



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
TESTAMENTARY SUIT NO.36 OF 2002
IN
TESTAMENTARY PETITION NO.602 OF 2001

Bapulal Maganlal Contractor ... Deceased
Umakant Bapulal Contractor & Anr. ... Plaintiffs
Vs.
Nitin Bapulal Contractor ... Defendant

Mr. Atit Shukla a/w. Ms. Neena Kapadia i/b Pandya
Gandhi & Co. for Plaintiffs
Mr. K. K. Kurup for Defendant

ORDER RESERVED ON 18TH JULY 2009
ORDER PRONOUNCED ON 18TH NOVEMBER 2009

CORAM : S. J. KATHAWALLA, J.

DATE : 18TH NOVEMBER, 2009

JUDGMENT

The Testamentary Petition No.602 of 2001
was filed on 11th April, 2001 by Umakant Bapulal
Contractor and Nalin Bapulal Contractor for grant

of probate in respect of the Last Will and Testament dated 11th February, 1997 of the deceased Shri Bapulal Maganlal Contractor (hereinafter referred to as 'the said Will'), who expired on 20th June, 2000. The Executors named in the said Will are the two sons of the deceased Umakant and Nalin i.e. the Plaintiffs/Petitioners herein. A copy of the said Will which is in English language is annexed as **Exhibit-B** to the Petition. Along with the Petition the Plaintiffs/Petitioners filed an Affidavit dated 5th February, 2002 of Mr. Narendran Madhavan Menon, one of the attesting witnesses to the said Will. Along with the said Petition the Plaintiffs/Petitioners also filed a Joint Consent Affidavit dated 11th April, 2001 of Smt. Parvatiben Bapulal Contractor (wife of the deceased) and Smt. Jayshreeben P. Khambhati (married daughter of the deceased) and also a Consent Affidavit dated 13th August, 2001 of Smt. Sushila I. Contractor (married daughter of the deceased). By the said Affidavits,

the wife of the deceased 'Parvatiben' and his married daughters 'Jayshree' and 'Sushila' deposed that the said Will was the last Will of the deceased. The same was genuine and valid and the deponents had no objection if the Probate in respect of the said Will was issued to the Plaintiffs/Petitioners, and they consent for the same.

2. In the said Petition No. 602/2001, the Defendant who is admittedly one of the son's of the deceased and brother of the Plaintiffs/Petitioners filed a Caveat dated 3rd May, 2002 wherein the Defendant contended that he is not aware of any Will prepared by his father during his lifetime and that he has received a citation issued by the High Court inter alia informing that the Petition has been filed by his two brothers i.e. the Plaintiffs/Petitioners herein, for grant of Probate in respect of the said Will allegedly left by the deceased. Since he has not been served with a copy

of the said Will and the Petition, it is not possible for him to give para-wise reply to the alleged Will or the Petition. He therefore reserved his right to file a detailed reply after receiving a copy of the alleged Will. The Defendant without allegedly not having seen the Will submitted :- *"my father was paralysed since ___ years and bedridden before his death and was not able to sign anything. I say and submit that the said Will was not executed by my father."* Again, without having allegedly seen the said Will, and the Defendant having reserved his right to file a detailed Affidavit, nonetheless stated in his Affidavit dated 3rd May 2002 that the Will allegedly left by the deceased is false and fabricated. In fact on 18th July, 2009 when the arguments in the Suit commenced, it was submitted by the Learned Advocate appearing for the Defendant before this Court that the Defendant is not contending that the deceased was suffering from paralysis as stated in

the Affidavit in Support of the Caveat. This Court has noted the fact that the Defendant is unable to speak and understand English. His Affidavit of Examination-in-Chief dated 20th April, 2009 is interpreted and explained to him by the Office of the Translator, High Court and the questions put to him during his examination and cross-examination were either put to him directly in Gujarati or were put to him in English and thereafter translated in Gujarati. Despite this, the Affidavit of the Defendant in support of the Caveat dated 3rd May, 2002 nowhere states that the same has been read out and/or explained/interpreted to the Defendant in Gujarati. The contents of the Affidavit dated 3rd May, 2002 are not confirmed/reiterated by the Defendant in his Examination-in-Chief. In view of the aforesaid Caveat filed by the Defendant, the Petition was converted into a Suit.

3. Though the Defendant had stated in the Affidavit in support of the Caveat that he has not

even seen the said Will propounded by the Plaintiffs/Petitioners and that he will be filing a detailed Affidavit after receiving a copy of the said Will, no such Affidavit was filed by the Defendant at any time thereafter. Even when the matter was placed for framing of the Issues none appeared for the Defendant and this Court proceeded to frame the **following Issue** in the absence of the Defendant:- ***“Whether the Plaintiffs prove that the Will dated 11th February 1997 is a Will duly executed by the Testator in accordance with Law.”***

4. The Plaintiffs/Petitioners have examined both the attesting witnesses to the said Will i.e. Mr. Narendran Madhavan Menon (P.W.1) and Dr. Pravin L. Shah (P.W.2). The Defendant has examined himself as a Witness (D.W.1) and his mother Pravatiben B. Contractor as witness (D.W.2).

REASONS

5. As stated hereinabove the Plaintiffs /Petitioners have claimed that the said Will is the Last Will left by the deceased. The deceased had left the following persons surviving as his only heirs and next of kin according to Hindu Law by which he was governed at the time of his death :-

1. Smt. Parvatiben Bapulal Contractor
(Parvatiben) - Wife
2. Smt. Jayshreeben P. Khambhati
(Jayshreeben) - Married
Daughter
3. Mr. Nitin Bapulal Contractor
(Defendant) - Son
4. Mr. Umakant Bapulal Contractor
(Plaintiff No.1) - Son
5. Mr. Nalin Bapulal Contractor
(Plaintiff No.2) - Son
6. Smt. Sushila I. Contractor
(Sushilaben) - Married
Daughter

6. Shri Narendran Menon (P.W.1) has in his Affidavit of Examination-in-Chief dated 29th January, 2009 stated that between the years 1994

and 2002 he was staying in 401, "Harmony", 4th Floor Kandivali (West), Mumbai. In the same building, the deceased Bapulal Maganlal Contractor was residing in Flat No.304 on the 3rd Floor. On 11th February, 1997 P.W.1 was present at the residence of the deceased alongwith one Dr. Praveen Shah (P.W.2) a Medical Practitioner who has his dispensary at Shop No.2, Damodarwadi, Ashok Nagar, Kandivili (East), Mumbai. At that time and in both their presence, the deceased duly executed his Last Will and Testament dated 11th February, 1997. The said Dr. Shah (P.W.2) and P.W.1 at the request of the deceased and in the presence of the deceased and each other subscribed their respective signatures to the Last Will and Testament of the deceased as witnesses to the signature of the deceased.

7. In his Examination-in-Chief before this Court on 26th February, 2009 P.W.1 confirmed the contents of his Affidavits dated 5th February, 2002

and 29th January, 2009. P.W.1 was shown the original Will dated 11th February, 1997 when he deposed that he has signed the document as a witness and was aware that he was witnessing the Will.

He has deposed that the deceased put his signature on the said Will in his presence and in the presence of Dr. P. L. Shah (P.W.2) who has also witnessed the Will. The original Will was thereafter taken on record and marked as **Exhibit P-1**.

8. P.W.1 in his cross-examination admitted that he knew the deceased since about 11 years prior to his death. During all the 11 years he was staying in 401, "Harmony", on the 4th Floor, at Kandivali (E), Mumbai. The deceased was staying in Flat No.304 in the same building, i.e. "Harmony" and Mr. Nalin B. Contractor (Plaintiff No.2) was also residing in Flat No.101 of the same building. P.W.1 also stated in his cross-examination that he knows both the Plaintiffs, but he does not know the Defendant.

Before attesting the said Will of the deceased as a Witness he had gone through the Will. At the time of execution of the Will, the deceased, Dr. Pravin Shah (P.W.2) and P.W.1 were the only persons present. At the time of executing/signing of the said Will the deceased was in good health. P.W.1 has stated in his cross-examination that prior to his visit to the house of the deceased for witnessing his Will, he had visited the house of the deceased on one or two occasions. However, he does not recollect when he visited the house of the deceased earlier. He has admitted that he has also witnessed the previous Will of the deceased which was executed sometime in the year 1995. He has stated that the deceased had signed the Last Page of the said Will of 1997 in his presence and had also put his initials on the other pages of the said Will in his presence. In his cross-examination the Learned Advocate for the Defendant showed P.W.1 the signature of the deceased on both

the Wills i.e. the Will of 1997 and the Will of 1995 and suggested to P.W.1 that the second Will of 1997 was not signed by the deceased, to which P.W.1 answered *"It is not true to say that the second Will of 1997 was not signed by the deceased."*

9. P.W.1 has in his cross-examination, inter alia denied the following suggestions put to him in his cross-examination by stating (1) that *"it is incorrect to say that I was close to the son of Bapulal Contractor and not Bapulal Contractor."* (2) that *"it is incorrect to say that he was mentally unwell prior to 5 years of his death."* (3) that *"it is incorrect to say that I have signed the Will at the instance of the son of Bapulal Contractor or that I have never seen Bapulal Contractor putting his signature on the Will."* (4) that *"it is not correct that I have come to court to give false evidence at the instance of the son of Bapulal Contractor."*

10. P.W.2 Dr. P. L. Shah filed his Affidavit of examination-in-chief dated 12th March, 2009 wherein he has deposed that he is a Medical Practitioner since the year 1983/84. The deceased was residing at 304 'Harmony' which is very close to his dispensary. The deceased was his patient for a long time. The deceased was keeping good health and use to consult him only for minor ailments. He personally knew the deceased for six to seven years. The remaining facts as regards the attestation of the said Will in the Affidavit of examination-in-chief of Dr. P. L. Shah (P.W.2) are similar to those set out in the Affidavit of examination-in-chief of P.W.1. In his examination-in-chief conducted on 12th March, 2009 before this Court, Dr. Shah confirmed the contents of his Affidavit of Examination-in-Chief dated 12-3-2009 and upon being shown the original Will (**Exhibit P-1**) admitted that he had signed the document as a

witness and at the time of signing the same was aware that he was witnessing the Will of the deceased. P.W.2 has deposed before this Court that the signature on the right hand side on Page 5, of Exh. P-1, above the signature of the Witness is that of the deceased which was put by the deceased in the presence of P.W.2 and underneath his signature the deceased in his own hand wrote the date 11/2/97 in the presence of P.W.2. After the deceased put his signature on the said document/will in the presence of P.W.1 and P.W.2 both P.W.1 and P.W.2 witnessed/signed the Will in the presence of the deceased and in the presence of each other. Below the signature of P.W.2, P.W.2 has handwritten the date 11/2/97. Apart from the signature of the deceased on Page 5, the deceased had put his initials on each page of the document/will in the presence of P.W.2.

11. In his cross-examination, P.W.2 has stated that he knew the deceased about three to four years

prior to witnessing the said Will. The deceased himself had called P.W.2 at his residence to witness his Will. The deceased had called up P.W.2 in the morning of 11/2/1997. However, P.W.2 informed the deceased that he would be visiting the residence of the deceased in the evening, which he did at around 7/7.30 p.m. When P.W.2 went to the residence of the deceased, the deceased was alone. Thereafter Mr. Menon (P.W.1) also came to the residence of the deceased. P.W.2 in his cross-examination has further stated that he knew the deceased since he was visiting his dispensary as his patient. P.W.2 has stated that he maintains the medical records of his patients for a maximum period of six to eight years and he does not know whether he still has the medical records of the deceased. P.W.2 has stated that when he visited the deceased on 11th February, 1997 the physical and mental condition of the deceased was absolutely normal. P.W.2 has further stated that apart from

the deceased Bapulal being his patient, his son Nalin Contractor was also his patient and had consulted him on some occasions and on very rare occasions the wife of the deceased had also consulted him as a patient. He has also stated that it would be correct to say that on most of the occasions when the deceased visited P.W.2 at his dispensary his wife had accompanied him. In a question put to P.W.2 whether the deceased only knew Gujarati or other languages also, P.W.2 stated that in his presence the deceased only spoke in Gujarati. P.W.2 has stated that the Will was not explained to the deceased in Gujarati in the presence of P.W.2 and he is not aware as to who had prepared the said Will. He had only signed the document as a witness without going through the Will. P.W.2 has categorically stated in his cross examination that Nalin Contractor the son of the deceased is not a friend but a patient of P.W.2. P.W.2 has inter alia denied the suggestion put to

him in his cross-examination by stating that *"it is incorrect to say that the deceased Bapulal had not signed the 1995 Will or the 1997 Will or that I am giving false evidence at the instance of his sons."*

12. After the evidence of P.W.1 and P.W.2 was concluded, a joint Affidavit dated 26th March, 2009 of Examination-in-Chief was filed by the Defendant and Smt. Parvati Babulal Contractor wife of the deceased. When it was pointed out to the Learned Advocate for the Defendant that Parvatiben had already filed a Consent Affidavit as far back as on 11th April, 2001 admitting that the said Will is genuine and valid and she has no objection to Probate being granted to the Plaintiffs/Petitioners in respect of the said Will, the Learned Advocate for the Defendant informed this Court that he will not rely on the said Joint Affidavit of evidence of Parvatiben and the Defendant dated 26th March, 2009 but will file a separate Affidavit of evidence of the Defendant and shall take appropriate steps to

have the Consent Affidavit of Parvatiben dated 11th April, 2001 set aside.

13. Thereafter an Affidavit of Examination-in-Chief of the Defendant dated 20th April, 2009 was filed before this Court. In the said Affidavit the Defendant, who had alleged in his Affidavit in Support of the Caveat dated 3rd May, 2002 that his father was paralysed and bedridden before his death and was not able to sign anything, now, after a span of 7 years changed his story to allege that his father was not in a position to sign at all for the last 5 years prior to his death since his hands were "shivering" and he had a "failed memory". The Defendant has further deposed that the properties mentioned in the said Will are not the self acquired or the exclusive properties of the deceased and therefore the said Will is itself bad in law and cannot be probated at all. It is alleged that the said Will is clearly a manipulation by the Plaintiffs to the detriment of others. It is

deposed by the Defendant that in the Will of 1995 and 1997 it is stated that it was explained in Gujarati language to the maker of the Will. However, no evidence is on record to show that the Will was explained to the maker by anybody. The Deponent has deposed that as regards the Consent Affidavit of Parvatiben dated 3rd April, 2001, Parvatiben would be taking out appropriate proceedings to defend herself. The Defendant has alleged that the attesting witnesses are good friends of the Plaintiffs who wanted to grab the entire premises.

14. The Defendant in his cross-examination has admitted that upto 1993 the deceased, his wife Parvatiben, the Plaintiffs and the Defendant were residing at Ganga Niwas at Khar which was a joint family property. After 1993 the deceased shifted to Kandivali along with Parvatiben and brother, Nalin Contractor (Plaintiff No.2). However, the Defendant continued to reside at 'Ganga Niwas' at

Khar. Though according to the Defendant, initially there was no demarcation amongst the family members and the entire property (Ganga Niwas) was treated as one property, he has admitted that he has a separate ration card of his immediate family and has produced the same. He also admitted that a separate room was given to him in 'Ganga Niwas', since his wife was a pure vegetarian and his father and other members use to eat non-vegetarian food like eggs. He has admitted that in the year 1993 itself he filed a suit against his father being Suit No.1328/1993 and his father filed a suit against him being No.8010/1993 in the City Civil Court Bombay. He has also admitted that his father had filed a suit against him before this Court being Suit No.4190/1994. He has further admitted that M/s. Parvati Builders had filed a Suit against him being Suit No.4510/1995 before this Court. He has also admitted that there were complaints filed with the police by his father as well as himself

against one another. The Defendant has stated that he use to meet his father on certain occasions after 1993. He has stated that his mother and sisters had informed him that their family doctor was Dr. Nair. He has admitted that he had never accompanied his father to any doctor. When asked in his cross-examination on what basis the Defendant was alleging that the attesting witnesses viz. P.W.1 and P.W.2 are the friends of the Plaintiffs, he has stated that when he visited his father and mother he had seen them "loitering together". The Defendant, though specifically asked to produce an original signature of his father could not do so. Instead he produced the Membership Card of Khar Gymkhana (Exhibit P-5) which again does not bear the original signature of the deceased. The Defendant has stated that both the Wills of the deceased were read out to him in the presence of his mother and three brothers by one Mr. Ashwin Pandya approximately two years after

the demise of the deceased. He has admitted that Mr. Ashwin Pandya had also taken signatures after verifying the facts that the Will was read out to him and his brothers.

15. Thereafter a Notice of Motion being No. 72/2009 was taken out on behalf of Parvatiben by the Advocate for the Defendant seeking withdrawal of the Joint Affidavit dated 11th April 2001 filed by Parvatiben jointly with her married daughter Jayshreeben in support of the Probate Petition, and for allowing her to file her Affidavit of Evidence in the above Suit and to contest the same. It is pertinent to note that Jaysrheeben did not seek withdrawal of the said Joint Affidavit. In the Affidavit in Support dated 27th April, 2009 of the Notice of Motion it is inter alia alleged that the signature in the said Will is not of the deceased and that it is unbelievable that the deceased would Will away the properties to only two

of his sons. The said Notice of Motion was disposed of by the following order dated 18th June, 2009:-

"2. After hearing the parties at length, the parties have agreed that the notice of motion be disposed of by the following order :-

(i). The affidavit dated 11th April 2001 filed by Mrs. Parvati B. Contractor be treated as withdrawn.

(ii). Mrs. Parvati B. Contractor is not desirous of contesting the Will by filing any caveat and shall only be giving evidence in the suit as a witness by the defendant Shri Nitin B. Contractor. It is made clear that Mrs. Parvati B. Contractor is not a party to the present proceedings.

(iii). The allegations made in the Notice of Motion against the plaintiff/petitioner are withdrawn.

3. The evidence of Mrs. Parvati B. Contractor tendered by Mr. Kurup, learned Advocate for

the defendant - Shri Nitin B. Contractor is taken on record. The cross-examination of Mrs. Parvati B. Contractor is kept tomorrow at 10 a.m. since she is an elderly lady of 80 years of age and has to leave for Ahmedabad by 12.00 noon.

3. *In view thereof, Notice of Motion stands disposed of."*

16. In the Affidavit of Examination-in-Chief of Parvatiben (D.W.2) dated 19th June 2009, despite having agreed to withdraw the allegations made against the Plaintiffs/Petitioners as recorded in the Order passed in the Notice of Motion No. 72/2009, Parvatiben once again repeated some of the same allegations. Parvatiben alleged that the Plaintiffs/Petitioners immediately after the demise of their father drove her and the Defendant out of Mumbai. She has alleged that the Plaintiffs became very greedy and wanted to grab all the properties. Therefore, they befriended some of the local people

and came to this court with false documents. She alleged that the signature of the deceased appearing on the said Will is forged. What is found in the said Will is the manipulation by the Plaintiffs/Petitioners and it does not bear the signature of the deceased. She has alleged that her husband knew only Gujarati and he could not have signed a Will which is made in English without interpreting the same in Gujarati. There is no date on the said Will. The beneficiaries could not have sold the properties since the court had not granted probate on the said Will. She and the Defendant are at the mercy of her daughters who also supports the claim in the matter.

17. In her cross-examination Parvatiben (D.W. 2) in a question put by the Court to her as to why she did not contest the said Will since 2002, first stated that she had not stated anything against the said Will earlier because her sons had already disposed off the properties. She was therefore

asked by the Court that in that event why was she now alleging, after several years, that the said Will was not genuine, to which D.W.2 answered that she is now making statements against the genuineness of the said Will because she is now told that she will not get the share in Ganga Niwas property. As regards her knowledge pertaining to the said Will and its contents, she first stated that she came to know about the Will and its contents only six months after the demise of the deceased. She later changed her answer and stated that she came to know about the contents of the said Will approximately one year back. She thereafter once again changed her answer to allege that about two years back Advocate Mr. Wasawada who was the Advocate of the deceased handed over a copy of the said Will to her. Thereafter once again she changed her answer to say that the said Will was read out and explained to her by Mr. Ashwin Pandya on 31-12-2000 (wrongly typed in the Notes of

Evidence as 31-2-2000) at 11.30 a.m. D.W.2 was confronted with a letter dated 30th May 2005 in Gujarati language (Exh.P-6) signed by her in which she has accepted that she has received Rs. 2,50,000/- being her 1/3rd share in the Kandivali flat. In the said letter she has also acknowledged that she is going to Ahmedabad taking with her, fixed deposit receipts for a sum of Rs.1,35,000/- standing in her name. She has further acknowledged receiving a sum of Rs.40,000/- being the sale proceeds of silver utensils which was to her share. She further acknowledged having received gold ornaments described therein apportioned as her share and Rs.11,000/- approximately lying in her Bank Account. D.W.2 admitted that the signature on the said letter was hers and the entire contents were true and correct. The said letter is marked **Exhibit P-6.**

18. The Learned Advocate appearing for the Plaintiffs/Petitioners has submitted before this Court that the following are the admitted facts :-

(i). After the demise of the deceased the said Will was read out and explained by Mr. Ashwin Pandya to Smt. Parvatiben, the Plaintiffs and the Defendant. Parvatiben i.e. D.W.2 has further admitted that the said Will was read out on 31-12-2000 at 11.30 a.m. i.e. approximately within 6 months from the demise of the deceased;

(ii). On 11th April 2001 Parvatiben and her daughter Jayshree filed a Joint Affidavit before this Court wherein, Parvatiben and Jayshree have stated that the said Will dated 11-2-1997 referred to in the above Suit/Petition and marked 'Exhibit-B' to the

Suit/Petition is the last Will of the deceased and they believe that the said Will is genuine and validly executed. The Plaintiffs/Petitioners have filed the above Suit/Petition for grant of Probate of the said Will and that Parvatiben and Jaysree have no objection whatsoever if the Probate of the said Will is granted to the Plaintiffs/Petitioners. The contents of the said Affidavit have been translated and interpreted to Parvatiben by the Asst. Chief Translator and Interpreter of this Court. The other daughter of the deceased and Parvatiben i.e. Sushilaben also gave her Consent Affidavit to the Plaintiffs /Petitioners, the contents of which are identical to the Joint

Affidavit of Parvatiben and Jayshree;

- (iii). The Defendant had filed a Suit in the year 1993 against the deceased and the deceased had filed suits against the Defendant before this Court and in the City Civil Court in Mumbai;
- (iv). The deceased and the Defendant have filed complaints and counter complaints against each other with the police authorities;
- (v). Both the 1995 and the 1997 Wills contain the following clauses as paragraph Nos. 4 and 5 -

"4. My son Nitin is not at all in good terms with me and he has, for last more than 8 years, caused harassment to me. My son Nitin has filed false and frivolous suits against me, claiming right, title and interest in the said property at Khar.

I do not desire to devise and bequeath any of my movable or immoveable properties to my said son Nitin.

5. My two daughters namely Jayshree and Sushila are married and I have already provided them with whatever moieties I could and hence I do not desire to devise and bequeath any of my movable or immoveable properties to my daughters the said Jayshree and Sushila.”;

(vi). In the year 2005 Parvatiben took her 1/3rd share in respect of Flat No.304 in building 'Harmony' and her share in silver utensils and gold ornaments and also took her fixed deposits and amounts lying in her bank accounts and went to Ahmedabad to reside with her daughter of her own free will;

19. The Learned Advocate appearing for the Plaintiffs/Petitioners has submitted that both the attesting witnesses i.e. P.W.1 and P.W.2 have deposed that the deceased had signed/executed the said Will in their presence and had initialed each page in their presence and they too had put their signatures on the said Will in the presence of the deceased and in the presence of each other. Both the witnesses have also deposed that the deceased was physically as well as mentally stable on the day of the execution of the said Will. It is submitted that the Defendant has even in the cross-examination of P.W.1 and P.W.2, not been successful in establishing that the deceased had not executed the said Will in the presence of P.W.1 and P.W.2 or that the said Will has been manipulated by the Plaintiffs/Petitioners. As regards the contention of the Defendant namely that though it is written in the Will that the same has been signed by the deceased as his last Will after the same has been

read over and explained to him and had been admittedly perfectly understood and approved by the deceased, no evidence has been produced to show that the same was read out and explained to him, it is countered by the Plaintiffs/Petitioners that the Defendant who has challenged the said Will and who is the eldest son of his father, the deceased, has nowhere stated that his father did not understand English. In fact the Defendant in his cross-examination dated 23rd April, 2009 at Page 4 (last paragraph) has stated - *"I do not know the education qualification of my father, though I can say that he was an educated man. I am not aware whether he has studied in Gujarati or in English medium."* It is further submitted by the Plaintiffs/Petitioners that the evidence of Parvatiben cannot be relied upon because the said Parvatiben who has not challenged the said Will and has withdrawn the allegations made in the Notice of Motion No. 72 of 2009 cannot be heard to say that

the said Will is not genuine or that the Plaintiffs/Petitioners have fabricated or manipulated the same out of greed. It is submitted that on close scrutiny of the evidence of Parvatiben (D.W.2) it would show that the entire evidence is dishonest, tutored and given at the instance of the Defendant (D.W.1) only to oblige him. It is further submitted on behalf of the Plaintiffs/Petitioners that the allegation on the part of the Defendant that the P.W.1 and P.W.2 have given evidence only because they are the friends of the Plaintiffs/Petitioners is false and incorrect. The Defendant has failed to produce any evidence in support of the said contention except an answer which is both false and foolish that he has so alleged because he had seen them "loitering together" when he visited the deceased and Parvatiben at their Kandivali residence. The Plaintiffs/Petitioners have further submitted that the Defendant has questioned the capacity/ability

of the testator to dispose off the property by way of a Will, on an incorrect ground that the properties which are sought to be disposed off by way of the said Will are inherited properties and hence are not self acquired properties of the deceased. Relying on the decision of the Mysore High Court in the case of ***D. S. Sriramaiah Shetty vs. D. Kanthamma Reported in AIR 1971 Mysore 148,*** it is submitted on behalf of the Plaintiffs/Petitioners that if one challenges the capacity/ability of the testator to dispose off the property, his Caveat cannot be entertained and the same deserves to be rejected in limine. The Plaintiffs/Petitioners therefore submitted that they have well and truly proved their case and the Defendant has failed to prove otherwise.

20. The Learned Advocate appearing for the Defendant has submitted that under the 1995 Will the deceased had created certain life interest in favour of his wife Parvatiben which rights have

been taken away under the 1997 Will. The 1997 Will is therefore manipulated by the Plaintiffs /Petitioners. The date of the execution of the Will is blank and the date put under the signature of the deceased is also not put by the deceased. It is submitted that no evidence is produced on behalf of the Plaintiffs /Petitioners that the said Will was explained to the deceased. It is submitted that the Plaintiffs/Petitioners have failed to prove the execution of the said Will and therefore the Plaintiffs/Petitioners are not entitled to obtain a Probate of the said Will.

21. I have considered the pleadings, as well as the evidence on record and the rival contentions advanced by the Learned Advocates appearing for the parties. I will first deal with the role played by Parvatiben (D.W.2) or rather the role she was made to play by the Defendant in the present proceedings. The said Parvatiben as set out hereinabove, initially in her Consent Affidavit

dated 11th April 2001 filed jointly with her daughter Jayshree before this Court deposed that the said Will is a genuine Will and is validly executed by the deceased. As can be seen from the said Consent Affidavit itself, the same was translated/interpreted to Parvatiben by the Asst. Chief Translator and Interpreter of this Court. The said Parvatiben never disputed the said Will in the next 8 eight years but instead took her share in respect of one of the flats as well as silver utensils, gold ornaments, etc. and voluntarily left for Ahmedabad to reside with her daughter, Sushilaben, as can be seen from the document at **Exhibit P-6** the contents of which the said Parvatiben has admitted before this Court to be true and correct. It is only when the Defendant had to file his Affidavit in the present Suit/Petition that he filed a Joint Affidavit before this Court wherein he and the said Parvatiben questioned the genuineness and the

validity of the said Will. When it was pointed out to the Learned Advocate for the Defendant that the said Parvatiben has already filed a Consent Affidavit dated 11th April 2001 before this Court, accepting the genuineness and validity of the said Will and declaring that she has no objection whatsoever if the probate in respect of the said Will is granted to the Plaintiffs/Petitioners, the Learned Advocate for the Defendant stated that he will not rely on the joint Affidavit and he will file a separate Affidavit of examination-in-chief of the Defendant and will also take steps for setting aside/withdrawal of Parvatiben's Affidavit dated 11th April, 2001. Thereafter, the Advocate for the Defendant took out a Notice of Motion for allowing Parvatiben to withdraw her Consent Affidavit dated 11th April 2001 inter alia on the grounds that the same was obtained by force/fraud by the Plaintiffs / Petitioners. After the said Notice of Motion was argued at some length before

this Court, the said parties agreed that the Affidavit dated 11th April 2001 filed by Parvatiben be treated as withdrawn. Parvatiben agreed that she is not desirous of contesting the said Will by filing any Caveat and shall only be giving evidence in the present Suit as the Defendant's witness. It was made clear that Parvatiben is not a party to the present proceedings. The allegations made in the Notice of Motion by Parvatiben against the Plaintiffs/Petitioners were also withdrawn. Parvatiben thereafter filed her Affidavit of Examination-in-Chief before this Court inter alia repeating the allegations which she had withdrawn on the earlier day and thereafter appeared as D.W.2 for cross-examination before this Court. As can be seen from the cross-examination of Parvatiben, the said Parvatiben was since inception making false statements on oath. Though Parvatiben has stated in her cross-examination that she has not signed the Affidavit of the Examination-in-Chief at the

instance of the Defendant but has signed the same of her own free will, the same is inter alia belied by the following questions and answers put to her during her cross-examination :-

“Per Court – Why did you not contest the Will since 2002?

i. I had not said anything against the Will of the deceased earlier because my sons had already disposed of the properties.

(Per Court) In that event, why did you make an affidavit today i.e. after several years, making statement therein against the genuineness of the Will of the said deceased?

A. Because I am now told that I will not get the share in my Ganga Niwas property.

Q. When did you first come to know about the Will and its contents?

A. I came to know about the Will and its contents approximately six months after the demise of my deceased husband.

Q. If you were aware about the contents of the Will, you were also aware that Ganga Niwas property is not bequeathed to you?

A. I say that I was not aware of the contents of the Will, I came to know of the contents of the Will approximately one year back.

2. I now say that about 2 years back the Advocate Mr. Wasawada, who was the Advocate of my deceased husband, handed over a copy of the Will to me.

[Attention of the witness is now drawn to the writing on the folder in which the Will of the deceased is kept and after recording that the Wills were read out to parties, signatures are obtained including the signature of the witness. (The entire contents of the writing is read out and explained to the witness in Gujarathi by the Translator)].

Q. Is this your signature?

A. Yes.

3. I now say that the Will was read out and explained by Mr. Ashwin Pandya to me on 31.2.2000 at 11.30 a.m.

Q. Do you still maintain you were not aware that the Ganga Niwas property was not going to come to you, until recently?

A. I cannot answer this."

From the aforesaid evidence it can be seen that the said Parvatiben first tried to explain that she had not contested the said Will since the year 2002 because the Plaintiffs/Petitioners had already disposed off the properties. Parvatiben on being asked why after several years she now decided to allege that the said Will is not genuine, answered that she is now told that she will not get the share in the Ganga Niwas property. On being asked when she came to first know about the said Will and its contents she admitted that she came to know about the said Will and its contents approximately six months after the demise of the

deceased i.e. she came to know about the said Will and its contents sometime in December 2000. It was therefore put to Parvatiben that if she was aware of the contents of the said Will, she was also aware that the Ganga Niwas property was not bequeathed to her. Thereupon the said Parvatiben immediately changed her earlier stand and answered that she came to know about the contents of the said Will approximately a year ago. She thereafter again changed her answer and stated that about two years back the Advocate of the deceased Mr. Wasawada had handed over a copy of the said Will to her. When the attention of Parvatiben was drawn to the writing on the folder in which the said Will of the deceased is kept where after recording that the Wills were read out to the parties and signatures were obtained including the signature of Parvatiben, she admitted that the same was her signature. She thereafter also admitted that the said Will was read out and explained by Mr. Ashwin

Pandya to her on 31.2.2000 at 11.30 a.m. (the date 31.2.2000 is an obvious mistake and same should have been typed as 31.12.2000). After this admission of Parvatiben, she was asked whether she still maintained that she was not aware that the Ganga Niwas property was not bequeathed to her, until recently, she responded by saying "*I cannot answer this*". The aforestated evidence of Parvatiben shows that she was conscious of the fact she had no answer whatsoever to the question as to why she did not contest the genuineness/validity of the said Will till date. Parvatiben therefore as can be seen from the above discussion of her evidence, gave false and incorrect answers knowing them to be so, until she had no alternative left but to admit that she was in fact aware of the said Will as well as its contents since 31.12.2000.

22. Parvatiben has alleged in her Examination-in-Chief that she and the Defendant were thrown out of Mumbai immediately after the death of the

deceased by the Plaintiffs/Petitioners. Parvatiben suppressed the fact that after the demise of the deceased she stayed with the Plaintiffs/Petitioners for five years and thereafter, after taking her share from the Plaintiffs/Petitioners voluntarily left for Ahmedabad to reside with her daughter Sushila. Attention of Parvatiben in her cross-examination was therefore drawn to a letter dated 30th May 2005 (Exhibit P-6) wherein she has stated that she of her own free will and volition is going to reside with her daughter Sushila at Ahmedabad. It is further recorded in Exh. P-6 that she has received - (i) Rs.2,50,000/- towards her share in the Kandivali flat; (ii) fixed deposits for a sum of Rs.1,35,000/- standing in her name; (iii) Rs. 40,000/- being the sale proceeds of the silver utensils apportioned as her share; (iv) gold ornaments consisting of one big necklace, two 'patlas', (big bangles, a bracelet) weighing about 146 grams and small necklace weighing 40 gms, which

was her share; and (v) the amount lying in her bank account at Borivali branch which approximately amounted to Rs.11,000/-. In the said letter it is also recorded that Plaintiff No.1 shall send a sum of Rs.1,000/- every month for two years to Parvatiben towards the monies which she had used for Probate and medicine of the deceased. It is further recorded that her sons shall not have any right whatsoever over what she is taking away and if her daughter Sushila allows her to stay with her till her lifetime, only Sushila shall have a right to the same. It is further recorded that Plaintiff No.2 shall pay Rs.35,000/- to her. Parvatiben has further agreed in the said letter that during her lifetime her mother's jewellery shall remain with Plaintiff No.1 and thereafter upon her death the same shall be distributed to her daughters in equal share. It is further provided that if she is required to, she can sell the ornaments. It is further provided that the

jewellery worn by her will remain with her during her lifetime and she will be entitled to give the same to anyone she desires. The said document is inter alia signed by the Plaintiffs/Petitioners and her daughters. The said Parvatiben has admitted before this Court the execution as well as contents of the said letter. The said letter and its contents completely destroys the evidence of Parvatiben as stated in her examination-in-chief that after the demise of the deceased she and the Defendant were driven out of Mumbai by the Plaintiffs/Petitioners. In view thereof, I am satisfied that the said Parvatiben who has admittedly not contested the said Will and has been produced by the Defendant only as a witness has sought to give false and incorrect evidence knowing the same to be so which destroys her credibility as a reliable witness and leaves the Court with no option but to reject the same in its entirety.

23. The Plaintiffs/Petitioners as set out hereinabove have led evidence of both the attesting witnesses to the said Will viz. P.W.1 and P.W.2. P.W.1 at the time of attestation of the said Will was the neighbour of the deceased. P.W.2 is a qualified doctor having his dispensary in close proximity to the residence of the deceased. Both P.W.1 and P.W.2 have deposed that they had attested the Will of the deceased in the year 1995 as well as the said Will dated 11th February, 1997. Both P.W.1 and P.W.2 have deposed that the said Will was signed by the deceased in their presence and they too had signed the said Will in the presence of the deceased, as well as in the presence of each other. Both P.W.1 and P.W.2 have also deposed that the physical as well as the mental condition of the deceased at the time of the execution of the Will was sound. P.W.2 has categorically stated that the deceased used to visit his dispensary with minor problems like cold, fever, etc. and the Defendant

beyond alleging that he was informed by his mother/sister that his father was treated by one Dr. Naik has not been able to discredit the evidence of P.W.2 on this issue. In fact the Defendant has not even suggested to P.W.2 that the deceased was not a patient of P.W.2. Though the Defendant has alleged that P.W.1 and P.W.2 have given evidence in favour of the said Will because they are the friends of the Plaintiffs/Petitioners, the Defendant has not attempted to explain/demonstrate the extent of friendship between P.W.1, P.W.2 and the Plaintiffs /Petitioners, but in a specific question put to the Defendant has stated that according to him they are friends because he has seen them loitering together when he use to visit the deceased and his wife at their Kandivali residence. Admittedly, P.W.2 is a practicing doctor. It is also not the case of the Defendant that the Plaintiffs/Petitioners as well as P.W.1 are not

pursuing any business/service. It is therefore unbelievable that when the Defendant was visiting his parents at Kandivali he use to see the Plaintiffs/Petitioners and P.W.1 and P.W.2 "loitering" as alleged. Both P.W.1 and P.W.2 have denied the suggestion put to them in their cross-examination on behalf of the Defendant that they are giving evidence in the matter because they are the friends of the Plaintiffs/Petitioners. P.W.1 has stated in his cross-examination that he knows the Plaintiffs/Petitioners and not the Defendant. P.W.2 has stated that he knows Plaintiff/Petitioner No.2 who has visited him as a patient.

24. As regards the allegation of the Defendant that despite being typed in the Will that the same has been read over and explained to the deceased no evidence is produced to show that the same was actually read over and explained to the deceased, I am of the opinion that the said contention would have had some merit if the Defendant had positively

established before this Court that the deceased failed to read and understand English. Instead the Defendant has in his cross-examination stated "*I do not know the educational qualification of my father though I can say he was an educated man. I am not aware whether he has studied in Gujarati or English medium.*" Therefore, it is not the case of the Defendant who is the eldest son of his father that his father did not know and/or understand English.

25. As regards the allegation of the Defendant that the Will has been manipulated by the Plaintiffs/Petitioners and the date below the signature of the deceased is not in the handwriting of the deceased, this Court has noted that the Defendant in his Affidavit in Support of the Caveat dated 3rd May 2002 which unlike his Affidavit of Examination-in-Chief dated 20th April, 2009 is not interpreted and explained to him in Gujarati and the contents of which are not reiterated and confirmed by him in his evidence, has alleged that

"my father was paralysed since ___ years and bedridden before his death and was not able to sign anything." In the said Affidavit it is also alleged by the Defendant that though he has not seen the said Will, the said Will is false and fabricated. Interestingly the Affidavit of Examination-in-Chief of the Defendant dated 20th April, 2009 does not mention that the deceased was paralyzed or was bedridden before his death. Instead it is alleged that for the last five years prior to his death, the deceased was unable to sign because his hands were "shivering" and he had a "failed memory". It would be pertinent to once again state that on 18th July, 2009 when arguments in the Suit commenced the Learned Advocate for the Defendant submitted before the Court that the Defendant is not contending that the deceased was suffering from paralysis as stated in his Affidavit in Support of the Caveat. Even the words "false" or "fabricated" used in the Affidavit in Support of

the Caveat are not found in the Affidavit of Examination-in-chief of the Defendant but it is alleged that there is "manipulation" on the part of the Plaintiffs/Petitioners. P.W. 2 has categorically stated in his examination-in-chief that "the signature of Bapulal Contractor was put by him in my presence and underneath he handwrote the dated 11/2/97 in my presence." On behalf of the Defendant it was not even suggested to P.W.2 in his cross-examination that the said date under the signature of the deceased is not put by the deceased in the presence of P.W.2. Nothing much turns on the issue that the date in the said Will is left blank, since underneath the signatures of the deceased as well as P.W.1 and P.W.2 the date 11/2/97 is set out. The docket of the said Will also bears the said date. Again, though the Defendant in his cross-examination was asked to produce any original signature of the deceased the Defendant expressed his inability to do so and

produced the membership card of the deceased of Khar Gymkhana which admittedly does not bear the original signature of the deceased. In any event a bare visual inspection of the said signature on the said card shows that the signature of the deceased thereon is identical to the signature on the said Will. I am therefore convinced that the Plaintiffs/Petitioners have proved that the said Will dated 11th February, 1997 is duly executed by the Testator in accordance with law. In addition to the aforesaid facts my view is also fortified by the fact that except for the Defendant neither the wife of the deceased or her married daughters have challenged the said Will, instead they have given Affidavits in support of the above Suit/Petition by accepting the genuineness and validity of the said Will. Even though Parvatiben withdrew the Affidavit executed by her on 11th April, 2001 only on 18th June, 2009 she informed the Court that she is not desirous of contesting the said Will by filing any

Caveat and shall only be giving evidence in the Suit as a witness of the Defendant. The evidence subsequently given by her is already dealt with by me at length hereinabove. Again the Defendant admittedly was not on good terms with his father and there were a number of suits and counter suits filed between them as also police complaints filed by the Defendant and the deceased against each other. The deceased has categorically made a mention about his disputes with the Defendant in his 1995 Will as well as the said Will and has expressed his desire not to bequeath any of moveable or immoveable properties to the Defendant. The Defendant in his affidavit in support of the caveat dated 3rd May 2002 has not contended that the Defendant has by the said Will bequeathed joint family properties and not his self acquired properties. No additional affidavit in support of the caveat is filed thereafter despite having reserved the right to file a detailed affidavit.

In any event the question as to whether the testator had a right to bequeath certain property/properties, involves a question of title to the property/properties so bequeathed and this Court in its testamentary jurisdiction cannot decide the same.

26. Under the circumstances I answer the issue framed hereinabove in the affirmative. The suit is allowed/decreed in terms of Prayer Clause (a) of the Plaint/Petition which reads thus :

- (a) *that Probate may be granted to the Petitioners in respect of the last will and testament dated 11th February 1997 of the deceased Shri Bapulal Maganlal Contractor having effect throughout the State of Maharashtra."*

The Defendant is directed to pay the cost of this



suit to the Plaintiffs/Petitioners as incurred by the Plaintiffs/Petitioners.

Order accordingly.

(S. J. KATHAWALLA, J.)