

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
TESTAMENTARY SUIT NO.51 OF 2001
IN
TESTAMENTARY PETITION NO.604 OF 2000**

Mansukhlal Kanji Shah

... Deceased

Prakashkumar Mansukhlal Shah
Hindu Indian Inhabitant, residing at
Block No.4, Raj Hansa, Zaver Road,
Mulund (W), Bombay – 400 080.
Sole Executor and Trustee named
in the will of the deceased abovenamed

... Plaintiff

Vs.

Smt. Sunita Anant Mehta
of Bombay, Hindu, Indian Inhabitant
Residing at Block No.A-1, Milap Apartment,
Nandivali Road, Dombivli (East).

... Caveator/Defendant

Mr. J. S. Kini along with Mr. Aum J. Kini, Ms. Sapna Krishnappa i/by Advocate
Suresh Dubey for the Plaintiff.

Mr. Uttam S. Rane for the Defendant.

CORAM	:	ARIF S. DOCTOR, J.
RESERVED ON	:	03rd MARCH 2023
PRONOUNCED ON	:	30th MARCH 2023

JUDGMENT:

1. The present Testamentary Suit seeks Probate in respect of a Writing dated 24th March 1997 ('the said Will'), which the Plaintiff propounds as being the last Will and Testament of one Mansukhlal Kanji Shah ('the deceased').

The facts briefly stated are as follows: -

2. The deceased passed away on 2nd December 1998 leaving behind him, as his only legal heirs and next of kin in accordance with the Hindu Succession Act, 1956, the following persons: -

1. Jayaben Mansukhlal Shah (Wife)
2. Prakash Mansukhlal Shah (Son)
3. Lata Dhirajlal Gala (Married Daughter)
4. Sunita Anantrai Mehta (Married Daughter)

The Plaintiff is the son of the deceased and the executor named in the said Will. Jayaben Mansukhlal Shah is the wife of the deceased and Lata Dhirajlal Gala is one of the married daughters of the deceased both of whom have consented to the grant of probate. Sunita Anantrai Mehta, the Defendant to the present Suit is the other married daughter of the deceased who has opposed the grant of Probate by filing a Caveat. The main grounds of challenge

raised in the Affidavit in Support of the Caveat *inter alia* are that the said Will is forged and fabricated and is an unnatural Will.

3. Based on the contentions raised in the Affidavit in support of the Caveat filed, the following issues were framed for determination. –

- “i) Does the plaintiff prove that deceased Mansukhlal Kanji Shah has validly executed document purported to be Will dated 24.3.1997?*
- ii) Does the defendant prove that the document purported to be Will dated 24.3.1997 has been executed by the deceased Mansukhlal not by his free will and consent and under undue influence?*
- iii) What Order?”*

At the outset, it is to be noted that the only evidence led in the matter was that of the Plaintiff. One of the attesting witnesses namely Gajanan Hanumant Patgaonkar had filed an Affidavit in lieu of Examination in Chief however he did not present himself that for cross examination. No evidence was led of the other attesting witness. It was thus that the Learned Advocate for the Plaintiff made a statement to this Court that no other witness was available, who could prove due execution and attestation of the said Will. It was thus that by an order dated 30th October 2018 (G. S. Patel, J.), was pleased to record as follows, viz.

"PC. –

1. *Ms Krishnappa on behalf of the Plaintiff states that the only attesting witness whose evidence they propose to lead is not traceable. They are unable to lead the evidence of that attesting witness. Consequently, the attesting witness, PW1, Gajanan Hanumant Padgaonkar is not being tendered for cross-examination, and the inevitable consequences will follow. She also states on instructions that the Plaintiff has no other witness who can prove the due execution and attestation of the Will propounded, i.e. there is no other person who was present at the time. This is noted.*

2. *The Plaintiff will now be cross-examined. He is not entitled to file further Affidavit in lieu of examination-in-chief.*

3. *I note that on the Evidence Affidavit filed by the attesting witness, the Will being propounded was marked as a document in evidence. If that attesting witness is not made available for cross-examination then obviously it is open to the Defendant to contend that the Will is not proved in its solemn form because the witness has not been made available for having his testimony scrutinized by the only method known to our system of adversarial jurisprudence, i.e. cross-examination. It will, therefore, be open to the Defendant not only to contend that the Will is not proved but also to submit that an adverse inference be drawn against the Plaintiff and the attesting witness.*

4. *The cross-examination will now commence of the Plaintiff himself before Ms Azmin Irani, learned Commissioner previously appointed.*

5. *List the matter on 8th January 2019 for directions including as to the status report."*

It was in the aforesaid backdrop, that the Plaintiff was cross-examined and the Plaintiff's evidence was thereafter closed. The Defendant did not lead any evidence and consequently the evidence of the Defendant was also closed. Hence, only evidence on record was that of the Plaintiff.

SUBMISSIONS OF MR. J. S. KINI, LEARNED COUNSEL FOR THE PLAINTIFF: –

4. At the outset, Mr. Kini, learned counsel, submitted that the very fact that the Defendant had chosen not to lead any evidence in the matter and had not entered the witness box must necessarily draw the presumption that the case with which the Defendant had come to Court was a false case. Learned counsel submitted that the presumption under the illustration (g) of Section 114 of the Indian Evidence Act 1872 must therefore be drawn against the Defendant. In support of his contention, learned Counsel placed reliance upon a decision of the Hon'ble Supreme Court in the case of *Iqbal Basith and Others Vs. N. Subbalaxmi and Others*¹. He submitted that the Defendant not having proved its case, the case of the Plaintiff must therefore be accepted as being true and correct.

5. He then, without prejudice to the above, submitted that even though the attesting witnesses were not cross-examined, the said Will stood

¹ (2021) 2 SCC 718

duly proved in accordance with Section 63 of the Indian Succession Act, 1925 ('Succession Act'), based on evidence led by the Plaintiff. In support of his contention, he first invited me attention to the Plaintiff's Affidavit of Evidence, to submit that the Plaintiff had identified the signature of the deceased/testator as also those of the attesting witnesses, viz.

"7. I state that I informed about the same to my sisters as well as other legal heirs. I identify the signatures of my deceased father and the two witnesses on the will. I am conversant with the signature of my deceased father as well as the two witnesses. I state that my relations with my sisters and other family members remains extremely cordial since the beginning till date. I state that the relations of the defendant with the family members has been extremely hostile. I state that her relations with her own family has also been very bad. I state that the relations of my father with my mother were very good and therefore the will was made by my father in the fashion that it is."

He then invited my attention to the following answer given by the Plaintiff in cross-examination to submit that, the Plaintiff had also identified the signature of one of the attesting witnesses to the said Will, namely Gajanan Patgaonkar, viz.

"Witness is shown paragraph 7 of Affidavit of Evidence, more particularly line 2 and 3.

Q. 182. I put it to you that in view of the answers to Q.180 & 181 the statement made in line 2 and 3 of paragraph 7 of the Affidavit of Evidence to the extent of Mr. Gajanan Patgaonkar is incorrect.

Ans. I had met Mr. Patgaonkar for obtaining his signature on the Affidavit of Evidence and he signed the Affidavit in front of me and I have compared his signature on the Affidavit with that on the Will. On that basis, I have made the statements referred above in paragraph 7."

Learned Counsel then fairly accepted that though the Plaintiff had not in his Affidavit in lieu of Examination-in-Chief stated the reason for non-examination of the attesting witnesses, he submitted that the reason for their non-examination had in fact been brought out in detail in the Plaintiff's cross-examination. In support of his contention, he placed reliance upon the answers given by the Plaintiff to the following Questions 178 to 188 in cross-examination. He submitted that since no case had been put to the Plaintiffs witness suggesting that the evidence given by the Plaintiffs witness was false or that the Plaintiff had deliberately withheld the evidence of both the attesting witnesses, the Defendant could not now raise these contentions. Placing reliance upon the judgement of this Hon'ble Court, in the case of ***Harish Loyalka and Another Vs. Dilip Nevatia and Others***² he submitted that the Defendant was now precluded from raising any such contention that the Plaintiff had deliberately withheld the evidence of both the attesting witnesses or that a negative inference must be drawn in view thereof. Basis this he submitted that the signature of the testator as also that of one of attesting

2 2014 SCC OnLine Bom 1640

witnesses was duly proved and therefore the requirements of Section 63 of the Succession Act were duly met.

6. Mr. Kini then invited my attention to a judgment of the Hon'ble Supreme Court in the case of *V. Kalyanasamy Vs. L. Bakthavatsalam*³, in which the Hon'ble Supreme Court has interpreted Section 69 of the Indian Evidence Act, 1872 ('Evidence Act') and held that in the case of unavailability/death of both the attesting witnesses, it is sufficient to prove that the attestation of one of the attesting witness, which is in the handwriting of such attesting witness. He submitted that this requirement was met since the Plaintiff had deposed that he had identified the signature of Gajanan Patgaonkar t. It is thus that learned Counsel submitted that there has been due compliance with the provisions of Section 63(c) of the Succession Act and Section 69 of the Evidence Act as also Rule 384 of the Bombay High Court (Original Side) Rules, 1980.

7. He submitted that the said Will was not an unnatural Will as the reason for excluding the Defendant from the said Will had expressly been set out in the said Will. He therefore submitted that the propounded Will stood duly proved and that the Plaintiff was entitled to Probate of the same.

3 2020 SCC OnLine SC 584

SUBMISSIONS OF MR. UTTAM S. RANE, LEARNED COUNSEL FOR THE DEFENDANT: -

8. Mr. Rane learned Counsel for the Defendant at the outset submitted that onus to prove due execution of the said Will was upon the propounder. He submitted that the Plaintiff being the propounder of the said Will had completely failed to prove due execution of the Will. Learned Counsel placed reliance upon the The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary. judgment of the Hon'ble Supreme Court in the case of ***H. Venkatachala Iyengar Vs. B. N. Thimmajamma and others⁴*** in which the Hon'ble Supreme Court was pleased to hold as follows:-

"(18) What is the true legal position in the matter of proof of wills? It is well known that the proof of wills presents a recurring topic for decision in Courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a

4 AIR 1959 Supreme Court 443

document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. Under S. 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Ss. 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the Will? Did he understanding the nature and effect of the dispositions in the Will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by S. 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with

mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

(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 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.

"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 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."

Basis the above, Mr. Rane submitted that it was therefore incumbent upon the Plaintiff to prove the following,

- i. That the deceased had signed the Will with knowledge that the same was his testamentary disposition.
- ii. That the deceased was in a sound and disposing state of mind.
- iii. That the said Will had been duly executed as per Section 63 (c) of the Succession Act.

Learned counsel submitted that in the facts of the present case, the Plaintiff had failed and neglected to prove even one of the above and thus the question of granting probate did not arise. Additionally, he submitted that the evidence of the Plaintiff made plain that the execution and making of the said Will was shrouded in highly suspicious circumstances. He submitted that the burden of proving due execution and dispelling the suspicious circumstances lay squarely upon the Plaintiff and the Plaintiff had failed neglected to discharge the said burden. He submitted that the said Will was a fraudulent and got up document, since the same could never have excluded, the Defendant who shared an extremely good relationship with the deceased/testator.

9. Learned Counsel then submitted that as per Section 63 (c) of the Succession Act, it was mandatory for the Plaintiff to have led the evidence of the attesting witnesses to support due execution of the said Will in the terms mandated under Section 63(c) of the Succession Act. Mr. Rane submitted that in the present case, admittedly neither of the two attesting witnesses had come forth to give evidence and thus on this ground alone probate ought not to be granted to the Plaintiff.. Learned counsel submitted that the only evidence based on which the P I wish the plaintive sought to prove you execution and attestation of the said Will was that of the Plaintiff. He then without prejudice to his contention that the Plaintiffs evidence could never be considered to prove due attestation since the Plaintiff was admittedly neither an attesting witness nor was present at the time of the alleged execution of the said Will, invited my attention to the following answer is given by the plaintiff in cross-examination, viz.

“Q. 180. As you just met him once and you don’t know him well, can you identify the signature of Mr. Gajanan Patgaonkar, the second alleged witness to the alleged Will of the father?”

Ans. No. I cannot identify.

Q. 181. Is it correct to say that you are not well conversant with the signature of Mr. Gajanan Patgaonkar, the second alleged witness to the alleged Will of the father?”

Ans. Yes.

Q.185. Is it correct to say that you cannot identify the signature of the witness Mr. Dinubhai Shah?

Ans. Yes.

Q.186. Is it correct to say that you are not conversant with the signature of the witness Mr. Dinubhai Shah?

Ans. Yes."

Basis the above, he submitted that the Plaintiff had on his own showing deposed to the fact that the Plaintiff was unfamiliar with the signature of the attesting witnesses and was unable to identify them. He therefore submitted that the mandatory requirements of Section 63(c) of the Succession Act had not been met by the Plaintiff and consequently that the Plaintiff had failed to prove due execution of the said Will.

10. Without prejudice he submitted that it was well settled that in cases, where one of the attesting witnesses was unavailable, then a negative inference must be drawn if the other witness though available was not produced. Learned Counsel submitted that in the present case no attempt had even been made by the Plaintiff to make available the second attesting witness. Learned Counsel submitted that therefore an adverse inference must necessarily be drawn under Section 114(g) of the Evidence Act against the Plaintiff, since the Plaintiff did not produce all the evidence to show due execution. In support of his contention, he placed reliance upon the judgments in the cases of

*Lalitaben Jayantilal Popat Vs. Pragnaben Jamnadas Kataria and Others*⁵ and *Yumnam Ongbi Tampha Vs. Yumnam Joykumar Singh and Others*⁶.

11. Learned Counsel then again without prejudice to the submission that due execution had not been proved by the Plaintiff, submitted that the evidence of the Plaintiff must be disregarded since the same was replete with contradictions and incorrect statements. In support of his contention, he invited my attention to the following, viz.

i. Paragraph 6 of the Affidavit of evidence in which the Plaintiff has deposed as follows: –

“6. I state that the deceased showed me the will after he had prepared it and told me to keep it safely and I had kept the same in my safe custody, till the death of my said deceased father, after which I have filed the present Petition. I state that I had enjoyed excellent relations with the deceased due to which the said deceased executed the will appointing me as an Executor.”

He then invited my attention to the following answers given by the Plaintiff in cross-examination: –

“Q355. I put it to you that the alleged Will document is false, bogus and forged.

Ans. No. It is not correct. I was given the copy of Will by my mother.

5 2009(1) UJ SC 0119; MANU/SC/8457/2008

6 Criminal Appeal No.1600 of 2009 dated 06/03/2009

Q357. *Is it correct to say that as per your contention the alleged Will was not given by your father to you.*

Ans. *Yes. It is correct. My mother gave it to me after the demise of my father.*

ii. Paragraph 7 of the Plaintiff's Affidavit in lieu of examination-in-chief, which reads thus: -

"7. I state that I informed about the same to my sisters as well as other legal heirs. I identify the signatures of my deceased father and the two witnesses on the will. I am conversant with the signature of my deceased father as well as the two witnesses. I state that my relations with my sisters and other family members remains extremely cordial since the beginning till date. I state that the relations of the defendant with the family members has been extremely hostile. I state that her relations with her own family has also been very bade. I state that the relations of my father with my mother were very good and therefore the will was made by my father in the fashion that it is."

He also pointed out the following answers given by the Plaintiff in his cross-examination: -

"Q.77: Do you know the witnesses?

*Ans. if name is given I can answer
the name is given by the advocate for the defendant as follows*

1. Dhinubhai Nanchand Shah

2. Gajanan Patgaonkar

Yes I know Dhinubhai Shah however I do not know the witnessed namely Gajanan Patgaonkar

Q. 178. Is it correct to say that you do not know Mr. Gajanan Patgaonkar, the second alleged witness to the alleged Will of the father?

Ans. Yes, it is correct.

Q. 179. Is it correct to say that you have not met Mr. Gajanan Patgaonkar, the second alleged witness to the alleged Will of the father many times?

Ans. Yes, I have only met him once.

Q. 180. As you just met him once and you don't know him well, can you identify the signature of Mr. Gajanan Patgaonkar, the second alleged witness to the alleged Will of the father?

Ans. No. I cannot identify.

Q. 181. Is it correct to say that you are not well conversant with the signature of Mr. Gajanan Patgaonkar, the second alleged witness to the alleged Will of the father?

Ans. Yes.

Q.184. Is it correct to say that the said witness Mr. Dinubhai Shah has not signed on any document in front of you?

Ans. Yes.

Q.185. Is it correct to say that you cannot identify the signature of the witness Mr. Dinubhai Shah?

Ans. Yes.

Q.186. Is it correct to say that you are not conversant with the signature of the witness Mr. Dinubhai Shah?

Ans. Yes."

From the above, he submitted that there could be no manner of doubt that the Plaintiff had come to the Court with an entirely false case. He submitted that on this ground alone, the present Suit must necessarily be dismissed, since it was well settled that a party who comes to the Court must come with clean hands. He submitted that the consequence of not doing so must therefore meet the inevitable fate of dismissal of the Suit.

12. Learned Counsel then invited my attention to Paragraph 11 of the propounded Will and submitted that the contents thereof were *ex facie* false as the deceased and the Defendant infact shared a very good relationship. He first invited my attention to paragraph 11 of the said Will, a translation of which reads thus: –

“11. My daughter Sunita quarrels with us and with my son. She comes to our residence and wrongly demands money and ornaments from us and from my son. And she harasses us, she threatens us and she keeps on lodging false complaint with the police against us. Sunita quarrels with her husband also. We all are tired of such behaviour of Sunita and inspite of making her understand, she is not ready to bring about any change in her behaviour. Sunita’s above-mentioned behaviour affects the health of my wife and mine.”

He then to demonstrate that the contents of paragraph 11 of the said Will was false and fabricated, placed reliance upon a postcard addressed by the deceased to the Defendant in which the deceased had expressed his deep

affection for the Defendant. Learned counsel then pointed out that the said post card was a document which was in fact admitted by the Plaintiff and therefore the same negated what was stated in paragraph 11 of the said Will.

13. Based on the aforesaid facts, learned Counsel submitted that apart from the fact that the Plaintiff had failed to prove the execution of the said Will as per Section 63 (c) of the Succession Act and Section 68 of the Evidence Act, the evidence on record also made plain the fact that the propounded Will was *ex facie*, a got-up and fabricated document and the evidence of the Plaintiff was completely false, replete with inconsistencies and contradictions and, therefore, ought to be disregarded. It is in these circumstances, he prayed for dismissal of the Suit.

Reasons and Conclusions. –

14. I have heard learned counsel considered the rival submissions made as also the evidence that has been led and the case law cited, and I have absolutely no hesitation in holding that the Plaintiff has not made out a case for the grant of probate for the reasons stated hereinafter.

15. It is well settled that the burden of proving due execution of the Will is upon the propounder. It was thus that Issue No. 1 was framed. To

discharge the burden cast upon the Plaintiff to prove Issue No. 1 it was incumbent upon the Plaintiff to have proved (a) that the testator was of sound and disposing state of mind (b) that the testator had executed the said Will in terms of Section 63 (a) of the Succession Act and (c) that the said Will was duly attested in accordance with Section 63 (c) of the Succession Act. The mere fact that the Defendant has not led any evidence would not by itself absolve the Plaintiff from discharging the burden of proving due execution and attestation of the said Will. This is a burden that the Plaintiff will have to discharge before the burden to prove Issue No. 2 shifted to the Defendant. In the facts of the present case, I find that the Plaintiff has been unable to discharge the burden of proving due execution of the said Will. Hence, in the facts of the present case, it is immaterial that the Defendant did not led any evidence nor stepped into the witness box and consequently the judgment of the Hon'ble Supreme Court in the case of *Iqbal Basith and Others (supra)* is of no assistance to the Defendant. The reasons why I find that the Plaintiff has failed to prove Issue No. 1 are as follows, viz.

- i. Section 63 (c) of the Succession Act mandates that a Will be duly attested by two or more witnesses in the manner more particularly set out therein. In the present case neither of the two attesting witnesses have come forward to give evidence proving due attestation. The one attesting witness who filed an

affidavit of evidence did not present himself for cross examination and thus the evidence given by him in his Affidavit of Evidence cannot be regarded.

- ii. Rule 384 of the Bombay High Court (Original Side) Rules, 1980 provides for the procedure to be followed when it is not possible to file the evidence of the attesting witness. The said Rule reads as follows: –

“384. In absence of attesting witness, other evidence to be produced.

If it is not possible to file an affidavit of any of the attesting witnesses, an affidavit of some other person, if any, who may have been present at the execution of the will shall be filed, but if no affidavit of any such person can be filed, evidence on affidavit shall be produced of that fact and of the handwritings of the deceased and attesting witnesses, and also of any circumstances which may raise a presumption in favour of due execution.”

In the facts of the present case, it is not even the Plaintiffs case that the attesting witnesses were unavailable. One of the attesting witnesses in fact filed an Affidavit of Evidence but did not present himself for cross examination. No reason was both coming as to why the second attesting witness did not come forth to give evidence of due attestation. Additionally, the Plaintiff did not file any application to lead evidence in terms of Rule 384. The Plaintiff has relied solely upon his Affidavit of

Evidence and answers given in cross examination to prove due attestation. While I find that such evidence does not meet the requirements of Section 63(c) nor Rule 384, given *inter alia* that both attesting witnesses are available even assuming the same can be looked at, the same infact proves that the signatures of the attesting witnesses have not been proved at all. The Plaintiff has in terms deposed that he is unable to identify the signatures of both the testing witnesses. Thus, it is clear that there is no evidence whatsoever on record to prove due attestation of the said Will. On this ground alone, the Suit must therefore fail.

- iii. Similarly, the Plaintiff reliance upon Section 69 of the Indian Evidence Act, 1872, is entirely misplaced. Section 69 reads as follows: –

“69. Proof where no attesting witness found. – If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.”

Section 69 clearly provides that in cases where no attesting witnesses can be found evidence can be led to prove the

handwriting of one of the attesting witnesses. In the present case as already observed above, it is not as though the attesting witnesses cannot be found and hence the question of pressing into service Section 69 of the Indian Evidence Act does not arise. As also observed above, even if the Plaintiff's evidence is to be treated as evidence under section 69 of the Indian Evidence Act, the Plaintiff has in terms admitted that he cannot in fact identify the signature of either of the attesting witnesses.

- iv. Additionally, I find that the case with which the Plaintiff has approached this Hon'ble Court is replete with inconsistencies and self-defeating statements. The Plaintiff has firstly in his Affidavit of Evidence in lieu of Examination-in-Chief deposed by saying that the Plaintiff can identify and is conversant with the signatures of the two attesting witnesses and then in answers to Question Nos.180 to 185 stated that he cannot identify the signatures of either of the attesting witnesses. The Plaintiff has in his Affidavit of Evidence in lieu of Examination-in-Chief stated that the said Will was given to him for safe keeping by the deceased, however in his cross-examination, he deposed that the said Will was given by the wife of the

deceased, i.e., his mother, after the demise of the deceased.

16. Hence, considering the above, I find that the Plaintiff is not entitled to the grant of Probate. Additionally, I find that the case putforth by the Plaintiff is indeed highly suspect given the contradictions in the case of the Plaintiff which have come out in the course of the cross-examination of the Plaintiff. The Plaintiff has, therefore, clearly come to Court on a false case. In this context, it is useful to refer to the observations of the Hon'ble Supreme Court in the case of ***S. P. Chengalvaraya Naidu V/s. Jagannath (Dead) by LRS***⁷ which are as follows viz.

"The Courts of law are meant for imparting justice between the parties. One who comes to the Court must come with clean hands We have no hesitation to say that a person whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation".

The Apex Court and this Court have, on many occasions, stated that if a party comes to the Court with unclean hands summararily thrown out. In this case, the falsity of the Plaintiff's case has come to the fore in the course of the cross-examination. While, learned Counsel for the Plaintiff submitted that a witness had infact answered honestly, in my view, such a submission cannot be countenanced, since the falsity in question is contained in the evidence in lieu

⁷ (1994) 1 SCC 1

of examination-in-chief of the Plaintiff. It is based on this evidence that the Plaintiff has sought to propound the Will and seek Probate in respect thereof. It is this case which has been proved to be false and, therefore, to submit that the Plaintiff's witness has answered honestly is a submission that is devoid of merit. In *Sciemed Overseas Inc. V/s. BOC India Ltd.*⁸ the Apex Court has lamented about the unhealthy trend in filing of affidavits which are not truthful. Paragraph 2 of the said judgment reads as under:

"2. A global search of cases pertaining to the filing of a false affidavit indicates that the number of such cases that are reported has shown an alarming increase in the last fifteen years as compared to the number of such cases prior to that. This is illustrative of the malaise that is slowly but surely creeping in. This 'trend' is certainly an unhealthy one that should be strongly discouraged, well before the filing of false affidavits gets to be treated as a routine and normal affair."

Kuldip Singh, J. (as he then was) in S.P. Chengalvaraya Naidu (Dead) by LRS (Supra) in paragraph 5 observed :

"5. We are constrained to say that more often than not, process of the Court is being abused. Property-grabbers, taxevaders, bank loandodgers and other unscrupulous persons from all walks of life find the Court process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation."

8 2016 AII SCR 370

17. Hence considering the above, I have no hesitation in holding that the Plaintiff has come to Court with a false case and it is thus on this ground alone that the Plaintiff has disentitled himself to any relief. The conduct of the Plaintiff in propounding a false case and, therefore, entitled the Defendant to costs. Accordingly, I answer the issues framed as follows :-

Issue No.1

Does the plaintiff prove that deceased Mansukhlal Kanji Shah has validly executed document purported to be Will dated 24.3.1997?

Answer : No.

Issue No.2

Does the defendant prove that the document purported to be Will dated 24.3.1997 has been executed by the deceased Mansukhlal not by his free will and consent and under undue influence?

Answer : The same does not arise in view of answer to Issue No.1 above.

18. Hence, I pass the following order :-

- (i) Testamentary Suit No.51 of 2001 is dismissed with costs of Rs.50,000/- (Rupees Fifty Thousand Only) to be paid to the Defendant within 8 (eight) weeks from the date of this judgment.

- (ii) In the event that the costs as directed above is not paid within a period of 8 (eight) weeks from the date of the judgment, the same shall carry interest at the rate of 9% and shall be recoverable as arrears of land revenue.
- (iii) In view of the disposal of the above Suit, all applications filed therein became infructuous and thus disposed of accordingly.

(ARIF S. DOCTOR, J.)