

(2016) 06 BOM CK 0052

In the Bombay High Court

Case No : Testamentary Suit No. 9 of 1994 in Testamentary Petition No. 745 of 1993

Chittaranjan Narottamdas Negandhi

APPELLANT

Vs

Hemkala Alias Meenakshi Mansingh Udeshi

RESPONDENT

Date of Decision : 24-06-2016

Acts Referred:

Citation : (2017) 3 AIRBomR 1 : (2017) 2 BCR 358 : (2016) 3 HLR 154 : (2016) 4 MhLJ 819

Hon'ble Judges : G.S. Patel, J.

Bench : Single Bench

Advocate : Mr. Arzan Bulsara with Ms. Neha Kodap, i/b Tyabji Dayabhai, Advocates, for the Appellant; Mr. M.M. Shah, i/b Mr. Amod Mulye and Mr. Vivek Tambe, Advocates, Ms. Dimple R. Joshi, i/b Ms. P.G. Bhatia, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

G.S. Patel, J.(Oral)—The Plaintiff seeks probate of a Will dated 24th May 1973 left by his mother, Bhanumati Narottamdas Chapsi ("Bhanumati"). Bhanumati's husband was one Narottamdas Negandhi, but it appears that she did not take his surname. It is not disputed that Bhanumati, born in 1919, was about 54 years old when she made the Will in question, or that she lived for 19 years thereafter until her death at the age of 73 on 14th May 1992. Narottamdas died before she, on 24th July 1979. He was one of the two Executors named in her Will; the Plaintiff is the other. The Plaintiff is, thus, the sole surviving Executor of Bhanumati's Will.

2. Bhanumati and Narottamdas had six children: Pratapsingh, born in 1936; Yaswant, the 2nd Defendant, born in 1941; Indumati, the 3rd Defendant's mother, born in 1943; Hemkala, born in 1948, the 1st Defendant; Chittaranjan, the Plaintiff, born in 1950; and Kirtikumar born in 1952. Of these six children, Pratapsingh and Kirtikumar have not opposed this Petition. Hemkala, Yaswant

and Indumati, all filed Caveats and supporting Affidavits and are now arrayed as Defendants Nos. 1, 2 and 3 respectively. For reasons that are now not material, Indumati (the 3rd Defendant's mother) withdrew her Caveat. For his part, Yaswant seems not to have participated in these proceedings; he led no evidence. The solitary opposition comes from the 1st Defendant, Chittaranjan's older sister, Hemkala.

3. The Will in question is a typed document prepared with some degree of formality by M/s. Tyabji Dayabhai, an old and reputed firm of Solicitors. The Will has four typed pages. There is a docket at the reverse. There are no markings on pages 1, 2 and 3. I note this because there has been some level of argument that there are portions of the Will that are demonstrably erroneous to Bhanumati's knowledge. These ought to have been corrected before execution; the absence of corrections is, the Defendants submit, itself a sufficiently suspicious circumstance to warrant a dismissal of the Petition. Four pages of the Will are typed front and reverse. Page 4 has Bhanumati's signature in English in a running hand. This is in blue ink. The handwriting is firm and the letters are well-formed. From the signature alone, it is not possible to say that on the date of this Will, 24th May 1973, Bhanumati suffered from such impairment as would render her incapable of making a valid testamentary writing. I note this at the beginning because there is 1 Exhibit "A" in evidence, p. 7 of the paper-book. not even a suggestion to this effect, although a case is attempted to be made out of want of testamentary capacity.

4. Just above the execution is the date, and here we find the expression "24TH" written in blue ink. Again, there are arguments based on this, to which I shall return. There are then two signatures and an endorsement at the foot of this paper. The first is in blue ink. It reads "Chimanlal C. Vakil" and below that "Solicitor, Bombay". Below that is the signature of "V.J. Ved", also in blue ink, and below that, the words "his clerk". The last endorsement at the very foot of the page says, "Read over and explained to the Testatrix before execution. Chimanlal C. Vakil."

5. Hemkala, Defendant No. 1, entered a Caveat dated 3rd February 1994. In her Affidavit in Support, she alleged that the Will was false, unnatural, got up and fabricated. She took a specific plea that her mother, Bhanumati, suffered from an early age from what is described in this Affidavit as "hysteria". In this context, paragraph 9(b) of the Affidavit in support of the Caveat merits reproduction:

"9(b). I say that since the age of about 22 years i.e. since the year 1941, thereafter through out her life, my said mother was suffering from Chronic deceased of Hysteria. I say that frequent attacks of Hysteria were coming to the said deceased. I say that due to the said decease of Hysteria the said deceased was not allowed to cook food, kept away from any fire place and all other precautionary measure were taken. I say that the said deceased was not allowed to go out of the house alone, any one of the family member used to accompanying her. I say that due to the said decease of hysteria, the said

deceased was not in balance state of mind, her memory power was very weak, she was not capable of understanding, even minor things of life, she used to nag her husband, beat the servants, cooks and other family members of house, used to throw all nearby things, used to scree loudly. I further say that when the family Doctor used to visit for the treatment of the said deceased, at least three to four persons has to hold her. I say that the said deceased also some-time used to pass urine and toilet in bed. I say that the said deceased was treated by the family doctors namely K.K. Mankodi and G.K. Mankodi. I say that in the year 1973 the said deceased was about the age of 53 years and as stated herein above. She was suffering from said decease of hysteria. I say that my mother was not in a mental condition to make any Will during her life i.e. after her age of about 22 years, the said deceased was suffering from the said decease of hysteria as stated herein above."

6. The other ground made out is that the bequest in the Will favoured Chittaranjan and Kirtikumar, and gave a miniscule amount to Bhanumati's two daughters, Hemkala and Indumati. Thereafter, there are allegations that the Will is not genuine because there are typographical errors. Principal among these is that Hemkala is referred to as Hemlata. It is also alleged that the Will has incorrect narratives about immovable property. Before me, it is also argued that the Will does not mention the given name of the substantial property at Vile Parle, Mumbai.

7. Having described the physical state of the Will, I will turn now to its contents, before I proceed to the issues and the evidence. In paragraph 4(a), the Testatrix sets out that she owns an immovable property at Vile Parle. This is described in both area and location and she says that there is a bungalow standing on that plot, though she does not name the bungalow. She says, in this paragraph, that her husband, Narottamdas, did not contribute any part of the consideration for the acquisition of this property. In paragraph 4(b), she speaks of the property at Station Road at Amreli in Saurashtra, which she inherited from her father. She says that there is a Laxminarayan temple on a portion of this, and this has been dedicated to charity. There are then mentions of other properties in paragraphs 4(c), 4(d) and 5. In paragraph 6, she names her children and notes that two of her sons and both her daughters are married. Paragraph 8 says that on their marriage, four of her children (two sons and the two daughters), were given certain ornaments. Paragraph 10 then contains certain modest monetary legacies. Each of the daughters receive Rs. 1,000/-; their husbands receive Rs. 250/- each; and Bhanumati's grandchildren receive Rs. 101/- each.

8. The Vile Parle property is left to all four sons in equal shares. The daughters are completely excluded from this. In paragraph 12, Bhanumati bequeathed her other property to two of her sons, Chittaranjan and Kirtikumar, in equal shares absolutely.

9. It is on this basis that a challenge was laid to this probate Petition. Issues were struck on 14th March 2012. An additional issue was framed very recently,

by consent, on 10th February 2015. The issues as framed together with my findings thereon are set out below:

Sr. No.

Issues

Findings

1

Does the Plaintiff prove that document dated 24th May 1973 is the last Will and testament of the deceased Mrs. Bhanumati Narottamdas Chapsi?

In the affirmative.

2

Does the Plaintiff prove that document dated 24th May 1973 has been validly executed by late Mrs. Bhanumati Narottamdas Chapsi as her last Will and Testament?

In the affirmative.

3

Does the Defendant prove that late Mrs. Bhanumati Narottamdas Chapsi was not mentally sound on or about 24th May 1973 and as such she was not competent to execute any document including document of Will?

In the negative.

3A.

Whether Defendants Nos. 1 and 3 prove that the Will in question is unnatural?

In the negative.

4

What order?

As per final order.

10. Before I deal with each of these issues, I must note that Issues Nos. 1 and 2 are identical. They will be treated as one. As regards Issue No. 2, I will take it, and Mr. Bulsara for the Plaintiff agrees, that the initial burden of proving sufficient testamentary capacity is, as it must always be, on the Plaintiff. What Issue No. 3 does, as currently framed, is to place the burden of proving a specific medical condition sufficient to render the Testatrix completely incapable of any testamentary writing on the Defendants. The additional Issue No. 3A had to be framed because there is a specific pleading to that effect.

Testamentary and Documentary Evidence

11. The Plaintiff led evidence of two witnesses. PW1 was the Plaintiff himself. By the time the Suit came to trial, both attesting witnesses had passed away. One of them, V.J. Ved, had filed an Affidavit supporting the Petition as required under our Rules. He did not, however, live to file an Affidavit of Evidence. There is, therefore, no Affidavit in lieu of examination-in-chief filed by Mr. Ved for the purposes of Order 18, Rule 4 of the Code of Civil Procedure, 1908. All parties have proceeded, as must I, on the basis that Mr. Ved's Affidavit supporting the Petition would have been substantially his Affidavit of Evidence. I have heard Mr. Bulsara for the Plaintiff and Mr. Shah for the 1st Defendant on the question of the probative value and evidentiary weight of Mr. Ved's Affidavit. I will return to this presently.

12. Since neither of the attesting witnesses were available, the Plaintiff led evidence of Mr. Jayant Chimanlal Vakil, a partner of M/s. Tyabji Dayabhai, and a Solicitor in his own right. Mr. Vakil was a partner of the firm at the time when the Will was executed, although he was not himself an attesting witness to it, or in any way involved in its making. His evidence was limited to identifying the signatures of his father, Mr. Chimanlal Vakil, the other partner of the firm, and Mr. Ved, the firm's clerk. The Plaintiff led in evidence several documents. Six of these are marked Exhibits "A", to "F" evidence. Exhibit "A" is, of course, the Will in question. Exhibit "B" is a motorcar registration policy, Paper book, p. 171. It was produced by the Plaintiff essentially to show that a few weeks or months after the execution of the Will, Bhanumati herself signed this motorcar registration document. Exhibit "C" (page 172) is a LIC Policy, Paper book, p. 172. Exhibit "D" is the death certificate of Narottamdas, Paper book, p. 130. Exhibits "E" and "F" are the original death certificates of Chimanlal Vakil, Paper book, p. 266 and V.J. Ved, Paper book, p. 267.

13. Part of the cross-examination of PW 1, the Plaintiff, was before a Commissioner, Ms. J.M. Sidhwa, an Advocate of this Court. While I am at this stage, I must note my appreciation of the exemplary manner in which those notes of evidence were recorded and the cross-examination conducted on commission. It is absolutely faultless, and it has made my task much simpler. I must record my thanks to Ms. Sidhwa for her assistance in the matter. I urge the Bombay Bar Association to ask Ms. Sidhwa and some of her colleagues who take up these assignments, including Mr. Salil Shah, Mr. Farhan Dubash and Mr. Phiroze Colabawalla, whose own work is of just such a high standard, for their assistance in developing a framework of guidelines or a set of templates for use in all commissions. I refer specifically to the presentation of the final report, the collation of documents, the recording of objections and the adoption of consistent page and question/answer numbering, as also the salutary practise of recording all examination only in question and answer form.

14. Before Ms. Sidhwa, the Plaintiff introduced several documents during their cross-examination of the Defendant. These were photographs and they have been marked in evidence as Exhibit "G" to Exhibit "X", Paper book, pp. 308 - 325.

15. The 1st Defendant, Hemkala, led her own evidence. She introduced no documents. She led no other evidence.

Re: Issue Nos. 1 and 2

16. The first issue, on the due execution of the Will, has two elements. Before I turn to the evidence on record, it is necessary to note the provisions of Sections 59 and 63 of the Indian Succession Act, 1925:

"59. Person capable of making Wills. - Every person of sound mind not being a minor may dispose of his property by Will.

Explanation 1. - A married woman may dispose by Will of any property which should could alienate by her own act during her life.

Explanation 2. - Persons who are deaf or dumb or blind are not thereby incapacitated for making a Will if they are able to know what they do by it.

Explanation 3. - A person who is ordinarily insane may make a Will during interval in which he is of sound mind.

Explanation 4. - No person can make a Will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.

63. Execution of unprivileged Wills.—Every testator, not being a soldier employed in an expedition or engaged in actual warfare or an airman so employed, or engaged or a mariner at sea, shall execute his Will according to the following rules: -

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) 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 been 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 of 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."

(Emphasis added)

17. Read together, these two sections have two distinct requirements. Section 59 demands proof of sufficient testamentary capacity. Section 63 speaks to the manner or mode of a valid execution of a Will. As to testamentary capacity, it is

always for the Plaintiff to show that the person making the testament was possessed of sufficient capacity as required in law. Soundness of mind must be established. There may be a variety of ways to do this. Important to our discussion are the explanations to Section 59, for they make it clear that certain impediments such as hearing, speech or sight impediments do not constitute testamentary incapacity. For our purposes, Explanation 3 is crucial. This speaks of persons who are, to use the unfortunate expression of the statute, "insane". I will read this to include any one or more of the well-known medical mental health disorders that are known to medical science today. What Explanation 3 says is that even if a person ordinarily suffers from any such established pathology, one that renders him or her momentarily incapable, he or she may still validly make a Will during an interval of lucidity. Consequently, it is never enough merely to say, for instance, that a Testator suffered from this or that ailment. It is unreasonable to expect a Testator to be in a most complete and perfect state of health. Nobody ever is. That is most emphatically not mandate of the law, as the Privy Council itself noted in *Judah v. Isolyne Shrojbashini Bose & Anr*, AIR 1945 PC 174 a view followed by this Court in *Dr. Feroze Homi Duggan v. Jean Duggan*, (2011) 6 Mah LJ 516 and by the Delhi High Court in *K.L. Malhotra v. Sudershan Kumari & Anr.*, (2008) 149 DLT 783 The law does not require every testator to be in peak physical and mental condition, or to be possessed of 'sound and disposing mind and memory' in the highest degree. Were it so, few would be able to make testaments at all. It is not even necessary for a testator to be in the same state as once he used to be, for even this would disable most in the inevitable decline of life. Enfeeblement with age and a degree of debilitation is to be expected. So long as the testator has enough to discern and discreetly to judge the matters that enter into a rational, fair and just testament, that is surely enough. (*Kanwar Sain v. State & Ors.*, AIR 1976 Del 11; *Gordhandas Nathalal Patel v. Bai Suraj & Ors.*, AIR 1921 Bom 193 (DB))

18. Given the pleadings in the Caveat, it would then fall on the Defendant to establish the existence of a disabling mental condition. It is not for the Plaintiff to have to disprove that condition. It is enough for the Plaintiff to show that at the time of the Will, Bhanumati was of sufficiently sound mind.

19. The second aspect is the mode of execution of the document. The section requires that there be at least two witnesses. Each must be present. Each must sign in the presence of the testator. Each must have seen the testator sign, or seen someone sign at the instance of the testator, or have received from the testator a personal acknowledgement of his signature. Both witnesses need not be present at the same time.

20. In this case, it appears that the Will was executed and attested at the offices of M/s. Tyabji Dayabhai. One of the partners was present. So also was his clerk. The Testatrix signed in their presence.

21. The Plaintiff filed two Affidavits in lieu of examination-in-chief, Paper book, pp. 109 - 110 and 121 - 123. There followed a long and debilitating cross-

examination spread over nearly three years. Not all of this is relevant given the narrow issues at hand.

22. As to the question of epilepsy, PW 1, in fairness, does not dispute this at all. He admits that his mother had epilepsy and that she had it from an early age, Qs. 396 to 402, pp. 242-243. He also accepts that during these epileptic episodes she had tremors, indicating, I think, that she was not able to go about her normal life during those times. I notice that PW 1 avoided directly answering whether during these epileptic episodes Bhanumati fell unconscious or into a semi-conscious stage, Qs. 403 to 408, pp. 243-244; but this matters little. He admits that she was under medication for this condition, that he does not know the exact medication that she was taking, Qs. 409 to 413, p. 245. In response to Question 419, PW 1 says that he learnt of his mother's epilepsy from his father.

23. Yet, there are two questions in this long and somewhat tiresome cross-examination that have consequence especially in regard to Bhanumati's condition between her epileptic episodes. Questions and answer 403 and 420 read as follows:

"403. Q. When she suffered from 'epileptic' fits was she conscious or unconscious?

Ans. For a few seconds she used to suffer from trembling and thereafter she would be alright and lead a normal life.

420. Q. Would it be correct to say that till 1991 you made no attempt to personally know what disease your mother was suffering from?

Ans. She used to take her medication and she used to live her life normally."

24. Both answers indicate that it has been elicited as a question of fact that while Bhanumati did suffer epileptic episodes, for the period between them she lived a perfectly normal life.

25. Part of this cross-examination of PW 1 was then continued in Court on 10th February 2015, when it was closed. There is one question in the cross-examination of PW1 on that date which is material. That is Question No. 4, which reads thus:

4. Q. Your mother Bhanumati made a Will in 1973. Was she suffering from epilepsy before that date?

Ans. Yes, she was.

(Emphasis added)

26. The wording of this question is of significance. It is, to my mind, a categorical admission in cross-examination on behalf of the 1st Defendant that the Will was duly made in 1973. The only surviving question was whether Bhanumati suffered from epilepsy before that date.

27. Given the way this question is framed, therefore, there can be very little room for doubt or debate as to the due execution of the Will. However, if any proof is needed, I imagine it is sufficiently provided by the two Affidavits filed by PW 2, Mr. Jayant Vakil, pp.253-261 & 262-265 of the paper-book. In these two Affidavits, Mr. Vakil identifies the signatures on the Will. He also says that Mr. Ved worked with the firm till he passed away, a few years later. Mr. Vakil was cross-examined in Court, pp. 268-273 of the paper-book. This cross-examination, conducted on behalf of both the 3rd Defendant and the 1st Defendant does nothing to disturb or shake Mr. Vakil's testimony-in-chief. Indeed, Questions Nos. 11 and 12 of Mr. Vakil's cross-examination put to rest any doubt there might be about the execution of the Will.

11. Q. Was it the practise in your firm to always endorse in handwriting when a document was read over and explained to a testator or testatrix?

Ans. Yes, in cases where the testator or testatrix was not conversant with English.

12. Q. Ordinarily where in that document would such an endorsement be placed?

Ans. It would be at the foot of the document."

28. At this stage, I must note an argument Mr. Shah attempted but which I did not allow him to pursue. He suggested that the signature of Mr. Ved that appears on his Affidavit supporting the Petition and the one that is seen on the Will are discrepant. I do not know what is sought to be suggested by this. There are several possibilities. First, that the signature of Mr. Ved is forged either on the Will or on the Affidavit. The 1st Defendant does not say which. Second, that Mr. Vakil has perjured himself in the witness box by identifying the signature of Mr. Ved on the Will. In fairness, Mr. Shah does not go quite this distance, and advisedly so. What is absent, however, and this is of significance, is that at no point was Mr. Vakil, though made available for cross-examination, confronted with these two signatures and asked to explain why they were discrepant, if indeed they are. I do not think it is possible for the 1st Defendant to now urge that an adverse inference must be drawn in some unknown manner for some unstated purpose and for an unclear result by inviting this kind of a comparison. The 1st Defendant had more than enough opportunity to precisely place her case as regards Mr. Ved's signature. If she chose not to do so, there is not very much more that can be said for this particular argument. After all, Mr. Vakil was present, and he was best placed to be able to answer such a question about any so-called discrepancy in Mr. Ved's signature.

29. The principle, one that was clearly enunciated by the Division Bench of the Calcutta High Court in *A.E.G. Dederian v. A.Y. Carapiet*, AIR 1961 Cal 359, paragraphs 8, 9 & 10 is now firmly established. *Carapiet* was also a testamentary case. A very similar situation arose: one set of witnesses deposed to a certain state of the testator's health. This state of affairs was not put to the next witness. An adverse inference was invited on the basis of a contradiction. The Division Bench held that it was a salutary principle that where such a

contradiction is sought to be used, it must be put to a witness so that the witness is given an opportunity to affirm or deny it. I am in most respectful agreement with this and, in any case, it is now far too well-established to admit of any distancing.

30. In what is presumably a last-ditch effort, Mr. Shah seeks to argue that the evidence given by Mr. Jayant Vakil should be disregarded since he, being the advocate-on-record, could not have been a material witness in the same case. He places reliance on two cases of this Court, in *R.K. Agarwal v. Rana Harishchandra Ranjitsingh and Ors.*, AIR 1994 Bombay 117 and *Vincent Joseph Konath and Ors. v. Jacintha Angela Vincent Konath and Ors*, AIR 1994 Bombay 120 in support of this contention. I do not think it is fair for Mr. Shah to raise this contention at this stage, so late in the day. This objection ought to have been taken before the cross-examination. However, on merits too this argument fails; I do not see how these judgments assist Mr. Shah. Stated briefly, these cases hold that professional ethics prohibit an advocate from accepting a brief in case in which he is likely to be a material witness; that an advocate who knows, or has reason to believe, that he will be an important witness in a particular case has the option of appearing either as a witness or as an advocate. If he chooses the latter, he cannot then appear as a witness by seeking a discharge from the case. I do not see how such knowledge or belief can be attributed to Mr. Jayant Vakil in the present case. He is not an attesting witness to the Will. His evidence was led only for the limited purpose of identifying the signatures of the two deceased attesting witnesses. This is precisely the procedure prescribed under Section 69 of the Indian Evidence Act for such a contingency: non-availability of the attesting witnesses. This is the thrust of the judgment of this Court in *Nooruddin v. Mahomed Oomer*, AIR 1956 Bom 641 which Mr. Bulsara cites in response.

31. This leaves the question of what, if anything, is to be made of Mr. Ved's Affidavit. At the cost of repetition, it must be noted that this is an Affidavit of Evidence within the meaning of Order 18, Rule 4 of the Code of Civil Procedure, 1908. Assuming for the purposes of argument, that it is an Affidavit of Evidence, or is liable to be treated as one, and Mr. Ved has not been available for cross-examination because he passed away before his cross-examination could commence, then that puts us in a situation squarely covered by Section 32 of the Evidence Act, 1872. In this context, the decision of Mr. Justice H.R. Khanna sitting singly in the Delhi High Court is one that clearly and succinctly elucidates the correct position in law. [*Krishan Dayal v. Chandu Ram*, ILR (1969) Del 1090, 1096] Such an Affidavit is not to be lightly disregarded. What weight is to be attached to it in such circumstances must depend on an assessment of all the surrounding factors. It may or may not be accepted in its entirety. In a given case, a Court may require further corroboration. Certainly it is not one to be discarded out of hand. Now, there is no inconsistency in what Mr. Ved says in his Affidavit and what Mr. Vakil says in his testimony (in a proper Affidavit of Evidence under Order 18, Rule 4) and in his cross-examination. If this be so,

then what emerges from the evidence, viz., that Bhanumati executed the Will in question, and that she did so on 24th May 1973 in the offices of M/s. Tyabji Dayabhai in the presence of Mr. Chimanlal Vakil and Mr. Ved, remains completely unshaken. Read with Question 4 put to PW 1 when cross-examined in this Court, in my judgment, this is sufficient to prove the due execution of the Will in its solemn form. Both Affidavits filed by the Plaintiff make a specific assertion that when she made the Will in question, Bhanumati was of a sound state of mind, memory and understanding. In paragraph 6 of his second Affidavit, PW 1 adds to this by saying that this is evident from the fact that she signed the car registration a few months after the date of execution of her Will. He produces the document in question. There is no meaningful cross-examination on this, and his testimony is undisturbed.

32. As a result of this discussion. I do not think that there can be any doubt about the due execution of the Will and proof of the Will in its solemn form. Accordingly, Issue Nos. 1 and 2 are answered in the affirmative.

Re: Issue No. 3

33. This then takes us to whether the Defendant has been able to establish that Bhanumati lacked the necessary diapositive capacity at the time when she made her Will, i.e., on or about 24th May 1973, and that, as such, she was not competent to execute any document including the document of Will. This is the exact phrasing of the issue frame. The way this issue has been framed indicates the burden that was placed on the Defendants, and that it is with this understanding that the parties went to trial.

34. What is the evidence required of DW 1 to discharge this evidentiary burden, i.e., to show this level of incapacity? She must be able to show either that Bhanumati was, on account of her admitted condition of epilepsy never, i.e., at no point in time, in a sufficiently lucid state of mind to make a testamentary instrument; or, alternatively, that on 24th May 1973 she was so incapacitated that she could not have possibly made that Will.

35. What DW 1 gives instead is truly a strange assertion. This is to be found in her Affidavit of Evidence. Here, in paragraph 10, of an Affidavit made in May 2015, 23 Hemkala recalls in very great detail events of 42 years earlier in May 1973. This is what she says:

"10. I say that I got married in the year 1968. I had three daughters. My elder daughter Nina was born on 8.3.1972 at Vile Parle. My all three daughters were born at Vile Parle and that I stayed at my mother's home at Green Bungalow for a period of one and half month during my 3 daughters' birth. My relationship with my parents was cordial and affectionate. I used to accompany my parents on various Tourists places even after my marriage. My mother was being taken care by me during my visits at my parents' place. I used to visit my mother's home on every Sunday and that I had stayed at my mother's bungalow during every summer vacation. I had also stayed one week every month during my periods as

per the customs prevailing to stay at my mother's home. I say that in the year of May, 1973 I was at Vile Parle Bungalow and stayed with my mother's home in entire Summer vacation of May, 1973. I say that my mother suffered Epileptic attacks in the second or third week of May, 1973 and that she was not in a proper sense. I had taken utmost care of my mother during my stay with her. I say that my 23 pp. 277-278 of the paper-book. mother had never made the purported Will. The contents of the purported Will are never made as per my mother's instructions. I say that my mother had never taken any independent decision in her life. My mother was always under care and supervision of my father and that after the death of my father on 24th May 1979, my mother was under supervision of my brother Chittaranjan. My two elder brothers got separated after the marriage of my brother Chittaranjan due to quarrels between wife of my brothers. My mother was under the influence of my brother Chittaranjan, his wife and elder brother's daughter Lina and that they used to torture my mother if she made telephone calls to me and my sister Induben. They used to quarrel with my mother after our visit at our mother's place. They did not like our visits to my mother's place."

36. Hemkala claims that Bhanumati suffered epileptic attacks in the second or third week of May 1973 and then says that she was not in a proper sense. But there is no evidence to show that because of her epileptic episodes Bhanumati was always in a state of incapacity. PW 1, while admitting that she had epileptic episodes, said in cross-examination that she was in the intervening periods perfectly normal. This is a situation contemplated by Explanation 3 to Section 59 of the Succession Act, 1925. There is no evidence whatsoever from Hemkala to show that throughout that period of the second half or third quarter of May 1973 Bhanumati was at all times in this condition. In fact, there is nothing to show what she says is true. Hemkala ends her Affidavit with the following assertions in paragraph 19:

"19. I say that as stated herein above, my mother was suffering from the chronic disease of epilepsy and Hysteria since the age of about 22 years throughout her life. My mother got frequent epileptic attacks at regular intervals in her life. She was not competent to take any independent decisions during her life time because of her sickness. My mother was under constant care of my father and thereafter my deceased mother was under constant care, control and supervision of my brother Chittaranjan. My brother Chittaranjan always quarrelled with my deceased mother if she accompanied with her daughters for outdoor visits."

37. Thus, the evidence led by Hemkala is that on account of epilepsy and hysteria, Bhanumati was at no time competent to make a Will.

38. Hemkala was extensively cross-examined, inter alia, on these assertions. Mr. Bulsara points to the cross-examination from Question 10 to Question 14. It reads as follows:

"Witness's attention is drawn to paragraphs 9 and in particular to the sentence

"during the epileptic attacks my mother used to become very dull" and in paragraph 11 to the first sentence of the said paragraph of her Affidavit of Evidence.

11. Q. Which of your two statements are correct?

Ans. At times she would become very dull and at times violent also. Witness? attention is drawn to paragraph 10 and in particular to the sentence "I say that in the year May 1973 vacation of May 1973." of her Affidavit of Evidence.

12. Q. Whose summer vacation are you referring to?

Ans. During my daughter?s summer vacation and when my sisters and her children used to visit the Vile Parle bungalow.

13. Q. Is it correct to say that in May 1973 your daughter was only one year old?

Ans. Yes.

14. Q. I put it to you that your daughter was not in school in May 1973 and therefore what you have stated in your Affidavit of Evidence is incorrect?

Ans. I did not mean during my daughter?s summer vacation. I meant during my sister?s children?s vacation."

39. Clearly, Hemkala?s memory is not quite as unerring as she makes it out to be.

40. If what Hemkala says is correct, then I think it would be reasonable to presume that Bhanumati would be on heavy doses of medication to keep her calm and stable. In cross, Hemkala says that she was given just one tablet once a day, Q. 50, p. 300 and that it was her father who would give her this medication while he was alive, Q. 51, p. 300. She then admits that after her father?s death, it was the Plaintiff and his daughter who administered medication to Bhanumati, Q. 52, p. 300. Read as a whole, this evidence suggests that Hemkala herself is quite unaware of Bhanumati?s exact medical condition. Indeed, she admits that it is Chittaranjan who is best placed to know her medical condition, even if he does not today recall the name of that medication. This admission from the 1st Defendant, that it was the Plaintiff who administered the medicine to Bhanumati, is crucial.

41. The Plaintiff has not rested at this. In order to show that Bhanumati had otherwise lived a normal life, Hemkala was shown several photographs, Q. 58 to Q. 77, pp. 302 - 306. For each of these photographs she was asked to identify the persons in the photograph and where it was taken. To her credit, Hemkala did not hesitate or prevaricate in her answers. The photographs are at Exhibit "G" to Exhibit "X" in evidence. They are the kind of photographs that one typically finds in old family albums: marriages, outings, picnics, travel and so on. Some of these photographs, such as the ones at Exhibit "H", Paper book, p. 309, Exhibit "I", Paper book, p. 310, Exhibit "J", Paper book, p. 311 and others are

significant not only because of their evident vintage, but because they show Bhanumati in a completely normal state going about various activities. Sometimes she is seen at a temple, sometimes at the sacred tank; at other times in a boat on a river and even on camel back. In Exhibit "O", Paper book, p. 316, she is seen in a field gathering what I presume is corn. In another photograph, identified by Hemkala as one of her parents, Exhibit "P", Paper book, p. 317, she is seen in what appears to be a foreign land. This is evident from the dress of the person who is to Bhanumati's right and the image of the cable car to the left in that photograph. There are also photographs of Bhanumati and Hemkala in Kashmir, Exhibit "R", Paper book, p. 319, and Bhanumati with Hemkala's three brothers and sister in a boat on a lake. There is also a photograph of Yaswant, Chittaranjan, Hemkala, Kirtikumar and Bhanumati taken at Amarnath, Exhibit "U", Paper book, p. 323, and of her in Amreli playing garba, Exhibit "W", Paper book, p. 324.

42. Mr. Shah refers to a decision of the Himachal Pradesh High Court in *State of H.P. v. Ranjeet Singh*, (2008) 2 Cur LJ (HP) 303 : (2008) 2 HLJ 1335 in regard to the question of epilepsy. He relies on paragraph 25 of this decision. This was a criminal case. I find that the Court refers to certain text books on toxicology and jurisprudence and it quotes a paragraph from Modi's *Medical Jurisprudence and Toxicology*, 22nd Edition page 73, which reads:

"The disease is generally characterised by short transitory fits of uncontrollable mania followed by complete recovery. The attacks however become more and more frequent. There is general impairment of the mental faculties with loss of memory and self control. At the same time hallucinations of sight and hearing occur and are followed by delusions of a persecuting nature. They are deprived of all moral sensibility, are given to the lowest form of vice and sexual excesses, and are sometimes dangerous to themselves as well as to others. In many long standing cases there is progressive dementia or mental deficiency Post epileptic insanity: In this condition stupor following the epileptic fits is replaced by automatic acts of which the patient has no recollection. The patient is confused, fails to recognise his own relatives, and wanders aimlessly about. He is terrified by visual and auditory hallucinations of a religious character and delusions of persecution, and consequently may commit crimes of a horrible nature, such as thefts, incendiarism, sexual assaults and brutal murders. The patient never attempts to conceal them at the time ... but on regaining consciousness, he tried to conceal them out of fear."

43. Now this, apart from assisting Mr. Shah, is against him. It establishes that epilepsy is characterised by its transitory nature followed by complete recovery. I am not even entirely certain about the accuracy of this text because of its unscientific use of the words such as "vice" and "sexual excesses". Moreover, the accused in that was acquitted due to lack of evidence establishing identity, rather than the plea of unsoundness of mind. This decision is of little avail to Mr. Shah, nor can the reference be taken to be authoritative. There is also no evidence of

Bhanumati's degeneration to this extent; to the contrary, the evidence shows otherwise.

44. Mr. Shah also tenders in his compilation of cases, another judgment of the Himachal Pradesh High Court in *Piar Singh v. Union of India*, (1995) 2 Shim LC 118 to support his argument on the question of epilepsy. This was a Writ Petition under Articles 226 and 227 of the Constitution of India. The Petitioner was discharged from military service on account of his suffering from epilepsy. He sought a writ of mandamus directing the respondents to grant him disability pension. After discussing the various causes of epilepsy, Vaidya J., in paragraph 24, notes the effects of epilepsy. I fail to see how this case in any manner assists Mr. Shah. The effects of epilepsy are not in dispute. The burden on Mr. Shah is to show that Testatrix was perpetually suffering from these effects or, at the very least, at the time when she made the Will. This he is unable to do.

45. What the Plaintiff has produced in contrast, including the admitted photographs and his own testimony, is compelling material. The photographs were introduced by the Plaintiff. They were acknowledged by the 1st Defendant. The evidence, taken as a whole, does not in any way substantiate 1st Defendant's case on complete and utter testamentary incapacity. To the contrary, it establishes precisely what Plaintiff candidly admits, that Bhanumati had epileptic episodes but that she was otherwise unimpaired in her faculties. This issue is, therefore, answered in the negative.

Re: Issue No. 3A

46. I am unable to understand the manner of pleadings or what it is that Hemkala is attempting in proof of this issue. It is true that the Will excludes both sisters. But the other sister has withdrawn her opposition. It is not enough, when alleging that the Will is unnatural, to show that the Will is unfair or one-sided or that it favours one person over another. By definition, every Will disrupts the ordinary line of succession. If it did not, there would be nothing to contest; indeed, there would be no call for a Will at all. When, therefore, it is stated that the Will is unnatural, it must be shown that the purported Will makes a disposition that the testator or testatrix in question could never have made on account of his or her closeness to the person challenging the Will. The defendant must show that he or she was so close to the testator that in the ordinary course of normal human conduct, there would have been no cause for an exclusion. I have taken a similar view in *Madhuri Baldota v. Omkarlal Banwat & Ors.*, 2015 (4) Mah LJ 327, paragraphs 11 and 12, cited by Mr. Bulsara. Hemkala has been unable to put forth any evidence to suggest that such an exclusion was inconceivable. The Will says, and this is undisputed, that at the time of the marriages of four of her six children several ornaments were given to them. The bequest of the Vile Parle house is to all four sons equally, and of the Amreli property is to the two of the four sons. It can hardly be argued by Hemkala that something should have been left to her father: that is not for Hemkala to say. Hemkala must establish by cogent evidence that her relations with her mother

were not just cordial, but were of such depth or intensity that her mother would never have contemplated any such exclusion in the Will. Of this, there is simply no evidence. A mere exclusion of one heir or even class of heirs is not by itself evidence that the Will is unnatural. This issue must also, therefore, be answered in the negative.

Re: Other Arguments

47. At this point I must mention that Mr. Bulsara tendered a compilation of judgments only after the judgment was reserved. I will not be dealing with these judgments, as that would be most unfair to Mr. Shah, who has had no opportunity to deal with them.

48. I have allowed Mr. Shah to address me on certain other aspects, though I am unable to see how they relate to any one of these issues. I have allowed him to do so on the footing that he has raised questions that the Will is shadowed in suspicious circumstances. He provides me a list of these. I have considered that list. None of the matters that he points to me compel me to disbelieve the Plaintiff's case or to discredit the Will. For instance, Mr. Shah would have it that there is no explanation of the insertion of the date "24TH" on the fourth page of the Will. Perhaps not. At this distance in time - and I am mindful of the fact that I am in June 2016 disposing of a Testamentary Petition filed 23 years ago - it would be difficult for anybody to recollect every single such detail with precision. Mr. Shah is also not correct when he says that the names of Mr. Vakil and Mr. Ved are not signatures but merely their names written out. PW 2, Mr. Jayant Vakil, says otherwise, and there is no reason to disbelieve his evidence.

49. Some of Mr. Shah's arguments seem to me to be ones of desperation: for instance to say that the docket bears no date is a matter that is surely irrelevant. The Will can hardly be invalidated for this reason. Similarly, saying that the signature of the deceased on the Will is "extremely close" to a closing bracket in that portion of the Will leads us nowhere.

50. Mr. Shah also make much of the fact that the Will makes no mention of the bungalow's name on the Vile Parle plot, and that it consistently refers to Hemkala as Hemlata. On the Will being read over and explained to Bhanumati, Mr. Shah says, surely these mistakes would have been corrected. It is unknown, he insists, in what language the Will was read over and explained to her. There are perhaps some things about the wordings of the Will which we will now never know for certain. There is, however, no reason to doubt Mr. Vakil, PW 2, when he identifies his father's and partner's signature and handwriting on the Will or to doubt the correctness of that assertion. Mr. Vakil's cross-examination is largely unsuccessful. Even if Hemkala's name is misspelled, what of it? There is no doubting the identity of the person to whom the Will refers. Merely because the name of the bungalow is not mentioned does not make that a suspicious circumstance. I must assume that Mr. Chimanlal Vakil, a solicitor of some standing, would have taken care to explain the Will to Bhanumati in a language

with which she was familiar. Perhaps, this was English; or perhaps, it was Gujarati. It matters little. The reason is that PW 1 in cross-examination was asked about Bhanumati's educational qualifications, and in answer to Question 193 he said that she could read and write in Hindi, Gujarati and English. To the next Question, Q. 194, he said that she used to read letters and newspapers in English as well. These are answers elicited by the Defendant in cross-examination. To say, therefore, today that this is a suspicious circumstance is not a submission that commends itself.

51. In furtherance to his argument on suspicious circumstances, Mr. Shah tenders decisions of the Supreme Court in *Gurdial Kaur v. Kartar Kaur*, (1998) 4 SCC 384 and *Bharpur Singh v. Shamsheer Singh*, (2009) 3 SCC 687 on what is already a well-established principle of law. These decisions, in brief, hold that the onus of dispelling the suspicious circumstances surrounding a Will lies on the propounder. As I have said earlier, Mr. Shah does not make out a persuasive case of the existence of suspicious circumstances to begin with, and therefore these decisions do nothing to further his case. In support of his argument on an inequitable or unnatural disposition, Mr. Shah tenders a decision of the Calcutta High Court in the case of *Sushma Bala & Ors v. Anantnath Tarafdar & Ors.*, AIR 1976 CAL 377 but again to no avail I might add. That decision said that while untrue statements and inequitable dispositions by themselves are not grounds to make a Will invalid, the confluence of such with unexplained suspicious circumstances add to the volume of suspicion on the genuineness of a Will. It follows, therefore, that this decision is against Mr. Shah; for, absent proof of any suspicious circumstances, incorrect statements and inequality in the dispositions in the Will do not per se operate to invalidate it.

52. Mr Shah rounds up his compilation of cases with the judgment of this Court in *Usha Shrikant Rege v. Gauri Gajanan Rege*, 2014 (6) Mh. L.J. 781. I am not certain to what end he includes it, since it is squarely against him. The case reiterate a already well-established principle: the procedure to prove due execution of a Will under Section 63 of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act 1872, and the procedure to be followed to prove a Will in case of death of the attesting witnesses. As discussed in the preceding paragraphs, the Petitioner has proved the due execution of the Will.

Conclusion & Order

53. The Testamentary Court's jurisdiction is not a jurisdiction of suspicion. It is a jurisdiction of circumspection and caution. The conscience of the Court must be satisfied. The test is, as well-settled by the decision of the Supreme Court in *H. Venkatachala v. B.N. Thimmajamma*, AIR 1959 SC 443 the satisfaction of a prudent mind, not mathematical certainty. Suspicious circumstances, where in existence, must be removed. But where there are no suspicious circumstances, and the execution of the Will has been sufficiently proved, a probate Court would be failing in its duty if it merely proceeded on speculation and surmise. This is what the 1st Defendant asks me to do.

54. In the result, the Suit succeeds and is decreed. The Petition will proceed to the grant of probate. Registry to act on an authenticated copy of this order. Given the fact that the Petition was filed in 1993, the Registry is directed to give this matter priority.

55. At Mr. Shah's request, issuance of probate is stayed for a three weeks from the date when this judgment is uploaded.

56. It remains only to thank Mr. Bulsara and Mr. Shah for their assistance in the matter. Both have conducted their respective cases with exemplary restraint and precision.