

Shephali/gsp/cf

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
TESTAMENTARY SUIT NO. 89 OF 1999

IN

TESTAMENTARY PETITION NO. 1205 OF 1998

MADHURI PUKHARAJ BALDOTA

of Bombay, Hindu Inhabitant, residing at 191, 4th
floor, Pushkaraj Sadan, Station Road, Wadala,
Bombay – 400 31. The Sole Executrix named
under the Last Will and Testament of the
deceased abovenamed.

... Plaintiff

versus

1. **OMKARLAL DAULATRAM BANWAT**
2. **VINAY OMKARLAL BANWAT**
3. **ABHAY OMKARLAL BANDWAT**

All Hindu inhabitants residing at 7, Jillha
Peth, near Shivaji Statue, Jalgaon – 425 001,
the heirs of late Smt. Vasanti Omkarlal
Banwat the deceased abovenamed.

... Defendants

APPEARANCES

FOR THE PLAINTIFF

Mr. J. S. Kini, *i/b Suresh Dubey*.

FOR THE DEFENDANTS

Mr. S. M. Shettigar, *i/b Chandrakant P.
Yadav*.

CORAM : **G.S.Patel, J.**
JUDGMENT RESERVED ON : **17th December 2014**
JUDGMENT PRONOUNCED ON : **5th February 2015**
JUDGMENT:

1. One Achaldas Hirachand Baldota (“**Achaldas**”) died in Mumbai on 9th January 1997. According to the Petitioner, Madhuri Pukharaj Baldota (“**Madhuri**”), Achaldas left a validly executed Will dated 26th July 1988. Madhuri is the sole executrix named in the Will, and she seeks to probate it.

2. Achaldas and his wife, Rajubai Baldota (“**Rajubai**”) had three children: a son, Pukharaj Achaldas Baldota (“**Pukharaj**”), Madhuri’s husband, and two daughters, Kanta Bansilal Lodha (“**Kanta**”) and Vasanti Omkarlal Banwat (“**Vasanti**”). Pukharaj was married first to one Kuntabai, with whom he had two children, Neeta Sumtilal Lodha (“**Neeta**”) and Sunanda Kamal Jain (“**Sunanda**”). Both are now married. After Kuntabai’s death, Pukharaj married Madhuri in 1984. Rajubai and Pukharaj both died before Achaldas: Pukharaj died on 10th December 1980 and Rajubai died on 10th February 1990. In other words, Pukharaj died before Achaldas and before he made his Will, while Rajubai died before Achaldas but after he made his Will.

3. Under the Will that Madhuri propounds, Achaldas allegedly revoked and annulled an earlier will made on 24th December 1975, and made certain bequests to his daughter-in-law, Madhuri; to

Rajubai; and to the children of Madhuri and Pukharaj, viz., Punit Pukharaj Baldota (“**Punit**”), Hitesh Pukharaj Baldota (“**Hitesh**”), Kalpana Deepak Bhatt (“**Kalpana**”) and Dipika Pukharaj Bhatt (“**Dipika**”). Achaldas allegedly bequeathed his business, Lalwani Stores, located at Mahavir Building, Ground Floor, Bhandarkar Road, Matunga, Mumbai 400 019, all properties, receipts and payments in respect of the said business, and the tenancy rights of the shop and the godown to his grandsons, Punit and Hitesh, in equal shares. He allegedly bequeathed the building he owned at 191, Pushkaraj Sadan, Station Road, Wadala, Mumbai 400 031, to Madhuri, Punit and Hitesh in equal shares, along with the rent income after the deduction of expenditures, with Rajubai retaining a life interest, i.e., a right of residence on the top floor of the building during her lifetime. A sum of Rs. 50,000/- was allegedly bequeathed to Rajubai. All ornaments, i.e. gold and silver, were allegedly bequeathed to Madhuri, Punit and Hitesh equally, out of which some were to be given to Dipika and Kalpana at the time of their marriages. The remainder was allegedly bequeathed to Madhuri, Punit and Hitesh in equal shares. It was also stated in the alleged Will that if Achaldas’s wife, daughter-in-law or grandsons predeceased him, their property was to be termed “remaining property” and was to devolve in the manner aforesaid, instead of going to their heirs.

4. The Defendants are Omkarlal Daulatram Banwat (“**Omkarlal**”), Vinay Omkarlal Banwat (“**Vinay**”) and Abhay Omkarlal Banwat (“**Abhay**”), some of the heirs of Achaldas’s deceased daughter, Vasanti, who also died after him. They entered a Caveat on 12th October 1999, in which they disputed the execution

of the Will. They alleged that the Will was fabricated; that the signature on the Will was not that of Achaldas; that assuming without admitting that the signature was in fact that of Achaldas, he had signed the Will without knowledge of its contents; that he was subjected to undue influence from Madhuri and Punit; and that the Will was unnatural in its exclusion of Kanta, Vasanti, Neeta and Sunanda. Vinay also filed an Affidavit on 22nd February 2012. According to the Defendants, Achaldas died intestate.

5. On the Caveat and Affidavit being filed, the Petition was renumbered as Suit No. 89 of 1999.

6. On these pleadings, issues were struck on 2nd February 2011. These are reproduced below, with my findings against each.

SR. NO.	ISSUES	FINDINGS
1	Whether the last Will and Testament of the deceased Achaldas Hirachand Baldota dated 26th July 1988 was validly executed?	Yes
2	Whether the said Will has been fabricated or forged?	No
3	Whether the Will is unnatural?	No
4	Whether the deceased was in sound state of mind at the time of execution of the Will?	Yes
5	To what relief, if any, is the Plaintiff entitled?	Suit decreed

7. It seems that no issue was formally framed on the question of undue influence, though there is a specific plea to that effect in the Affidavit in Support of the Caveat. Parties, too, proceeded to trial on the basis that this issue arose, and both Mr. Kini, learned Counsel for the Plaintiff, and Mr. Shettigar, learned Counsel for the Defendant, have addressed me on this aspect of the matter. I have therefore taken the liberty of framing as Issue No. 4A:

4A. Whether the Defendants prove that the deceased's Will was obtained by undue influence exercised by the Plaintiff and her son Punit?

I have answered this in the negative as well.

8. There are five distinct issues to be considered.

- (a) As to the validity of the execution of the Will as required by law; the burden of this lies on Madhuri;
- (b) Achaldas's state of mind and physical health; the burden of this, too, lies on Madhuri;
- (c) Whether the Will was fabricated and forged, something the Defendants must prove;
- (d) Whether the Will was unnatural, again something for the Defendants must prove; and

- (e) Whether the Defendants prove that Madhuri and Punit procured the Will by exercising undue influence on Achaldas?

Issues Nos: 4A and 3: Undue influence and whether the Will is ‘unnatural’:

9. Achaldas’s son, Pukharaj, predeceased him by 17 years. Vinay’s cross-examination tells us that this caused Achaldas much grief, understandably so. It is, therefore, not unreasonable to expect that Pukharaj’s untimely death resulted in a natural inclination by Achaldas towards Pukharaj’s widow and children; the latter especially were left without a father at a very young age. It is undisputed that Achaldas lived with Madhuri and her children, Punit, Hitesh, Dipika, and Kalpana, until his death. Madhuri was a second mother to Pukharaj’s daughters by his first marriage, Neeta and Sunanda. Both stayed with her in Achaldas’s home till their respective marriages. Madhuri seems to have cared for Achaldas throughout, right till the end. None of the other family members looked after him and his needs in his dotage. We know that Achaldas and Madhuri and her family shared a common kitchen; we know too that Madhuri helped him with his business. We also know that his daughters, Vasanti and Kanta, moved out of the flat after their marriages, as did Neeta and Sunanda. Achaldas seems to have maintained cordial relations with all of them and at least some of these relatives visited him from time to time; particularly noteworthy for our purposes, Vinay, Abhay, and their mother, Vasanti.

10. In 1988, Achaldas allegedly made a Will. He was then 83 years old. This Will leaves almost everything to Madhuri and her children; excluding, therefore, Vasanti, Kanta, Neeta and Sunanda; most intriguingly, neglecting to even mention Neeta and Sunanda, his grandchildren by Pukharaj's first marriage. On 21st April 2012, Neeta and Sunanda filed Affidavits in Support of the Petition, saying they were not interested in Achaldas's estate and that it was they who asked to have their names excluded from the petition. When Madhuri sought probate of Achaldas's Will, the only Caveats filed were by Vinay, Abhay, and their father, Omkarlal, some of the heirs of Achaldas's daughter Vasanti who died after he did. Even Vasanti's other heirs (her married daughters Saroj, Anila and Sunita) did not oppose the petition. Kanta, Achaldas's other daughter, was alive and she filed no opposition to the probate either. This lack of opposition from the others is itself something of a telling circumstance. It cannot be entirely without heft or consequence.

11. Every testamentary disposition disrupts the natural line of succession.¹ Wills, by their very nature, usually result in the reduction or deprivation of the share of a natural heir; were it otherwise, no will would be necessary. The exclusion, therefore, of a particular heir or even of a large number of heirs is not *ipso facto* a suspicious circumstance sufficient to dislodge an otherwise valid will,² or make it 'unnatural'.³ The exclusion of Neeta, Sunanda,

¹ *Rabindra Nath Mukherjee and Another v Panchanan Banerjee (dead) by L.Rs. & Ors.*, AIR 1995 SC 1684

² *Uma Devi Nambiar & Or. V T. C. Sidhan*, (2004) 2 SCC 321;

³ *Pentakota Satyanarayana and Ors. v Pentakota Seetharatnam and Ors.*, (2005) 8 SCC 67

Dipika and Kalpana, then, is not automatically suspicious. We do not know the reasons for their exclusion, except this: that in the time after Pukharaj's death, it was Madhuri and her family who were closest to Achaldas. There is no evidence of discord; to the contrary, in fact, for Madhuri accepts that relations between Achaldas and the rest of his family were cordial.⁴ Indeed, two of the defendants, Vinay and Abhay, seem to have lived with Achaldas briefly between 1968 and 1970 and between 1977 and 1981 respectively.⁵ Who are those excluded? They are Neeta and Sunanda, the married daughters of Pukharaj (by his first marriage) and Achaldas's two married daughters Kanta and Vasanti. Now Neeta and Sunanda have both filed supporting affidavits. Kanta has filed no opposition. Vasanti had several heirs, but only three stand up to oppose her father's Will. What Achaldas seems to have done is to have excluded all his female lineal descendants who were married. This is in contrast to the other two descendants (which, obviously, excludes Madhuri as she is an heir in succession but not a lineal descendant), viz., Madhuri's daughters, both unmarried. Achaldas makes some provision in his Will for ornaments to be given to them at the time of their marriages. By all accounts this is a conventional middle-class family from a Gujarati trading community and it is entirely possible that, although the Will does not say so, Achaldas and his wife gave their daughters traditional wedding gifts and perhaps left it at that. Mr. Shettigar's submission that the exclusion of the married daughters is irrefutable evidence that the Will is unnatural is not a submission that commends itself in the slightest. In many communities in this country, it is not an

⁴ Qs.40 and 41 of Madhuri's cross-examination.

⁵ Q.54 of Madhur's cross-examination.

uncommon belief that on marriage a daughter ‘goes out’ of the family.⁶ However much one may wish for a more contemporary set of beliefs, it is the testator’s perspective that must guide us. This is not to suggest that, as a matter of law, married daughters are to be excluded from inheritance or that in every case the exclusion of a married daughter is unexceptionable; that can never be the case. The point only is that the mere exclusion of a class of heirs is not, in and of itself, evidence of unnaturalness.

12. To establish unnaturalness something more than kinship or lineal descent is necessary. It must be shown that the relations between those excluded and the testator were so close that in the natural scheme of things, it was inconceivable that they should be altogether ignored. We have no evidence, beyond the banality of ‘cordial relations’, to show that Achaldas remained especially close to either of his daughters after their marriage. What is perhaps determinative is that in his Will Achaldas pointedly refers to the marital status of his daughters Vasanti and Kanta, and, too, the *unmarried* status of Madhuri’s daughters. Some inkling of his way of thinking is revealed by the nature of the bequests he makes to the two unmarried ladies: he leaves them ornaments, but no rights in property or other movables.

13. Vasanti died after Achaldas. She had three daughters in addition to her two sons. Only her husband and two sons challenged her father’s Will; her three daughters, all married, did not. It is indeed curious that Madhuri mentions all of Vasanti’s family in her

⁶ *Ammu Balachandran v Mrs O. T. Joseph & Ors.*, AIR 1996 Mad 442

petition, but it is Vinay in his caveat who omits all mention of his sisters as Achaldas's heirs through their deceased mother, Vasanti.

14. The exclusion does not itself mean a severance either. Achaldas contributed to Vinay's educational expenses,⁷ and Achaldas gave Vinay shelter while he was studying in Mumbai.⁸ Relations were, therefore, not inimical. But Achaldas seems to have left his estate to those who lived with him, shared his home and were his daily companions and caregivers. There is nothing to suggest that Madhuri and her family were remiss in their duties to look after Achaldas as he grew older, or that others, who had left his home, took on that obligation instead. Indeed, there seems to have been some distancing between Achaldas and those of his family who had moved away. Again, this is perhaps not unusual or unnatural for each had their own lives to lead and not all were in the city itself. But the evidence shows, for instance, that Vinay knew very little about Achaldas's daily life. He does not know when Achaldas's wife, Rajubai, passed on;⁹ whether Achaldas had a lawyer;¹⁰ if he was assessed to Income Tax;¹¹ and whether he had a family doctor.¹² Asked if he knew whether Achaldas had been hospitalized and if so when, for how long and for what ailment, Vinay could only recollect in the vaguest terms a solitary instance of Achaldas's admission to a hospital "near Portugese Church, Mumbai", but without any

⁷ Q.215 of Vinay's cross-examination.

⁸ Q.190 of Vinay's cross-examination.

⁹ Q.32 of Vinay's cross-examination.

¹⁰ Q.43 of Vinay's cross-examination.

¹¹ Q. 44 of Vinay's cross-examination.

¹² Q.47 of Vinay's cross-examination.

knowledge of the period or the medical condition.¹³ This is not evidence of closeness or affinity sufficient to warrant a finding that Achaldas's Will is unnatural. Again, other than Vinay, Abhay and Omkarlal, none of the other family members so viewed it.

15. As to the question of undue influence, it is well-settled that to prove undue influence in the execution of a Will, the opponent must establish that it was a document against the testator's wishes. As succinctly put in the 1949 judgment of the Privy Council in *Mt. Gomtibai Vs. Kanchhedilal and Ors.*:¹⁴

"28 ... Undue influence, in order to invalidate a will, must amount to coercion or fraud. Its existence must be established as a fact and it must also appear that it was actually exercised on the testator."

16. There is, I think, insufficient evidence from the Defendants to hold that Madhuri or her son Punit exerted this level of 'undue influence' on Achaldas in the execution of his Will. There are some vague accusations in Vinay's testimony pertaining to threats of physical violence and financial demands from Punit against Achaldas, but these are unsubstantiated, and in any event, do not pertain directly to the execution of the Will. The fact that after Pukharaj's death, Madhuri and her children (and Pukharaj's daughters by his first marriage till their own marriages) continued to live with Achaldas; that they looked after and cared for him; and that Madhuri and later Punit appear to have helped him in his small

¹³ Q.151 of Vinay's cross-examination.

¹⁴ AIR 1949 PC 272

business concern are not evidence of ‘undue influence’. In testamentary dispositions, all influence is not axiomatically ‘undue’. It must be shown that the testator was compelled to act against his wishes. This means, necessarily, that it must be shown by cogent evidence that the testator desired something different than the will shows. This is not a matter that can be left to conjecture or surmise. It is not enough to show that there was mere *influence*. There must be evidence of *undue* influence, i.e., material to show that the testator did something he did not intend or could not reasonably be expected to have intended.¹⁵ Closeness in relations, providing assistance and, within a family, being supportive are not evidence of ‘undue influence’.

17. Issues Nos. 4A and 3 are both answered in the negative.

Re: Issues Nos. 1, 2 and 4: Whether the Will was validly executed; whether the Will is fabricated and forged; and whether the testator was of sound mind when he made the Will.

18. These issues are interlinked, and I propose to deal with them together. It is now well-settled that the onus lies on the propounder of a will to show that it was validly executed. In *H. Venkatachala Iyengar Vs. B. N. Thimmajamma and Ors.*,¹⁶ the Supreme Court said:

“20. ... Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a

¹⁵ *Wingrove v Wingrove*, 1885 XI PD 81; *Hall v Hall*, 1868 I XXXI P&D Vict LR 481

¹⁶ AIR 1959 SC 443

court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is provided to be the last will and testament of the departed testator. Even so, in dealing with proof of wills the court will start on the same enquiry as in the case of the proof of documents. **The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will.** Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

21. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the

testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. **It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter."**

(Emphasis supplied)

19. Thus, it is the burden of the propounder of a will to show that it was signed by the testator, that he was in a sound state of mind at the time, that he understood the contents of the document to which

he put his signature, and that he did so of his own volition. Any legitimate doubts raised in the mind of the Court with regard to the validity of the execution of the will must also be put to rest by the propounder, independent of whether any accusations are made by any caveators. Mr. Shettigar cited several authorities in this regard; it is not necessary to consider each of these, as the position in law is too firmly established to admit of further debate.¹⁷

20. Section 63 of the Succession Act, 1925 sets out the requirements for the valid execution of a will. A testator must sign it, or affix his mark to it, or have a mark or signature affixed under his directions. There must be at least two attesting witnesses. Each must sign or mark the will in the presence of the testator and at his direction, and he must sign, mark or have marked the will in the presence of each, though all witnesses need not be present at the same time. In this case, one of the challenges to the Will is that the signature is not that of the deceased. None have led any expert evidence on handwriting or signature. There were two attesting witnesses, one Ashok L. Sharma (“**Sharma**”) and one S. G. Misar (“**Misar**”), who has since died. Sharma says in his evidence in chief that he was present at the time of execution of the Will, i.e., when Achaldas signed it, and, in cross-examination, that Achaldas signed it in his presence. Vinay, on the other hand, admits in cross-examination that he has never seen Achaldas’s full signature.¹⁸ He is

¹⁷ *Adivokka & Ors. v Hanamavva Kom Venkatesh ‘D’ by LRs. & Anr.*, AIR 2007 SC 2025; *Benga Behera & Anr. v Braja Kishore Nando & Ors.*, AIR 2007 SC 1975; *Gurdial Kaur & Ors. v Kartar Kaur & Ors.*, (1998) 4 SCC 384; *Smt. Jaswant Kaur v Smt. Amrit Kaur & Ors.*, (1977) 1 SCC 369; *Sridevi & Ors. v Jayaraja Shetty*, (2005) 2 SCC 784; *Pentakota Satyanarayana*, *supra*.

¹⁸ Q.197 of Vinay’s cross-examination.

also unable to unequivocally commit that the signature is *not* that of Achaldas.¹⁹

21. Mr. Shettigar submits that there is intrinsic evidence to show that the Will was bogus. Sharma says that Achaldas ‘dictated’ the Will to him, and he wrote it down in Marathi. But Achaldas’s mother tongue was Gujarati and some doubt seems to have been raised about whether he could read or write Marathi. For her part, Madhuri says that she was unaware that Achaldas was educated only to the second standard in Gujarati.²⁰ But this is a suggestion never established, and the question as put assumes a fact not in evidence. There seems to be little doubt, however, that Achaldas signed the Will using the Gujarati script.

22. Mr. Shettigar then attempts to make some capital of the fact that in his examination-in-chief or in his affidavit supporting the petition Sharma does not say in terms that he read out the Will to Achaldas, implying that Achaldas did not know what he signed. But this again assumes a fact not in evidence, viz., that Achaldas was so totally unfamiliar with Marathi that he understood not a word. But how is this to be reconciled with the fact that Achaldas did a business in a busy commercial area of Mumbai, and that he did so for several decades? It is not unreasonable to presume from the common experience of this city that persons who run such establishments acquire at least a smattering of the local language. This is true the world over and there is no reason to believe that Achaldas was so utterly insulated from the city’s linguistic and

¹⁹ Q.209 of Vinay’s cross-examination.

²⁰ Q.31 of Madhuri’s cross-examination.

cultural influences. In cross-examination, though, a suggestion appears to have been put to Sharma. This is a portion of the cross-examination that was most improperly recorded on commission in a narrative format rather than a question-and-answer format. Apparently, this was at the Defendants' behest on their saying that Sharma was a 'professional'. It is difficult to understand what, if anything, this is supposed to mean. The result is that from the answers we are required to deconstruct the possible questions; and it seems that the suggestion to Sharma was that "contents of the Will were never read out to" Achaldas. Sharma denied this. In cross-examination, this was ill-advised. An argument might have been founded on the omission in Sharma's evidence to say clearly whether or not he read out the Will to Achaldas. By suggesting that he did not, and obtaining a denial, the Defendants have only damaged themselves, for there is now, elicited in cross-examination, a response that the Will was in fact read out to Achaldas. Mr. Shettigar is not, I think, correct in saying that he was *required* to 'put the case' to the witness. This is a complete misreading of the law on this aspect of the matter. It is sometimes, but not invariably, necessary to put to a witness a positive and affirmative case contrary to the witness's testimony so that the witness may be afforded an opportunity of an explanation; no witness's testimony should be assailed on the ground that he did not deny something never put to him.²¹ But that is not the case here. There is no affirmative case by the Defendant to put to the witness.

²¹ *Harish Loyalka & Ors. v Dileep Nevatia & Ors.*, 2015 (1) Bom CR 361, considering *A.E.G. Carapiet v A.Y. Derderian*, AIR 1961 Cal 359.

23. Mr. Shettigar then points to what he describes as two clinching aspects: if Sharma was the scribe who wrote the Will, why did he leave the date blank to be filled in by Achaldas? And what is the explanation for the difference in the inks in the date of the Will and a handwritten interpolation? The suggestion to Madhuri was that the Will was prepared in advance and therefore the date was left blank. Madhuri denies this.²² But there are other possibilities that are left unexplored: that Sharma and Misar each had a pen, for instance, or that there was some other writing instrument at hand, and that Achaldas took the one nearest at hand. Sharma is confronted with none of this; instead, we are asked to speculate and conjecture that there is simply no valid explanation. I do not find this ‘clinching’; far from it.

24. There are other matters that Mr. Shettigar terms discrepant. In his affidavit of 21st June 2007, Sharma says that Achaldas asked him to write down the Will. In cross-examination he says that it was Misar who asked him to do so, Misar being Sharma’s ‘senior’. He then clarifies this and says that Misar said they would both have to go to Achaldas to prepare the Will and that Sharma would have to write it down. His testimony indicates that Achaldas and Misar discussed the Will while he took it down. Again, I find this, in the overall context, too trivial to be sufficiently strong evidence to dislodge the Will. On some aspects Sharma is unshaken and these are: that he, Misar and Achaldas were all present together when the document was brought into existence; that the document is indubitably in Sharma’s hand; that Achaldas signed it in his presence and made a handwritten alteration to a portion of it; that

²² Q.28 of Madhuri’s cross-examination.

Misar, too, signed it at the same time. The crucial requirements of Section 63 are fully met, and it is difficult to see how a minor inconsistency here or there can dislodge what appears to me to be sufficient evidence of due execution. It is not, I think, possible to hold that the due execution of the Will is unproved or that it was forged and fabricated.

25. There is one aspect that Mr. Shettigar emphasizes greatly and that is Madhuri's failure to explain how she obtained and produced the Will. There is no explanation of this in her examination-in-chief, and she admits as much under cross-examination.²³ I do not think too much can be made of this either. Mr. Shettigar's reliance on the decision of the Supreme Court in *S. R. Srinivasa and Ors. Vs. S. Padmavathamma*²⁴ is, I believe, more than somewhat misplaced. In that case, there were other suspicious circumstances: the will was twice presented for registration; no explanation was offered as to why it was not registered the first time; the sub-registrar was not examined; and, most importantly, neither were the attesting witnesses to the will. It was on account of the "cumulative effect" of all these circumstances that the Supreme Court held that the propounder's failure to explain how he came into possession of the will was telling, and weighed against him. This is hardly comparable with the case at hand, and I do not think that the decision is an authority for the proposition that every such failure is fatal. Where the propounder is himself or herself a major beneficiary, the failure to explain the finding of the will is itself an additional suspicious circumstance. But where the surrounding factors lend themselves to

²³ Q.30 of Madhur's cross-examination.

²⁴ (2010) 5 SCC 274

a legitimate acceptance of the validity of the will, I do not believe it can or should be dislodged because the propounder has not explained its discovery. There are any number of other possible reasons: perhaps Madhuri's lawyers did not include that disclosure and perhaps they advised her it was unnecessary. None of this is explored. She is not even asked specifics about where, when and in what circumstances she found the Will. She is only asked if she has made the disclosure, and truthfully says she has not. On so slender a thread it is impossible to conclude with any certainty that the Will was procured or, for want of such an explanation, so suspicious that it must be dislodged.

26. That Madhuri knows both Misar and Sharma seems to me to be inconsequential. She knows Misar and Sharma since 1964,²⁵ and provides a valid explanation why: Misar was Achaldas's and her own Chartered Accountant.²⁶ Both witnesses were fluent in Marathi. There seems little doubt that Misar would have been amply familiar with documents such as these, even if Achaldas and Madhuri (though she admittedly studied till the B.A.) did not. Mr. Shettigar also attempts to capitalize on Madhuri's answer when she was asked if she was present at the time when the Will was made. At first she says yes,²⁷ but then immediately says she did not understand the word 'execution'. That is an easy enough mistake to make especially when one is translating from legal English into another language.

²⁵ Qs.43 and 44 of Madhuri's cross-examination.

²⁶ Q.45 of Madhuri's cross-examination.

²⁷ Q.49 of Madhuri's cross-examination.

She denies emphatically that she changed her mind, or that she did so at the instance of her son Punit.²⁸

27. As to unsoundness of mind, other than old age, there is nothing to suggest that Achaldas was in any way incapacitated. Sharma says in cross-examination that from the manner in which Achaldas asked that his Will be written down, it was apparent that he was in a sound and disposing state of mind.²⁹ We know from Sharma too that he lived on the ground floor of Pukharaj Sadan, the immovable property Achaldas owned, and Sharma says he saw Achaldas regularly going about his business. The only evidence from Vinay is that Achaldas had issues with blood pressure, very likely a condition afflicting anyone who lives in this city, that he took medication for it (also not uncommon) and that he was, at least once, though for an unspecified reason, hospitalized. To say that Achaldas was ‘slightly disturbed’ after Pukharaj’s death³⁰ is no evidence of mental or physical testamentary incapacity. Vinay also claims, sans any corroboration, that Achaldas was ‘mentally weak’³¹ and that the memories of his deceased son drew tears.³² None of this shows such an unsoundness of mind or physical debility as would lead us to believe that Achaldas was not mentally or physically capable of making a solemn testamentary disposition. Vinay’s rather woolly evidence is unconvincing, particularly when we have the

²⁸ Qs. 49-A and 49-B of Madhuri’s cross-examination.

²⁹ Q. at page 85 of the compilation of Sharma’s cross-examination. Paragraph unnumbered.

³⁰ Q. 49 of Vinay’s cross-examination.

³¹ Q.58 of Vinay’s cross-examination.

³² Q.84 of Vinay’s cross-examination.

evidence of Sharma, one of the attesting witnesses to say that Achaldas was in complete command of his faculties.

28. I must return now to a point that I mentioned early in this discussion. What possible reason could these three men have to oppose the grant of probate? They are only some of Vasanti's heirs: her sister, Kanta, equally placed, has not objected; and nor have her own daughters. Mr. Kini submits that an answer is to be found in Vinay's cross-examination,³³ from which it appears that Omkarlal once practiced as a physician but no longer has an income; that he stays in Jalgaon; and that a moiety of the plot on which he stays belonged to Pushkaraj and seems to have been rented out. There is some indication, therefore, of the Defendants (or, at any rate, Omkarlal) having fallen on lean times and being of very modest means, and there being too some issue about the very plot on part of which he resides. I must see this in context: it is only the three male heirs of Achaldas's daughter Vasanti who oppose the petition. Not a single other member of Achaldas's family does so. This is not a matter that can be altogether slurred over. The opposition seems to me to be far less than *bona fide*, and almost certainly motivated.

29. Issue No.2 must be answered in the negative. The Will is not fabricated or forged. Issues Nos.1 and 4 must be answered in the affirmative. The Will is properly and validly executed and Achaldas was under no mental or physical incapacity when he made it.

Conclusion and Order

³³ Qs.173 to 177

30. The suit is decreed. Probate is directed to be issued. Drawn up decree is dispensed with. All concerned to act on an authenticated copy of this order.

31. The operation of this order is stayed for a period of four weeks from today.

(G.S. PATEL, J.)