

ASSP

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY & INTESTATE JURISDICTION
TESTAMENTARY SUIT NO. 20 OF 2005**

IN

TESTAMENTARY PETITION NO. 753 OF 2004

SHIRISH POPATLAL SHAH,

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 – 400 056

...Plaintiff

versus

ARUN POPATLAL SHAH,

U.S. Citizen, aged 62 years, presently in
Mumbai, residing at Salila, 15 Friend's
Housing Society, N.S. Road, 6 J.V.P.D
Scheme, Vile Parle (W), Mumbai – 400
056

...Defendant

APPEARANCES

FOR THE PLAINTIFF Mr. Ajay Panicker

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

CORAM : G.S.Patel, J.

JUDGMENT RESERVED ON : 23rd June 2016

JUDGMENT PRONOUNCED ON : 8th July 2016

JUDGMENT:

1. The Plaintiff seeks Letters of Administration with Will Annexed to a Will dated 21st November 1992¹ that he says was the last Will of his father, Popatlal Bhogilal Shah (“**Popatlal**”), who died in Mumbai on 2nd January 1993. Popatlal had a daughter and three sons with Lilavatibai Popatlal Shah (“**Lilavati**”). They are: Vinodini Mody (“**Vinodini**”), the Plaintiff, the Defendant and Sushil Shah (“**Sushil**”).

2. The Defendant filed a Caveat dated 14th February 2005² and an Affidavit in Support dated 21st February 2005.³ The Petition was then renumbered as Testamentary Suit No. 20 of 2005.

3. Before I go further, I should note that this is the second of two testamentary contests between the same parties. Shirish Shah, the present Plaintiff earlier filed Testamentary Petition No. 754 of 2004, for Probate to Will he said had been made by the parties’ mother, Lilavati. The present Defendant, Arun Shah, opposed the Petition. He entered a Caveat and that Petition was renumbered as Testamentary Suit No. 18 of 2005. The Will propounded divided Lilavati’s estate, including her inheritance from her husband, Popatlal, between Vinodini, the present Plaintiff, Sushil and Asim (the Plaintiff’s son). Arun, the present Defendant, was excluded. I decided that Suit, and held for the Defendant. For several reasons, I held that the Will was not proved. I pronounced judgment in that Suit on 28th March 2016. That judgment is under appeal. This is of

1 Paperbook, *p.* 275.

2 Paperbook, *p.* 30.

3 Paperbook, *p.* 33a.

some importance to this case, for Mr. Narula for the Defendant would have it that the present Will, too, was ‘conjured up’, as he puts it, at about the same time as Lilavati’s Will; and that the Plaintiff’s intention was only one: to grab the entirety of the parties’ parents’ estates. I will address that argument shortly.

4. First, to the Will’s physical aspect. This Will is typed in English, also a matter of some moment to one of Mr. Narula’s submissions. It has four pages. Popatlal has initialled pages 1, 2 and 3. His signature is on page 4. The attesting witnesses to this Will are one Suresh Mody (“**Mody**”), Popatlal’s son-in-law; and one Dr. Arun Shah, (“**Dr. Shah**”), a practicing physician. Mody died on 26th March 2010. Dr. Shah is said to have worked in an honorary capacity at the Bharatiya Arogya Nidhi Hospital at Juhu. This hospital is run by a Trust that Popatlal established or headed, and of which the Plaintiff is now the Chairman.⁴

5. I turn now to the contents of the Will. In this, Popatlal set out his properties and assets in some detail. He made an absolute bequest of all of these assets in favour of his wife, Lilavati. This included his share in their HUF; the plot of land in Friends Co-operative Housing Society at Juhu Scheme; and his tenancy rights in 14, Al-Sabah Court, 73 Marine Drive, Mumbai 400 020, where he lived till his death. The exception was his PPF Account, which he donated to Shah Public Charities, a trust that he settled. He provided that should Lilavati predecease him, his properties and

4 In fact, even the Defendant is said to be a Trustee.

assets would be equally divided between all four children. Popatlal appointed no executor under this Will.

6. In the Affidavit in Support of the Caveat, the Defendant alleges that this Will is a forgery by the Plaintiff and his family members. He says they did this with an ulterior motive and for personal gain, and that the circumstances surrounding the execution of the Will are suspicious and unnatural. He takes these grounds: First, the Testator, though a polyglot, was intensely proud of his Gujarati heritage and culture. He was a published Gujarati poet. He had made prior wills in 1979⁵ and 1985,⁶ and both were in Gujarati; the final will is, inexplicably, in English. Second, the family met after Popatlal's death. The Plaintiff showed the entire family a document in Gujarati, one the Defendant then believed was Popatlal's last Will. However, the Plaintiff never furnished the Defendant with a copy of this Will, despite promising to do so. Third, the attesting witnesses to the Will are 'interested witnesses', because Dr. Shah is a physician at the Bharatiya Arogya Nidhi, run by a trust of which the Plaintiff is the President. Sushil and Asim, the Plaintiff's son, are also trustees. Mody is the Plaintiff's brother-in-law (Vinodini's husband); his son works for Sushil. Fourth, the Plaintiff filed for Probate more than 11 years after Popatlal died and there is no apparent reason for so inordinate a delay.

7. The Plaintiff alleges that the Defendant promised to pay a certain sum of money that he owed Lilavati, and that this discussion

5 Ex. D-8, *pp.* 305–308.

6 Ex. D-9, *pp.* 309–312.

took place in the family meeting after the Testator's death. There are other issues that the Plaintiff covers in his Evidence Affidavit that are far removed from the issues before me.

8. Issues were first framed on 16th January 2009. Considering the evidence on record and the points of contention between the two parties, Mr. Panicker for the Plaintiff and Mr. Narula for the Defendant agreed that the issues framed earlier needed to be recast and substituted. I accepted the common submission, and framed issues again on 9th June 2016. These are set out below with my findings against each.

Sr. No.	Issue	Finding
1.	Whether the Plaintiff proves that the writing dated 21st November 1992 was duly and validly executed and attested in accordance with law as the last Will and Testament of the deceased, Popatlal Bhogilal Shah?	Yes
2.	Whether the Plaintiff proves that at the time of the said alleged Will, the deceased was of sound and disposing state of mind, memory and understanding?	Yes
3.	Whether the Defendant proves that the alleged Will is a forged and fabricated document?	No

- | | | |
|----|---|---------------------------|
| 4. | Whether the Defendant proves that the alleged Will is suspicious and unnatural? | No |
| 5. | What relief and what orders? | As per final order |

THE EVIDENCE ON RECORD

9. The Plaintiff examined himself (PW1), his brother Sushil (PW2) and Dr. Shah, the attesting witness (PW3). The Defendant led his own evidence as DW1, and also examined one Parag Khatri, a handwriting expert (DW2).

10. As to the documents marked, I will turn to them when discussing each issue.

RE: ISSUES NOS. 1 & 2

11. A Will is proved if it meets the requirements of Sections 59, 61 and 63 of the Indian Succession Act, 1925. Section 59 says that a Will can be validly made by any adult of sound mind. The testamentary or dispositive capacity must be proved to the satisfaction of the Court. Section 61 requires that the Will not be importunate; i.e., it must be made of the Testator's volition, absent fraud, coercion, undue influence or other factors that take away the testator's free agency. Section 63 has the requirements of a proper execution of an unprivileged Will. There is no particular form, but

its execution must be attested by at least two witnesses at the direction of the testator; each witness must attest the Will in the presence of the testator, though both need not be present at the same time. Proof of a Will means its proof *in its solemn form*. Such proof can only be established by complying with all these aforementioned requirements and adducing evidence to prove it. A Plaintiff who fails to prove the Will in its solemn form cannot be granted Probate or Letters of Administration with Will Annexed.⁷ This proof is not required for a mere reading of the document, but to afford the Court a reasonable assurance that the document is indeed what it purports to be.⁸

12. In his Evidence Affidavit, the Plaintiff states that on 21st November 1992, seven persons were present at Popatlal's residence at Marine Drive: the Plaintiff, Sushil, Vinodini, Popatlal himself, the two attesting witnesses Mody and Dr. Shah and an Advocate named R. F. Trivedi ("**Trivedi**"). Neither Vinodini nor Trivedi were examined. The Plaintiff goes on to say that on that day, Trivedi read out the will to the Testator,⁹ who confirmed it and thereafter executed the Will in the presence of the others. Sushil, PW2, corroborates this in his Evidence Affidavit.¹⁰ The Plaintiff identifies the signatures of the two attesting witnesses, the Testator's initials at pages 1, 2 and 3, and the Testator's signature at page 4 of the Will.

7 *Arvind and Ors. v Indirabai and Ors.*, (2008) 5 Mh.L.J. 185.

8 *B. Venkatamuni v C.J. Ayodhya Ram Singh & Ors.*, (2006) 13 SCC 449.

9 Plaintiff's Evidence Affidavit, para 3, p. 36.

10 Sushil's Evidence Affidavit, para 6, p. 77.

13. Mr. Narula's submission is that both attesting witnesses are 'interested' witnesses; neither should be believed. Dr. Shah, one of the two attesting witnesses, is an honorary physician at the Bharatiya Arogya Nidhi Hospital, in Juhu. The Plaintiff is the President of the Bharatiya Arogya Nidhi Trust. Sushil and Asim are also trustees. The Defendant alleges that Dr. Shah is only 'complying with the Plaintiff's wishes because his job depends on it'.¹¹ As to Mody, the Defendant alleges that Mody is Vinodini's husband, i.e., the Testator's son-in-law, and that Mody's son works for Sushil. He also claims that Mody was suffering from an advanced stage of Alzheimer's disease, and he was unable to remember his own identity, let alone go about his daily routine.

14. Mody filed no Evidence Affidavit; he passed away on 26th March 2010. He did, however, file an Affidavit in Support of the Petition,¹² and in this he says that he knew Popatlal well; that on 21st November 1992, he and Dr Shah were both present at Popatlal's residence; that he saw Popatlal sign the Will; and that, at Popatlal's request, he and Dr. Shah then signed it as witnesses and wrote their names below their signatures. Mody identifies the signatures on the Will.

15. Dr. Shah too filed an Affidavit supporting the Petition, corroborating Mody's statements.¹³ He also filed an Evidence Affidavit.¹⁴ In his Evidence Affidavit, Dr. Shah says that around mid-

11 Defendant's Evidence Affidavit, para 23, *p.* 142.

12 Mody's Affidavit in Support of Petition, *p.* 24.

13 Dr. Shah's Affidavit in Support of Petition para 2, *p.* 22.

14 Paperbook, *pp.* 110-112.

November 1992, Popatlal requested him to witness the execution of the Will and accordingly, he was present at Popatlal's Marine Drive residence on 21st November 1992 (a Saturday; this cannot be disputed) and that he reached there at about 10:30 am. Mr. Narula argues that it is in itself 'suspicious' that the Testator would have thought it necessary to call Dr. Shah all the way from Juhu, where Bharatiya Arogya Nidhi Hospital is located, to his Marine Drive residence merely for attesting his Will, especially when Popatlal had his own family doctor closer by near Gamdevi. I am unable to appreciate this submission. The evidence shows that in 1992, Dr. Shah used to go to Bhatia Hospital in the morning. On Saturdays, he would go to Bhatia Hospital and then go on to the Bharatiya Arogya Nidhi Hospital. He says that on the day in question, he went to Popatlal's residence directly after his visit to Bhatia Hospital.¹⁵ Bhatia Hospital is at Tardeo, not far from Al-Sabah Court on Marine Drive. Mr. Narula's submission actually finds its honour, albeit in an unexpected way, in Dr. Shah's cross-examination. When asked why he charged no fees to visit Popatlal — very likely an ill-advised question in cross-examination — Dr. Shah supplied a perfectly cogent reason: he said he was the Honorary Medical Director at the Bharatiya Arogya Nidhi Hospital at the time, and it was his 'honour' to attest Popatlal's Will, for Popatlal was then the Chairman of that hospital.¹⁶ What we have, therefore, is direct evidence from Dr. Shah supplying a reason in response to what is the purest conjecture on Mr. Narula's part.

¹⁵ Qn. 33, *p.* 120.

¹⁶ Qn. 34, *p.* 121.

16. Faced with this, Mr. Narula argues that because Popatlal, as the Chairman of the Bharatiya Arogya Nidhi Hospital, 'gave' Dr. Shah the post of Honorary Medical Director, Dr. Shah was somehow beholden to Popatlal. Even if that is so, it makes no difference; merely because an attesting witness is obliged to a testator it does not follow that the attestation or execution are either bad or even suspect. In any case, it is one thing to say that Dr. Shah was beholden to Popatlal; that is irrelevant. It is quite another to say that Dr. Shah was beholden to the Plaintiff. Of this there is no evidence, and in any case, it does not stand to reason for, at the time in question, it was Popatlal who was at the helm of the Bharatiya Arogya Nidhi Hospital, not the Plaintiff. Mr. Panicker counters this by citing two questions from Dr. Shah's cross-examination:

Q-37. Can I take it that since the deceased was a trustee and his son the Plaintiff was the trustee of the Hospital at which you practice, you never questioned either of them and blindly obeyed instructions without questioning them?

Ans. When a sound minded person who is living makes a will and he requests me to be there to sign the will, there are no questions to be asked if you know the person personally. **I had no obligation to sign the Will. It was out of mutual respect with each other that I signed the Will.**

Q-38. Can I take it that since the deceased was a trustee and his son the Plaintiff was the trustee of the Hospital at which you practice, you never questioned either of them and blindly obeyed instructions without questioning them?

Ans. Since the deceased was the Chairman of the Hospital and I was the Honorary Medical Director of the Hospital at that time, if I had to sign a Will of a sound person, there was no pressure on me and I thought it was an honour that he called a person from outside his family to sign the Will.

(Emphasis added)

17. I imagine these two answers (I do not know why the two questions were repeated *verbatim*) provide a complete answer to Mr. Narula's argument. First, it is abundantly clear from Dr. Shah's Affidavits and cross-examination that he could not be called an 'interested witness' merely because he had a subsisting professional relationship with the Testator. Alternatively, assuming he was an 'interested witness', he would still be able to witness the execution of the Will and attest to the *animus testandi*. Dr. Shah had no interest in the Will itself.

18. Mr. Narula also argues that Mody had Alzheimer's disease and was neither able to remember his own identity nor capable of understanding his actions; therefore, his attestation is invalid. I cannot accept this either, simply because there is no proof at all of any such incapacity on that day. To the contrary, the Defendant admits in his cross-examination that he has no personal knowledge of any such condition at all, but it is only what he was told.¹⁷

19. In his Evidence Affidavit, the Plaintiff claims that Popatlal dictated the Will in the presence of Lilavati, Sushil, Vinodini, and

¹⁷ Defendant's cross-examination, Qns. 278, 280, *p.* 204.

himself. The Will was scribed by Trivedi, a lawyer.¹⁸ It was dictated at the Al-Sabah Court residence in early November 1992, after which Trivedi had it typed in English in his own office. The typed Will was ready on 21st November 1992. On that day, Trivedi read it out to Popatlal. Both attesting witnesses, the Plaintiff, Sushil and Vinodini were present at the time. Before signing the Will, Trivedi explained parts of it to the Testator in Gujarati. The Plaintiff says that he called Trivedi because Popatlal asked him to call an Advocate. However, in his cross-examination, he says that it was Popatlal who gave him Trivedi's phone number and only then did he call Trivedi.¹⁹ He does not know Trivedi's whereabouts or have his contact information. From his answers to Questions 97 to 106 in his cross-examination, it is clear that the Plaintiff did not personally know Trivedi, nor did he have any professional acquaintance with him.²⁰ He had never even seen Trivedi. Some sort of answer is provided by Sushil, PW2, who says that while he, too, had no personal knowledge as to how Popatlal knew Trivedi, his mother told him that Trivedi was a friend of one of Popatlal's morning walk acquaintances.²¹ This provides much grist to Mr. Narula's mill: he says it is inconceivable that a man from a traditional Gujarati background would ever ask a stranger such as Trivedi, with whom there is no evidence of any previous contact, to get involved in any fashion in an intensely personal document such as a Will.

18 Plaintiff's Evidence Affidavit, para 3, *p.* 36.

19 Plaintiff's cross-examination, Qn. 98, *p.* 68.

20 Qns. 97-106, *p.* 68.

21 Sushil's cross-examination, Qns. 75-81, *p.* 102.

20. Had this remained here, there may have been something to it. After all, Trivedi's evidence was never led, and it is inexplicable how Trivedi should make what Mr. Narula acerbically describes as 'this guest appearance' on this of all days, unknown and unheard of before and never to be heard of again.

21. Unfortunately for Mr. Narula, it is not that easy to catch the redoubtable Mr. Panicker out of his crease. As to Trivedi not being examined, Mr. Panicker says there was no possibility of it since Trivedi died on 6th October 1994 and was well out of the reach of even a judicial summons. He produces a written confirmation dated 15th June 2016 from Jayen Trivedi (R. F. Trivedi's son) to confirm this. As to the question of a confirmation of Trivedi's presence, Mr. Panicker points out that in answer to Question 41 in his cross-examination, Dr. Shah says:²²

Q-41. Can you please tell me why you have not put the date besides your signature when you allegedly signed as a witness?

Ans. I was not asked to put the date by Mr. Trivedi, who was the lawyer and was present at that time.

22. That, Mr. Panicker says, and I think he is probably right, is enough to put paid to this limb of the argument. Coming now to Mr. Narula's argument that Popatlal had a 'traditional' background, Mr. Panicker says he is at a loss to understand what, if anything, this is supposed to mean. Frankly, so am I. There is no evidence of any

22 Dr. Shah's cross-examination, Qn. 41, *p.* 122.

such ‘conventionality’ and the fact that a person can read and write in a language other than English, or is passionate about poetry (or, from that matter, music, literature or drama) in the vernacular is hardly evidence of being ‘conventional’. I have not allowed Mr. Panicker to place material about Lilavati’s or Vinodini’s education and so on simply because it is no part of the evidentiary record, though Mr. Panicker did attempt to include it in his written note of arguments. Mr. Narula says the ‘balance of probabilities’ must weigh against this story, simply on account of Trivedi’s presence. Must it? The others confirm his presence and their testimony is unshaken in cross. One does not and cannot expect complete conformity with our latter-day imaginings in such matters; after all, we are looking back and trying to envision ourselves in that fabled armchair occupied by a testator. What should we expect to see? Just this, I expect: a man of evident intelligence, prudent and cautious in his affairs — evidenced from his having made two Wills much earlier — certainly proud of his heritage, but with an active social conscience as well. I am not required to be a perpetual sceptic; what is demanded of me is vigilance and circumspection. Is the presence of Trivedi by itself so very outrageous? Must one always demand complete consistency in all matters and at all times? We do not here seek absolute perfection in the making of Wills (no more, I may venture, than anyone does in the writing of judgments). The task before a person proving a Will is to show due execution and testamentary capacity. I do not see how either are defeated by Trivedi’s presence. It is true that it is for the propounder of a Will to remove all suspicious circumstances, but these circumstances must either appear from the document itself or must be shown to exist by cogent evidence. Again, Trivedi’s presence is not such a suspicious

circumstance as would alarm a judicial conscience; and that, after all, is the final test in such matters.²³ In *Leela Rajagopal & Ors. v Kamala Menon Cocharan & Ors.*,²⁴ the Supreme Court said that an overall view is to be adopted; emphasis cannot be placed on a single feature or circumstance in the execution of a Will.

23. As to testamentary capacity, it is nobody's case that Popatlal was not of a sound and disposing state of mind at the time when he made this Will. In his Evidence Affidavit, the Plaintiff asserts that the Testator was in good health and proper state of mind and understood the contents of the Will.²⁵ This account is confirmed by Sushil in his Evidence Affidavit. He says that till the time of his death, the Testator was healthy and alert and had also attended office till the last week of December 1992. He further goes on to say that Popatlal used to write his own books of accounts and handle matters relating to the Shah Public Charities.²⁶ In his Affidavit filed with the Petition, Mody affirms that at the time of signing the Will, the Testator was of a sound and disposing mind, memory and understanding and had made the said Will out of his free will and pleasure.²⁷ Dr. Shah also says so.²⁸ He reaffirms this in his Evidence Affidavit.²⁹ It is clear that in addition to both the witnesses, the

23 *Surendra Pal v Dr. Saraswati Arora*, (1974) 2 SCC 600; *Madhukar D. Shende v Tarabai Aba Shedage*, (2002) 2 SCC 85.

24 AIR 2015 SC 107.

25 Plaintiff's Evidence Affidavit, para 4, p. 36.

26 Sushil's Evidence Affidavit, para 6, p. 77.

27 Mody's Evidence Affidavit, para. 5, p. 25.

28 Dr. Shah's Evidence Affidavit, para. 5, p. 22.

29 Para. 5, p. 111.

Plaintiff and Sushil depose that the Testator was possessed of a sufficient dispositive capacity and that he signed it freely.

24. I am unable to agree with Mr. Narula that the Will is shrouded in suspicious circumstances, or that it has not been duly proved. Issues Nos. 1 and 2 are answered in the affirmative.

RE: ISSUE NO. 3:

25. The Defendant's contentions as to forgery and fabrication must be carefully parsed. The first limb of the argument is that it is written in English, even though the previous Wills were in Gujarati. The second is attempted proof the signature on the last page being forged. This is sought to be established by relying on the evidence of DW2, Dr. Parag Khatri, a handwriting expert.

26. The Defendant contends that though his father was a polyglot who knew French, Sanskrit, Flemish, and Hindi,³⁰ he was an avid Gujarati poet and fostered a 'deep love' for his mother tongue.³¹ He was most comfortable speaking and writing to the family in Gujarati.³² All correspondence between the Testator and the Defendant is written by hand in Gujarati, evidenced by letters which are on record. These letters are indicative not only of the

30 Defendant's Evidence Affidavit, para. 4-5, *pp.* 125-126; Evidence Affidavit of PW2, para. 5, *p.* 77; Plaintiff's cross-examination, Qn. 16, *p.* 45.

31 Caveat, para 6(c), *p.* 33c.

32 Defendant's Evidence Affidavit, para. 4, *p.* 126.

Testator's choice of language, but its contents also expressed his pride in communicating in Gujarati. He was also a Gujarati litterateur, and had published a book of his selected poems titled *Runanubandh*. This book had but only one English poem.³³ This is countered *inter alia* by Sushil, PW2, who asserts that the Testator was very comfortable with speaking in English, to the extent that he often used English words in Gujarati correspondence.³⁴ It is also on the record that the Testator ordinarily drew up official documents in English.³⁵

27. It has always been the Plaintiff's case that the Testator could communicate in English, and did so reasonably well. It is nobody's case that the Will is fabricated because the Testator could not speak English. The only case, as I understand it, is that it was exceedingly odd for him to have done so considering he had written his previous wills in Gujarati and took great pride in his mother tongue. A very similar argument was taken before a Division Bench of the Calcutta High Court in *Sanat Kumar Das v Arati Das*.³⁶ Here, the testator, who was educated in English, had signed the Will in Bengali. Though the caveators in this matter were aware that the testator knew Bengali, they had not known him to sign in that language before. The High Court dismissed the submission. It is settled law, the Division Bench said, that the Probate Court cannot require

33 Defendant's cross-examination, Qn. 40, p. 154.

34 Sushil's Evidence Affidavit, para. 5, p. 77; Cross-examination of PW-2, Qn. 35, p. 91.

35 Documents D5-D7, Compilation of Documents by the Defendant, pp. 295-297.

36 (2009) 4 CHN 593 (DB).

proof ‘beyond reasonable doubt’, nor must the Court proceed on a presumption that the Will is suspicious. I am in most respectful agreement with this decision. I do not find that the language of the Will is troublesome enough to doubt its veracity. Every person is at liberty to draw up their Will in whatever language they please; and once there is, as we have here, proof that the testator was fluent in more than one language, this aspect, on its own, assumes no significance at all. I am therefore unable to accept Mr. Narula’s submission in this regard.

28. As regards the second contention, the Defendant alleges that the signature of the Testator on the Will is not his, but has been forged by someone else. He relies on the report of Dr. Khatri, a handwriting expert who the Defendant commissioned to analyse Popatlal’s signature.

29. The Defendant has only questioned the Testator’s signature on the last page of the Will. The first three pages of the Will, which bear the handwritten initials of the Testator, have not been called into question. Furthermore, despite Mr. Narula’s arguments, a personal allegation of forgery and fabrication was never put to any of the Plaintiff’s witnesses.

30. Dr. Khatri’s report is an elaborate analysis of the Testator’s signature. He compares the signature on the Will, which he calls “Disputed Document Q”, to four documents, viz., three letters to the Bank of Baroda dated 23rd February 1987 (called, respectively, “Known Document K-1”); 8th April 1988 (“Known Document K-

2”), and 22nd September 1989 (“Known document K-3”), and the passport of the deceased (“Known document K-4”) The analysis is divided into what Dr. Khatri calls *class characteristics* and *individual characteristics*.

31. *Class characteristics* are, he claims, based on various parameters such as the movement of the writing instrument, the slant, the pressure applied etc.; *individual characteristics* deal with aberrations in the disputed signature when compared to individual signatures in the known documents. The Testator’s signatures on his passport and other documents tendered for comparison reveal that his signature had a forward slant and was made at some speed.³⁷ The speed in the disputed signature had decreased. Discrepancies can also be found between individual characteristics of the admitted and disputed signatures.

32. I will deal with the so-called class characteristics first, as they speak to the general nature of the Testator’s signature. Tendered for consideration as his standard signatures are the exhibits in the ‘K’ series of the report. There exist several anomalies in the class characteristics; to my mind, they follow a trend. To begin with, the Testator wrote at a medium speed and with superior skill in the ‘K’ series of signatures; his speed is said to decrease and the skill is said to be inferior in the contested signature. As for the slant of the letters and their alignment, the difference is negligible. The muscle co-ordination is said to have deteriorated in the disputed signature.³⁸

37 Dr. Khatri’s report, *p.* 394.

38 Dr. Khatri’s report, *p.* 394.

33. To my mind, these observations merely accommodate the fact that the Testator had grown older. Dr. Khatri was not informed at the time of analysing the signatures that he had suffered a paralytic attack some years earlier and was also suffering from heart disease.³⁹

34. Individual characteristics are often more telling of deceit, as they analyse the strokes of the pen in minute detail. Dr. Khatri's findings are that the signature in K-4, made around 1960, was made with a good rhythm and speed, which is missing from the rest. The other signatures were made in the period of 1987-89, almost thirty years after the first. There are other discrepancies found by the handwriting expert, none too great. He observes that the letter 'P' in 'P.B. Shah' in the admitted signatures has a certain stroke, in the shape of an oval, which he says the disputed signature does not have. I notice that the admitted signatures have varying versions of that stroke, as does the disputed signature. Further, Dr. Khatri says, the word 'Shah' has been written with a trembling hand.⁴⁰

35. The report in itself does not offer any conclusive finding. It merely opines that *there are fundamental and significant dissimilarities, except some resemblance*.⁴¹ In his cross-examination, Dr. Khatri states that the document 'seems to be forged'.⁴² He further states that he has not used the word "forgery", but the meaning was

39 Dr. Khatri's cross-examination, Qns. 130, 131, p. 234.

40 Dr. Khatri's report, p. 395.

41 Dr. Khatri's report, p. 394.

42 Dr. Khatri's cross-examination, Qn. 197, p. 244.

the same.⁴³ As for attempts at disguising the signature, Dr. Khatri admits that he did not find any.

36. Before moving on, a look at the information that the expert had before him when preparing his Report. The relevant questions of Dr. Khatri's cross-examination are these:

Q – 130. Did you have any discussion about the health of the Testator with anybody?

Ans. No.

Q – 131. Do you agree that you were not aware that he was suffering from any ailment?

Ans. No, I was not aware whether he was suffering from any ailment.

Q - 162. Are you aware if the signatory had suffered from a paralytic attack?

Ans. No.

Q - 163. If a person suffers from a paralytic attack, the signature can differ. Is that correct?

Ans. Yes.

Q – 166. Did you enquire whether the Testator was writing with his left hand or the right hand?

Ans. No, since it does not matter.

Q – 167. Is it correct to say that the handwriting or signature of a person differs if he suffers

43 Dr. Khatri's cross-examination, Qn. 201, *p.* 244.

from partial blindness, heart problem as well as due to ageing?

Ans. Yes.

Q – 309. Does the signature of a person differ from time to time; say over a period of 2 years, depending upon the age of a person?

Ans. Yes, may be.

Q – 311. According to you, what are the circumstances or reasons when signature or handwriting differs?

Ans. It could be the age of a person, time, health and mental orientation.

Q – 312. Does the signature differ, when the person is required to sign in a limited space?

Ans. Yes, a little variation may happen.

Q – 313. Would it be correct to say that the Testator had to sign in a limited space i.e. in between two lines?

Ans. Yes.

37. It is known that the Testator suffered a paralytic stroke in his late sixties. He also suffered from heart disease. I presume that a paralytic stroke might well impede a person's physical ability to write. This is substantiated by Dr. Khatri in Q. 53 of his cross-examination.⁴⁴ So would afflictions such as heart disease and aging, and this, too, is borne out by Dr. Khatri himself in his response to

44 p. 221.

Q. 167. After his paralytic attack, the Testator learnt how to write and sign with his left hand.⁴⁵ This is, in fact, a question elicited by the Defendant in the Plaintiff's cross-examination, and it creates an anomaly in and of itself. For, if it is the Defendant's case at one stage that Popatlal used his left hand, then there is little point in this exercise of comparing signatures. That assumes a certain continuity in the manner and mode of writing — the same hand without any great or intervening impairment. This conflict in the Defendant's own case is never reconciled at all. It is therefore unreasonable on the Defendant's own showing to expect that Popatlal would sign with the same level of dexterity after the attack as he did before. It is apparent from the expert's cross-examination that he was unaware of this fact.⁴⁶ Further, he says that in a given case, it would not matter if the Testator signed with his right or left hand as far as his report is concerned.⁴⁷ I find this hard to believe. Many of us simply cannot sign with the other hand; not everyone is ambidextrous; and should we have to learn to use that hand, it would be very difficult to achieve the same fluency in signatures that we once had with the good hand. Indeed, most of us have difficulty signing with the same hand on an unfamiliar medium, such as an electronic tablet. I do not find in Dr. Khatri's report any allowance for this working-hand reversal; the assumption is that all the signatures are with the same hand. Surely, had he been made aware of the Testator's paralysis and the consequent adoption of his left hand for writing and signing, Dr. Khatri might have considered this fact of some moment in his assessment of the so-called aberrations in the disputed signature.

45 Plaintiff's cross-examination, Qn. 5, *p.* 43.

46 Dr. Khatri's cross-examination, Qn. 162, *p.* 238.

47 Dr. Khatri's cross-examination, Qn. 166, *p.* 238.

Without the information placed at his disposal, Dr. Khatri only considered signatures made within a span of 5 years, i.e., from 1987 (K-1) to 1992 (Q). He disregarded K-4 saying that because the signature in K-4 was in very good rhythm and speed, and this was missing in all the other documents, which signified ageing and health issues and this, in turn, caused the difference in style of writing and rhythm. For these reasons, he does not take K-4 as a standard for comparison.⁴⁸ In my judgment, this is the single most telling fallacy in Dr. Khatri's report. Simply put, he disregarded the issue of age and health, and refused to examine K-4 as a standard specimen. Moreover, he was not told of the paralytic attack, nor did he have any information as to the Testator's forced adoption of his left hand to write and sign. These are undoubtedly material circumstances and they would certainly have had a bearing on his final assessment.

38. An expert's opinion does not always need corroboration, but it must be complete, i.e., based on a completeness of factual material, and must reflect sound reasoning. Mr. Narula relies on the decision of the Supreme Court in *Murari Lal s/o Ram Singh v State of Madhya Pradesh*⁴⁹ for the proposition that corroboration is not invariably required. This is true. However, the Court in *Murari Lal* also held that on the facts of a particular case, a court may require corroboration; the degree of corroboration might vary from case to case. A court should be cautious, not suspicious.⁵⁰ It should

48 Dr. Khatri's report, p. 394.

49 (1980) 1 SCC 704.

50 *H. Venkatachala Iyengar v. B. N. Thimmajamma and Ors.*, 1959 Supp (1) SCR 426.

consider all other relevant evidence and then decide whether to accept or reject it. Handwriting analysis is an imperfect science. Experts' opinions are error-prone. They are not to be brushed aside, but they are also not to be accepted as the unvarnished truth merely because they say a particular thing. Nothing prevents the court from comparing the disputed writing with the admitted writing and then coming to a conclusion of its own. If there is an opinion of an expert, or of any witness, the court may apply its own observation by comparing the signatures, or handwriting for providing a decisive weight or influence to its decision. In *Ajay K. Parmar v State of Rajasthan*,⁵¹ the Supreme Court held that the evidence of an expert witness, though inconclusive on its own, was not to be discarded entirely. The final decision is always that of the Court.⁵²

39. I find little evidence to support Mr. Narula's submissions. Some discrepancies are inevitable, and allowance must be made for them. Dr. Khatri's report does not prove forgery.

40. Issue No. 3 is answered in the negative.

RE: ISSUE NO. 4:

41. The Defendant argues that the circumstances surrounding the Will are suspicious and unnatural. He raises several grounds in this regard. I have considered these in detail.

51 (2012) 12 SCC 406.

52 *Delhi Administration v Pali Ram*, (1979) 2 SCC 158.

42. On the ground of the ‘unnatural’ character of the Will, Mr. Narula argues that the intention of the Testator was never to exclude the Defendant from a share in his estate. To establish this, the Defendant has brought to light several factors such as one of the previous Wills of the deceased written in 1985, the letters written to him by the deceased showing the closeness in their relationship, the Testator having held the Power-of-Attorney for him, and so on.

43. The Defendant insists that he had a close and loving relationship with the Testator, despite having moved to the United States of America.⁵³ Mr. Narula submits that the Testator’s love for the Defendant is evident from the letters written by him to the Defendant. The Testator had also sent a copy of the previous Will of 1985 to the Defendant wherein he included all his heirs as beneficiaries. Therefore, there was no reason whereby he would have excluded the Defendant from a share in his estate.

44. In response, Mr. Panicker points out, and I agree, that the Defendant is not the only one who has been left out by the deceased in the said Will. The Will bequeaths the entire estate to Lilavati, to the exclusion of all four of their children, including the Defendant. I do not see anything so very unnatural in leaving his estate to his widow. I would consider it considerably more suspicious if he excluded her.

53 Defendant’s Evidence Affidavit, para. 3, *p.* 125; para. 15-16, *pp.* 133-134.

45. Every Will disrupts the natural line of succession and the standard devolution of estate.⁵⁴ Its purpose is to determine the inheritance to the Testator's property, which may or may not include the natural heirs who would otherwise be entitled to a share in such legacy. Therefore, whether or not the Defendant had excellent relations with the Testator is immaterial. Making an absolute bequest in favour of one's spouse out of love or to provide for his or her security is not uncommon, even if this excludes the children. I find nothing unnatural in the disposition made under the Will in favour of Lilavati.

46. Finally, Mr. Narula submits that the Plaintiff filed this Petition for Letters of Administration with Will Annexed 11 years after the Testator's death and that this delay remains unexplained. Therefore, no relief should be granted.⁵⁵ Mr. Narula contends that this unexplained delay is substantial and that it gives rise to a grave suspicion. The Defendant made repeated requests to the Plaintiff to furnish him with the details of the estate left behind by their father or with a copy of the said Will. Moreover, the Defendant's Advocate sent three letters to the Plaintiff calling upon him to disclose this, all to no avail. Mr. Narula argues that this, among other circumstances, makes the Plaintiff's conduct suspicious.

47. I have looked into the evidence produced on record in this regard. The Plaintiff states that he had no knowledge that a Probate is necessary to enforce a Will; that nobody objected and all family

54 *Rabindra Nath Mukherjee and Anr v Panchanan Banerjee (dead) by L.Rs. & Ors.*, AIR 1995 SC 1684.

55 Defendant's Evidence Affidavit, para. 24, *p.* 142.

members had verbally agreed to carry out the Testator's wishes under the Will.⁵⁶ He also states that the petition for Probate was filed in 2004 because the Defendant had disputed the Will in Suit No. 2622 of 2004 in the Bombay City Civil Court.⁵⁷ Sushil corroborates this.⁵⁸

48. I cannot agree with Mr. Narula. The lapse of 11 years, though long, does not draw substantial suspicion towards itself. The petition for Letters of Administration with Will Annexed was filed only after the dispositions under the Will became contentious in 2004. Moreover, the alleged failure of the Plaintiff to furnish a copy of the Will was never put to him in the cross-examination. I find it difficult to draw an adverse inference against the Plaintiff for these reasons. Therefore, the arguments as to the delay in filing this Ptn must fail.

49. The jurisdiction of a testamentary court is not one of suspicion but one of caution. As the Supreme Court said in *H. Venkatachala Iyengar v. B. N. Thimmajamma and Ors.*:⁵⁹

It is not for the Probate Court to adopt what has been described as a resolute scepticism and unshakeable doubt. It is only required to be cautious and careful in its approach.

56 Plaintiff's cross-examination, Qns. 66 & 68, p. 59.

57 Plaintiff's cross-examination, Qn. 67, p. 68.

58 Sushil's cross-examination, Qn. 84, p. 104.

59 AIR 1959 SC 443.

50. Where suspicious circumstances are present, they do not *ipso facto* preclude the grant of Probate. The Plaintiff must be given an opportunity to dispel them.⁶⁰ This is only to satisfy the judicial conscience that there is nothing untoward.⁶¹ When more than one such circumstance exists, the cumulative effect must be considered.⁶²

51. What are the factors Mr. Narula marshals to show 'suspicion'? They may be summarised thus: that the Will is in English rather than Gujarati; that Dr. Shah was asked to travel from Juhu to attest it instead of the doctor who lived or worked closer by; that Trivedi's presence is peculiar and inexplicable; and that Dr. Khatri says the signature on page 4 of the Will is probably not genuine. Each of these so-called suspicious circumstances have found an answer, and a good answer at that. If there were any suspicious circumstances, they have been explained. I am unable to dislodge this Will on what to me appears to amount to no evidence and little more than conjecture. It is also not a ground that because I held for the Defendant in the matter of Lilavati's Will, propounded by this very Plaintiff, I should follow suit in regard to the father's Will. That is an argument of *falsus in uno, falsus in omnibus*, and it must be rejected out of hand.

52. Issue No. 4 is answered in the negative.

60 *Kunvarjeet Singh Khandpur v Kirandeep Kaur and Ors.*, (2008) 8 SCC 463.

61 *Smt. Jaswant Kaur v Smt. Amit Kaur*, (1977) 1 SCC 369.

62 *S.R Srinivasa Rao and Ors. v S. Padmavathamma* (2010) 5 SCC 274.

CONCLUSION AND ORDER

53. The suit succeeds and is decreed. Letters of Administration with Will Annexed are ordered to be issued on a priority basis. The registry will act on an authenticated copy of this order.

54. At the Defendant's request, the issuance of Letters of Administration with Will Annexed is stayed for a period of three weeks from today.

(G.S. PATEL, J.)