

(2016) 10 BOM CK 0134

In the Bombay High Court

Case No : Testamentary Suit No. 74 of 2011 in Testamentary Petition No. 970 of 2009

Panna Surendra Mehta

APPELLANT

Vs

Purnima Latik Shah

RESPONDENT

Date of Decision : 14-10-2016

Acts Referred:

Succession Act, 1925 — Section 59, Section 59, Section 63, Section 63

Citation : (2016) 6 AIRBomR 515 : (2017) 2 ALLMR 278 : (2017) 1 MhLJ 52

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

Bench : Single Bench

Advocate : Mr. T. G. Vora, i/b Mr. D. R. Mishra, Advocates, for the Plaintiff; Mr. G. S. Mansawala and Ms. Kusum Poojary, Advocates, for the Defendant

Final Decision : Dismissed

Judgement

G.S. Patel, J. - A. Parties And The Litigation History Jaswantbhai Natwarlal Jolia ("Jaswantbhai") died on 26th January 2004.(1)He left a Will dated 10th August 2002.(2) The Plaintiff, Panna S. Mehta ("Pannaben"), seeks Letters of Administration with Will Annexed to this Will. She is Jaswantbhai's sister-in-law, his wife Veenaben's sister. Panna is one of the beneficiaries of the Will. The major beneficiary is Panna's son, Ashitkumar Surendra Mehta, also known as Asit Mehta ("Asit"). He was also the sole executor named in the Will. Asit died on 18th May 2009.

(1) Ex. "A" in evidence, Vol. D, p. 224.

(2) Copy at Ex. "B" in evidence, Vol. D, pp. 225-226. Original deposited in Court. 2. Jaswantbhai's wife, Veena, died on 3rd March 2000, about four years before Jaswantbhai passed. Jaswantbhai and Veena had no children of their own. Jaswantbhai had three sisters, Ramaben Krishnalal Shah, Indiraben V Bankley and Trilochanaben T. Fozdar, and a brother Kanhaiyalal Dalal. Ramaben and Indiraben died before Jaswantbhai. He was, therefore, survived by Trilochanaben

and Kanhaiyalal, his surviving siblings.

3. After Jaswantbhai died, Asit sought probate. He filed Testamentary Petition No. 243 of 2004. That petition was opposed by Trilochanaben and by three of Ramaben's children (Panna, Jitendra and Kishore). It was renumbered as Testamentary Suit No. 22 of 2004. Kanhaiyalal died on 10th May 2007 without leaving any heirs. Asit filed Notice of Motion No.104 of 2007 to dismiss the caveats filed by Ramaben's children, contending that they had no caveatable interest, since, at the time when succession opened, Jaswantbhai's heirs in law were Trilochanaben and Kanhaiyalal, and they took before, in preference to, and to the exclusion of Ramaben's children. The Notice of Motion succeeded, and Ramaben's children's caveats were dismissed. *Ashitkumar Surendra Mehta v. Trilochanaben Thakorlal Fojdar*, 2008 (4) Bom. C.R. 372.

4. Asit died on 15th May 2009 and it was then held that his probate petition abated.(4) On 30th September 2009, his mother, Pannaben, filed the present petition for Letters of Administration with Will Annexed seeking to prove Jaswantbhai's Will. On 25th November 2009, Trilochanaben filed Testamentary Petition No. 45 of 2010 for Letters of Administration to Jaswantbhai's estate. Pannaben filed a Caveat, and this was renumbered as Testamentary Suit No. 118 of 2010. On 1st November 2010, Trilochanaben died in Mumbai. She left a Will dated 11th February 2008. In this, she purported to make bequests of her share, if any, from Jaswantbhai's estate inter alia to her own children and to the children of her deceased sister, Ramaben.

(4) Order dated 4th September 2009, following the decision of the Division Bench in *Thrity Sam Shroff v. Shiraz Byramji Anklesaria*, 2007 (4) Mh. L.J. 56. The correctness of this decision has been doubted in the Division Bench decision in *Haresh Chetan Thadani v. Komal Suresh Chainani*, Appeal No. 1 of 2015, decided on 27th January 2015, in appeal from an order I passed on 16th December 2014 allowing a Chamber Summons for conversion of a probate Petition into one for Letters of Administration with Will Annexed. The Division Bench in *Thadani* held that in *Thrity Sam Shroff*, the Court's attention had not been drawn to the decision of the Supreme Court in *Shambu Prasad Agarwal & Ors. v. Bholu Ram Agarwal*, (2000) 9 SCC 714.

5. On 1st April 2011, Trilochanaben's daughter, Purnima Latik Shah ("Purnima") filed a Caveat in the present Petition for Letters of Administration with Will Annexed brought by Pannaben. On 16th January 2013, Jitendra Krishnalal Shah and Jaisukh Krishnalal Shah, two of Ramaben's children, filed Caveats in the present Petition. Pannaben filed Notice of Motion No. 49 of 2013 for discharge of those Caveats. The Motion succeeded: the two Caveats by Jitendra and Jaisukh were discharged. *Panna Surendra Mehta v. Jaisukh Krishnalal Shah & Anr.*, 2014 (3) ALL MR 341 : 2014 (3) Mh. L.J. 724; per R. D. Dhanuka, J. Thus, Ramaben's children had twice opposed proof of Jaswantbhai's Will: first in the Probate Petition filed by Asit and again in the Petition for Letters of Administration with Will Annexed filed by Pannaben. Both oppositions failed. The surviving opposition

to the present Petition is only, therefore, by Purnima.

B. THE WILL DATED 10TH AUGUST 2002

6. I turn now to the physical aspect of the Will dated 10th August 2002. This is a two-page document typed in English. Jaswantbhai's signatures appear on both pages. The attesting witnesses to this Will are Mr. Kirit Damania, an Advocate & Solicitor of this Court, and one Ms. Shree Kumary S. Mr. Damania was Jaswantbhai's friend and legal advisor. Ms. Shree Kumary S was his stenographer. In the document, the testator refers to himself as "Jaswantbhai" he signs it as "Jaswantlal". This, as we shall see, is of significance because it is central to Purnima's opposition that he was never known by this name but only as "Jaswantlal". In the Will, Jaswantbhai sets out his properties and assets in some detail. He makes an absolute bequest in favour of his nephew, Ashitkumar (alias Asitkumar, alias Asit), and directs him to take charge of his entire estate. He also devises and bequeaths all his gold and other valuable ornaments and silver utensils in equal shares to 1) Devyani H. Kapadia (Pannaben's sister) and 2) Pannaben. The Will also speaks of a flat at Kirti Manor on S.V. Road, Santacruz (W). The words "with two garages" are handwritten. Then there is the signature of the testator on the first page.

C. THE CAVEAT & AFFIDAVIT IN SUPPORT

7. In her Affidavit in Support of her Caveat, Purnima alleges that this Will is forged, fabricated and unnatural.(6) She takes these grounds:

(6) Affidavit in Support of the Caveat, pp. 37 - 47.

(a) Purnima says that the name on the Will is "Jaswantbhai Natwarlal Jolia" and not "Jaswantlal Natwarlal Jolia", which was his "real" name. She claims he was never known as Jaswantlbhai. The Defendant also relies on the death certificate, (7) bank account details(8) and certain share certificates(9) to substantiate her claim.

(7) Exhibit "A" in evidence, Vol. D, p. 224.

(8) Not received in evidence.

(9) Ex. D-5, Vol. D., p. 386.

(b) Purnima claims that Jaswantlal's signature was obtained on a blank paper; the Will had been drawn thereafter and that the signature itself is of Jaswantlal Jolia and not Jaswantbhai Jolia.

(c) Purnima alleges that Asit coerced Jaswantlal into signing the Will;

(d) Finally, Purnima sets up an affirmative case that Jaswantlal always treated Purnima as his own daughter and, therefore, he would have confided in her and brought to her notice his intention to create a Will.

D. ISSUES

8. Mrs. R.P. Sondurbaldota J framed and settled issues on 1st March 2012.(10)
On 1st September 2016, I framed an additional issue, parties having agreed. The final issues are set out below with my findings against each.

(10) Vol. A, pp. 48-49.

Sr No Issue Findings

1. Whether the Plaintiff proves that Will dated 10th August 2002 is the last Will and testament of Mr. Jaswantbhai Natwarlal Jolia? In the affirmative.

2. Whether Plaintiff proves that the said Will dated 10th August 2002 is validly executed by the deceased as per provision of law? In the affirmative.

3. Whether Defendant proves that the said Will is forged and fabricated by the Plaintiff? In the negative.

3A. Whether the Defendant proves that the in the negative. Will in question is unnatural? In the negative.

4. What Order? As per final order.

E. THE EVIDENCE ON RECORD

9. The Plaintiff examined herself (PW1) and Mr. Kirit Damania, an attesting witness (PW2).

10. The Defendant led the evidence of nine witnesses:

(1) DW1: the Defendant herself;

(2) DW2: Dr. Sandeep Borse, a doctor at the P.D. Hinduja National Hospital & Medical Research Centre, Mahim in the Neurology department;

(3) DW3: Dr. Parinaz Humranwala, a Consulting Homeopath;

(4) DW4: Dr. P. Marfatia, a medical practitioner;

(5) DW5: Dr. Deepak Rajani, another medical practitioner;

(6) DW6: Ajay Barve, Chief Branch Manager, Bank of Maharashtra, Tardeo Branch;

(7) DW7: Mrs. Kumudini Sequeira, Branch Manager, Bank of Maharashtra, Khar West Branch;

(8) DW8: Chandmal B. Chhajed, a Chartered Accountant;

(9) DW9: Sankaran Nair, Chief Manager, Indian Overseas Bank, Santa Cruz Branch.

11. The Plaintiff led four documents in evidence:

(1) Ex. "A": Jaswantbhai's death certificate as Ex. "A"(11)

(11) Vol. D, p. 224.

(2) Ex. "B": the Will in question, of 10th August 2002, as Ex. "B"(12)

(12) Copy at Vol. D, pp. 225-226. Original deposited in Court.

(3) Exs. "P" and "P1": true certified copies of property tax and land revenue issued by the Talati, Gram Panchayat, Kabilpur, Taluka District Navsari, Gujarat in respect of a bungalow known as Vina Villa.(13)

(13) Vol. D-1, p. 373.

12. The Defendant put seven documents into evidence:

(1) Ex. "D": undated letter from Jaswantbhai to the Branch Manager, Bombay Mercantile Cooperative Bank;(14)

(14) Vol. D, p. 227.

(2) Ex. D1: letter dated 12th March 2001 from Jaswantbhai to M/s C. B. Chhajer & Co.(15)

(15) Vol. D, p. 228.

(3) Ex. D2: A Share Certificate dated 1st January 1980 of the Kirti Manor flat.(16)

(16) Vol. D-1, p. 374.

(d) Ex. D3 (Colly): The original bills in respect of the flat at Kirti Manor.(17)

(17) Vol. D-1, p. 375 - 384.

(e) Ex. D4: Letter dated 8th March 1999 in Gujarati on the letterhead of ACME Manufacturing & Agencies.(18)

(18) Vol. D-1, p. 385.

(f) Ex. D5 (Colly): Share certificate dated 1st February 1988;(19) Possession Receipt;(20) Four maintenance receipts dated 29th June 2012, 29th June 2012, 27th April 2012 and 27th April 2012;(21) Five electricity bills from the Gujarat State Electricity Board;(22) Letter dated 2nd April 2004 from Jaswantbhai.(23)

(19) Vol. D-1, p. 386.

(20)Vol. D-1, p. 387.

(21)Vol. D-1, pp. 388 - 391.

(22)Vol. D-1, pp. 392-396.

(23)Vol. D-1, p. 397.

(g) Ex. D6 (Colly): Four receipts - two receipts in respect of Shop No. 20;(24) two receipts in respect of Garage/Godown No.7.(25)

(24) Vol. D-1, pp. 398 - 399.

(25) Vol. D-2, pp. 400 - 403.

F. RE: ISSUES NOS. 1 AND 2

13. The burden of these two issues is on the Plaintiff. They need to be addressed together. The requirements of a valid unprivileged Will are well known. The testator must be an adult of sound mind.(26) He must be shown to have made the Will of his own volition and without any importunity as might rob him of free agency.(27) He must sign the Will intending it to be such a document. The execution of the Will must be attested by at least two witnesses. Both need not be present at the same time, but each must have seen the testator sign the Will. (28)

(26) Succession Act, Section 59.

(27) Succession Act, Section 61.

(28) Succession Act, Section 63. The Section allows the making of a mark or the signature on behalf of the testator by another and at his direction; each attesting witness must either see the testator sign, make or make another sign the Will or receive a personal acknowledgement of the signature, mark or other person's signature from the testator.

14. As to the actual execution, we have the evidence of PW2, Mr. Kirit Damania, an Advocate & Solicitor of this Court. He filed an Affidavit in lieu of Examination-in-Chief.(29) He says he knew the testator both as Jaswantlal and Jaswantbhai; they were family friends since 1977. Mr. Damania is aware that Veenaben died earlier on 3rd March 2000. Mr. Damania has an office at Nariman Point and another at Khar. On 10th August 2002, Jaswantbhai came to Mr. Damania's Khar office. There, in the presence of Mr. Damania and his stenographer, Ms. Shree Kumary S., Jaswantbhai signed the Will. Then Mr. Damania and Ms. Shree Kumary S. signed it as witnesses. Mr. Damania says that Jaswantbhai knew English well and that before signing the Will, he went through it and only executed it after understanding its contents. Mr. Damania identifies the signatures on the Will.

(29) Vol. C, pp. 82 - 84; further cross-examination, Vol. C, pp. 85 - 87.

15. Mr. Damania was cross-examined, though very briefly.(30) The very first question put to him was whether this was the first time Mr. Damania had said that Jaswantbhai and Jaswantlal were the same person. The question is itself peculiar; Mr. Damania had no occasion to say anything of the kind before; at the time when the Petition was filed, there was no Caveat and this case by Purnima, that Jaswantbhai and Jaswantlal do not refer to the same person, had never been put up before. It is difficult to comprehend why such a question was put at all; it invited a riposte and, predictably, this followed, for Mr. Damania promptly said that he knew the deceased as Jaswantlal N. Jolia and also Jaswantbhai N. Jolia. Now this was a frontal blow to a principal defence, and it came very early in the proceedings. To my very great surprise, I find that this answer was not

further tested at all; the entire line of question was simply abandoned, and the testimony of Mr. Damania, therefore, obtained in cross-examination, remained uncontroverted. The only question that came is whether, when he drafted the Will, Mr. Damania did not state (presumably in the Will) that Jaswantbhai N. Jolia was also known as Jaswantlal N. Jolia. To this, Mr. Damania said yes; as indeed he had to, because that is what the Will says. Nothing in law requires that every alias or nickname must be inserted into every document; and Purnima's case that Jaswantbhai was only ever known as Jaswantlal is her affirmative case, the burden of proving which is squarely on her. In any case, it is difficult to see to what issue these questions are directed.

(30) Vol. C., pp. 87 - 89.

16. Mr. Damania was asked if he knew that Jaswantbhai was unwell four years before his death; Mr. Damania said yes, but did not know of a hospitalization. (31) He was then asked if during his last days, Jaswantbhai was unable to walk and suffered from a lack of memory. To this, Mr. Damania responded saying that for at least a year prior to his death, the testator could move about and had a good memory.(32) Again, this was an answer that ought to have been tested further in cross-examination but was not. It remains uncontroverted.

(31) PW2 cross-examination, Vol. C, Qns. 18 - 19, p. 88.

(32) PW2 cross-examination, Vol. C, Qn. 20, p. 88.

17. The time frame of these questions is unhelpful. The Will is of 10th August 2002. Jaswantbhai lived for a good two years after, and died on 26th January 2004. The first of the questions about his health relates to a period of four years before 10th August 2002, i.e., about 1998; and that is, therefore, irrelevant. The second is vague when it speaks of "last days", and in any case is fully met by Mr. Damania's answer, that at least for a year before his demise, i.e., for a year after the making of the Will, Jaswantbhai was of sound health and memory. The result of this testimony is, of course, to immediately shift the burden onto Purnima to show that Jaswantbhai lacked the necessary testamentary capacity.

18. It is the Defendant's case that Jaswantbhai was not of sound mind and body. In paragraph 7 of her Affidavit in support of Caveat,(33) Purnima says that after Veenaben died, Jaswantlal was confined to bed and was suffering from paralytic attacks. This is not enough to show testamentary incapacity. The law does not require a testator to be in absolutely perfect health; were it so, almost no testator could ever make a Will (though perfectly capable of rendering judgment in Court). Persons with speech, hearing or visual impairments may make Wills. (34) A person not of sound mind may also do so in an interval of lucidity.(35) What is relevant is testamentary capacity on the date of execution of the Will.

(33)Vol. A, p. 40.

(34)Succession Act, Section 59, Explanation 3.

(35)Succession Act, Section 59, Explanation 4.

19. To demonstrate testamentary incapacity, Purnima had to show either that Jaswantlal was, on account of his condition of paralytic attacks, never, i.e., at no point in time, in a sufficiently lucid state of mind to make a testamentary instrument, or, alternatively, that on the day in question, 10th August 2002, he was so incapacitated that he could not possibly have made the Will. It is not for the Plaintiff, Pannaben, to show those conditions did not exist. Purnima must show they did. It is enough for Pannaben to show that at the time of the Will, Jaswantlal was of sufficiently sound mind. In his evidence, Mr. Damania, PW2, clearly said that on the day of execution of the Will, Jaswantlal himself came to his office, read the Will, understood it, and then executed it.

20. Though Purnima called very many medical practitioners to give evidence, none of it establishes testamentary incapacity. The only relevant testimony is from DW4, Dr. P. Marfatia. After a short examination-in-chief,(36) Dr. Marfatia was cross-examined.(37) This is most revealing:

(36)Vol. C, pp. 154 - 156.

(37)Vol. C, pp. 157 - 159.

Q.16. Who introduced J. N. Jolia to you?

Ans. I do not recollect who called up, but on 16.10.2002, somebody called up and requested me to visit Mr. Jolia.

Q.18. At which place did you examine Mr. Jolia?

Ans. I examined him at the residential place of Jolia at Kirti Manor.

Q.19. I put it to you that prior to 16.10.2002, you did not meet Mr. Jolia at any point of time?

Ans. Yes.

Q.20. Why did you not advise Mr. Jolia, after his examination, to get himself admitted in the hospital?

Ans. At the time of my examination of Mr. Jolia, his general condition was not bad.

Q.21. Then, what was the reason you were called to examine Mr. Jolia?

Ans. Mr. Jolia had difficulty in breathing.

Q.22. Do you agree that the breathing problem was not that serious and therefore you did not advise Mr. Jolia to get admitted in the hospital?

Ans. I agree.

Q.23. How many times you examined Mr. Jolia?

Ans. Only once i.e. on 16.10.2002.

21. It is, in my judgment, thoroughly unreasonable to say that this is evidence of testamentary incapacity. To the contrary, it is clear that Jaswantbhai had a transitory issue on 16th October 2002 (several months after he made his Will on 10th August 2002); that it was admittedly not serious; and, in fact, was so trivial that the doctor who saw him did not see him for this complaint ever again. This is no evidence of want of testamentary capacity on 10th August 2002, the date of the Will.

22. The other doctors contribute nothing to this, and I do not propose to spend further time labouring their evidence. DW2, Dr. Borse, spoke of Jaswantbhai's hospitalization in 1998. That is not denied. It is, however, wholly irrelevant and does not prove testamentary incapacity four years later in 2002. In any case, Dr. Borse had no personal knowledge about Jaswantbhai's condition. Dr. Humranwala, DW3, also on a summons like Dr. Borse, is a homeopath. She deposed that Panna Shah (not the Plaintiff; Ramaben's daughter) came to her on 5th April 2004 - after Jaswantbhai's death and of which Dr. Humranwala was unaware - for a medical certificate saying that she had examined Jaswantbhai on 23rd January 2003 at his residence. That certificate was not marked in evidence as the original was not produced. She had examined him earlier at her clinic in 1996 and again in 1998. He did not visit her clinic thereafter. In her Affidavit in lieu of Examination-in-Chief, Dr. Humranwala says Jaswantbhai had diabetes, hypertension, bronchial asthma and "chronic renal failure". Of this last, there is no evidence at all; and, as for the others, they are not in and of themselves sufficient to support a theory that Jaswantbhai was too incapacitated to make a Will. Importantly, Jaswantbhai lived for another six years after his last visit to Dr. Humranwala. DW5 was Dr. Rajani, a physician at the Mahavir Medical & Research Centre, where Jaswantbhai was hospitalized for a two days between 19th and 21st August 2003. The original records were not produced and are not in evidence.

23. There is nothing, I note, to controvert Mr. Damania's evidence of the actual execution and attestation of the Will. As to the second aspect, viz., testamentary capacity, there is no material to indicate that Jaswantbhai lacked it in the slightest on the day he made the Will. The inevitable result is that Issues Nos. 1 and 2 are proved.

G. RE: ISSUE NO. 3

24. Paragraph 4 of Purnima's Affidavit in Support of her Caveat contains several contradictory statements. In that Affidavit, she claims his signature was taken on blank paper. In paragraph 4, she says that on a second reading, he hand write a correction regarding two garages. This demolishes her case of the signature being taken on blank paper; but also says that the papers were signed by the testator as Jaswantlal (though the name on the Will is Jaswantbhai); and this further contradicts her case that the two are different persons. She seems to

accept his signature on the first page but not the second.

25. The evidence of the Plaintiff herself, Pannaben, is actually relevant on only one aspect of the matter. In her Affidavit in lieu of Examination-in-Chief, she says clearly that the testator was known both as Jaswantbhai and Jaswantlal.(38) In her further examination-in-chief, (39) the Plaintiff said the Will was of Jaswantlal N. Jolia.(40) In cross-examination, a most peculiar suggestion was put to her:

(38) PW1, Evidence Affidavit, Vol. C, pp. 50 - 55; paragraphs 7 and 8, p. 54.

(39) Vol. C, pp. 56 - 57.

(40) Vol. C, Qn. 3, p. 57.

Q.23 I put it to you that the Will was made by Jaswantlal N. Jolia and not by Jaswantbhai N. Jolia?

A. I state that the Will was made by Jaswantlal N. Jolia.

26. Now, apart from the Pannaben's unequivocal refutation of the suggestion, what is important is the suggestion implicit in the question. If it is, therefore, shown that Jaswantlal and Jaswantbhai are the same person, then on this case placed by the Defendant herself the Testamentary Suit must succeed; for it admits the execution of the Will but only disputes the identity of the maker of it.

27. Later, Pannaben said that Jaswantlal N. Jolia was the family name or he was so known to the family, but in business circles he was known as Jaswantbhai. This is of some significance, because among Gujaratis, the word "bhai" is an honorific and a frequently used term of respect. Yet again, there is no follow through on this answer and it remains untested.

28. What follows, however, is as baffling as it is crucial. The Plaintiff was confronted with an undated letter from the testator to the Branch Manager of the Bombay Mercantile Cooperative Bank. This was marked in evidence.(41) This letter was signed by the testator as "Jaswantlal N. Jolia". His name appears in that fashion in handwriting below his signature. But the letterhead describes him as "Jashwantbhai N. Jolia". I cannot begin to imagine how and why this document could have been considered as being of the slightest assistance to the Defendant's cause. To the contrary, it seems to me that this one document totally eviscerates her defence that the testator was never known as Jaswantbhai but only ever as Jaswantlal, and fully establishes the Plaintiff's case that he was known as both.

(41) Vol. D, Ex. "D", p. 227.

29. I should have thought this was sufficiently damaging to the Defendant's case, a most grievous self-inflicted wound. But it did not stop there. The Defendant then confronted the Plaintiff with another document, a letter dated 12th March 2001 from Jaswantbhai to his Chartered Accountants, M/s C. B. Chhajed & Co.(42) Like the previous letter to the Bombay Mercantile Cooperative

Bank, this is also on Jaswantbhai's residential letterhead.(43) The printed letterhead is clearly "Jashwantbhai N. Jolia". The document was marked as the Defendant's document, and she admits it was signed by the testator. In cross-examination, the Plaintiff was asked if she was aware that the letter was addressed by Jaswantlal N. Jolia to M/s C. B. Chhajed & Co; she said yes.(44)

(42) Vol. D, Ex. "D-1", p. 228.

(43) 502, Kirti Manor, Plot No. 3, SV Road, Santacruz (W), Mumbai 400 054.

(44) Cross-examination of PW1, Plaintiff, Qn. 33, Vol. C, p. 62. The follow up question, Qn. 34 at Vol. C, p. 63, seems to have been incorrectly revised. The suggestion to PW1 was whether the letter was on the letterhead of Jaswantlal N. Jolia and not on the letterhead of Jaswantbhai N. Jolia. It is the other way around, as the document itself shows; and the initial recording and noting during the cross-examination was correct. For this reason, too, the later questions, Qns. 36 and 37, at Vol. C, p. 65, suggesting that the letterheads were of Jaswantlal and not Jaswantbhai were misleading and inaccurate. No other letterheads with these letters were ever produced.

30. Quite apart from these two answers being utterly fatal to the Defendant's case on the question of a difference in identity, it must be noted that in the two printed documents, the letterhead shows the testator's name (and there is no doubt that it was the deceased who signed both) as "Jashwantbhai" i.e., there is yet another variant in the name, one that is clearly as irrelevant as the difference between Jaswantlal and Jaswantbhai.

31. I turn next to the evidence of DW8, Mr. Chandanmal B. Chhajed, a Chartered Accountant with M/s. C. B. Chhajed & Co. He filed an Affidavit in lieu of Examination-in-Chief,(45) and was briefly further examined in chief.(46) He claimed to have a photocopy of Ex. D-1, the letter dated 12th March 2001 to him by the deceased. He referred to this letter in his examination-in-chief. The cross-examination that followed reads thus:

(45) Vol. C, pp. 187 - 188.

(46) Vol. C, pp. 189 - 190.

Q.14. Is it true that the photocopy of letter dated 12-3-2001 is typed on the letterhead of "Jaswantbhai N. Jolia"?

Ans. Yes.

Q.15. I put it to you that "Jaswantlal N. Jolia" was also known as "Jaswantbhai N. Jolia".

Ans. I used to call him or address him as "Jaswantbhai".

Q.16. Would it be correct to say that "Jaswantlal N. Jolia" and "Jaswantbhai N. Jolia" were one, and the same person?

Ans. Yes.

32. This is the last nail in the defence's coffin. The Defendant's own witness deposes that her case, of the two being different, and of the testator never being known as, or using, the name "Jaswantbhai" is untrue. There are other documents that the Defendant put into evidence, too, such as the share certificate at Ex. "D-4", (47) admitted by the Defendant to be signed by the deceased and showing his name, written in Gujarati, as "Jaswantbhai".

(47) Vol. D-1, p. 386.

33. The evidence of DW6, DW7 and DW9 carries the matter no further. None knew Jaswantbhai personally, but only in their professional capacity as bank managers at their respective banks. Their testimonies before the Commissioner do not assist the Defendant's case in any way.

34. There is absolutely no substance to the case that the testator was never known as Jaswantbhai but only ever as Jaswantlal. The evidence the Defendant herself led destroys her case as pleaded that the Will was fabricated.

35. On the question of forgery, there is no evidence whatever and, again, the Defendant's own pleadings, admissions in the cross-examination in questions, and on documents falsifies any such case.

36. As to the case on "undue influence", (48) there is no evidence at all. To invalidate a Will, undue influence must be established as a fact. The actual exercise of that undue influence on the testator, and which is in the nature of coercion and fraud, must also be demonstrated. *Mt. Gomitibai v. Kanchhedilal & Ors.*, AIR 1949 PC 272. It is not enough to show that one person was in a position or had the power to overbear the testator; it must be shown that Will was the result of the exercise of that power. *Wingrove v. Wingrove*, [1885 11 PD 81. Generalized allegations will not do: undue influence is to be pleaded with specificity, particularity and precision. *Afsar Shaikh & Another v. Soleman Bibi & Ors.*, (1976) 2 SCC 142.

(48) Pleaded, after a fashion in paragraph 7 of the Affidavit in Support of the Caveat, Vol. A, p. 40; no issue separately framed on this.

37. Issue No. 3 must be answered in the negative.

H. RE: ISSUE NO. 3A

38. Purnima alleges that the Will is unnatural: she was so close to Jaswantlal that he could not have made a Will without telling her about it. In the Affidavit in Support of her Caveat, she says: (52)

(52) Vol. A, paragraph 12, pp. 43 - 44.

"I say that Shri Jaswantlal was my maternal uncle and had always treated me like his own daughter and I used to live with him for months together since my childhood. He used to visit my house whenever he was in Bharuch. He would

have confided in me and made me know his intention for Will if really the Will was made by him and hence I fear that some foul play has been played in making out his Will".

39. In her Affidavit in lieu of Examination-in-Chief, Purnima said:(53)

(53) Vol. C, p. 93.

"3. ... The deceased Jaswantlal always treated me like his daughter, and I used to live with him for months together since my childhood. Whenever Shri Jaswantlal was in Bharuch, he used to visit my house in Bharuch.

4. ... He confided in me and used to discuss matters of his property. He never told me about any Will as made by him."

40. Purnima was cross-examined on these assertions.(54) She was unable to maintain her case in cross-examination:

(54) Vol. C., pp. 101 - 140.

Q.62. When did you shift at Bharuch, Gujarat?

Ans. I shifted to Bharuch, Gujarat in 1987.

Q.63. Please state the date and the month when you shifted to Bharuch, Gujarat?

Ans. It was in May, 1987.

Q.79. Would it be correct to say that your permanent address is at Bharuch?

Ans. Yes.

Q.80. Whether you are having your own residential accommodation at Bharuch?

Ans. Yes. We have got our own bungalow at Bharuch. I state that on occasions, we also visit Mumbai and stay at Vasai.

Q.98. Did you attend his funeral?

Ans. No. I did not attend.

Q.101. When you last met Jaswantlal alias Jaswantbhai N. Jolia before his death?

Ans. It was in 2003.

Q.102. Do you remember the month when you met Jaswantlal alias Jaswantbhai N. Jolia in 2003?

Ans. It was in May 2003.

Q.125. Do you remember what did you state in that affidavit?

Ans. In the said affidavit I stated that the Last Will of Jaswantlal alias Jaswantbhai N. Jolia is false.

Q.126. Before filing your affidavit in response to the citation, did you take

inspection of the original Will from the Hon''ble High Court?

Ans. No.

Q.127. In that event, on what basis you filed your affidavit in support of the Caveat pleading therein that the Last Will of Jaswantlal alias Jaswantbhai N. Jolia is false?

Ans. I filed the affidavit on the basis that my maternal uncle Jaswantlal alias Jaswantbhai N. Jolia could not have made such a Will.

Q.128. Would it be correct to say that it was your presumption which is not supported by any evidence that your maternal uncle Jaswantlal alias Jaswantbhai N. Jolia could not have made such a Will?

Ans. Yes. I have no evidence.

(Emphasis added)

41. These answers do not further Purnima's case of being so close to Jaswantbhai that he would, of necessity, and by reason of that close affinity, told her of the Will. She did not attend his funeral; she last saw him in May 2003 - several months before he died; and she also alleges that he was critically unwell (of which, of course, there is no evidence either). When she admits that she has no evidence that Jaswantbhai could not have made such a Will, and that this is her presumption, what she is actually saying is that she has no evidence of such closeness that Jaswantbhai would never have excluded her from his Will.

42. Mr. Mansawala's reliance of the decision of the Delhi High Court in *Lalita Sharma v. Sumitra Sharma*, 178 (2011) DLT 358, does not, in my view, carry his case further. There, Kailash Gambhir J only said that where the dispositions in the Will are unnatural and the Will is propounded by a major beneficiary, the burden lies heavily on the propounder. But to get to that proposition, it must first be established that the dispositions are unnatural. This is not to be assumed; it must be pleaded and it must be proved. By her own admission, Purnima only speculates; she says she has no proof of this so-called closeness or that Jaswantbhai would have confided in her of the making of his Will. As the Supreme Court said in *Madhukar D. Shende v. Tarabai Aba Shedage*, (2002) 2 SCC 85, cited by Mr. Vora:

"8. ? The conscience of the court has to be satisfied by the propounder of the will adducing evidence so as to dispel any suspicions or unnatural circumstances attaching to a will provided that there is something unnatural or suspicious about the will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well-founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict - positive or negative."

(Emphasis added)

43. The mere fact that some heirs are excluded is not per se evidence of a Will being unnatural; every Will disrupts the ordinary line of succession, and this is obvious. *Pentakota Satyanarayana & Ors. v. Pentakota Seetharatnam & Ors.*, (2005) 8 SCC 67. Were it otherwise, there would be no need for Wills. As against Purnima's lack of evidence, there is the evidence of Pannaben, elicited in her cross-examination, that her son, Asit, stayed with Jaswantbhai.(58) She said she had some proof of this, but not complete proof. This is in sharp contrast to Purnima's case, of which she has no proof at all.

(58) Vol. C., cross-examination of Plaintiff, Qns. 47 - 49, p. 67; Qn. 62 - 64, pp. 73 - 74.

44. Issue No. 3A must, therefore, be answered in the negative.

I. Conclusion & Order

45. The testamentary jurisdiction is one of caution, not suspicion. *H. Venkatachala Iyengar v B. N. Thimmajamma & Ors.*, AIR 1959 SC 443. Where nothing is shown against the reasonable nature of a Will, and there are no suspicious circumstances, the propounder's onus is discharged. On an overall assessment, it seems to me clear from the record that Jaswantbhai, himself childless, was close to Pannaben and her son, and treated her son (Asit) as his own. Issues such as undue influence, coercion, forgery or the Will being unnatural cast the burden not on the propounder, but on he or she who alleges these things. *Daulat Ram & Ors. v Sodha & Ors.*, (2005) 1 SCC 40; *Sridevi & Ors. v Jayaraja Shetty & Ors.*, (2005) 2 SCC 784; *Savithri & Ors. v Karthyayani Amma & Ors.*, (2007) 11 SCC 621. Again, these are not matters to be presumed. Where there are reasons shown for exclusion and for favouring one over others - and, again, there is no statutory prescription that a Will must favour all heirs - and the execution of the Will is satisfactorily established, the propounder's burden must be held to have been discharged. *Mahesh Kumar v Vinod Kumar & Ors.*, (2012) 4 SCC 387. It is never correct or proper to emphasise only one feature and to ignore other circumstances; an overall view is always the correct approach. *Leela Rajagopal & Ors. v Kamala Menon Cocharan & Ors.*, (2014) 15 SCC 570.

46. The suit succeeds, and is decreed with costs. The caveat is dismissed. The Registry will proceed to issue Letters of Administration with Will Annexed in respect of the Will dated 10th August 2002 of Jaswantbhai alias Jaswantlal Natwarlal Jolia.

47. The drawn up decree or order is dispensed with. The Registry is not to raise any objections or requisitions regarding service of citations. Given that the Petition is of 2009, pending for seven years already (and that a probate was first sought even earlier in 2004, i.e., 12 years ago), Letters of Administration with Will Annexed are to be issued no later than by 30th November 2016. For these reasons, and since, too, I have found not a shred of substance in the defence, the application for stay of this order is refused.

48. The registry will act on an authenticated copy of this order.