

gsp/ssm

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
TESTAMENTARY SUIT NO. 46 OF 2008

IN

TESTAMENTARY PETITION NO. 105 OF 2008

*Petition for Probate of the Last
Will and Testament of the
**LATE BABUBHAI
CHUNNILAL PATEL**, of
Mumbai Indian Hindu
Inhabitant, Occupation :
Business, residing at the time of
his death at 83, Kashiniketan,
Govandi Road, Chembur,
Mumbai – 400 071*

...

Deceased

YATIN GORDHANDAS DOSSA,
of Mumbai Indian Inhabitant, aged 51 years,
residing at 101, Trishul Apartments, Kane
Road, Mount Mary Road, Bandra (W),
Mumbai – 400 050

...

Plaintiff

versus

SUPRIYA SHAILESH PATEL,
Indian Inhabitant of Mumbai, widow of
Shailesh Patel, Residing at Ashirwad, 94,
N.G. Acharya Marg, Chembur, Mumbai –
400 071

...

Defendant

APPEARANCES

FOR THE PLAINTIFF

Mr. Rohit Kapadia, Senior Advocate,
*with Mr. Vatsal Shah, Ayaz Bilawala
& Priti Tare, i/b M/s. Bilawala & Co.,*

FOR THE DEFENDANT

Mr. A.S. Khandeparkar, with Mr. V.V.
*Warerkar & Prasad Desai, i/b
Warerkar & Warerkar.*

CORAM

: G.S.Patel, J.

JUDGMENT RESERVED ON

: 14th November 2014

JUDGMENT PRONOUNCED ON

: 20th January 2015

JUDGMENT:

1. One Babubhai Chunnilal Patel (“**Babubhai**”) died at Mumbai on 3rd October 2006. He left a Will dated 10th March 2005. The will is registered. Babubhai was married to one Neelaben Babubhai Patel (“**Neelaben**”). They had three children, two daughters and a son. Both daughters, Sheila Vasu Sumaya (“**Sheila**”) and Bharati Yatin Dossa (“**Bharati**”) are married. Babubhai’s and Neelaben’s son Shailesh died intestate on 3rd February 2005, i.e., before Babubhai. He was married to one Supriya Shailesh Patel, the Defendant (“**Supriya**”).

2. Babubhai was thus survived by his widow, Neelaben, his two daughters, and his daughter-in-law, the Defendant. Yatin Dossa, the Plaintiff (“**Yatin**”), is Babubhai’s son-in-law, the husband of his second daughter, Bharati.

3. On 23rd January 2008, Yatin filed the present Testamentary Petition 105 of 2008 for probate to Babubhai's Will. Babubhai's heirs were cited. Neelaben, Sheila and Bharati filed Affidavits of the same date consenting to the grant of Probate. On 29th January 2008, the two attesting witnesses to the Will, one Mr. V. Shanbag and one Mrs. S. Biswas, filed their affidavits accompanying the probate petition.

4. On 27th March 2008, Supriya entered a caveat and, on 4th April 2008, filed an Affidavit in Support of that caveat. In her affidavit, Supriya disputed the execution of the will. She alleged it to be invalid for want of a dispositive state of mind on Babubhai's part, and also alleged undue influence by the Plaintiff, Yatin, Babubhai's son-in-law. She claimed that Babubhai was in extremely poor health and, following Shailesh's death, was in a 'morbid depression'. For some peculiar reason, and despite the fact that the Affidavit in Support of the Caveat is to be treated as a Written Statement, on 15th October 2008 Yatin filed an 'Affidavit in Reply' to the Caveat and this was taken on record.

5. The peculiarities in this trial did not stop there. After the affidavits in lieu of examination-in-chief were filed by the Plaintiff and the attesting witness, Vasudeo Shanbag ("**Shanbag**"), cross-examination commenced. This was followed by the cross-examination of the Defendant, Supriya.

6. In all this time, issues had not been formally framed and, indeed, it was not till 3rd November 2014, when the matter was placed before me, that this was pointed out. Accordingly, issues

were framed on that day. These are set out below with my responses against each.

Sr No	Issue	Finding
1.	Does the Plaintiff prove that the Will dated 10th March 2005 is duly, properly and validly executed by the deceased and the same is duly attested?	Yes
2.	Does the Defendant prove that the Will dated 10th March 2005 is executed by the deceased under coercion and by exercising undue influence by the Propounder/ Plaintiff and hence the said Will dated 10th March 2005 of the deceased is not valid?	No.
3.	Does the Defendant prove that the deceased did not have disposing mind or necessary mental capacity to make any testamentary disposition and hence the said Will dated 10th March 2005 of the deceased is invalid?	No.
4.	Whether the Plaintiff is entitled to probate the Will as prayed for?	Yes
5.	What order and reliefs?	Suit decreed

7. Before I discuss the issues, I must note that Mr. Kapadia, learned Senior Counsel for the Plaintiff, fairly conceded that the burden of proof of Issue No. 3, i.e., as to the testator's soundness of mind, lay on the Plaintiff and not on the Defendant. Therefore, despite the manner in which it is framed, I have proceeded on the basis that the burden of proving that issue is on the Plaintiff.

RE: ALL ISSUES

8. I do not believe much of significance is to be gained by addressing each issue separately. Clearly, they overlap. At the heart of the dispute lies a narrative of Babubhai's life and, in particular, his last days after the death of his only son Shailesh. The Defendant, Babubhai's daughter-in-law Supriya, Shailesh's wife, insists that Babubhai was in no mental or physical condition to make any sort of legitimate testamentary disposition. She also says that his son-in-law, Yatin, the Plaintiff, exercised 'undue influence' and compelled Babubhai to make a one-sided will.

9. It is far too well settled, I think, to admit of debate that a will by definition disrupts the natural line of succession. Supriya undoubtedly has a caveatable interest, being the widow of a predeceased son. On intestacy, Babubhai's estate would have devolved on his widow, Neelaben, his two daughters Sheila and Bharati, and Supriya in equal shares, i.e., a one-fourth each. Babubhai's will does not follow this line. In clause 7 of his will, he lists his heirs. There follows in clause 8 a listing of his various assets. These are distributed in clause 9. One half of his estate is left to his daughter Sheila. The remainder is distributed equally between Yatin and Bharati's daughters Neha and Anisha, these shares to be held and managed by Bharati till the two grand-daughters attain majority. Clause 10 of the will deals with his business concern, M/s Patel Constructions, apparently a sole proprietor firm of construction contractors. This business is divided in the same way as the other part of his estate, i.e., a moiety to Sheila and the remainder divided equally between his grand-daughters, Yatin and Bharati's children.

Supriya is not excluded from the will. She is to receive a legacy of Rs. 1 lakh under clause 11. The rest, if any, is divided equally between his daughters Sheila and Bharati under clause 12. Indeed, the only person wholly excluded from this will is Babubhai's widow, Neelaben, and she has not challenged it.

10. It is important to note that Supriya makes out no case of the will being unnatural. Her case is limited to questions or issues of Babubhai's dispositive capacity and Yatin's so-called influencing of Babubhai in the making of this will.

11. Mr. Kapadia's first submission is that under Sections 59 and 61 of the Succession Act, the burden lies on the Defendant to establish undue influence. Section 59 says that every adult of sound mind may make a will; and Section 61 says that any will procured by fraud, coercion or any "importunity that takes away the free agency of the testator" is void. Also, Section 68 makes it clear that no person who has an interest in, or is an executor of, any will is for that reason disqualified as a witness to prove the due execution of the will or its validity or invalidity. Section 63 specifically sets out the manner in which a will must be made. It need not be in any particular form. Broadly stated, there must be at least two witnesses who have attested to its execution, and each must attest it in the presence of the testator and at his instance, and the testator must sign or affix his mark to the will in the presence of each witness.

12. The two attesting witnesses to Babubhai's will were Shanbag and one Mrs. S. Biswas. Both were from the General Education

Academy, Chembur. Mrs. Biswas was the headmistress of that institution.

13. The Plaintiff, Yatin, led his own evidence, and that of Shanbag, one of the two attesting witnesses. The Defendant examined herself. Evidence was recorded on commission by Ms. Jerestin Sidhwa, learned Advocate of this Court. I must at this stage record my appreciation of Ms. Sidhwa's work: systematic, organized and meticulous, it was of invaluable assistance. Before Ms. Sidhwa, some of the Plaintiff's documents were taken on record and assigned identifying numbers, **P1** to **P8**. Similarly, a compilation of the Defendant's documents were taken on record and identified as **D1**. I considered these documents, and by an order dated 31st October 2014, received them in evidence retaining the marking assigned by Ms. Sidhwa.¹ The will in question is marked **Exhibit "P4"**. To the extent necessary, I will turn to the documents as I assess the oral evidence led.

14. I believe it would be proper to begin with the evidence of the attesting witness, Shanbag, though he was PW2 and it was the evidence of the Plaintiff that was led first. Apart from anything else, I do so because I have recently held that, as a matter of law, in contested testamentary matters where a testamentary writing is sought to be proved (either in a probate petition or one for letters of administration with will annexed), in a statutorily required departure from the provisions of Order XVIII Rule 3-A of the Code

¹ Though it is true that some of the documents (such as evidence affidavits and so on) ought not to have been marked as exhibits strictly speaking, I retained Ms. Sidhwa's marking for consistency and to avoid later confusion.

of Civil Procedure, 1908, the evidence of the attesting witness must be led first.²

15. Shanbag's evidence affidavit³ is dated 15th November 2011. At that time, he was 81 years old. In his evidence affidavit, Shanbag says he knew Babubhai well: Babubhai was the President of the General Education Academy Trust, a registered public charitable trust that runs and manages a school called the General Education Academy at Chembur, not far from where Babubhai lived and worked. Shanbag says that till his demise, Babubhai was actively involved in the affairs of this trust and school. Shanbag himself has an association of several decades, since 1964, with the school: he was its Principal and Executive Secretary in 1971 and, till the time of the making of his evidence affidavit, continued to hold that position. He claims specifically that through this association of many years he and Babubhai knew each other. Indeed, Shanbag and Babubhai were the founder members of the Trust. On this aspect of the matter, Shanbag was not cross-examined at all. To the contrary, the suggestion put to Shanbag⁴ was that he and Babubhai knew each other for over 45 years, to which, quite naturally, the witness said yes. On the rest, i.e., to the closeness and length of the association, Shanbag's testimony was not challenged.

16. By all accounts, the General Education Academy is an institution of some considerable size: there is evidence of a student

² *Walter D'Souza v Anita D'Souza & Ors.*, Judgment dated 14th November 2014 in Testamentary Suit No. 33 of 1998 in Testamentary Petition No. 774 of 1997.

³ Ex.P-3 in evidence.

⁴ Q.11 in cross-examination, p. 23 of the Notes of Evidence

body strength of about 3000 students. Shanbag's evidence, therefore, that Babubhai, being actively involved in the school and the trust, met him eight to ten times a month, is neither unreasonable nor unexpected. Babubhai's association with the Trust saw him hold different positions: he was earlier the Treasurer of the Trust and latterly, since 2003, its President. Shanbag deposes to Babubhai's association with the Trust in paragraph 2 of his evidence affidavit. Once again, this testimony remains unchallenged.

17. Paragraph 3 of Shanbag's affidavit is crucial; for, in this paragraph, he sets out his testimony about the execution of Babubhai's will. Briefly, Shanbag says that in March 2005, Babubhai told him that he (Babubhai) wanted to make a will. He asked if Shanbag would be an attesting witness. Shanbag agreed. On 10th March 2005, Babubhai and Neelaben visited Shanbag at his office at about 2:00 pm. Shanbag is very precise about this date and time. After some general discussion, Babubhai told Shanbag of the purpose of his visit and also said that a second witness would be required. At this, Shanbag sent for Mrs. Biswas, the second attesting witness, then the headmistress of the school, to attest the will. Shanbag then goes on to say in paragraph 4 of his evidence affidavit that in the presence of both himself and Mrs. Biswas, Babubhai initialled each page of the will and signed it (he identifies the initials and the signature). Following this, both he and Mrs. Biswas, in that order, wrote their names on the will in their own hand and signed it. A rubber stamp was affixed beneath the signature of each witness. Finally, in paragraph 8, Shanbag says that at the time Babubhai was of sound and disposing state of mind, memory and understanding.

18. As necessary evidence of execution of a will, this testimony can hardly be bettered. Most importantly, this evidence remains entirely unshaken in cross-examination. Although I did not record the cross-examination of the witness myself and there are no notes on his demeanour, from the manner in which Shanbag's answers to the questions put to him are recorded, it does seem that he answered these directly, without hesitation and with complete confidence. These, for instance, are his responses to Questions 12 to 16 in cross-examination:

Q.12) Did you know and interact with the deceased in an official capacity only or was it personal also?

Ans: I knew him in my official capacity.

Q.13) Would it be correct to say that you met the deceased only in the office premises and never in his house?

Ans: I have been to his house only once. (Witness Volunteers) I have visited his house twice.

Q.14) Can you tell us the two occasions when you visited his house?

Ans: The first time I visited him at his residence was when I needed to take his signatures on certain documents. He was unwell at that time and the second time I visited his house was for a condolence visit after the demise of his son.

Q.15) Had the deceased consulted you or sought your advice or help in his personal matters before?

Ans: No.

Q.16) If that is the case, why is it according to you that the deceased consulted you and sought your help at the time of making his last Will?

Ans: He did not consult me. He asked me whether I would attest his Will.

19. Shanbag makes no claim to any personal friendship or closeness. He does however make one telling point in cross-examination: of his familiarity with Babubhai's signature on documents other than the will in question, and going back some years. If there was any dispute about this, it is put to rest by what follows in Questions 24 to 29 of the cross-examination:

Q.24) How do you identify the initials of the deceased as found on the Will?

Ans: He has initialled the Will in my presence.

Q.25) Have you in the course of your professional association with the deceased, had occasion to see his handwriting?

Ans: No.

Q.26) Had the deceased at any time prior to 10th March 2005, marked his initials on any other document in your presence?

Ans: Yes.

Q.27) Can you tell us when?

Ans: In the Minutes of the Managing Committee where he had presided over the same, if there were any corrections he would initial the same.

Q.28) How do you identify the signature of the deceased?

Ans: He had signed on many documents, particularly in my Minute Books.

Q.29) How do you identify the signature of the 2nd attesting Witness Ms.Biswas?

Ans: She has been working with us for the last 30 years. She was a Teacher with us and at present she is the Headmistress.

20. I find particularly telling Shanbag's candour in admitting that he was not familiar with Babubhai's *handwriting* but was very familiar with his initials and signature. There is thus uncontroverted evidence of Babubhai having initialled and signed documents known to the witness well prior to the will in question. There is also no doubt about Shanbag's familiarity with the signature and initials of the second attesting witness, Mrs. Biswas. As to due execution of the will, the evidence is, in my view, complete in every respect.

21. This leaves, so far as the burden on the Plaintiff is concerned, the matter of Babubhai's state of mind and his dispositive capacity. As I have noted, Shanbag says that Babubhai was actively involved in the affairs of the trust and the school right till his demise. He also speaks of a general discussion on 10th March 2005 before the will was executed, and specifically says that Babubhai was of a sound and

disposing state of mind, memory and understanding; and that he signed the will of his own volition. He was cross-examined on this latter testimony. In response to Questions 37 and 38 in cross-examination, Shanbag said that Babubhai presided at a Founders' Day function held on 16th March 2005. This date is of some significance: it is very proximate to the date of the will, 10th March 2005, and, even more pertinently, to the date of Shailesh's demise, 3rd February 2005. In other words, in a little over a month after his son's demise, not only did Babubhai make his will but, a few days later (within the week), presided over an open function at the school. Babubhai was invited to preside at this function at some time between 7th and 9th March 2005.⁵ Shanbag also specifically denied that, following the death of his son, Babubhai was overwhelmed and had a mental and emotional breakdown;⁶ and that he was depressed and had withdrawn completely from society and his friends.⁷ This exchange in cross-examination is important and reads:

Q.37) On the basis of the limited interactions you had with the deceased after the death of his son and before the execution of his alleged last Will, how do you say that he was of sound and disposing mind?

Ans: We had called a meeting on 16th March 2005 for celebrating the Founders day, I wanted to know if he would come and preside over the said function as a President and he agreed to the same.

⁵ Q.38 in cross-examination, *p.* 26 of the Notes of Evidence.

⁶ Q.39 in cross-examination, *p.* 26 of the Notes of Evidence.

⁷ Q.40 in cross-examination, *p.* 26 of the Notes of Evidence.

Q.38) Do you remember when you called him in that regard?

Ans: May be somewhere on 7th to 9th March 2005.

Q.39) If I put it to you that the sudden death of his only son overwhelmed the deceased and led to his mental emotional breakdown, what would you say?

Ans: Not to my knowledge. No.

Q.40) If I put it to you that after the death of his only son the deceased was depressed and withdrew completely from society and friends. Would you be able to deny it?

Ans: Yes. On 16th March 2005 when he presided over the meeting for Founders day he was quite normal.

22. Shanbag's evidence is, thus, both undisturbed and compelling. If there was the slightest doubt about his credibility, it is paid to rest by the candour of his answer to Q.27. Asked if he could deny that the Plaintiff had exercised undue influence over Babubhai, Shanbag said he did not know, a perfectly honest and correct reply.

23. I turn now to the evidence of PW1, the Plaintiff, Yatin Dossa ("Dossa"). On the question of execution of the will, Dossa's evidence is, of necessity, limited. He does not claim to have been present at the execution of the document, and only claims to be able to identify Babubhai's initials and signature. This he does in paragraph 4 of his evidence affidavit dated 17th January 2011. As

with Shanbag, Dossa's testimony appears to be straightforward. It is certainly undisturbed in cross-examination:

Q.21) When did you come to know about the alleged last Will of the deceased Mr. Babubhai Patel?

Ans: 15 days after his death.

Q.21) Who informed you that the deceased had prepared a Will?

Ans: Mr. Murlidhar informed me of this.

Q.22) What is the relationship of Mr. Murlidhar to the deceased?

Ans: Mr. Murlidhar is a chartered accountant by profession and the deceased used to consult him along with the Defendant's husband Shailesh for tax related matters for the last two decades.

Q.23) Were you present when the deceased signed the alleged Will?

Ans: No.

Q.24) How do you say that the signature found on the alleged will is the signature of the testator?

Ans: For the last 13 to 14 years, I was assisting my late father-in-law Mr. B. C. Patel by handling his property matters and other matters relating to different queries with regard to the municipality etc. My father in law was involved in construction business/jobs for which I used to assist him. I used to also accompany my father

in law to the Small Causes Court where I used to see him sign certain documents in Court, therefore I was familiar with his signature.

Q.25) How do you say that the initials found on the individual pages of the alleged Will are the initials of the deceased?

Ans: The power of attorney which was given to me in January 2003 by my late father in law (deceased) where all the papers were initialed in front of me. I had also accompanied my father in law to a law firm where I had seen him sign some documents. I am familiar with his initials.

Q.26) Are you aware as to where the alleged last Will of the deceased was executed?

Ans: No.

Q.27) Was the alleged Will registered?

Ans: After the Will was handed over to me, I saw that it was registered.

Q.28) Are you aware of any other Will or testament that the deceased made prior to this alleged last Will?

Ans: No.

Q.29) Do you know either of the witnesses to the Will personally?

Ans: I got to know them after the Will was given to me. I had never met them before the Will was handed over to me.

(Witness volunteers: I had met one of the witnesses only

on one occasion when I had gone to drop my father in law to the school).

Q.30) Can you name which witness you met?

Ans: Mr. Shanbhag.

Q.31) Were you residing with the deceased at the time when the last Will was made?

Ans: No.

(Emphasis supplied)

24. On the aspect of Babubhai's mental and physical fitness, Dossa's evidence is considerable. He deposes not only to his personal mental and physical condition but also to his work. In paragraph 7 of his evidence affidavit, Dossa says his own relations with Babubhai were very good; that he regularly met and was in contact with him; and hence knew of his mental and physical state. Dossa tells of Babubhai's two minor surgeries in 2001 and 2002. He acknowledges that Babubhai had diabetes, but says this was under control with medication. He too claims that Babubhai was mentally and physically fit and active till his demise, including, importantly, during March 2005. At all times, Dossa says, Babubhai was physically and mentally alert and well.

25. Dossa then goes on to speak of Babubhai's work. Babubhai had his own firm, a sole proprietorship named M/s Patel Constructions, through which he worked as a construction contractor. The compilation marked Exhibit "P-2" in evidence has some 10 different documents, all of 2005/2006. These include

letters to various clients, bills and invoices in relation to projects (including work for AFAC School, Nicholas Piramal India Ltd and others), routine documentation, and, on 22nd October 2005, a marvellously irate complaint to Tata Teleservices about the quality of its telephone services. There is also some correspondence from March 2005 till at least July 2005 with the Municipal Corporation regarding a municipal assessment demand. In October 2005, Babubhai brought an eviction suit in the Small Causes Court: he personally verified and signed the plaint. In addition, Babubhai continued to remain deeply involved in the affairs of the General Education Academy trust and school. His association with these went back to the late 1960's. Annual Reports for 2004-05 and 2005-06⁸ mention him by name and speak of his contribution to the trust. Dossa remained close to Babubhai, and held a power of attorney from him. This document is also in evidence and dates back several years to 2003.⁹ Dossa used to assist Babubhai and was, he says, thus familiar with his signature.

26. Shailesh, the Defendant's husband and Babubhai's son, died on 3rd February 2005. The cause of death was cirrhosis, and there is evidence to show that Shailesh was an alcoholic. Bearing the loss of one's child's death is never easy for anyone, and there is no reason to imagine that Babubhai did not grieve. But it is quite another thing to assume, as the Defendant seems to do, that the death of a child inevitably and invariably means, and can only mean, that the surviving parent is immediately cast into a morbid depression and that it must be held, without further evidence being required, that

⁸ Items 20 and 21 of Ex.P-2

⁹ Item 2 of Ex.P-2

he had withdrawn from society and family or become so thoroughly incapable of a normal life that he was, axiomatically, incapable of making a will. There is no basis for any such assumption, nor is there any legal requirement that compels a court to start with any such *a priori* presumption, rebuttable or otherwise. If this state of mind and body is to be accepted as true, then evidence is necessary. In his testimony, Dossa says that Babubhai was healthy and agile during the period when the will was executed. He led a normal and healthy life. He suffered no debilitating ailment sufficient to impair his mental or physical faculties. He tended to his family, his property and his business affairs and he did so himself. Other than some general assistance from Dossa, he seems to have managed all this on his own. Certainly there is nothing to show that he abdicated these matters and left them in the hands of anyone else. As Dossa says, Babubhai was saddened by the death of his son, but he remained in control of his faculties and carried on his quotidian routine.

27. This testimony is entirely unshaken in Dossa's cross-examination:

Q.36) What was the cause of the deceased's death?

Ans: He died of a cardiac arrest.

Q.37) Was the deceased suffering from any illness prior to his death?

Ans: He suffered from diabetes for a long time prior to his death.

Q.38) Was the deceased hospitalized prior to his death?

Ans: In or about the year 2001, he was hospitalized for a minor surgery regarding his toe. The following year he was hospitalized for a minor surgery for a small mole on his stomach. Besides that to the best of my knowledge, he never needed hospitalization.

Q.39) Are there any medical records available documenting his health?

Ans: I can check and let you know.

Q.40) Would it be correct to say that in the beginning of the year 2005 the deceased was suffering from an advanced stage of diabetes and was in an extremely feeble condition?

Ans: It is not true.

Q.41) Would it be correct to say that during the period from the death of his only son to his making his last Will, the deceased was suffering from depression and had withdrawn completely from society and was not interacting with friends and relatives?

Ans: It is not correct.

Q.42) Would it be correct that during the period from the death of his only son to the making of his last Will, the deceased was suffering from delusions?

Ans: Not true.

28. The Defendant's case on the matter of Babubhai's mental condition is thus very specific: depression, delusions and debilitating diabetes. A long-standing history of diabetes is admitted, but this is certainly neither unusual nor, from the evidence, does it seem ever to have been life-threatening. Of the rest there is no evidence at all. At the Defendant's instance, following Questin 39, Dossa produced medical records.¹⁰ Even from a layman's perspective, these do not indicate a condition of severe diabetes; under medication, the condition seems to have been controlled. A blood report of February 2006 indicates fasting and post-prandial blood sugar levels entirely in the normal range. This is also true of the reports of March 2005, when Babubhai must have been under stress. Indeed, it is the levels of several years earlier (2003) that appear to have been higher. Toward the end of his life, everything points to Babubhai's diabetes being well under control, very far from the picture of a debilitating condition set up by the Defendant. If Defendant wished to show otherwise, either from this material or some other, it was for her to so do by leading appropriate evidence. Why did the Defendant seek the introduction of these medical records? Did she know that those records would show something other than what they do? If the Defendant called for these records without knowing what they might reveal, it was a catastrophic lapse of forensic judgment. If on the other hand, the Defendant continued to believe that those records, as they stood, established her case, it was then incumbent on her to lead the evidence, perhaps of an expert. She has not done so. The result is a

¹⁰ Produced in answer to Q.70, *p.* 13 of the Notes of Evidence and marked in evidence as Ex.D-1

fatal blow to the Defendant's case on the aspect of Babubhai's health as a result of his diabetes.

29. I must consider now the third aspect of Dossa's evidence, and that relates to his, and his family's, relationship with the Defendant. This also affects the last matter for consideration, viz., the Defendant's allegation of undue influence. Dossa's evidence on this is in paragraphs 13 to 22 of his evidence affidavit. For both Shailesh, Babubhai's son, and the Defendant, Supriya, this was their second marriage. Supriya was earlier married to one Padhye, by whom she had a daughter Sameera. Shailesh was previously married to one Pritam Bhatti. That marriage ended in a divorce. Shailesh and Pritam had no children. Shailesh and Supriya married on 31st December 2000. Sameera, Supriya's daughter by her first marriage, lived with them. Shailesh and Supriya had no children of their own. Dossa says that a year or so later, Supriya began pressurising and nagging Shailesh to formally adopt Sameera. It is common ground that there was no such formal adoption. There was, Dossa says, resistance from Shailesh and his family. He deposes to increasing friction and tension in the family on account of Supriya's conduct. She was, he says, a quarrelsome and most disagreeable person. Shailesh, too, was stressed by this. He took to drink. Dossa claims to have personally witnessed quarrels between Shailesh and Supriya and between Supriya and other members of the family. Shailesh gradually became an alcoholic. His health deteriorated. He contracted hepatitis and, on 3rd February 2005, died of cirrhosis. Dossa says that Babubhai and Neelaben asked Supriya to keep peace within the family. She did not, and following Shailesh's death, her conduct worsened.

30. In paragraph 19, Dossa says that within a few short days of Shailesh's demise, Supriya demanded her share of Shailesh's estate. This shocked Babubhai and his family, coming so soon after Shailesh's death. They asked her to let the period of mourning pass. Supriya remained adamant. Attempts at resolution failed. At this point, and again this is common ground, Supriya threatened legal action, and there were even meetings with lawyers for both sides. Babubhai was, at this time, consulting his daughters, Dossa and his Chartered Accountant of two decades, one M. H. Murlidhar of M/s Sameer Sanghavi & Co. There is also evidence of correspondence between Supriya's lawyers, and Babubhai too took legal advice. Exhibits "P5" and "P6" in evidence are copies of letters from Supriya's Advocates' letters to Babubhai's Advocates. These are dated 13th June 2005 and 29th April 2005. Babubhai was very hurt, Dossa says, by Supriya's conduct. Dossa then says that on 4th May 2005, Supriya left the house with Sameera and went to live with her father.

31. Dossa himself knew nothing of Babubhai's will. He was informed of it by Mr. Murlidhar when he, Neelaben, Sheila and Bharati went to Mr. Murlidhar's office a fortnight after Babubhai's passing. At this time, Mr. Murlidhar told them that Babubhai had left a will; that it was registered; and that Mr. Murlidhar himself had drawn it. He read out its contents in their presence and gave it to them.

32. Before I consider Dossa's cross-examination on this material, I must note two aspects about this narrative. First, that it is not in dispute that within a few days of Shailesh's death, which Supriya

claims to have thrown Babubhai into a morbid depression, it was she who began making demands. Second, she did not stop at that; she invoked her legal rights, and correspondence began between the lawyers. The two documents on record, Exhibits “P5” and “P6”, are of April and June 2005. Shailesh died in February 2005. In other words, within a few weeks of his death, Supriya had initiated legal proceedings.¹¹ This is of some significance in view of Supriya’s testimony, to which I will turn presently.

33. There is no effective cross-examination of Dossa on this aspect of the matter at all. The bulk of the cross-examination is directed, ineffectively, to establishing the so-called undue influence that Dossa is alleged to have exercised over Babubhai. What emerges, however, is that Dossa, who has his own travel agency,¹² assisted Babubhai in several property and business matters. There was a motel firm, and there was a hotel property in Lonavala, in addition to the tenanted property in Chembur.¹³ There was, too, a litigation at Wadgaon.¹⁴ Dossa admits to having taken a small loan of Rs.2.5 lakhs from Babubhai,¹⁵ but nothing from Shailesh. When questioned about his relationship with Shailesh, he says they were more friends than merely brothers-in-law.¹⁶ Throughout, he maintains his testimony about Supriya and her conduct and the effect it had on the family.

¹¹ Including Suit No. 3416 of 2006 in this Court. Supriya accepts this in cross-examination in response to Q.59, *p.* 41 of the Notes of Evidence.

¹² Q.95 of Dossa’s cross-examination, *p.* 20 of the Notes of Evidence.

¹³ Qs. 51, 54, 55, 56-69, 86-94 of Dossa’s cross-examination.

¹⁴ Q.65 of Dossa’s cross-examination, *pp.* 11-12 of the Notes of Evidence.

¹⁵ Q.60 of Dossa’s cross-examination, *p.* 11 of the Notes of Evidence.

¹⁶ Q.68 of Dossa’s cross-examination, *p.* 12 of the Notes of Evidence.

34. Supriya filed an evidence affidavit dated 29th December 2011. There is also her affidavit dated 4th April 2008 in support of her caveat, one that is to be treated as her written statement. The contents of the supporting affidavit are amplified in the evidence affidavit, and it is, for that reason, sufficient to refer to the evidence affidavit alone. In paragraphs 7 and 10 to 13 of this affidavit Supriya sets out her case on Babubhai's alleged lack of dispositive capacity. She says:

7. I say that the said deceased had been suffering from severe diabetes since 2000. I say that in the year 2001, the said deceased underwent a surgery on his toe, for the treatment of diabetic wounds. I say that in or about the year 2002, the said deceased underwent another surgery for treating a growth in his stomach. I say that after these successive surgeries, the said deceased was in extremely poor health, and physically in a very weak and feeble condition.

10. I say that the shock of the sudden and untimely death of his only son was so overwhelming for the said deceased that the said deceased had a complete breakdown, from which he never recovered till his death.

11. I say that throughout the period between 2nd February 2005 — being the day my husband passed away — and 4th May 2005 — being the day I left my matrimonial home — the said deceased exhibited a completely neurotic behaviour. I say that throughout the afore-said period, he was suffering from morbid depression in the nature of melancholia. He withdrew completely from society and even his nearest friends. I say that the said deceased also exhibited signs of mental perversion including unnatural animosity towards persons approaching him.

12. I say that after long spells of depression, he would have sudden and frequent spells of uncontrollable sobbing during which he would beat his head and chest violently. I say that I have witnessed the said deceased stay silent for days, and then suddenly break into shouting and excitement bordering on mania. The said deceased was clearly suffering from delusions.

13. I say that on the basis of the behaviour and demeanour of the said deceased leading up to the day on which he allegedly executed the alleged will, I state that the said deceased did not have sufficient capacity to comprehend the condition of his property, his relation to persons and the scope and bearing of the provisions of his alleged will and testament.

14. I say that there was want of disposing mind and memory on the part of the said deceased as of the date of the purported last will and testament.

35. Now this is a particularly strongly worded statement in evidence. Words like “mania”, “delusion”, “morbid depression” and the general description attributed to Babubhai are indeed extreme and even harsh. Some of these are medical conditions and they required more than Supriya’s *ipse dixit* as proof. There is no such evidence.

36. Supriya then says that after Shailesh’s death, Yatin ‘took over’ the house. Babubhai confined himself to bed and would occasionally get upset and ‘start crying loudly and beat his head and chest’.¹⁷ She then alleges that Dossa was the only male member of the family attending to Babubhai and that Babubhai ‘relied exclusively on the

¹⁷ Paragraph 17 of Supriya’s evidence affidavit.

Plaintiff to carry on his business affairs and financial dealings’ and that he would ‘sign whatever papers were prepared and brought to him by the Plaintiff.’ Dossa is supposed to have been ‘in a fiduciary position *vis-à-vis*’ Babubhai, and in a position to ‘subdue, influence and control’ the latter’s mind, ‘which had already become weak by age and the irreparable grief caused by the untimely death of his only son, and further impaired by sickness and disease’. Again, of any of this there is no proof. Suggestions put to Dossa are firmly denied. Supriya also alleges a breakdown in relations between Shailesh and Dossa, *inter alia* on account of Shailesh having lent Dossa an amount of Rs.30 lakhs. This was put to Dossa in cross-examination and denied, and, again, Supriya adduces no proof.

37. Supriya’s cross-examination, on the other hand, is revealing. It turns out she knows next to nothing. She has the vaguest recollection of his medical condition.¹⁸ She knows Babubhai did some work as a construction contractor, but has no idea of the name of his firm or whether it was a sole proprietorship.¹⁹ Indeed, from Questions 44 to 65 of her cross-examination, Supriya is evasive and unclear even on matters that could only have been specially within her knowledge: the dates of the legal notices sent on her behalf,²⁰ for instance, and even the names of her earlier advocates.²¹ So poor is

¹⁸ Qs.20-32 and 37 of Supriya’s cross-examination, *p.* 23 of the Notes of Evidence.

¹⁹ Qs.40-43 of Supriya’s cross-examination, *p.* 23 of the Notes of Evidence.

²⁰ Qs.53 and 55 of Supriya’s cross-examination, *p.* 42 of the Notes of Evidence.

²¹ Q.62 of Supriya’s cross-examination, *p.* 42 of the Notes of Evidence.

her response in cross-examination that it borders on the farcical. She says twice that she did not ask for a share in Shailesh's estate:

Q.52) Did you ask for partition of properties and your share immediately after the demise of your husband?

Ans. No.

Q.78) After the demise of your husband, did you ask your in-laws for your share in the estate of your deceased husband?

Ans. No.

38. These answers are demonstrably incorrect. Exhibit "P-5" is Supriya's advocates' letter to Babubhai's lawyers and the penultimate paragraph of that document contains an explicit demand for just such a share. Supriya's claims to being kept in the dark are arrant nonsense.

Q.54) Prior to the notice, was there any demand or any discussion, or any fights regarding your claim?

Ans. Since my father-in-law was highly disturbed and at the time I felt that he was being influenced by Mr. Dossa, I felt the need to leave home and since nobody was telling me anything about any of the things happening in the house and I had heard that some of the properties were to be disposed off without my knowledge, I went to the lawyers.

Witness volunteers: There was no real demand or discussion, but since I was being kept in the dark, I was compelled to send the notice.

Q.75) What was the reason to exchange the list of assets of Mr. Shailesh Patel?

Ans. Since I was being kept in the dark, and nobody was telling me anything and since I had heard that his assets are being disposed off, my lawyers thought it right to ask for the list of assets.

Q.79) Why do you say that you were being kept in the dark?

Ans. Normally my father-in-law used to talk to me a lot about household matters, but after my husband's death, since Mr.Dossa was visiting the house daily and I saw that my father-in-law was signing papers given to him by Mr.Dossa and since he suddenly stopped telling me anything, I felt I was being kept in the dark.

39. Supriya does not even know with any degree of precision of Babubhai's involvement in the General Education Academy trust and school, something that evidently featured with some prominence in his life.

Q.90) Do you know any school called "General Education Academy"?

Ans. Yes.

Q.91) How did you become familiar with that school?

Ans. The school is situated in Chembur and therefore I am familiar with the same.

Q.92) Are you aware that the deceased was President of the trust which is managing that school?

Ans. I do not know whether he was President, but I do know that he was involved with the school and was on their committee.

Q.93) Do you know till what time the deceased was on the said committee?

Ans. Till such time that I left the Patel residence, i.e. 4th May 2005. I do not know whether he continued thereafter since I had left the house.

Q.94) Are you aware about the deceased's involvement in the functioning of the trust?

Ans. No.

40. Supriya was then shown several documents relating to Babubhai's work with the General Education Academy after Shailesh's death.²² These were put to her.

Q.96) After seeing these documents, can you say that he was regularly attending to the matters of the trust?

Ans. I remember him attending to his matters till my husband passed away, but after February 2005, he was confined to the house most of the time. I

²² Exhibit "P-7" in evidence. These are minutes and notices of the trust from June 2004 till October 2006.

didn't see him going out of the house after February 2005.

Witness' attention is once again drawn to Exhibit-P7 (Colly) and in particular to the dates of the said notices and minutes of the meetings.

Q.97) After seeing the minutes, do you still maintain that the deceased did not go out of his house after February 2005?

Ans. Yes.

41. Supriya was also asked about a power of attorney given by her own husband, Shailesh, to Dossa.²³ She has no personal knowledge of this either, and at the end is compelled to admit that her only information is on the basis of what she claims she was told by her husband. This is hearsay, and is no evidence at all of the correctness of what she was told, even assuming that her evidence proves she was told anything at all.

42. The portrait that emerges of Babubhai is of a sober, dignified and pragmatic man, one deeply involved in at least one charitable institution of some considerable size; a man of more than comfortable means and with little impairment of health beyond that to be expected in one of his age; one who absorbed the untimely demise of his son's death and, perhaps saying to himself, *life must go on*, resumed at the soonest his daily routine at home and at work. In the latter, he seems to have been a person of some rectitude and demonstrable courage: his correspondence with his clients, service

²³ Exhibit "P-8" in evidence.

providers and the local authority and his litigations with tenants point to a man undaunted. Certainly there is nothing to support the Defendant's case of a man so depressed and so withdrawn from society, so overwrought by the death of his son as to be unable to go about his business.

43. The image we have of Supriya is quite the reverse. Her actions and demands for a share in Shailesh's estate, so close on the heels of his demise, point to a grasping and avaricious nature. Dossa says she was most disagreeable. Her answers in cross-examination show her in remarkably poor light: evasive, perfectly willing to adopt a wholly false line, unfazed by patent contradictions in her own testimony, and quick to resort to legal action (only to attempt a faint-hearted denial in cross-examination). This is in direct contrast to the forthright and candid testimony of both Dossa and Shanbag. When, therefore, Dossa describes her as something of a termagant, he is not wrong. Particularly telling is the irresponsible, reckless and immoderate language she uses against Babubhai and Dossa, persons who, by all accounts, did her no wrong. Even her own testimony does not indicate that they, or anyone in Babubhai's family, treated her badly or with disrespect.

44. There is no evidence at all of Babubhai's mental or physical incapacity. Indeed, as we have seen, the evidence is to the contrary. Shanbag's evidence on the execution of the will is unimpeachable. That leaves the question of undue influence and, on this, other than Supriya's hollow allegations, there is no evidence at all.

45. Mr. Kapadia is, of course, correct in saying that generalized allegations of ‘undue influence’ sans particulars are of no use. They are to be pleaded with specificity, particularity and precision.²⁴ What we have in this case is a generalized allegation that because Dossa assisted Babubhai therefore it necessarily follows that he exerted undue influence in the making of the will. It has been well-settled for over a century that to constitute undue influence in testamentary law, the testator must be compelled to act against his wishes. It is not enough to show that there was mere *influence*. There must be *undue influence*, such that the testator did that which he did not intend or could not reasonably be expected to have intended.²⁵ Closeness in relations, providing assistance and, within a family, being supportive are not evidence of ‘undue influence’. The suggestion by Mr. Khandeparkar, learned Counsel for the Defendant, that Dossa admits to assisting Babubhai in some of his affairs is not enough to carry him to proof of undue influence. There is intrinsic evidence to indicate that there was none: the will itself does not cut out Supriya, nor does it fail to acknowledge her. Indeed, the only one it does completely cut out is Neelaben and she has no complaint about it, presumably because she knew that this is what Babubhai intended, given that she was very much with him when he executed his will, and perhaps because he had adequately provided for her in his lifetime. She has, in any case, filed a consenting affidavit. Babubhai’s major bequests are to one of his daughters, Sheila, and to his two grand-daughters by Bharati, with a subsidiary bequest to Bharati. It is impossible to hold that this was

²⁴ *Bishnudeo Narain & Anr. v Seogeni Rai & Ors.*, AIR 1951 SC 280; *Afsar Shaikh & Anr. v Soleman Bibi & Ors.*, AIR 1976 SC 163.

²⁵ *Wingrove v Wingrove*, 1885 XI PD 81; *Hall v Hall*, 1868 I XXXI P&D Vict LR 481

the work of a man 'unduly influenced'. On the contrary, it suggests a man who very much knew his own mind. It must be noted, too, that there is no suggestion that the will was unnatural.

46. The will stands proved, as does the testator's dispositive capacity. There is no evidence of undue influence. The issues are answered accordingly.

47. The suit is decreed, and, given the circumstances, is decreed with costs. Drawn up decree dispensed with. Probate is to be issued expeditiously and, in any case, within four weeks from today. The opposition to the petition is entirely without merit and there will therefore be no stay of the operation of this judgment and order.

(G.S. PATEL, J.)