

Atul

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY & INTESTATE JURISDICTION
TESTAMENTARY SUIT NO. 18 OF 2005
IN
TESTAMENTARY PETITION NO. 754 OF 2004**

- 1. SHIRISH POPATLAL SHAH**
of Mumbai Inhabitant, aged 65 years
residing at Salila, 15 Friend's Housing
Society, N.S.Road, 6 J.V.P.D. Scheme,
Vile Parle (W), Mumbai-400056
- 2. SUSHIL POPATLAL SHAH**
of Mumbai Inhabitant, aged 56 years
residing at Salila, 15 Friend's Housing
Society, N.S.Road, 6 J.V.P.D. Scheme,
Vile Parle (W), Mumbai-400056 ... Plaintiffs

versus

ARUN POPATLAL SHAH
U.S. Citizen, aged 62 years presently, in
Mumbai, having address at Salila, 15
Friend's Housing Society, N.S.Road, 6
J.V.P.D. Scheme, Vile Parle (W), Mumbai-
400056 ... Defendant

APPEARANCES

FOR THE PLAINTIFFS	Mr. Ajay Panicker
FOR THE DEFENDANT	Mr. Rajiv Narula, i/b M/s Jhangiani Narula & Associates

CORAM : **G.S.Patel, J.**
JUDGMENT RESERVED ON : **16th July 2015**
JUDGMENT PRONOUNCED ON : **28th March 2016**

JUDGMENT:

1. The Plaintiffs seek probate to the Last Will and Testament dated 10th May 2003 of their mother, Lilavati Popatlal Shah (“**the deceased**”; “**the Testatrix**”; “**Lilavati**”), who died in Mumbai on 28th November 2003. The Plaintiffs and the Defendant are brothers. The Defendant opposes the grant of probate on several distinct grounds.
2. The parties’ father, Lilavati’s husband, Popatlal Shah died in Mumbai on 2nd January 1993. He was survived by the deceased, their eldest daughter Vinodini Shah (“**Vinodini**”) and three sons, viz., the two Plaintiffs and the Defendant. The 1st Plaintiff is the eldest son; the Defendant is the second son; the 3rd Plaintiff is the youngest of the three. Popatlal left a Will dated 21st November 1992, bequeathing his entire estate to his widow, Lilavati.
3. Probate was also sought of Popatlal’s Will. That, too, is opposed, and it is the subject matter of Testamentary Suit No. 20 of 2005. The present suit is concerned only with Lilavati’s Will.
4. In her Will, Lilavati supposedly appointed the Plaintiffs as joint Executors. She is said to have divided her estate between her daughter Vinodini, the two Plaintiffs (two of three sons) and her grandson Asim Shah (“**Asim**”), the 1st Plaintiff’s son.

5. The Defendant is said to have been wholly excluded and disinherited by Lilavati, on account of differences and quarrels alleged to exist between the Defendant and other family members. The Will provides some reasons for this disinheritance: that the Defendant did not stay with her; that he did not take care of her; that he did not act in the interests of the family; and that he quarrelled with her on financial matters. The Will says that Vinodini and the Plaintiffs looked after Lilavati, Popatlal and their family interests. In the Will, Lilavati is said to have left her movables equally to Vinodini and the two Plaintiffs. Lilavati then claims to have a 25% share in her husband's HUF which is said to a one-fourth interest in the Salila Building at Juhu and in its TDR. This is left to Vinodini and Asim. The remaining 25% interest in the HUF was left to Vinodini. The Will also makes a purported bequest of tenancy rights in Flat No.14, Al-Sabah Court, 73, Marine Drive, Mumbai 400 021 to the Plaintiffs and Vinodini.

6. The execution of the Will in question was supposedly witnessed by one R. R. Patel ("**Patel**") and one Dr. G. K. Mavani ("**Dr. Mavani**").

7. The Defendant entered a Caveat on 8th February 2005, and filed an Affidavit in Support of it on 14th December 2005. He disputed the due and proper execution of the Will. He alleged that Lilavati made no Will, and the document propounded by the Plaintiffs was forged and fabricated. He said the signature on the Will was not Lilavati's; that the circumstances under which the Will was allegedly executed were suspicious; that the contents of the Will appeared to have been written/typed on a blank stamp paper on

which Lilavati's signature was obtained in advance; that Lilavati did not sign the Will of her volition and lacked the necessary dispositive capacity at the time; that, assuming the signature was hers, she had signed it without knowledge or understanding of its contents; and that the will was unnatural in excluding the Defendant. The Defendant also alleged that Lilavati had suffered from Alzheimer's for four or five years before her death, and that her condition had worsened in that time.

8. On the caveat and affidavit being filed, the petition was renumbered as a suit and proceeded to trial.

9. Issues were struck on 25th June, 2015. These are reproduced below, with my findings against each.

Sr No	Issue	Finding
1.	Whether the Petitioners prove that the deceased had executed the last Will dated 10th May 2003?	No
2.	Whether the Petitioners prove that the deceased had left the Will and that the Petitioners are the joint executors of the said Will?	No
3.	Whether the Petitioners prove that the Caveator has filed the Caveat with the mala fide intention merely to delay the issuance of the probate on the Will of the deceased?	No

- | | | |
|----|---|---------------------------|
| 4. | Whether the Caveator proves that the deceased had not executed the will and the will produced in the Petition is forged? | Partly in the affirmative |
| 5 | Whether the Plaintiffs prove that the deceased was in proper physical and mental condition so as to make the will bequeathing her estate? | No |
| 6. | Whether the Defendant proves that the alleged will is unnatural? | Yes |

10. The burden of proof for Issues Nos. 1, 2, 3 and 5 lay on the Plaintiffs. Issues Nos. 4 and 6 were required to be proved by the Defendant. If the Plaintiffs did not discharge their burden, the Defendant would still succeed, irrespective of whether or not the Defendant was able to prove Issues Nos. 4 and 6. The two issues to be proved by the Defendant are distinct, and proof of any one of them would be sufficient to defeat the suit. On a consideration of the evidence, and for the reasons that follow, I have held that the Plaintiffs have not discharged their burden; that the Defendant has shown the Will to be unnatural; and I have, accordingly, dismissed the suit. Issue No.4 is in two parts; the first is as to whether the deceased executed the Will. This is the same as Issue No.1, the burden of which is on the Plaintiffs. Therefore, if the Plaintiffs fail in proving Issue No.1, the Defendant succeeds in proof of the first part of Issue No.4. I have therefore answered this Issue partly in the affirmative.

11. The Plaintiffs examined four witnesses: Plaintiff No.1 (PW1); Asim Shirish Shah, the 1st Plaintiff's son (PW2); Dr. Mavani (PW3)

and R. R. Patel (PW4), the last two being the attesting witnesses. The Defendant examined himself.

Re: Issues Nos. 1, 2 and 4: the due execution of the Will

12. These Issues are interlinked and are dealt with together. It is well-settled that the burden of proving the valid execution of a Will in accordance with Section 63 of the Indian Succession Act, 1925 lies on the Will's propounder. Proof of a Will 'in its solemn form' has several distinct probanda. In *H. Venkatachala Iyengar v B.N. Thimmajamma and Ors.*,¹ the Supreme Court said:

"19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. **The propounder would be called upon to show by**

¹ AIR 1959 SC 443

satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated."

(Emphasis added)

13. Before assessing the evidence of the witnesses led by the Plaintiffs, I believe it is necessary to consider the document itself. Often, a study of the manner of a Will's writing, its 'get up' as it were, the placing of signatures, the kind of paper used and so on yield important hints about the circumstances and nature of the document's execution. To be sure, none of these factors may in themselves be determinative. All may be explained. But yet there may be aspects here that need to be addressed.

14. The Will dated 10th May 2003 is Exhibit "P-2" in evidence. It is on Rs.20/- stamp paper. The stamp paper itself is dated 5th May 2003 and is in the name of the deceased. The body of the Will

is typed or prepared on a computer and printed out. The get up is very peculiar: the document starts very close to the purchase stamp and runs through part of it. The lines are single-spaced. On the first page or face, the spacing between the paragraphs is reasonably regular. On page 2, the reverse face, however, paragraphs 2 and 3 appear to have been placed close together in an irregular manner; and the line spacing in the last two lines of the second paragraph on page 2 is also irregular. There is the usual closing paragraph, directly beneath which is a signature said to be of the deceased against a small x or cross. Beneath that is the execution clause:

"Signed by the within named testator Smt Lilavati Popatlal Shah as her last Will and testament in our presence all being present at the same time. Thereafter at the request of the testator and in her presence we subscribed our respective names."

Below this, to the left, is the word "WITNESSES" in all caps. There are then two signatures side by side of the two attesting witnesses, R. R. Patel to the left against the numeral "1)", and Dr. Mavani to the right against the numeral "2)". Both seem to have written their names and addresses beneath their signatures. Neither seems to have put the date. The typing or printing from the front face is seen to have come through in mirror image on the reverse face.

15. The manner in which the deceased's signature is found placed, tightly positioned between two paragraphs, and the inexplicably inconsistent and awkward spacing of the paragraphs on

the second page require explanation as to the preparation of this document. For this reason, before I turn to the evidence of the two attesting witnesses, I believe it is necessary to consider more closely the evidence on record about the manner and circumstances in which this document was brought into existence. The evidence for this comes, of course, from the 1st Plaintiff, who gave evidence as PW1.

16. In his Affidavit in lieu of Examination-in-Chief, Plaintiff No.1 says that at the time of her death, Lilavati, the Testatrix, lived at 14, Al Sabah Court, 73, Marine Drive, Mumbai 400 020. He then identifies Lilavati's signature on the document, as also those of the two attesting witnesses and says that Lilavati signed the Will in the present of the two attesting witnesses and that they attested it in her presence. Paragraph 3 of this Affidavit is crucial. It is best set out in full:

"3. I say that the said WILL was dictated by the deceased herself to me and my brother Sushil Popatlal Shah. We in turn told our auditor Mr. Dilip Thakkar of her the said last wish. The auditor prepared the same and I got it typed which was given to my mother at the residence of the deceased at 14, Alsabha Court, 73, Marine Drive, Mumbai - 400 020, some where in May, 2003. I say that the said draft Will approved by the deceased was then engrossed on Stamp Paper of Rs.20/-. I had given the said WILL prepared on Stamp paper a day earlier and the following day same was executed by the deceased in the presence of

2 witnesses Dr. G. K. Mavani and Shri R.R. Patel who were present at her Marine Drive residence when my mother the testator subscribed the signature on page 2 of the WILL and also initialled on page 1."

(Emphasis added)

17. Reading this passage with the two dates that appear on the document itself gives us something of a time-line. The Will is supposedly dated 10th May 2003, a Saturday. The Stamp Paper on which it is drawn up has a date of 5th May 2003, the previous Monday. PW1, the 1st Plaintiff tells us that the stamp paper was purchased after Lilavati 'approved' the Will; and that the draft was given to Lilavati 'some where in May 2003'. Therefore, the dictation of which PW1 speaks was evidently a few days before 5th May 2003, for after it was supposedly dictated, it was taken to Thakkar, who drew it up; and then PW1 got it typed. But this time-line gets confused when PW1 says the final Will was drawn up on the Stamp Paper just the day before, i.e., Friday, 9th May 2003. Yet, the Stamp Paper was purchased in Lilavati's name four days earlier. Therefore, we do not know when the so-called dictation took place. The dictated version is not produced. We do not know what was conveyed to Thakkar or how. We do not know what he drew up, or when. We do not know when the draft was typed up, where and by whom exactly. We do not know when exactly it was approved by Lilavati or who took it to her for approval and who was present at the time. PW1 says he 'had given' (to whom we are not told) the Will on stamp paper the day before, i.e., 9th May 2003. This means

it was typed in its final version on or before that day, i.e., between 5th and 9th May 2003.

18. PW1 was extensively cross-examined on this aspect of the matter. He confirmed that when she died on 28th November 2003, a few months after the date of the Will, she was 86 or 87 years old. She supposedly died of natural causes. This cross-examination starts from Question 56.² When asked how long before the alleged execution did Lilavati ‘express her desire to make a Will’, the 1st Plaintiff says this was 10 days to two weeks earlier. This therefore puts the beginning of the Will-preparation process at about the end of April 2003. PW1 is then asked how he communicated Lilavati’s wishes to Thakker. He replies by saying that Lilavati dictated her wishes in Gujarati. Sushil, Plaintiff No.2, took down points. Then Sushil and PW1 made an English draft and sent it to the auditors.

19. This is immediately a point of concern, as *both* Plaintiffs, as propounders, are by the 1st Plaintiff’s own admission in cross-examination, direct participants in the creation of the Will being propounded.

20. PW1 then says he needs to check if Sushil’s notes are available. He later confirms that they are not.³ He then says that Thakkar sent the draft Will to him about two or three days after these ‘notes’ were sent to him.⁴ There is nothing in writing to

² From p. 65 onward.

³ Qn. 105, p. 74.

⁴ Qn. 59, p. 66.

evidence this.⁵ He insists that his man went to Thakkar's office and collected the draft. PW1 was then asked if Lilavati was shown the draft prepared by Thakkar or some other draft. In response, he says the draft was handwritten and it was typed at his office, i.e. that of the 1st Plaintiff, PW1.⁶ The 'final Will' was also prepared at his office, possibly by the computer operator or by his son, PW2, Asim Shah.⁷ Question 64 is important. The 1st Plaintiff is asked if the date of execution was decided in advance; he says yes, and further that his computer operator was told of this.⁸ Thakkar advised the 1st Plaintiff to purchase stamp paper.⁹ At first, he does not know if the draft received from Thakkar is available;¹⁰ later, he confirms it is not.¹¹

21. That the Will bears a typed date of 10th May 2003 and that it was so prepared (with this date) on 9th May 2003 necessarily means that both attesting witnesses were informed no later than 9th May 2003 that they were required on 10th May 2003. In fact, both attesting witnesses say something far more interesting in their Affidavits in lieu of Examination-in-Chief. Those Affidavits are almost identical. In both, the two attesting witnesses say that "in the first week of May 2003", Lilavati contacted them and requested them to witness the execution of her Will and, 'accordingly', they

⁵ Qn. 60, *p.* 66.

⁶ Qn. 61, *p.* 66.

⁷ Qns. 63, 65, *p.* 67.

⁸ Qns. 65, 67, *p.* 67.

⁹ Qn. 67, *p.* 67.

¹⁰ Qn. 68, *p.* 67.

¹¹ Qn. 105, *p.* 74.

were present on 10th May 2003.¹² There is no evidence that Lilavati spoke with either of them after the first week of May 2003 to fix a date. This can only mean that in the first week of May 2003, the date of 10th May 2003 had been settled. But that is difficult to accept since, at that time, the Will had not been finalized. Mr. Panicker submits, on a consideration of these dates, that the Will was fully ready on 5th May 2003, the date of the Stamp Paper. But that is directly contradicted by the 1st Plaintiff's evidence, which does not say this at all, but instead suggests that the final document was not got ready till 9th May 2003. This is a material discrepancy and, till the end, remains unresolved.

22. I turn now to the events of 10th May 2003 and the actual execution of the Will. As I have noted, both attesting witnesses say they were called by Lilavati in the first week of May 2003 and asked to attest her execution of her Will. In his evidence, Patel, PW4, says he was 'accordingly' present on 10th May 2003. How he knew the time when he was to be present is unexplained in his Evidence Affidavit. In that Affidavit, he also says that those present when he arrived were Dr. Mavani, the two Plaintiffs and Asim, PW2, the 1st Plaintiff's son. In other words, three of the four beneficiaries to the Will were also present at the time.

23. Patel's cross-examination is most interesting. For one thing, he first gives his residential address throughout his cross-examination as being at Poonam Apartments, Dr. Annie Besant

¹² Mavani, PW3, Affidavit in lieu of Examination-in-Chief, para 3, *pp.* 125-126; Patel, PW4, Affidavit in lieu of Examination-in-Chief, para 3, *pp.* 142.

Road, Worli, Mumbai. This is some distance from Al-Sabah Court. In cross-examination, he says he has been living at the Worli address since 2006 or 2007, i.e., some years *after* the date of the Will.¹³ He then says that in 2003, he was staying at Al-Sabah Court at Marine Drive, previously known as Ishwar Niwas.¹⁴ He says too that when he saw a draft of his Affidavit, he corrected the address to show it at Poonam Apartments at Worli.¹⁵ Later, he is asked why he gave his address at Poonam Apartments if he was staying at Al-Sabah Court. His answer is that at that time, both houses were functional: his mother stayed at Al-Sabah Court and he sometimes stayed at one and sometimes at the other. Now this is of consequence because in his Evidence Affidavit he says Lilavati called him in early May 2003 and asked him to attest her Will. What he says in cross-examination is, however, different. First, asked how long before the signing of the Will he was informed he would have to come, he does *not* reaffirm his version in the Evidence Affidavit. Instead he says that he would come home from his factory at around 5 pm, and park his car below the Al-Sabah Court building. He speculates that ‘they’ must have seen him there and called him upstairs.¹⁶ No particular message was conveyed to him. He was simply asked to come up.¹⁷ This does not reconcile with the assertion in the Affidavit in lieu of Examination-in-Chief that Lilavati had called him in early May 2003 and asked him to witness the execution of her Will. Indeed, in cross-examination, Patel abandons this assertion altogether:

¹³ Qn. 1, *pp.* 145-146.

¹⁴ Qn. 14, *p.* 148.

¹⁵ Qn. 10, *p.* 147.

¹⁶ Qn. 25, *p.* 150.

¹⁷ Qn. 30, *p.* 150.

Q.23 Who informed you that your presence is required for witnessing the execution of the Will?

A) I do not remember who called me up.

Q.24 Were you informed personally or by telephone?

A) I was informed personally it may have been a servant or a child I do not remember.

Q.25 How long before signing of the said Will were you informed that you will have to come?

A) Normally I used to come from my factory at around 5 o'clock and park my car down below and they must have seen me there and called me up. This a presumption I do not exactly know how I was called.

. . .

Q.30 What was the message communicated to you when you were called up to the residence of the deceased as you have said?

A) I was simply called up.

24. That is not all. Patel is specifically asked when his mother passed away; he says that was some time earlier, possibly in 1995.¹⁸ Therefore, read with his answer that he unpredictably visited the Marine Drive address, this necessarily means that he did not come there on 10th May 2003 to visit his mother, but entirely by chance; and this is a further contradiction to his evidence in chief that he was asked to come there specifically on that day.

25. Patel is then asked who were the ones present at the time of the execution of the Will. In his Affidavit in lieu of Examination-in-Chief, he clearly says in paragraph 3¹⁹ that those present were Dr. Mavani, the two Plaintiffs and the 1st Plaintiff's son, Asim. Now in cross-examination, he is given an opportunity to reaffirm this. Instead, this is what he says:

Q.31 When you went up to the residence of the deceased who all were present there at that time?

A) Shirish was present Assem was present and Sushil was present and one maid servant was present.

Q.32 Was any advocate present at that time?

A) I do no recollect and I do not think so.

¹⁸ Qn. 40, *pp.* 152-153.

¹⁹ At *p.* 142.

Q.33 The persons named above were
the only ones present?

A) Yes. These were the people
whom I came across if there
anybody else in the flat I am not
aware.

26. There is no mention here of Dr. Mavani's presence at all. I notice that in Q.33, Patel was given an open-ended opportunity to correct course. He maintains here, though, that the two Plaintiffs, Asim and the maid were the only ones there; he still does not mention Dr. Mavani. He is given yet another opportunity:

Q.36 Can you please narrate as to
what happened after you were
asked to sign on the said Will?

A) Shirish read the Will and
explained it to Lilabhabi.
Lilabhabi stated that all was
fine. Thereafter I signed the
Will I was asked to.

Even now there is no mention of the other attesting witness, Dr. Mavani, or of his having attested the Will.

27. This is hardly a minor or irrelevant discrepancy. This is insufficient proof of due execution and attestation of the Will. This is, after all, the evidence of not someone who was merely present at the time, but someone who is said to have actually attested the execution of the Will. I do not think Mr. Panicker is correct in saying that no opportunity was given to this attesting witness to explain the

discrepancy or contradiction between his Evidence in Chief and his answers in cross-examination. To the contrary: Patel was afforded ample opportunity; not once but at least twice. The questions put to him, as Mr. Narula correctly says, were sufficiently open-ended to allow him to give an answer consistent with this examination-in-chief. If he chose not to, that is surely enough for the Defendant.

28. What of the other attesting witness, PW3, Dr. Mavani? His Affidavit in lieu of Examination-in-Chief matches that of Patel's almost *verbatim*. He too says that Lilavati called him in the first week of May 2003 and requested him to attest the execution of her Will. He is confronted with this directly in cross-examination.²⁰ He says he does not recall whether Lilavati phoned him or told him personally when she was in Juhu. Later, he says that when she made the request, Lilavati told him the date and time.²¹ In other words, when Lilavati asked Dr. Mavani to be a witness to the execution of her Will (either on the telephone or personally), in early May 2003, she *already knew* that it would be done on 10th May 2003. But this disrupts any rational time-line, for in early May 2003, the draft Will was not ready; Thakker had yet to draw it up, and the 1st Plaintiff had yet to get it approved from Lilavati. At the time, Dr. Mavani was attached to the Bharatiya Arogya Nidhi Hospital at Juhu. He says, in response to the very first question in cross-examination, that he attends this hospital seven days a week, unless out of town.²² His timings are usually from 10:00 am to 1:30 pm and from 6:00 pm to 10:30 pm. Yet, when asked how it was then that he was available on

²⁰ Qn. 19, *p.* 133.

²¹ Qn. 38, *p.* 138.

²² Qn. 1, *p.* 130.

10th May 2003, a Saturday, at 5:30 pm for attestation, he responds by saying that there are no consultations on Saturdays.²³ But what is troubling about Dr. Mavani's evidence is that he has no established professional relationship with the deceased at all. That he is attached to the Bharatiya Arogya Nidhi hospital in Juhu is something he deposes to in his examination-in-chief. He claims to have been Lilavati's family doctor,²⁴ and to have been appointed to that hospital in 1987 by Lilavati's husband, Popatlal. In cross-examination, he says that his only practice is at this hospital,²⁵ though he sometimes has patients admitted to the Sujay Hospital.²⁶ He maintains no records at all of his patient consultations,²⁷ or even an appointment diary,²⁸ a completely fantastic assertion for any physician. As to Lilavati's medical history, Dr. Mavani seems only to know that she had a mild cardiac illness for which she was taking some medicines and that she once had a major episode of pancreatitis. He does not claim to have treated her for either.²⁹ What he does admit that there was another doctor, one Dr. Ramesh L. Shah, who had a nursing home at Gamdevi, closer to Lilavati's residence, and who was also affiliated with the Bharatiya Arogya Nidhi hospital; and who, more importantly, was the doctor that the family consulted for all serious ailments.³⁰ Confronted with this, he volunteers that he was the 'main treating doctor'. He is asked later

²³ Qn. 39, *p.* 139.

²⁴ Examination-in-chief, paragraph 1, *p.* 125.

²⁵ Qns. 3-4, *p.* 130.

²⁶ Qns. 5-6, *pp.* 130-131.

²⁷ Qn. 8, *p.* 131.

²⁸ Qn. 25, *p.* 135.

²⁹ Qn. 11, *pp.* 131-132.

³⁰ Qns. 16-17, *pp.* 132-133.

what he means by this,³¹ and says that this is a reference to the doctor who ultimately takes the decision regarding the treatment to be administered. He then claims to have seen Lilavati once or twice a month from 1998 to 2003, but of course has no records of this at all. He recalls only treating her respiratory illness and sometimes an abdominal illness.³² This is about as generalized and vague as it is possible to be. He has, however, treated the 1st Plaintiff and his family regularly including for cardiac disease, neurological issues, diabetes and so on.³³ There is nothing specific in Dr. Mavani's evidence about Lilavati's medical condition. He has not issued a fitness certificate as to her condition or state on that day and he does not claim to have examined her then either.

29. The difficulty in the Plaintiffs' way is that both attesting witnesses are more closely tied to the 1st Plaintiff than they were to the deceased. The 1st Plaintiff was a trustee of the Bharatiya Arogya Nidhi Hospital,³⁴ apart from having treated the 1st Plaintiff and his family in the past. The other attesting witness, Patel (PW4) is even more closely linked. It was the 1st Plaintiff who brought him a lawyer for preparing his Evidence Affidavit. The 1st Plaintiff was also present when Patel made his Affidavit. He admits to having travelled overseas with the 1st Plaintiff around three times.³⁵ He also admits that the 1st Plaintiff was close to his younger brother.

³¹ Qn. 27, *p.* 135.

³² Qns. 28-29, *p.* 136.

³³ Qns. 30-31, *p.* 136.

³⁴ Qn. 42, *p.* 139.

³⁵ Qns. 14-15, *p.* 148.

Though he claims to have been close to Lilavati, he does not know if she had any siblings.³⁶

30. The result is that as regards Patel's testimony, there are unexplained contradictions: as to when he was told he would have to be an attesting witness and by whom, the persons present at the time, his unexplained presence at the Marine Drive residence and so on. Dr. Mavani's evidence is hardly satisfactory either. Given his evident association with the Plaintiffs, it remains unexplained why he should have been called all the way from Juhu when the physician who regularly attended to her lived much closer by. There is also the contradiction between the testimonies of the two attesting witnesses: Patel mentions the presence of a maid servant; Dr. Mavani does not.

31. Even more peculiar is the 1st Plaintiff's and his son's lack of familiarity with the deceased's handwriting, though they claim to have been close to her, and the 1st Plaintiff claims to have visited her almost daily,³⁷ while Asim stayed at the Marine Drive flat intermittently and helped her with her accounts.³⁸

32. Finally, although the witnesses insist that the Will was explained to Lilavati in Gujarati, none explain why this was

³⁶ Qn. 22, *p.* 149.

³⁷ Cross-examination of the 1st Plaintiff, Qns. 22-24, *p.* 52, read with Qn. 13, *p.* 50;

³⁸ Cross-examination of Asim, PW2, Qns. 31 and 33-35, *p.* 101 and *p.* 102, read with Qn. 16, *p.* 98.

necessary, given the 1st Plaintiff's evidence that she was educated in English at SNDT University and graduated with a degree in arts.³⁹

33. There are altogether too many inconsistencies and imponderables in this evidence, starting with the get up of the testamentary document itself, the manner of its preparation and continuing to its execution. Section 63 of the Indian Succession Act tells us of the manner in which a valid Will is to be made. Though it need not have a particular form, its execution must be attested by at least two witnesses; each must attest the Will in the presence of the testator, though both do not have to be together at the same time. In this case, though both Dr. Mavani and Patel claim to have attested the execution of the Will, there are far too many gaps and lacunae in their respective accounts. The execution of the Will, and its preparation, are surrounded by circumstances that it is impossible to describe as innocuous or irrelevant. They are downright suspicious. These suspicious circumstances must be explained and removed before the Will can be said to have been proved. That burden lies on the propounder, and it is heavier still when the propounder is a participant in the making of the testamentary instrument; and heavier yet when the propounder is a significant beneficiary.⁴⁰ The role of the Court in such cases is to adopt a reasonable scepticism, not disbelief or impenetrable incredulity. The Court must be vigilant, cautious and circumspect. Ultimately, it is the Court's conscience that must be satisfied.⁴¹

³⁹ Qn. 10, p. 50; paragraph 4, p. 42.

⁴⁰ *H Venkatchala Iyengar v B. N. Thimmajamma & Ors.*, *supra*.

⁴¹ *Surendra Pal v Dr. Saraswati Arora*, (1974) 2 SCC 600; *Madhukar D. Shende v Tarabai Aba Shedage*, (2002) 2 SCC 85; *Sridevi v Jayaraja Shetty*, (2005) 2 SCC 784.

34. I find it impossible to hold that the due execution of the Will has been proved. The evidence of the two attesting witnesses admits of no reconciliation. The manner in which the document was brought into existence is itself suspect, and this is never properly explained. There is the constant involvement of the Plaintiffs and of the 1st Plaintiff's son, from start to finish; and all of them are among the only beneficiaries (the other being the sister, Vinodini). The argument postulated by the Defendant, that the deceased's signature was previously taken in blank on a stamp paper, and that the entire document was then created around it, with the two signatures being taken later, may not have been strictly proved by the Defendant. But it is more than plausible; and, given the evidentiary lacunae, eminently probable. This becomes more apparent when read with the discussion under Issue No. 6 (whether the Will is unnatural).

35. Issues Nos. 1 and 2 are both answered in the negative. Issue No.4 is in two parts: the first part, whether the Defendant proves that the deceased had not executed the will is perhaps incorrectly phrased and almost certainly unnecessary. If Issues Nos. 1 and 2 are answered in the negative, this part of Issue No. 4 must be automatically answered in the affirmative; there is nothing further for the Defendant to prove. The second part of Issue No.4, whether the Will produced in the Petition is forged, is rendered unnecessary. To this limited extent this part of Issue No.4 will need to be answered in the negative, for the Defendant led no evidence of 'forgery', properly so called, i.e., of the signature of the Testatrix having been done by somebody else. In any case, given the answers

to Issues Nos. 1 and 2, and the first part of Issue No.4, this makes no difference at all to the final outcome.

Re: Issue No.6: Whether the Will is unnatural?

36. The Defendant's case is simple: there was no call for the Testatrix to have completely excluded him from the Will. The Will itself supplies reasons but these, the Defendant says, are not reasons the Testatrix could ever have herself given; all have been supplied by the Plaintiffs.

37. The Plaintiffs claim that the Defendant owed Rs.13.5 lakhs to the deceased. This was originally repayable to their father, Popatlal, and, after he died, the Defendant assured the deceased that he would repay it to her. This he did not do, and this explains the deceased's ire.

38. The Defendant refutes this entirely. There was no such debt, he insists; and, in any case, since the money was already sufficiently accounted for and available, the deceased could have withdrawn it at any time, especially since the deceased had access to the Defendant's accounts. He points out that 1st Plaintiff was at one point entrusted with managing the 1st Defendant's accounts and affairs in India. There is correspondence to suggest that the 1st Plaintiff asked the Defendant for money for the deceased, and that this was provided. The correspondence also indicates a more than

sufficient bank balance being maintained. In addition, the deceased held a power of attorney from the Defendant; this was later withdrawn, but the reason, the Defendant says, was his belief that the deceased was pressured by the Plaintiffs into signing some documents relating to TDR in respect of the family property at Juhu. The Defendant says that in 2001-2002, the deceased herself told him that the 1st Plaintiff and his son Asim were coercing her into signing papers in blank. That led to the withdrawal of the Power of Attorney.

39. In addition, the Defendant claims that he regularly sent money to the deceased to meet her daily expenses through their joint account in the Bank of Baroda. Bank statements are produced. These show cash withdrawals in excess of Rs.10 lakhs over time. In addition, there are cheques written by the Defendant to the deceased on 19th July 2002 and 17th April 2003; the second of these, for Rs. 1 lakh, was less than a month before the alleged Will. The Defendant also produces a statement from Citibank to show availability of sufficient funds. Mr. Panicker insists that all this money was the deceased's, and that these were investments made by the Defendant for the deceased, but this is not proved. It is not in doubt that the 1st Plaintiff too had access to the Defendant's bank statements and bank accounts. It is difficult, given all this material, to accept the Plaintiffs' version that the Defendant had neglected the deceased and had never supported her, and that the statement to this effect in the Will is, therefore, correct and deserving of acceptance.

40. The Plaintiffs however argue that the Defendant quarrelled often with the deceased and other family members. This, too, seems difficult to accept at face value. After all, every testamentary disposition, by definition, disrupts the natural line of succession.⁴² Where there is evidence of an ongoing relationship and evidence of the Defendant having lent financial and other support, it is difficult to accept that his estrangement from the deceased was so complete and so final that she would have totally cut him out of her Will. To the extent that the burden lies on the Defendant, it is enough for him to show that he continued to maintain close relations with the deceased till her death, and that there was nothing of the kind of distancing or estrangement as would justify so complete a testamentary exclusion. The Defendant claims to have visited India often between 1994 and 2004⁴³ and to have kept in touch with his mother over the phone at other times.

41. The Defendant has tendered some letters in evidence. These are in Gujarati and were sent to the Defendant in the United States.⁴⁴ Mr. Narula is also correct in saying that when the Defendant produced a statement of expenses⁴⁵ by the Defendant for the deceased, this went entirely uncontroverted. The Defendant also referred to the 1st Plaintiff's letter dated 7th September 1995,⁴⁶ which not only establishes that the 1st Plaintiff was managing

⁴² *Rabindra Nath Mukherjee & Another v Panchanan Banerjee & Ors.*, AIR 1995 SC 1684

⁴³ The passport details are on record and are not controverted.

⁴⁴ Exs D-15 to D-21, from 11th May 1990 onward. Some of these are undated.

⁴⁵ Paragraph 3, *p.* 156.

⁴⁶ Ex.D-1, *p.* 292.

financial affairs in India but, more importantly, seeks a cash withdrawal cheque for the deceased. The Defendant was not cross-examined on this letter at all. Similarly, there is no cross-examination on the letters dated 9th May 1996⁴⁷ and 28th May 1997⁴⁸ from the 1st Plaintiff to the Defendant. There is also a letter dated 21st February 2005 from UTI Bank to the Defendant confirming the clearances of two cheques issued to the Defendant.⁴⁹ Both cheques were of Rs.1 lakh. The second of these was dated 17th April 2003 — barely a month before the alleged Will, and only two weeks or so before the deceased allegedly ‘gave instructions’ to the Plaintiffs to draw up a Will excluding the Defendant *inter alia* because he did not provide for her. This letter is not controverted. There is no cross-examination on it at all. In fact, the 1st Plaintiff actually admits this in response to Question 27.⁵⁰ The 1st Plaintiff also admits that the deceased withdrew cash from the joint account she held with the Defendant at the Bank of Baroda; and that on several occasions, the 1st Plaintiff’s own staff made these withdrawals.⁵¹ His attempt at denying knowledge of why the deceased made these withdrawals is futile; there is no suggestion that she was independently running a business of her own. That the funds came from a joint account she held with the Defendant and which was seeded by the Defendant is not in dispute. There is some dispute about a Citibank statement that contains the endorsement ‘BA’ on it. The Plaintiffs claim that this means that the money in this account belonged to the deceased and that this is the loan

⁴⁷ Ex. D-2, p. 293.

⁴⁸ Ex. D-3, p. 295.

⁴⁹ Ex. D-28, p. 393.

⁵⁰ Qn. 27, p. 52.

⁵¹ Qns. 28-32, p. 53.

account. The Defendant says this is only a tracking of his investment account in India. When cross-examined, he says he cannot explain the endorsement but it does not represent any loan account. He also says that he never referred to the deceased as 'Ba' but only ever as 'mummy'.⁵² In any case, this argument of the Defendant owing the deceased Rs.13.5 lakhs and this being adequate reason to disinherit him is hardly compelling when weighed against the remaining evidence of his continued support for her almost to the very end. Mr. Narula is correct, I think, in saying this is all a red herring; no demand for return of this alleged loan was ever made. The parties' father died in 1993; and till 2003 there was not a whisper of it. It also does not stand to reason, he says, and I think correctly, that the 1st Plaintiff and supposedly the deceased would ask the Defendant for money again and again but not for a return of the so-called loan. What is more telling, perhaps, is the fact that very soon after the deceased passed away, the 1st Plaintiff withdrew the amounts she held in fixed deposit.⁵³ The amounts were distributed between the two Plaintiffs and their sister.⁵⁴ Clearly, as Mr. Narula says, this is nothing but an attempt to usurp the estate. Then there is evidence that in 2002, the Defendant did come to India but his wife was almost immediately hospitalized. The Defendant could not see his mother; but his mother did go to visit the Defendant's wife at their house. The 1st Plaintiff says so himself.⁵⁵ Then there is a letter from

⁵² Qns. 48-57, *pp.* 192-193.

⁵³ Qns. 83-87, *p.* 70; Qns. 89-92, *p.* 71.

⁵⁴ Qn. 88, *pp.* 70-71.

⁵⁵ Cross-examination of the 1st Plaintiff, Qn. 100, *p.* 72.

PW2, Asim, the 1st Plaintiff's son, thanking the Defendant for letting him use the house at Parla.⁵⁶

42. I find it difficult to accept Mr. Panicker's argument that if the Defendant could, as he alleges, have 'supported' the deceased, then he ought to have repaid her. That argument assumes there was an admitted loan to begin with; and it is in any case irrelevant for what is being contested here is not the loan recovery but proof of the Will being unnatural; i.e., an assessment of whether or not there was a falling out between mother and son. Mr. Panicker also claims that the deceased was 'very rich'. He points to certain tax returns.⁵⁷ The first, for the FY 2002-2003, shows a total annual income of only Rs.2,07,128 and tax paid of Rs.10,339. The next shows a taxable income of Rs.60,855 till Lilavati passed away. There is evidence of income from mutual funds, but these are negligible.

43. Overall, therefore, what we have is this: a Will that speaks with bitterness of the Testatrix's younger son's estrangement, and his fall from grace and favour; and, as against this, considerable evidence of continued financial and emotional support, concern, constant communication, a sharing of bank accounts, and no demonstration of any severance of ties during the deceased's life time. The ostensible reasons in the Will are sought to be justified on what appears to me to be one single, solitary ground: the non-payment of a loan debt, one that is never proved. None of this points to the kind of estrangement that the Plaintiffs claim existed; and I

⁵⁶ Cross-examination of the 1st Plaintiff, Qns. 102-103, *p.* 73, read with letter dated 25th April 1999, Ex. D-24, *p.* 381.

⁵⁷ Ex. P-12, *p.* 267; Ex. P-13, *p.* 269.

think, conversely, this is more than sufficient evidence from the Defendant in discharge of his burden of proving that the Will is unnatural; and that the reasons purportedly given in it are not those of the Testatrix herself. They cannot have been.

44. Certainly there is evidence of litigation disputes between the Plaintiffs and the Defendant; but these seem all to be of 2004 and 2005, after Lilavati's passing in November 2003, not during her life time.⁵⁸ There is no evidence that these suits were brought in Lilavati's lifetime or that she was in any way involved in any litigation. When Mr. Panicker therefore speaks of the Defendant 'quarrelling' with his family, he is referring to a period after Lilavati's death, not during her lifetime. Given that these disputes, following her demise, seem to have been acrimonious it is not wholly unreasonable, regard being had to all factors, including the physical aspect of the Will and the extraordinary story of its being brought into existence, that the Will itself is a document that followed Lilavati's demise, not preceded it. This may be surmise; but cogent evidence of post-death fabrication will undoubtedly be impossible. Yet this seems the only possible result when the evidence of the due execution (and the very creation) of the Will is so very suspect.

45. Issue No.6 will have to be answered in the affirmative. The Will is unnatural in its exclusion of the Defendant.

⁵⁸ Affidavit in lieu of Examination-in-Chief of PW2, Asim Shah, *pp.* 86-87.

Remaining Issues: Issues Nos. 3 and 5

46. With Issues Nos. 1, 2, 4 and 6 answered, there remain only Issue No.3 and Issue No.5. Issue No.3 is not strictly an issue; its answer has no bearing on the outcome of the suit. Why the Defendant filed the caveat is wholly irrelevant. In any case, no evidence is led on this; it is answered in the negative.

47. This leaves Issue No.5, a stand-alone issue as to the deceased's dispositive capacity. The burden of this lies on the Plaintiffs. The Defendant alleges that the deceased suffered from Alzheimer's disease for four or five years before her death and her condition steadily worsened. The Plaintiffs produced no documentary evidence; there was only the evidence of Dr. Mavani, without any supporting certificate or evidence of any examination having been done, and the say-so of the 1st Plaintiff and his son. There is no real evidence either way; except that it is undisputed that the deceased was indeed hospitalized in April and May 2002, just a year earlier. I simply cannot presume that the deceased was in a sufficiently sound state of mind, memory and understanding. Once the due execution of the Will itself is not proved, and there is a significant doubt, never dispelled, that the deceased did not ever sign the document as drawn up, it is impossible to conclude that on that day she had the necessary capacity to do so. Something more was required from the Plaintiffs to prove this, and it is not forthcoming.

48. Issues Nos. 3 and 5 are answered in the negative.

Conclusion and Order:

49. Given these findings, the result can only be that the suit must fail. There is no proof at all of the due execution of the Will, i.e., proof of the Will in its solemn form.

50. The suit is dismissed. There will be no order as to costs.

(G.S. PATEL, J.)