

Shephali

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
TESTAMENTARY SUIT NO. 23 OF 1990
IN
TESTAMENTARY PETITION NO. 458 OF 1989**

NARSINGH MUKUND PRABHU,
sole executor named in the last Will and
testament of the deceased above named Hindu
Inhabitant of Bombay residing at Room No. 10,
Plot No. 8, Pushpa Part Road No. 3, Malad
Estate, Mumbai – 400 097. ... **Plaintiff**

versus

- 1. CHANDRAKANT M. PRABHU**
(since deceased) by his LR
MRS ROHINI C. PRABHU
- 2. ATMARAM M. PRABHU**
since deceased by his LRs
- 2a) ASHWINI ATMARAM PRABHU,**
- 2b) AKASH ATMARAM PRABHU**
- 2c) UJWALA ATMARAM PRABHU,**
all residing at Madan Bhavan, Room No.
7A, Pushpa Park Corner, Daftary Road,
Malad (E), Mumbai. ... **Defendants**

APPEARANCES

FOR THE PLAINTIFFS	Mr. Tejas Vora , <i>i/b Mr. D.R. Mishra.</i>
FOR THE DEFENDANT	Ms. K.C. Nichani , <i>with Mr. S.C. Dhawan & Ms. Vaishali Choudhari.</i>

CORAM : **G.S.Patel, J.**

JUDGMENT RESERVED ON : **28th August 2015**

JUDGMENT PRONOUNCED ON : **12th April 2016**

JUDGMENT:

1. One Mukund Janardhan Prabhu (“**deceased**”; “**Mukund**”; “**the Testator**”) died at Mumbai on 3rd February 1987. He supposedly left a Will dated 26th November 1986. His eldest son Narsingh Mukund Prabhu (“**Narsingh**”), the Plaintiff in the Testamentary Petition filed on 9th August 1989, seeks Probate to this Will. Narsingh is the sole named Executor in his father’s Will.

2. Mukund was married to one Rukmani. She died on 3rd April 1991. They had five children, three sons and two daughters. Both daughters, Kamala and Surekha, are married. Mukund and Rukmani’s second son, Chandrakant, died intestate on 11th January 2007. He was married to one Rohini. Mukund and Rukmani’s youngest son, Atmaram, died intestate on 2nd January 2001. He was married to one Ashwini. Atmaram and Ashwini had two children, Akash and Ujwala.

3. Both Chandrakant and Atmaram suffered from muscular dystrophy. Atmaram had a more than fifty percent disability since his childhood.

4. This Will has a title: “Will in favour of Wife and Son”. The four-page Will is typed in English. It has seven numbered paragraph. Paragraph 2 states that the testator is owner of Hotel Prabhu Niketan and Biscuit Shop situated at Shop No. 7 and 8, Ground Floor, Madan Bhuvan, Pushpa Park Corner, Daftary Road, Malad East, Mumbai 400097. In paragraph 2, the testator says he is the owner of Sushila Art Printers which was earlier known as Laxminarayan Hotel situate at Morobachi Chawl, N. M. Joshi Marg, Deli Road, Mumbai 400011. Laxminarayan Hotel was converted to Sushila Art Printers. The Testator also mentions that he has a Bank Account including a Fixed Deposit and certain other accounts. He states that he is the owner of the residential premises being Room No.8, First floor, Madan Bhuvan, Pushpa Park, Daftary Road, Malad East, Mumbai 400097. He also has household articles in the premises i.e. furniture and fixtures, utensils etc. In paragraph 3 the testator bequeaths all the movable and immovable properties mentioned in paragraph 2 ‘firstly’ to his wife Rukmani, 67 years, residing with him and his elder son Narsingh, residing at 58/10, Pushpa Park, Road No.3, Malad East, Mumbai 400097 subject to certain restrictions. In Paragraph 4, the testator declares that his elder son Narsingh will be the sole Executor and administrator of the properties and the profits derived from the said properties. He also states that his son Narsingh must provide his wife, Rukmani a sum of Rs.3000 per month after deducting expenses. After the death of the testator, only his wife would be entitled to the properties

along with Rs.3000 per month as maintenance but she could not sell or dispose of these. On her death, the testator's son Narsingh would be entitled to all his properties. Then in paragraph 5 the testator says he has been harassed by his other two sons who are said to have lodged false litigations in various Courts. This is given as a reason to exclude them from the Will. In paragraph 6, the Testator states that the interest from the fixed deposits have to be used for charitable purposes in his name for which his elder son Narsingh is the sole trustee. The other amounts in the bank belong to his elder son Narsingh. Paragraph 7 states that if the testator's son fails to administer the properties then the Court may appoint an Administrator to distribute the said properties in accordance with the Will.

5. The Will is said to be signed by the Testator and attested by two witnesses, one Manjunath Narayan Wagle (spelled variously in the record as Waghale or Waghela) and one Chandra Korgu Nayak. In addition, there is a stamp, signature and a medical certificate of one Dr G. K. Savla and, on the Will itself, there appear two other stamps, one of Advocate A.A. Khan, and the other of one Arvind S. Thaker, Notary.

6. After Narsingh filed the probate Petition, citations were served. Chandrakant and Atmaram, the two other sons of the Testator, filed Caveats opposing the grant of Probate. Atmaram filed an Affidavit in Support for himself and for Chandrakant.¹ In this, he alleged *inter alia* that:

¹ Volume A, pp. 20-36.

- (a)** Mukund had not executed the Will dated 26th November 1986;
- (b)** The Will was forged and fabricated;
- (c)** At the relevant time, Mukund was terminally ill with cancer and did not have the dispositive capacity on the date the alleged Will is said to have been executed;
- (d)** Mukund could not have disposed of assets and properties in the manner set out in the alleged Will since these were joint properties, and Mukund was only the manager and *karta* of the HUF;
- (e)** Mukund had allegedly signed the alleged Will in Kannada language even though the Will itself was drafted in the English language and there was nothing to show that the contents of the Will were explained to Mukund in Kannada;
- (f)** A Deed of Family Settlement was executed on 6th July 1978 wherein Narsingh was paid a sum of Rs.80,000 as his share from the estate of the joint property whereby Narsingh relinquished his right, title and interest in the joint property. Mukund knew this, and he would not, therefore, have bequeathed all his assets to Narsingh in this Will.

7. On the Caveats and Affidavit in Support being filed, the Petition was renumbered as a suit and proceeded to trial. The original Caveators Chandrakant and Atmaram died pending the suit. Their heirs (Rohini, Ashwini, Akash and Ujwala) were brought on record and continued the opposition to the suit.

8. Issues were framed on 2nd September 2005. These are set out below with my findings in each:

Sr. No.	Issue	Finding
1.	Whether the plaintiff proves that this is the last Will and testament of the deceased.	In the negative
2.	Whether the plaintiff proves that the alleged Will of the deceased is duly executed by the deceased in accordance with law.	In the negative
3.	Whether the defendants prove that the alleged Will is false, fabricated and forged one.	Partly in the affirmative
4.	Whether the defendants prove that the alleged Will has been procured under coercion, fraud and undue influence.	In the affirmative
5.	Whether the petitioner is entitled to the grant of probate of the alleged Will.	In the negative

6. What order and reliefs? **As per final order**

9. The Plaintiff examined Dr. Savla (in rebuttal), himself and one attesting witness, Wagle, who had also filed an Affidavit accompanying the Petition.² Defendant No.2(a), Ashwini (Atmaram's widow), led her own evidence.

RE: ISSUES NOS. 1 AND 2: PROOF OF THE WILL IN ITS SOLEMN FORM

10. Where there are, *ex-facie*, 'suspicious' circumstances, the burden is on the person propounding the Will to explain these to the satisfaction of the Court.³ The signature of the Testator on the Will must be proved, and it must be shown that he was, at the time of sound and disposing state of mind, memory and understanding. He must be shown to have signed the document of his own volition. The signatures of the attesting witnesses must be proved to satisfy the requirements of Section 63(c) of the Indian Succession Act, 1925. All legitimate doubts must be removed. Read together, Sections 59, 61 and 63 provide the framework for the proper execution of a Will. Soundness of mind is an essential requirement under the first of these Sections, and it must be established by proper evidence when the proof of a Will is disputed. A second requirement, set out in Section 61, is volition on the part of the testator, i.e., the absence of fraud, coercion or such importunity as takes away the testator's free agency. Finally, Section 63 gives us the

² Vol. A, pp. 9-11.

³ *H. Venkatachala Iyengar v B.N. Thimmajamma*, AIR 1959 SC 443

requirements of proper execution, including *inter alia* the need for at least two witnesses to its execution.

11. The execution of this Will must be seen, therefore, in this context. The Will, as I have noted, has four pages. A signature, supposedly of the Testator, appears on pages 1 and 3 (the fourth is the execution page; of this more later), but not on page 2. The Will is in English. The signatures are said to be in Kannada. Whether it was explained to Mukund and, if it was, in what language is another question that arose during the trial.

12. On the execution page, there are very many signatures, including one material deletion. This, too, required explanation. In his cross-examination, the Plaintiff, Narsingh, said that the Will was explained to the deceased by Advocate A. A. Khan who allegedly drafted the Will.⁴ We still do not know in what language. The execution clause on page 4 of the Will says it was explained to the testator in Marathi; but by whom? Wagle does not say he did this. Both he and the other attesting witness, Nayak, filed affidavits in these proceedings with the Petition,⁵ but both Affidavits were interpreted to them in Marathi. Though Wagle says in his evidence that he knows English, Hindi and Marathi,⁶ at least as regards English, this is difficult to accept. Wagle says at different places that he and the Plaintiff (and therefore presumably his father, Mukund) were of the same caste,⁷ as were he (Wagle) and the other attesting

⁴ Vol. C-1, Plaintiff cross-examination, Qn. 149, *pp.* 178-179

⁵ Vol. A., *pp.* 9-11 and 12-14 respectively.

⁶ Vol. C-1, *p.* 192, cross-examination of Wagle.

⁷ Vol. C-1, *p.* 193, cross-examination of Wagle.

witness Nayak.⁸ In his examination-in-chief, Dr. Savla, the certifying doctor, says that the deceased fully understood the contents of the Will.⁹ He says nothing of it being explained to Mukund by Advocate Khan, or that the advocate did so in Marathi. We are asked to presume, therefore, that the deceased knew English (sufficient to understand legal English), Kannada and Marathi.

13. The deceased allegedly signed the Will in Kannada. His signature appears on pages 1 and 3 but does not appear on page 2 of the four-page Will. On page 4, the signature of the deceased is cancelled once and then there is another signature. This is never explained.

14. Other discrepancies abound. On page 4 of the Will, in the execution clause, the word “Testatrix” is mentioned when the deceased is the “Testator”. It rather seems that this entire clause was copied and pasted from some other document. There is a blank space before “November 1986” and this is filled with a handwritten date, “26th”. There is a handwritten endorsement above Advocate A.A. Khan’s signature, and a “Before me” endorsement above Arvind Thaker’s signature. There is another handwritten endorsement also on the last page saying “Identified by me”. None of these are explained by any of the Plaintiff’s witnesses. What is, however, interesting about these various endorsements is what the attesting witness Wagle has to say about them in his Affidavit in lieu of Examination-in-Chief, in paragraph 8:¹⁰

⁸ Vol. C-1, Qns. 74-75, *p.* 221, cross-examination of Wagle.

⁹ Paragraph 6, *p.* 227

¹⁰ PW2, Evidence Affidavit, *p.* 182.

8. I say that "and identified by me" name and address of A.A. Khan, Advocate and Dr. G. K. Savla and Special Executive Magistrate with signature A.S. Thaker dated 26.11.1986 with his rubber stamp and phone number did exist at the time execution of the said last will of the deceased.

(Emphasis added)

15. In cross-examination, Wagle denied the suggestion that this is an admission that these portions were there before the Will was executed.¹¹ In arguments, Mr. Vora for the Plaintiff argued that this statement in the Affidavit follows, and follows exactly, Form 102 of the Bombay High Court (Original Side) Rules, and is a mere typographical error. But that cannot be. The same form also says that where there are alterations or deletions, these too must be explained, and we find no explanation at all for the scoring out of a signature below that said to be Mukund's next to the execution clause.

16. As if this is not enough, there is a serious issue about Mukund's testamentary capacity. That Mukund was seriously ill and was in hospital can hardly be disputed. The Plaintiff admits Mukund was suffering from terminal abdominal cancer¹² and had been suffering from this for six months prior to his death.¹³ Even at

¹¹ PW2, cross-examination, *p.* 197.

¹² Vol. C-1, paragraph 5, *p.* 124, cross-examination of the Plaintiff; Vol. C-1, *p.* 121.

¹³ Vol. C-1, *p.* 121, cross-examination of the Plaintiff.

the time of the Will, 26th November 1986, he was under treatment.¹⁴ The evidence shows that Mukund was discharged from Bombay Hospital on 18th November 1986. We do not know from the Plaintiff or his witnesses the date of his admission to that hospital, a matter of some consequence on the question of the relations between the parties, but Ashwini, Defendant No.2(a), says he was admitted to Bombay Hospital on 1st November 1986¹⁵ and stayed there till 18th November 1986. He was then admitted to Asha Hospital that very day, 18th November 1986, where he remained till 23rd November 1986. The Plaintiff and Dr. Savla insist that Mukund was then taken to Dr. Savla's Jay Polyclinic, but there are no records to show this.¹⁶ We do know that Mukund died in Asha Hospital on 3rd February 1987. This would necessarily mean that he was discharged from Jay Polyclinic (assuming he was ever admitted there) and re-admitted to Asha Hospital. At this stage, I must note that Dr. Savla's evidence was taken *after* the Defendants had closed their case. This was permitted by a speaking order and judgment of Mrs. R.S. Dalvi J.¹⁷ This is important, because by this time, Defendant No.2(a), Ashwini had already been cross-examined and she had said that after being discharged from Bombay Hospital, Mukund was taken to Asha Hospital, where he died.¹⁸

¹⁴ Vol. C-1, paragraph 7, *pp.* 124-125, cross-examination of the Plaintiff.

¹⁵ Vol. C-1, paragraph 10, *p.* 264, Evidence Affidavit of Defendant No.2(a).

¹⁶ Vol. C-1, Qn. 23, *p.* 134, cross-examination of Plaintiff; Qn. 19, *p.* 234, cross-examination of Dr. Savla.

¹⁷ Order dated 16th September 2014, in Notice of Motion No.104 of 2014.

¹⁸ Vol. C-1, paragraph 12, *p.* 265, Evidence Affidavit of Defendant No.2(a).

17. It is at this stage that the Plaintiff's version progresses from the dubious to the truly incredible. In her evidence, Ashwini says that Mukund was diagnosed with cancer in 1985. He suffered terribly. He was being treated by one Dr. Sharik at Asha Hospital (apparently also at Bombay Hospital), and by Dr. Pramod Jhaver at Bombay Hospital. His condition deteriorated. In 1986, he was admitted to Bombay Hospital under Dr. Jhaver. He was discharged and brought home in February/March 1986; his condition worsened. He was re-admitted to Bombay Hospital on 1st November 1986. Ashwini and her husband Atmaram, his brother Chandrakant and his wife Rohini tended to him. Dr. Jhaver said the disease had gone beyond the terminal stage. On 18th November 1986, the Plaintiff, against all advice, and exercising his authority as the eldest son, forced a discharge from Bombay Hospital and took him to Asha Hospital in Malad. By this time, Mukund was semi-conscious and in agony. His ability to recognize people was gone, and he could barely comprehend anything. He was totally bed-ridden.¹⁹

18. I find the cross-examination of Ashwini very peculiar. She was cross-examined on this aspect of her direct testimony at all, beyond suggestions being put to her. The bulk of the cross-examination focussed on properties. But her evidence as to Mukund's physical and mental condition was surely critical to the first two issues. The absence of any meaningful cross-examination about his illness and hospitalization is fatal.

¹⁹ Vol. C-1, paragraphs 10, the first paragraph 11, and paragraph 12, pp. 263-265, Evidence Affidavit of Defendant No.2(a)

19. What the Plaintiff says makes things worse. According to him, Advocate Khan came to Jay Polyclinic to take instructions from Mukund about the Will.

20. Now the story gets unbelievable. In Narsingh's and Dr. Savla's version, Advocate A. A. Khan who allegedly drafted the said Will in question came to Jay Polyclinic on 26th November 1986 to take instructions for drafting the Will. Dr. Savla gave him a 'draft' of the medical certificate to be attached. Khan then left the clinic.²⁰ This would, I think, sufficiently indicate that Mukund was in no condition to move about. Yet, Wagle, Dr. Savla and the Plaintiff all insist that Mukund then walked to Khan's office, a short distance from Wagle's hotel and close also to Mukund's house²¹ and Dr. Savla's Jay Polyclinic.²² We are also asked to believe that Khan had kept everything in readiness, including the two attesting witnesses, and the Notary. Why this could not have been done at the Jay Polyclinic, if indeed Mukund was there and since he admittedly had cancer, is not explained. It is also not insignificant that Narsingh was present at the time of execution of the Will.

21. What little remains of the Plaintiff's case is, I think, given the burial it deserves by what I can only describe as the most ill-advised question put in cross-examination to Ashwini, Defendant No.2(a). This is worth reproducing in full:²³

²⁰ Vol. C-1, Qns. 43-50, *pp.* 242-244, cross-examination of Dr. Savla.

²¹ Vol. C-1, Qns. 51-52, *p.* 213, and Qns. 25-28, *p.* 207, cross-examination of Wagle.

²² Vol. C-1, Qn. 46, *p.* 243, cross-examination of Dr. Savla.

²³ Vol. C-1, *p.* 282, cross-examination of Defendant No.2(a)

Q35. You have said in your evidence that the Will dated 26.11.1986 is forged and fabricated. What is the basis of your statement in this regard?

Ans. Because on the day that the Will was purportedly signed, my father-in-law was admitted in Asha Hospital under Dr.Sharik, he was in a very bad medical condition, he was semi-conscious and not aware of what he was saying or his surroundings. His physical and mental condition were both very poor. He was not at all in the condition where he could execute any documents or understand any documents that were shown to him. He was completely bed-ridden.

22. I do not know why this question was put to Ashwini, or why it was put in this fashion. What the Plaintiff succeeded in doing is eliciting, as part of the cross-examination, and therefore as an answer obtained by the Plaintiff, the correctness of everything that the Defendants said.

23. It is impossible on this evidence to hold in favour of the Plaintiff on Issues Nos.1 and 2. Both are answered in the negative. The Will is not proved.

RE: ISSUES NOS. 3 AND 4: FRAUD, FORGERY, FABRICATION, UNDUE INFLUENCE, COERCION

24. This being the case, and given the findings on Issues Nos. 1 and 2, it matters not a whit whether the Defendants succeed in proving forgery, fraud, undue influence, coercion and so on. That the Will is false and fabricated is sufficiently established.

25. There is no separate evidence on ‘fraud’, ‘undue influence’ and ‘coercion’ except as I have noted above: viz., that the Plaintiff forced the discharge of Mukund, then critically and terminally ill from cancer, from Bombay Hospital and took him to Asha Hospital at Malad and then, allegedly, to Dr. Savla’s Jay Polyclinic. Both Wagle and the Plaintiff claim to have known each other for many decades. All these are at the least, and particularly in context, unacceptably suspicious circumstances. None are explained.

26. I would have to hold that undue influence, coercion and fraud are all established. That the Will is false and fabricated is also established. Forgery, technically, may not be proved, but that matters little. Issue No. 3 is answered partly in the affirmative. Issue No.4 is answered in the affirmative.

RE: UNFRAMED ISSUE: WHETHER THE WILL IS UNNATURAL

27. No such issue was ever framed, but parties went to trial and gave evidence on precisely such an aspect of the matter. The caption I give is for convenience. The discussion under this head overlaps in many ways the previous issues Nos. 3 and 4. I deal with it separately

for convenience and because the evidence, particularly of the Defendants, is separate on this.

28. Of course every Will disrupts the natural line of succession; were it otherwise, no Will would be necessary. But that is beside the point. This Will supplies a reason for the exclusion of the other children; it says that the other two says (Chandrakant and Atmaram) had filed false suits against Mukund and harassed him. It implies that relations between Narsingh and his father were close. There is nothing to show this. To the contrary: the evidence shows he lived apart from Mukund and the other family.²⁴ Ashwini said differently. She said that she, her husband Atmaram, and his brother Chandrakant and his wife Rohini tended to Mukund.²⁵ The Plaintiff, on the other hand, she said, was much given to drink, was quarrelsome and a spendthrift. He filed litigations in the father's name, of which the father was never aware. He demanded money from the father, and tried to snatch the father's hotel and printing business.²⁶

29. There is no cross-examination on any of this.

30. Ashwini also says there was a Deed of Family Settlement executed on 6th July 1978 between the deceased and Narsingh. In this, Narsingh relinquished all his right, title and interest to all the joint family properties in consideration for Rs. 80,000. The

²⁴ Vol. C-1, Qn. 143, *p.* 80, cross-examination of the Plaintiff.

²⁵ Vol. C-1, paragraphs 9-11, *pp.* 262-265, Evidence Affidavit of Defendant No.2(a).

²⁶ Vol. C-1, paragraph 8, *pp.* 258-262, Evidence Affidavit of Defendant No.2(a).

intention was to preserve peace in the family. Narsingh was cross-examined on this. He accepted there was such a Deed and that he had received the Rs.80,000 but under cross-examination persisted in parroting rote answers.²⁷ Now there is no mention of this Deed in the Will, and its provisions are directly contrary to the arrangement expressed in that Deed.

31. Ms. Nichani for the Defendants submitted that that Narsingh filed Suit No. 1814 of 1985 in the City Civil Court by allegedly procuring a Conducting Agreement dated 28th February 1985 from the deceased which claimed to reverse the Family Settlement Deed and put Narsingh in charge of the said Hotel Prabhu Niketan. The hotel was apparently in possession of the Defendants in early 1985. He filed the Suit for an injunction against the Defendants from disturbing his alleged possession. Narsingh's Notice of Motion for injunction was dismissed and the ad-interim earlier granted was vacated.²⁸ Narsingh's appeal in the High Court was withdrawn. Narsingh then coerced Mukund to file a Suit No. 5854 of 1986 against the Defendants again in the City Civil Court for a declaration *inter alia* that Narsingh was the conductor of the Hotel Prabhu Niketan business and for a restraint against the Defendants. This Suit was filed the very next day after the Notice of Motion in Suit No. 1814 of 1985 was dismissed. The merits do not concern. What is of relevance is that it seems from this that it was Narsingh throughout who attempted to grab the business and was embroiled in litigation, not the Defendants; and there is no evidence at all of the Defendants having filed any suits against the father. The reason

²⁷ Vol. C-1, Qns. 97-105, *pp.* 73-78, cross-examination of the Plaintiff.

²⁸ Vol.D, Exh.D1, *p.* 338

in the Will for the exclusion of Chandrakant and Atmaram is clearly false, and could not have been intended by Mukund. This not only shows that there was, evidently, importunity and the lack of free agency in the making of the Will, but that its terms are themselves suspicious and contrary to the now established record. The provisions of the Will are certainly unnatural given the material that is now before me.

THE SUBMISSIONS ON LAW

32. Mr. Vora submits that the present Defendants have not filed any independent Caveat, and the only Caveat filed is of one Kamala Prabhu, who never led evidence. That is surely irrelevant at this stage. All proceeded to trial on the basis that the heirs of the original Caveators were brought on record and were pursuing the original Caveators' cause. It is too late in the day now to take such a hyper-technical argument, particularly when I see no sign of any protest at the extended cross-examination on behalf of these Defendants, or the leading of evidence by Ashwini, Defendant No.2(a).

33. Mr. Vora is also wrong when he says that the Defendants have not demonstrated a lack of testamentary capacity. Indeed, I think he has very much the wrong end of the stick. It is for the propounder to show dispositive capacity; that is not an assumption; it is a matter of proof. Given the facts, and the admitted ailment and condition of the Testator, I have absolutely no hesitation in rejecting this submission and holding that it is the Plaintiff who has not showed the necessary dispositive capacity, and that the Defendants have more than sufficiently discharged their burden. The second limb,

regarding the ownership of the properties purportedly bequeathed, is not something that should detain us, simply because these proceedings do not, it is well-settled, determine or decide questions of title. Even if the title had been shown by evidence one way or the other, this would have had no impact on proof of due execution of the Will (except perhaps tangentially as additional corroborative evidence of the Testator's dispositive capacity or want thereof). The Plaintiff cannot possibly succeed on this. What is material are the huge lacunae and failings in the Plaintiff's cross-examination and the contradictions, indicated earlier, in the Plaintiff's and his witnesses' testimony. These it is impossible to ignore, as Mr. Vora would have me do.

34. Mr. Vora refers me to a considerable amount of learning in the matter of proof of Wills. None of this is necessary, given our facts and the evidence. Much of it is against him. For instance, the ratio in *Pendock Barry v James Butlin*,²⁹ puts the onus of proving a Will firmly on the propounder, and says that this is generally discharged by proof of capacity and the fact of execution. Consequently, a plaintiff who fails to show any one of these must fail.³⁰ A plaintiff who fails to show both must most certainly fail; this Plaintiff, for instance. Similarly, *M. B. Ramesh v K. M. Veeraje URS*,³¹ is against Mr. Vora: since regard must indeed be had to attendant circumstances, I must assess whether those attendant circumstances establish or disprove the Plaintiff's case. It is not enough to say only that one must have regard to attendant circumstances. Which

²⁹ II MOORE, 480 [1838]

³⁰ *Arvind & Ors. v Indirabai & Ors.*, 2008 (5) Mh.L.J. 185.

³¹ (2013) 7 SCC 490

particular attendant circumstances assist the Plaintiff in this case remains unclear to the end. Every one of them seems to support the Defendants. Similarly, *Leela Rajagopal & Ors. v Kamala Menon Cocharan & Ors.*³² requires that an overall view is to be adopted and emphasis cannot be placed on a single feature or circumstance in the execution of the Will. I believe this is just what I have done; and it is Mr. Vora who would have me blind myself to a whole host of the oddest and most inexplicable circumstances, all of them most suspicious. On any fair overall assessment, the finding must be against the Plaintiff.

35. Where there are suspicious circumstances, and here they abound, the matter is really one of satisfying the judicial conscience that there is nothing untoward.³³ I find it difficult to conceive of a case where there is more that is untoward than in this one. It is true that this is not a jurisdiction of circumspection, but one of caution and circumspection,³⁴ but that circumspection speaks to, and only to, an assessment of whether or not the plaintiff before the Court has been able to satisfy its conscience that there is a good and legitimate explanation, perhaps less than perfect, but satisfactory even so for every such circumstance that is alleged to be suspicious. In this case, I find that explanation wholly missing. It is pointless multiplying authorities in this vein.³⁵ Cases like *Subhash Hirji*

³² 2014 (6) All MR 419 (SC)

³³ *Smt. Jaswant Kaur v Smt. Amit Kaur*, AIR 1977 SC 74.

³⁴ *Dr. A. Ravikumar v. M. Savithiri & Ors.*, (2006) 4 M.L.J. 113

³⁵ *Madhukar D. Shende v Tarubai Shende*, (2002) 2 SCC 85; *Daulatram & Ors. v Sodha & Ors.*, (2005) 1 SCC 40; *Sridevi & Ors. v Jayaraja Shetty & Ors.*, (2005) 2 SCC 784; *Mahesh Kumar v Vinod Kumar & Ors.*, (2012) 4 SCC 387.

Jadhav & Anr. v Padmakar Hiroo Jadhav & Ors.,³⁶ *Max Cajeton Travasso of Bombay v Mrs. I. Fernandes*,³⁷ and *Lalita Krishnaraj Parekh & Anr. v Kirti Jagdish Mulani*,³⁸ turning narrowly as they did on the narrow facts of those cases do not set out any different universal standard.

36. My own decision in *Madhuri Pukharaj Baldota v Omkarlal Daulatram Banawat & Ors.*,³⁹ is, I fear, misread by Mr. Vora at least on the question of the relations between the parties. In our case, the Plaintiff propounded a Will that gave reason for the exclusion of the Caveators. Those reasons were found on evidence being taken to be wholly incorrect and self-serving to the Plaintiff. There is ample uncontroverted material on record to show that what the Will purports to say could only have been inserted by the Plaintiff to suit his own ends, ones he had been chasing for the longest time, even during the Testator's lifetime.

37. I am also unable to see how Mr. Vora's reliance on *Meenakshiammal & Ors. v Chandrasekaran & Anr.*,⁴⁰ *Pentakota Satyanarayana & Ors. v Pentakota Seetharatnam & Ors.*,⁴¹ and *Savithri & Ors. v Karthyayani Amma & Ors.*,⁴² in any way assists him. Apart from bolstering my view that parties did address themselves to the issue of the Will being unnatural, whether framed formally or

³⁶ 2009 (4) Mh.L.J. 266
³⁷ 2009 (5) Mh.L.J. 837
³⁸ 2010 (5) Bom.C.R. 364
³⁹ 2015 (4) Mh.L.J. 327
⁴⁰ (2005) 1 SCC 280
⁴¹ (2005) 8 SCC 67
⁴² (2007) 11 SCC 621

not, on a fair reading of any of these decisions, it must be held that the evidence before me does not show the kind of estrangement between the Testator and the Caveator that the Plaintiff alleges when propounding the Will.

38. To the contrary: as I have noted, the Plaintiff has done nothing to establish any such estrangement, and he has wholly failed to even minimally cross-examine Defendant No.2(a) on her quite comprehensive and elaborate evidence of the Plaintiff's attempt to hijack the Testator's business, his own estrangement, his wayward character and so on. Added to this is the Plaintiff's rampant involvement in the making of the Will at a time when, to put it bluntly, his father was dying. Then there is the incredible story of the events of the day of the Will itself. None of this, as they say, 'adds up'.

CONCLUSION

39. It is impossible to find for the Plaintiff on these facts and on this evidence. The suit must fail.

40. In the circumstances of the case, the dismissal must be accompanied by an order of costs. It would be wholly remiss on my part not to do so. The manner in which the Plaintiff has conducted himself not only on the question of propounding of the Will but also *vis-à-vis* his father in his last days is shocking and lacking in even the most minimal decency. When Ms. Nichani describes this as an utterly false suit, like the ones initiated or instigated by the Plaintiff

in the City Civil Court, she is not wrong. In all this, the Defendants have been put through much trauma, expense and anguish. Parties like this Plaintiff cannot be allowed to take courts for granted or to play fast and loose with the judicial system.

41. The suit is dismissed with costs quantified at Rs. 50,000/- to Rohini, the heir of Chandrakant; Rs. 25,000/- each to Akash Prabhu and Ujwala Prabhu; and Rs. 2 lakhs to Mrs. Ashwini Prabhu, she being the one who carried the burden for all the Defendants. Costs to be paid within eight weeks.

42. Mr. Vora requests a stay of order of costs. Since I have given eight weeks' time to make payment, the request is declined.

(G.S. PATEL, J.)