

(Emphasis added)

25. This is the clearest possible admission of soundness of mind and testamentary capacity of both Eliza and Anthony. It is hardly possible to suggest that the two deceased were of sound mind in

19 Vol. B, pp. 173-174.



respect of the disposition of the Goa property but were of unsound mind for the rest. Indeed, the statement, never explained in paragraph 19 is that they were both of sound mind when they allegedly made their respective Wills.²⁰

26. In view of this state of the evidence, it will have to be held that issue No. 1 in both cases is to be answered in the affirmative. The due execution of the two Wills is thus proved.

H. RE: REMAINING ISSUES

27. The remaining issues can all be dealt with together. They cover undue influence, misrepresentation, coercion, whether there was a second Will prepared, and whether Eliza and Anthony desired to bequeath their estate equally to all four children. The burden of proving all these issues was always on the Defendants. That burden has not, as we shall see, been discharged. I will note here that there is some degree of overlap between the previous issues and this bunch because of the way Mr. Raphael D'Souza has placed his case, particularly his submission that the undue influence alleged is tied to the Defendants' case that Eliza and Anthony suffered from such ailments as left them incapable of dispositive understanding.

28. To appreciate the evidence, some dates are material. These are undisputed. In 1967, Leopold, DW1, took holy orders or vows

20 *Bharat Singh & Anr v Bhagirathi*, AIR 1966 SC 405; *Ramji Dayawala & Sons v Invest Import*, (1981) 1 SCC 80.



and left the family home. He went to reside in quarters allotted to him by the Society of Jesus. In 1980, DW2, Juliana married and left the house. In February 1999, Clement and his wife left Mumbai and went to Muscat. Patrick stayed on at Aldona House in Mumbai. Patrick has, however, never challenged either of the Wills. Clement and his wife remained in Muscat for the next five years till 2004, when they returned. They then resumed residing in the same house as their parents and they say they looked after them.

29. The substance of the case by the Defendants is that Clement had lost a lot of money in the Harshad Mehta scam and that he was drawing on his parents' resources. How this can be said to be evidence of 'undue influence' is never fully or properly explained. In any case, much of this, at least in the hands of the Defendants, is hearsay and inadmissible evidence. Paragraph 5 of Leopold's Affidavit of Evidence²¹ is that he had come home in December 1999 when Eliza confided to him that Clement had forced her and Anthony to sign two Wills without giving them an opportunity to read them. He says that Eliza asked him to help her and Anthony make Wills afresh. He claims he took his mother to an Advocate, Mr. Johnson John, in Bandra and that in his presence Eliza instructed Mr. Johnson John to prepare two Wills, one for herself and one for Anthony, ensuring that at the demise of either of them, the surviving parent would inherit the entire movable and immovable properties, and that on the surviving spouse's demise, all the estate would be divided between the four children equally. He claims that he then collected these fresh Wills and gave them to his

21 Vol. B, p. 161.



mother. This is in direct contradiction to what Juliana says. Her evidence is also hearsay because she only reports what Leopold told her, so she cannot attest to the correctness of what she was told, but only that she heard a particular thing. She says that she was told that the Wills were given not to Eliza but to Clement. In any case, no attempt was made by the Defendants to summon Advocate Mr. Johnson John or to have copies of these drafts produced.

30. Leopold himself never tendered himself fully for cross-examination. His cross-examination was recorded only in part.²² In this, he admits that he joined the Society of Jesus in 1967 and since then did not stay permanently at the family seat at Aldona House, Bandra. Between 1997 and 2007, he was at Nasik. It is, therefore, not explained how he came to be in Mumbai in December 1999 to have any alleged conversation with Eliza on making of a fresh Will.

31. Paragraph 2 of his cross-examination is most interesting.²³ In this he denies a suggestion that all household expenses were being incurred by the Plaintiff. Even the medical expenses, he says, were incurred by the parents themselves. In short, he maintains that his parents were managing their own finances and were financially independent. This is directly contradictory to what is stated in paragraph 4 of his examination-in-chief where he alleges that his parents were entirely at the mercy of the Plaintiff and were compelled to obey him without question.

22 Vol. B, *pp.* 165-168.

23 Vol. B, *p.* 166.



32. From the perspective of appreciation of evidence, this is a truly piquant situation. The Plaintiff, cross-examining Leopold, put the suggestion that it was Clement (the Plaintiff) who supported the parents Eliza and Anthony, bearing their household expenses etc. This was placed presumably to show a special affinity and a particular closeness between the parents and Clement; but the cross-examination strategy was not without risk: if the witness agreed, this might in itself have been one nugget of evidence on the question of undue influence, suggestive of a dependency of the parents on Clement. As it happens, the Plaintiff's failure to show dependency works to his advantage by dislodging any plausibility of undue influence. The parents were, by Leopold's own telling of it, self-reliant and not dependent on Clement at all.

33. It seems that the matter was adjourned for settlement on that date and Leopold never returned to the witness box. There is an order of 9th December 2009 in which the Court noted²⁴ that the Defendants claimed that Leopold was unwell. The Court left it to the Defendants to resolve the matter and to decide for themselves whether Leopold should return to the box, and, if not, what the consequences might be. As it transpires, Leopold never returned to the witness box.

34. I think it is safe, therefore, to say that if a witness does not tender himself for cross-examination or absents himself for the completion of the cross-examination, then so much of the evidence as is against the other side must necessarily be ignored and, equally,

24 Per SC Dharmadhikari J.

that any admissions in that testimony may be used against the party calling that witness. This is how it must be in the present case too. Leopold's admission, therefore, that his parents were financially independent is one that must be accepted. His allegation that they were at the mercy of the Plaintiff must be rejected simply because the Plaintiffs had no opportunity to fully test the assertions made by Leopold in his cross-examination. Mr. Shah for the Plaintiffs points out that there is some evidence to suggest that even during this time, far from being unwell, Leopold was actually in good health and serving his duties in Goa.²⁵ If that be so, that makes matter even worse.

35. This takes us to Juliana's evidence. Her Evidence Affidavit²⁶ is essentially on the basis that her parents desired to leave the property to all four children. In evidence of this, she cites certain proceedings against another tenant in Aldona House where on a ground of *bona fide* requirement it was stated that Anthony required the premises for Juliana's two sons. While this pleading is on record, by itself it does not invalidate a testamentary disposition. It is an admitted position that this so-called expression of intent never found voice in a fresh testamentary instrument. Juliana accepts in her examination-in-chief that her parents were financially self sufficient,²⁷ and that Clement and his wife lived abroad for a considerable period of time.²⁸

25 Questions 238–239, p. 238.

26 Vol. B, pp. 170–174.

27 Vol. B, para 15, p. 173.

28 Vol. B, para 14, p. 173.

36. She seems to claim that the undue influence arises from her parents' lack of good health. In paragraph 16, she says that her mother was unwell since 1984. It is to be noted that the Will itself is of 1999, a good 15 years later. To accept this submission, Juliana would, therefore, have to show that for that entire 15-year period Eliza was in such poor health that she could not know what she was doing. However, as I have noted, in paragraph 19 of her evidence she accepts her parents' soundness of mind. There is no dispute that Eliza was giving tuitions even at the time when she made the Will and that these tuitions were being given to 10th standard students and were in the subject of mathematics and science. On its own this is powerful testimony of soundness of mind but it also goes to destroy the Defendants' case on undue influence. There is a faint suggestion in paragraph 20 of the Affidavit of Evidence²⁹ that the Wills were unnatural, but this is no part of the Caveat and is beyond pleadings.

37. Juliana's cross-examination³⁰ is comprehensive. She says clearly in response to Question 26 that she does not remember the previous illnesses. More importantly, she also says in response to Questions 133 to 135 that Juliana recovered within one month from her illness in 1984. It is necessary to set out the two portions of the evidence, i.e., in the examination-in-chief and in the cross-examination one after the other:

"13. I say that my mother Mrs. Eliza Soares, had fallen seriously ill in 1984 and thereafter till her

29 Vol. B, p. 174.

30 Vol. B, pp. 182-250.



death was being treated for multiple medical conditions including diabetes, high blood pressure, heart ailments and was being medically treated both at private nursing homes and at Nanavati Hospital and Lilavati Hospital. I say that my deceased father had been ill with similar ailments since 1996 and not very much stronger than my mother.”

In contrast to this in cross-examination, Juliana said:

“(Witness’ attention is drawn to paragraph 13 of her Affidavit of Evidence)

Q.133 According to you your mother fell seriously ill in 1984. What had happened to her?

Ans. She had a stroke.

Q.134 What effect did the stroke have on her body?

Ans. She couldn’t walk, but she recovered very soon.

Q.135 Within approximately what time did she recover?

Ans. Within a month she recovered.”

38. Clearly, therefore, there is no question of incapacity such as would have rendered Eliza susceptible to undue influence. It is not even Juliana’s case that she was continuously ill from 1984 onwards³¹ and she admits that her only illness was diabetes.³² That

31 Question 141, *p.* 217.



she was giving tuitions at the time of the Will was also admitted³³ and that these were for mathematics and science.³⁴ Most interestingly in response to Questions 54 to 56,³⁵ she says her father was most astute about his financial affairs.

Q.54 According to you, was someone else providing for them and looking after them?

Ans. Whatever money was spent by my brother was the money he had taken from my father, which was badly invested by him and lost.

Q.55 Can you explain, if he had lost the money how he could have spent it on the parents?

Ans. I presume that it was what he was trying to give back, the best he could, since he had lost everything. My father was very careful with his money.

Q.56 Do you have any documents to support your claim that the Petitioner had lost all the money, which your father had given to him, in the Stock Market?

Ans. My father told me about it.”

32 Question 164, *p.* 220.

33 Question 45, *p.* 189.

34 Question 142, *p.* 217.

35 At *p.* 191.



39. On the question of dependency, it appears that her case was that Clement was dependent on her parents and not the other way round:³⁶

“Q.82 In paragraph 7 you have mentioned that your brother was dependent on your parents till the year 1994. If from 1989 he was already employed, do you agree that thereafter there was no question of his being dependent upon anyone?

Ans. That is not true, because he couldn't afford a house of his own. He was dependent on my parents.

Q.83 Was there enough space in the house?

Ans. Yes.

Q.84 Can you explain why if there was enough space in the house he should look out for another house?

Ans. Because he wanted to sponge off my father.

“Q.85 Is it correct that Plaintiff completed his studies i.e. B.E. Electrical in 1983?

Ans. I am not sure.

Q.86 Is it correct that immediately thereafter i.e. from 1983 to 1985 he was working with RCF?

36 *pp.* 197-198



Ans. Yes.

Q.87 Is it correct that from 1987 onwards he was continuously till 1999 working with Crompton Greaves and then with Credit Capital Finance Corporation and then Unit Trust of India and then Deutsche Bank Financial Services India Services India Limited and Shree Stock Vision Securities Limited?

Ans. I have no idea whether he worked for all these companies.”

40. This is no evidence of dependency at all, and it is difficult from this to see how Eliza and Anthony could be said to have been put under any sort of pressure by Clement. Her answers here are clearly prevarications, for it is hardly likely that at the time when the parents were alive, Juliana would have been totally unaware of Clement’s employment, especially if she claims to have such familiarity with his stock market losses.

41. A suggestion was put to Juliana that her father used to give her money periodically.³⁷ A document at Exhibit “D1”³⁸ was introduced and this is a document that is in Anthony’s handwriting. It notes very many items given to Juliana and her family members including her sons Vivek and Vinay at various times. These include cash and jewellery. All of this is meticulously maintained with dates and amounts.

37 Questions 61 to 64, *p.* 194.

38 *p.* 251.

42. There is then the evidence of Juliana that she was aware of the two Wills:

Q.219 Is it correct that in the above portion of your Written Statement you have alleged that your mother had expressed her desire to execute a fresh Will, which would mean that you were aware that prior to that she had already executed a Will?

Ans. This was told to me by my brother Leopold.

Q.220 Did you believe the words of Leopold?

Ans. Yes.

Q.221 Would it be therefore correct to say that you were aware even prior to the service of the Court papers that your mother had executed a Will?

Ans. It was told to me by my brother.

Q.222 Therefore, you knew that there was a Will?

Ans. Insofar as he told me about it.

Q.223 I am putting it to you that your statement that you became aware of the Will, only when the papers were served upon you by the Court is false.

Ans. It is not true.

Q.224 According to you, the entire portion in paragraph 5 which has been read out to you was told to you by Leopold i.e., *“I say that sometimes prior to her death during her visit bequeath”*?

Ans. Yes.

Q.225 When did Leopold allegedly tell you about this?

Ans. When my mother asked him to prepare a new Will at that time Leopold told me about this.

(Witness’s attention is drawn to the lines *“I say that some time prior to her death.”*)

Q.226 Can you now recollect, when did Leopold allegedly tell you this?

Ans. I don’t remember.

(Witness’s attention is drawn to the rest of the statements made in paragraph 5 beginning with the words *“I say that accordingly, and as per her instructions, Fr. Leopold Soares, the First named Caveator herein, had got prepared my mother’s Will the Will which he had already got executed from her in 1999.”*)



Q.227 Do I take it that according to you this entire portion which has been shown to you was told to you allegedly by Leopold?

Ans. Yes.

Q.228 Would it be therefore correct to say that your allegations that the two Wills were got executed by undue influence, coercion and misrepresentation were based on what was told to you by Leopold?

Ans. That is true.

Q.229 I am putting it to you that you have no personal knowledge about the allegations made by you impugning the said two Wills?

Ans. No. it is not correct.

(Emphasis added)

43. Finally there is the evidence of Juliana in response to Questions 254 to 255³⁹ and this is directly relevant to the question of undue influence. It is best to set out these questions.

Q.254 Would it be correct to say that therefore there was no point in your parents bequeathing anything to Leopold?

39 At p. 240.



Ans. I cannot say what my parents wanted to do. That was my parents' wish.

Q.255 As far as you are concerned at the time of your marriage and even thereafter, sufficient money gift and jewellery were provided to you by your parents?

Ans. They did what they thought right.

44. If there was ever any question of the two deceased persons not being under any undue influence and of having necessary testamentary capacity, this is probably it.

45. For the sake of completeness, I will now consider the evidence in rebuttal of Fr. Vernon D'Cunha.⁴⁰ This witness, PW3, held a high position in the Society of Jesus. He specifically deposed that a Jesuit would not be able to keep any wealth or assets, at least without specific permission. He would have to renounce it in favour of the Society although he could receive it, as for example by means of a bequest.⁴¹

46. In fairness, in his submissions on behalf of the Defendants, Mr. Raphael D'Souza restricts himself to one point only. He does not suggest that the parents were financially dependent. In fact, he says it was the other way around, and it was Clement who was financially dependent on his parents. The case of undue influence, Mr. D'Souza says, is only because of old age and infirmity.

40 *pp.* 519 to 526.

41 Questions 284–286, *p.* 522.

According to him, the evidence shows that Eliza was, he says, the evidence shows, infirm from 1984 till 2006. There is unfortunately no evidence at all of this. All the evidence is to the contrary. The fact that she was giving tuitions, and that these were in mathematics and science to 10th standard students, is not disputed. This is hardly evidence of infirmity of such a kind as would render her susceptible to any form of undue influence.

47. Mr. D'Souza then questions why the two Wills are mirror images of each other. There is nothing very untoward in any of this. It is probably salutary. It is certainly not uncommon. In and of itself, it is also not evidence or even indicative of either undue influence or lack of testamentary or dispositive capacity.

48. Mr. D'Souza attempts a faint submission that the Wills had places for signature marked with an "X", and this is evidence that Eliza and Anthony knew not what they were doing. It is clear that the Wills were drawn up by an Advocate. They are typewritten. Merely because there is a place indicator or a marking showing where a person is to sign, this does not establish a want of dispositive capacity. This practice is fairly common especially in complex legal documents and even otherwise.

49. Mr. D'Souza next says that there is a contradiction between the evidence of PW1 and PW2: PW1 says that both read the Wills in the witnesses' presence, whereas PW2 says to the reverse. Again nothing much can turn on this, simply because, being required to give evidence so many years after the fact, one cannot reasonably



expect a photographic recollection of every single detail that happens in the past.

50. As a general rule, Courts tend not to lean to interpretations that would result in intestacy;⁴² and certainly not on so thin a thread. Undue influence cannot be presumed. It must be pleaded and proved. The Defendants needed to show that Eliza and Anthony were wholly under Clement's domination, and acted on his dictates at least in the matter of the making of the Wills; that they did as he commanded and had no choice in the matter; and that, but for this undue influence, they would not have been moved to make such Wills. The actual exercise of that undue influence on the testator, and which is in the nature of coercion and fraud, must also be demonstrated.⁴³ It is not enough to show that one person was in a position or had the power to overbear the testator; it must be shown that Will was the result of the exercise of that power.⁴⁴ Generalized allegations will not do: undue influence is to be pleaded with specificity, particularity and precision.⁴⁵ As pointed out by this Court in *Arvind s/o Bhauroo Gangashettiwar & Ors. v Smt. Indirabai W/o Balkrishna Gangashettiwar*.⁴⁶

“26 ...Mere presence of motive and opportunity for playing fraud or exercising undue influence are not sufficient to draw any inference in this respect.”

42 *Pearey Lal v Rameshwar Das*, AIR 1963 SC 1703; *Bajrang Factory Limited & Anr. v University of Calcutta & Ors.*, (2007) 4 SC 513.

43 *Mt. Gombibai v Kanchhedilal & Ors.*, AIR 1949 PC 272.

44 *Wingrove v Wingrove*, [1885] 11 PD 81.

45 *Afsar Shaikh & Another v Soleman Bibi & Ors.*, (1976) 2 SCC 142.

46 2008 (5) All MR 651.



51. Similarly, in *Naresh Charan Das Gupta v Paresh Charan Das Gupta*,⁴⁷ the Supreme Court held:

“13. It is elementary law that it is not every influence which is brought to bear on a testator that can be characterised as “undue”. It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour. And if the testator retains his mental capacity, and there is no element of fraud or coercion – it has often been observed that undue influence may in the last analysis be brought under on or the other of these two categories – the will cannot be attacked on the ground of undue influence.”

52. In its recent decision in *Charulata @ Renuka Haresh Lulla v Gul Khanchand Gidwani & Ors.*,⁴⁸ this Court held:

“24. The principle of the ambit of undue influence which can be practiced upon a testator has been considered for the last more than a century in England and later also in the Indian cases. The authority under the said subject is the case of *Hall v Hall* (1868) LR 1 P & D 481 which held thus:

Even a reprehensible placing of pressure on a testator will not always be undue influence so as to avoid the will: **“To make a good will a man must**

47 AIR 1955 SC 363.

48 2013 (2) All MR 261.



be a free agent. But all influences are not unlawful. Persuasion, appeals to the affection or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like - these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting or the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes is overborne will constitute undue influence, though no force is either used or threatened.” And thus Sir Wilde concludes:

“In a word a testator maybe led but not driven and his must be the off-spring of his own volition and not the record of someone else’s.”

28. The defendants have not made out any case of fraud. They have not shown such coercion practiced by the plaintiff upon the deceased as to make him sign on the dotted line under her influence. They have, therefore, not shown any such misrepresentation made by the plaintiff. The fact of the plaintiff living with the deceased which led the deceased to make a will in her favour shows the course of the behaviour of the plaintiff. The deceased himself with a free mind decided to give her his properties under the will. The deceased had no other closer, better relative to bequeath his properties unlike in the cases cited above in which close family members themselves were disinherited.”

(Emphasis added)

53. All the other issues will, therefore, have to be answered in the negative.

I. CONCLUSIONS & ORDER

54. In my view, the Defendants have not been able to establish their case at all. The Plaintiffs have discharged their evidentiary burden.

55. Both Suits are accordingly decreed. The Caveats are dismissed. The Petitions to proceed accordingly. Drawn up decrees



dispensed with including as to dismissal or discharge of the caveats. The Registry is not to raise requisitions regarding proof of service of citations.

56. Registry will issue probate on an expedited basis and, subject to all just exceptions, preferably before 22nd December 2016.

(G. S. PATEL, J.)