

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.306 OF 2009

IN

TESTAMENTARY SUIT NO.37 OF 1992

IN

TESTAMENTARY PETITION NO.603 OF 1990

- | | | |
|---|--|----------------|
| 1 | PADMAKAR HIROO JADHAV)
7/14, Municipal Staff Colony, Sashmira)
Road, Prabhadevi, Bombay – 400 025.)
) | |
| 2 | SMT.SUMITRA SURVE)
Mankar Building, 2 nd Floor, Room No.39,)
11 th Lane, Khetwadi, Bombay – 400 004)
) | |
| 3 | SMT.MEGHNA VASANT SHINDE)
7/14, Municipal Staff Colony, Sashmira)
Road, Prabhadevi, Bombay – 400 025.) |)...APPELLANTS |

V/s.

- | | | |
|---|--|--|
| 1 | MRS.KUMUD SUBHASH JADHAV)
Widow of deceased original Petitioner)
No.1 / Plaintiff No.1, daughter-in-law)
of the deceased, Hindu, Inhabitant,)
Residing at B/15, Swapna Safalya Co-op.)
Housing Soc. Ltd., J.B.Temkar Marg,)
Prabhadevi, Bombay – 400 023)
) | |
| 2 | AKHILESH SUBHASH JADHAV)
Son of deceased original Petitioner No.1)
/Plaintiff No.1, Hindu, Indian Inhabitant)
Residing at Block No.15, B-1, Swapna)
Safalya Co-op. Housing Soc. Ltd., J.B.)
Temkar Marg, Prabhadevi, Bombay – 23) | |

Mr.H.S.S.Murthy, Advocate for the Appellants.
Ms.K.C.Nichani, Advocate for the Respondents.

CORAM : A. S. OKA & A. M. BADAR, JJ.

**DATE : Reserved on : 25th November 2016
Pronounced on: 22nd December 2016**

JUDGMENT : (PER A.M.BADAR, J.)

1 By this appeal, appellants / original defendants / caveators are challenging the judgment and order dated 25th March 2009 passed by the learned Single Judge of this court in Testamentary Suit No.37 of 1992 between the parties, thereby dismissing the caveat filed by the present appellants and decreeing the suit by declaring that the Will dated 3rd December 1988 executed by deceased Hiroo @ Hiraji Laxman Jadhav as his last Will and Testament. Consequently, by the impugned judgment and order, the learned Single Judge ordered for issuance of letter of administration as prayed for by respondents / original plaintiffs by allowing the Petition No.603 of 1990 filed by them. For the sake of convenience, parties shall be referred to in their original capacity.

2 Plaintiffs Subhash Hirji Jadhav and his wife Mrs.Kumud Subhash Jadhav filed Testamentary Petition bearing No.603 of 1990 for seeking letter of administration by annexing a Will claiming that the

said Will has been executed by Hiroo @ Hiraji Laxman Jadhav on 3rd December 1988 as his last Will and Testament. After service of citation notice on other heirs of said Hiroo @ Hiraji Laxman Jadhav (hereinafter referred to as the testator), a caveat came to be filed jointly by appellants / defendants namely Padmakar Jadhav, Indira Jadhav, Mrs.Sumitra Surve and Ms.Meghna Jadhav. Defendant no.1 Padmakar Jadhav filed an affidavit in support of the caveat jointly on behalf of all defendants. Accordingly, the testamentary petition was converted into the suit between parties.

3 In the affidavit filed in support of caveat, defendants raised following points for opposing the petition for grant of letters of administration :

- a) All caveators / defendants are legal heirs having right and interest to inherit the property of the testator.
- b) Purported Will is not the Will of the testator and the same is not executed according to law. It is not attested as per provisions of law.
- c) The testator got first heart attack in the year 1986/87 and he was bedridden for few months. Then the testator got paralytic attack and he was unable to move from the year 1987. He was not in a sound disposing state of mind at the time of execution of the alleged Will.
- d) The testator was in complete control of his son i.e. plaintiffs Subhash Jadhav and daughter-in-law Mrs.Kumud Jadhav. Therefore, the

disposition does not appear to be the result of testator's free will and mind.

e) The Will was got executed under force and by exercising coercion by plaintiffs on the testator. The purported Will is a forged and fabricated document.

f) Disposition shows that the purported Will is wholly unnatural, improbable and unfair. There was no reason for the testator to deprive the right of inheritance to his legally wedded wife Indira. There is no provision for unmarried daughter of the testator.

4 During pendency of the suit, original plaintiff no.1 Subhash Jadhav expired and therefore his remaining legal heirs namely, Akhilesh Jadhav was brought on record.

5 After framing issues, the parties went for trial. In support of their claim, plaintiffs adduced evidence of Mrs.Kumud Subhash Jadhav. Plaintiffs also examined Jayant Chandulal Kamani – attesting witness to the purported Will dated 3rd December 1988 as PW2. On behalf of defendants, Padmakar S. Jadhav gave evidence as DW1. Mrs.Sumitra Surve – daughter of the testator gave evidence as DW2. She is described in the purported Will as Ms.Shubhangi, as at that time, she was unmarried.

6 After hearing the parties and on considering the oral as well as documentary evidence adduced on record, the learned Single Judge by the impugned judgment and order was pleased to hold that the Will dated 3rd December 1988 is the last Will and Testament of Hiroo @ Hiraji Laxman Jadhav. The same was legally and validly executed by him. It is further held that defendants failed to prove that the said Will is a forged and fabricated document. The learned Single Judge considered evidence of PW1 Kumud and PW2 Jayant as well as cross-examination of DW1 Padmakar to come to the conclusion that plaintiffs have proved the execution of the Will. The learned Single Judge further held that non-examination of Advocate A.G.Shah cannot be termed as suspicious circumstance in view of evidence of PW1 Kumud and PW2 Jayant. The learned Single Judge placed reliance on statement of deceased Hiroo @ Hiraji Laxman Jadhav recorded by police on 30th September 1988 under Section 161 of the Code of Criminal Procedure (Cr.P.C.) and by reading that statement in evidence, it was held that DW1 Padmakar, his family members as well as Mrs.Indira – wife of the testator and Shubhangi – unmarried daughter of testator left the house on 30th September 1988 without any justification. Evidence of DW1 Padmakar was also relied for coming to this conclusion and it was held that the testator was not happy with

quarrel and he was impressed by the fact that his son Subhash and daughter-in-law Kumud (PW1) were taking his care and therefore the entire property was bequeathed to them. It was held that the testator was working as a Clerk in BMC and therefore there is no reason to hold that he could not read English language. The learned Single Judge further held that the Will is a registered document, evidence of the attesting witness is sufficient and therefore the Will cannot be discarded merely because the Sub-Registrar has not disclosed the testator that the document of which he was admitting execution was a Will disposing of his property. The learned Single Judge further held that no material was pointed out to show that the testator did not possess necessary mental ability for executing the Will. Change of nomination in respect of membership of the Co-operative Housing Society where the bequeathed flat was situated prior to execution of the Will was held to be a circumstance to show that the testator had planned to bequeath the flat to his son Subhash and daughter-in-law i.e. PW1 Kumud with a reason that the testator was staying at his flat with his son Subhash and daughter-in-law i.e. PW1 Kumud. It was held that there is nothing in evidence of DW1 Padmakar in respect of keeping the testator under his control by his son Subhash and PW1 Kumud. The complaint made by defendant Indira – widow of the

testator was discarded on the ground that she had lodged it after twenty days, and that, said Indira had left the house of the testator and had not taken any steps to establish her right to reside in the house of the testator. It was further held that PW1 Kumud had not played any substantive role in making the Will. Feeling aggrieved by this judgment and order, this is an appeal by unsuccessful defendants.

7 We have heard the learned counsel appearing for appellants / original defendants / caveators. The learned counsel for appellants argued that deceased plaintiff Subhash and his wife plaintiff Kumud had taken active part in preparation of the Will as well as in getting the Will executed. They are the sole beneficiaries under the Will executed by the testator. The disposition is also in favour of unborn child of propounders of Will namely deceased plaintiff Subhash and plaintiff Kumud. The only attesting witness examined is close friend of the propounders of the Will. The learned counsel further argued that disposition under the Will is unnatural, improbable and unfair. The testator lived happily with his family for a period of more than 40 years and as such in normal circumstance, he would not have preferred to exclude all his natural successors and to bequeath his property exclusively to his one son Subhash and family members of

Subhash. The learned counsel submitted that just prior to two months from the alleged execution of the Will, all family members of the testator were staying with the testator and therefore there was no reason to bequeath the entire property in favour of only one son Subhash and family members of Subhash. Our attention was also drawn to the fact that nothing was bequeathed in favour of his unmarried daughter by the testator. Antecedents of legatee Subhash were also pointed out to show that he was addicted to alcohol and was suspended from the job, in order to demonstrate that he and his family would not have been preferred in exclusion of the wife, another son and two daughters.

8 The learned counsel for appellants further argued that the testator was suffering from illness and was bedridden for a quite long period even prior to alleged execution of the Will and therefore he was not in a sound disposition state. The learned counsel for appellants further submitted that propounders of the Will somehow wanted the property to be transferred in their name and therefore they got nomination of membership of the flat in the Housing Society changed even prior to alleged execution of the Will. Even Indira – widow of the testator by letter dated 20th October 1988 pointed out the conduct of

deceased plaintiff Subhash to police. According to the learned counsel for appellants, the Sub-Registrar is not examined by propounders of the Will and therefore the mere fact that the Will is a registered Will is of no consequence. With this, the learned counsel for appellants submitted that though heavy onus was on propounders of the Will to remove all suspicious circumstances by adducing clear and cogent evidence, this onus is not discharged by propounders of the Will. To buttress these submissions, the learned counsel for appellants placed reliance on following rulings :

- a) H. Venkatachala Iyengar vs. B.N.Thimmajamma & Ors.
reported in AIR 1959 Supreme Court 443
- b) Rani Purnima Debi & Anr. vs. Kumar Khagendra Narayan Deb & Anr. reported in AIR 1962 Supreme Court 567
- c) Kalyan Singh vs. Smt.Chhoti and Others reported in AIR 1990 Supreme Court 396
- d) Ram Piari vs. Bhagwant and Others reported in AIR 1990 Supreme Court 1742
- e) Balkrishna Das Agarwal vs. Smt. Radha Devi & Others
reported in AIR 1989 ALLAHABAD 133
- f) B. Venkatamuni vs. C.J.Ayodhya Ram Singh & Ors.
reported in AIR 2007 Supreme Court 311
- g) Bharpur Singh & Ors. vs. Shamsheer Singh reported in AIR 2009 Supreme Court 1766

9 As against this, the learned counsel for respondents by taking us through the evidence has argued that in the year 1988, wife of the testator and other family members all of a sudden deserted the testator causing anguish in his mind. The learned counsel for respondents argued that plaintiff Kumud was taking due care of the testator who was ill from the year 1985. According to the learned counsel for respondents, infact, deceased plaintiff Subhash and his wife Kumud were assaulted by rest of the family members which required them to rush to the hospital and on return they found that except the testator, all other family members had left the house without any reason. This, according to the learned counsel for the respondents, is a reason for exclusion of remaining family members. The learned counsel for respondents further argued that evidence on record does not show any active part played by plaintiffs in execution of the Will. Role attributed to deceased plaintiff Subhash was just to fetch Advocate Shah and to call the Sub-Registrar. The learned counsel further argued that if the incident dated 3^r September 1988 was trivial, then there was no reason for remaining family members to leave the house. In submission of the learned counsel for respondents, the statement of testator recorded by police which is at Exhibit D2 shows that he was in sound disposing condition. The learned counsel for respondents placed

reliance on the judgment of the Apex Court in the matter of **Smt.Malkani vs. Jamadar and Ors.** reported in **AIR 1987 SC 767.**

10 Before advertng to the merit of the matter, it would be apposite to put on record the undisputed position. It is not in dispute that deceased Hiroo @ Hiraji Laxman Jadhav was residing in a flat bearing no.B/15, Swapna Safalya Co-op. Hsg. Soc. Ltd., Prabhadevi, Mumbai, with his two sons Padmakar and Subhash, families of those two sons, his wife Indira, and unmarried daughter Shubhangi up to 30th September 1988. It is not in dispute that Hiroo @ Hiraji Laxman Jadhav died on 20th September 1990. Undisputedly, deceased Hiroo @ Hiraji Laxman Jadhav was survived by his wife Mrs.Indira Hiraji Jadhav, two sons namely – Padmakar Jadhav and Subhash Jadhav, as well as one married daughter namely, Mrs.Meghna Surve and one unmarried daughter namely Shubhangi Jadhav. Similarly, parties are not disputing the fact that plaintiff Kumud married deceased plaintiff Subhash in the year 1985, and that, at about the year 1985, testator Hiroo @ Hiraji Laxman Jadhav suffered a paralysis stroke which had affected left side of his body. During pendency of the suit, Shubhangi Jadhav married. She is defendant no.4. It is not in dispute that plaintiff Kumud is wife, whereas, plaintiff Akhilesh is son of deceased plaintiff Subhash Hiraji Jadhav, who died during pendency of the suit.

11 By claiming that deceased Hiroo @ Hiraji Laxman Jadhav had executed his last Will and Testament on 3rd December 1988, plaintiffs had prayed for issuance of letter of administration with the Will annexed. For better appreciation of the subject matter, it is necessary to put on record relevant contents of the Will allegedly executed by Hiroo @ Hiraji Laxman Jadhav on 3rd December 1988. The alleged Will of Hiroo @ Hiraji Laxman Jadhav contains a recital that the testator was suffering from paralysis in left side of his body and is bedridden. The alleged Will also contains a recital that the testator has his wife Indira, elder son Padmakar, younger son Subhash, married daughter Meghna as well as unmarried daughter Shubhangi. The alleged Will contains the reason for bequeathing the property in favour of younger son Subhash and family members of Subhash to the exclusion of all other legal heirs. The alleged Will states that eldest son Padmakar, wife Indira and daughter Shubhangi started residing separately against wishes of the testator and they have chosen not to look after or to take care of the testator, though the testator has not been keeping well. With this reason, the alleged Will contains a recital that the testator does not desire to bequeath anything to his elder son Padmakar, wife Indira and unmarried daughter Shubhangi. The alleged Will also contains a recital that the testator had given enough

to his married daughter Mangal (defendant Meghna) at the time of her marriage and therefore he does not desire to bequeath anything to her. The alleged Will contains recital that younger son Subhash and family of Subhash looked after the testator very well and they all had taken his proper care and therefore the testator desires to bequeath them all his property. With these recitals, it is stated in the alleged Will that the testator is bequeathing all his assets and estate to his younger son Subhash Jadhav, daughter-in-law Kumud Subhash Jadhav and grandson Akhilesh Subhash Jadhav equally to get 1/3rd share by each of them in the estate. It is also stated in the alleged Will that in case of birth of male children to Subhash and Kumud, 1/3rd share of Akhilesh will be divided amongst them equally and in case of birth of a female child, marriage expenses of Rs.20,000/- to each female child should be earmarked.

12 Now let us examine whether the alleged Will dated 3rd December 1988 is duly proved and whether propounders of the said Will had removed all suspicious circumstances making it worth to act upon. A Will is a solemn document by which a dead man entrusts to the living, the carrying out of his wishes. It is an instrument by which a person makes a disposition of his property to take effect after his death.

Will obstructs natural inheritance. Therefore, while examining the Will, the court is required to see whether the testator signed the Will, after understanding the nature and effect of the disposition in the Will, condition of mind of the testator, his mental capacity as well as whether the testator was in sound disposing state. The court for examining proof of Will is also duty bound to see whether disposition under the Will is unnatural, improbable or unfair in the light of relevant circumstances. These aspects are to be looked into while construing the Will even without raising such plea by the other side. The duty is cast upon propounders of the Will to remove all legitimate doubts regarding suspicious circumstances and this initial onus on the part of the propounders is very heavy. At this juncture, it is apposite to quote relevant observations of the Hon'ble Supreme Court in the matter of H. Venkatachala Iyengar (supra) found in paragraph 18 to paragraph 20 which reads thus :

“18Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will ? Did he understand the nature and effect of the dispositions in the will ? Did he put his signature to the will knowing what it contained ? Stated broadly

it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by s.63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the, prudent mind in such matters.

19 However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a 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 proved to be the last will and testament of the departed testator. Even so, in dealing with the 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.

20 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.”

13 In paragraph 17 of its judgment in the matter of **Bharatsingh and Others (supra)** the Hon'ble Apex Court has set out suspicious circumstances warranting cogent and convincing explanation from the propounders of the Will even in absence of specific plea to that effect. It reads thus :

“17. Suspicious circumstances like the following may be

found to be surrounded in the execution of the Will:

- i) The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.
- ii) The condition of the testator's mind may be very feeble and debilitated at the relevant time.
- iii) The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.
- iv) The dispositions may not appear to be the result of the testator's free will and mind.
- v) The propounder takes a prominent part in the execution of the Will.
- vi) The testator used to sign blank papers.
- vii) The Will did not see the light of the day for long.
- viii) Incorrect recitals of essential facts.

14 We have already set out contents and provisions of the alleged Will which makes it clear that the sole legatee under the Will is deceased plaintiff Subhash and his family members to the exclusion of widow, elder son and daughters of the testator. As such, one will have to examine whether they being propounders of the Will of the testator Hiroo @ Hiraji Laxman Jadhav have explained this unnatural, improbable and unfair disposition of the property under the Will by removing all legitimate doubts regarding suspicious circumstances surrounding the Will. This initial onus on the part of the propounder is very heavy. As plaintiffs are propounders of the Will, it is apposite to

look into evidence of PW1 Kumud (daughter-in-law of the testator and wife of deceased plaintiff Subhash) in order to seek explanation in respect of unnatural and improbable disposition of the Will. Her evidence makes it clear that she married deceased plaintiff Subhash in the year 1985, and as an employee of the Stock Exchange having office timings from 11.30 a.m. to 6.30 p.m., she was leaving house at 10.30 a.m. Her evidence indicates that she used to be away from the residential place from 10.30 a.m. to about 7.30 p.m. on each working day. At this juncture, one will have to keep in mind that from cross-examination of DW1 Padmakar it is brought on record by plaintiffs that DW1 Padmakar and his brother i.e. deceased plaintiff Subhash were both in employment of Bombay Municipal Corporation. From cross-examination of DW1 Padmakar it is brought on record by plaintiffs that deceased plaintiff Subhash was posted in Slums Department at Head Office of the Bombay Municipal Corporation, but he was not attending office from the year 1985-86. These aspects will have to be considered by keeping in mind the undisputed position that from 3rd September 1988, defendant Padmakar, Indira – his mother and Shubhangi – unmarried sister started residing separately by leaving Flat No.B/15 of Swapna Safalya Co-op. Hsg. Society, and that the Will contains the recital that they failed to look after the sick testator.

15 PW1 Kumud in her evidence claimed that as testator Hiroo @ Hiraji Laxman Jadhav was suffering from paralysis since 1985, she was looking after his needs, serving food to him and bathing him. As per her version, on 30th September 1988, defendant Padmakar assaulted his brother i.e. deceased plaintiff Subhash leading to filing of the FIR by Subhash and from that day, defendant Padmakar and his family, defendant Indira and defendant Shubhangi left the house. PW1 Kumud in her chief examination stated that thereafter they never came back to the flat of testator Hiroo @ Hiraji Laxman Jadhav. PW1 Kumud deposed that Hiroo @ Hiraji Laxman Jadhav requested Subhash to arrange his meeting with Advocate A.G.Shah. Accordingly, Advocate A.G.Shah attended their flat, took instructions from Hiroo @ Hiraji Laxman Jadhav for preparing Will. She further deposed that Advocate A.G.Shah then handed over the draft of the Will which was approved by Hiroo @ Hiraji Laxman Jadhav. Then Advocate A.G.Shah engrossed the same and brought to their residence on 3rd December 1988 for execution of the same. As per version of PW1 Kumud, Hiroo @ Hiraji Laxman Jadhav went through contents of the endorsed Will. At that time, Jayant Kamani was present at the request of Hiroo @ Hiraji Laxman Jadhav. Thereafter, Hiroo @ Hiraji Laxman Jadhav signed that Will in presence of Advocate A.G.Shah and Jayant Kamani. PW1

Kumud testified that then Advocate A.G.Shah attested the Will by putting his signature and then second witness also signed that Will in her presence. PW1 Kumud further deposed that then she went to Old Custom House for fetching the Registrar at the request of Hiroo @ Hiraji Laxman Jadhav. Accordingly, the Registrar attended their residence in presence of attesting witnesses. PW1 Kumud in her chief examination itself has stated that on death of Hiroo @ Hiraji Laxman Jadhav, defendants Padmakar, Indira, Meghna and Shubhangi (described as Sumitra) attended his funeral.

16 PW1 Kumud was subjected to cross-examination by defendants. Her evidence as a whole reflects the following position :-

At about the time of marriage of plaintiff Kumud with deceased plaintiff Subhash in the year 1985, her father in law Hiroo @ Hiraji Laxman Jadhav suffered a mild paralytic attack and as such was unable to use the left side of his body. In the year 1988, Hiroo @ Hiraji Laxman Jadhav suffered severe paralytic attack. Therefore, defendant Padmakar i.e. elder son took his father Hiroo @ Hiraji Laxman Jadhav to the hospital. At that time, all family members of Hiroo @ Hiraji Laxman Jadhav were jointly residing in Flat No.B/15, Swapna Safalya Co-op. Hsg. Society, Mumbai. During hospitalization of the testator

Hiroo @ Hiraji Laxman Jadhav in the year 1988, all family members including two daughters of Hiroo @ Hiraji Laxman Jadhav and his wife Indira were attending him by visiting the hospital by rotation. Plaintiff Kumud accepted the fact that relationship of all family members were good, meaning thereby that Hiroo @ Hiraji Laxman Jadhav had no grudge against anyone, at that time.

17 Evidence of PW1 Kumud also shows cause of quarrel between the family members on 30th September 1988 which resulted in separate residence of her mother-in-law Indira, brother-in-law Padmakar and sister-in-law Shubhangi. She accepted in cross-examination that this quarrel took place because of shortage of water for household use. As per her version, on that day, defendant Padmakar assaulted his brother deceased plaintiff Subhash leading to filing of the FIR and from that day, Padmakar with his family, Indira and Shubhangi (described as Sumitra) started residing separately. PW1 Kumud also accepted the fact that testator Hiroo @ Hiraji Laxman Jadhav was not at all concerned with this dispute between his two sons and their wives. She also accepted the fact that there was no dispute between Hiroo @ Hiraji Laxman Jadhav and his wife Indira. This evidence proves the fact that up to atleast September 1988, ailing

father Hiroo @ Hiraji Laxman Jadhav was being looked after and attended by his family which apart from his wife, also included his two sons and unmarried daughter Shubhangi. Even his married daughter was visiting him during his hospitalization for taking his care.

18 What happened after defendants left the Flat No.B/15 is also brought on record from cross-examination of PW1 Kumud. Her cross-examination shows that even after leaving the flat of Hiroo @ Hiraji Laxman Jadhav, his wife Indira used to attend Hiroo @ Hiraji Laxman Jadhav by visiting the flat. PW1 Kumud also stated that because of suffering the stroke, Hiroo @ Hiraji Laxman Jadhav was answering nature's call in the bed itself because of his illness.

19 Totality of material reflected from evidence of PW1 Kumud as such shows that up to 30th September 1988, everything was going on smoothly in the family of testator Hiroo @ Hiraji Laxman Jadhav which was joint in residence. On 30th September 1988, there was quarrel between his two sons over petty domestic issue with which Hiroo @ Hiraji Laxman Jadhav was not at all concerned. Till that time, all family members of Hiroo @ Hiraji Laxman Jadhav were looking after him during his prolonged illness by taking his care even during his

hospitalisation. Even after 30th September 1988, defendant Indira – wife of Hiroo @ Hiraji Laxman Jadhav was attending his residence at Flat No.B/15. This implies that Indira must have been taking every care of her husband Hiroo @ Hiraji Laxman Jadhav even after 30th September 1988 because PW1 Kumud used to remain away from the flat from 10.30 a.m. to 7.30 p.m. of each working day, and as because of his illness Hiroo @ Hiraji Laxman Jadhav was compelled to answer nature's call in the bed itself. Relations of other family members of Hiroo @ Hiraji Laxman Jadhav were cordial with him even after separation as can be seen from the fact that Hiroo @ Hiraji Laxman Jadhav was not at all concerned with the dispute between his sons which took place on 30th September 1988 and that they all attended his funeral.

20 At this juncture, it needs to be put on record that even from cross-examination of DW1 Padmakar it is brought on record by plaintiffs that after leaving Flat No.B/15, owned by his father Hiroo @ Hiraji Laxman Jadhav, Padmakar used to visit Hiroo @ Hiraji Laxman Jadhav. This material do indicate that even defendant Padmakar was concerned with health of his bedridden father Hiroo @ Hiraji Laxman Jadhav, till the death of his father.

21 DW1 Padmakar while in the witness box proved letter dated 25th October 1988 issued by Advocate Gujar and addressed to the Commissioner of Police on instructions of defendant Indira. He also proved letter of his mother defendant Indira issued on 28th October 1988 and addressed to the Commissioner of Police. These documents are at Exhibits A and B. Reason for leaving the Flat No.B/15 of his father Hiroo @ Hiraji Laxman Jadhav by defendant Padmakar is also brought on record from his cross-examination. DW1 Padmakar has stated in his cross-examination that he left the house of his father as his brother – deceased plaintiff Subhash had threatened to kill him. In answer to court questions, DW1 Padmakar has stated that his mother / defendant Indira was not allowed to stay in the flat of her husband Hiroo @ Hiraji Laxman Jadhav by deceased plaintiff Subhash and she was being assaulted by deceased plaintiff Subhash. Considering the fact that this material is brought on record by plaintiffs from cross-examination of defendant Padmakar as well as by his answers to court questions, there is no reason to disbelieve this evidence. Moreover, contemporaneous documents in the form of complaints to the Commissioner of Police by defendant Indira and her advocate which are at Exhibits A and B show that defendant Indira was assaulted by deceased plaintiff Subhash requiring her to leave house of her husband

Hiroo @ Hiraji Laxman Jadhav. These contemporaneous documents reflect apprehension of defendant Indira that after driving out other family members, taking advantage of the fact that Hiroo @ Hiraji Laxman Jadhav is suffering from paralysis, her son Subhash and his wife Kumud (plaintiffs), may grab the property of her husband Hiroo @ Hiraji Laxman Jadhav by getting the flat transferred in their name and by misappropriating bank balance of Hiroo @ Hiraji Laxman Jadhav.

22 DW2 Sumitra Surve nee Shubhangi who is youngest daughter of the testator has deposed that her relations with her parents were cordial and relations of her father Hiroo @ Hiraji Laxman Jadhav with DW1 Padmakar were also cordial. She has also stated that her relations with deceased plaintiff Subhash and plaintiff Kumud were also cordial. There is nothing on record to disbelieve this version of then unmarried daughter of the testator, in the light of evidence of PW1 Kumud also.

23 The evidence on record as such does indicate that the testator was being looked after by his wife and son Padmakar throughout. It cannot be inferred from the evidence on record that

they were not taking care of the testator. Similarly, it cannot be said that from 30th September 1988, defendants Indira, Padmakar and Shubhangi i.e. wife, son and unmarried daughter of the testator left his house without his wish, despite the fact that he was unwell.

24 While construing the Will, “arm chair rule” is required to be applied and the court is expected to place itself in the arm chair of the testator to find out his intention. Intention of the testator is considered to be a polar star by which the court is guided. In the case in hand, as seen from the evidence discussed in foregoing paragraphs, testator Hiroo @ Hiraji Laxman Jadhav was being looked after during his prolonged illness by all his family members including defendants and he was being attended by his wife Indira and elder son Padmakar even after 30th September 1988 i.e. the day from which they started residing separately. Wife of Hiroo @ Hiraji Laxman Jadhav namely Indira (defendant) had looked after him for a long span of her marriage life with cordial relations all along. Evidence also shows that the Will in question was allegedly executed on 3rd December 1988. Till 30th September 1988, i.e. about two months prior to alleged execution of the Will, all family members of testator Hiroo @ Hiraji Laxman Jadhav were staying together with him. Hiroo @ Hiraji Laxman Jadhav

was looked after by all of them till that time and even thereafter by his wife Indira and son Padmakar. Relations of all family members with Hiroo @ Hiraji Laxman Jadhav till his death were cordial and the petty family dispute which took place on 30th September 1988 did not affect relations of other family members i.e. defendants with testator Hiroo @ Hiraji Laxman Jadhav. In the light of this evidence, recitals attributed to testator Hiroo @ Hiraji Laxman Jadhav in alleged Will to the effect that his elder son Padmakar, wife of the testator Indira and unmarried daughter Shubhangi separated from him against his wishes and have not chosen to look after him or to take care of him, even though he is not keeping well; does not appear to be correct and probable. The recitals to this effect in the Will obviously appears to be false in the wake of material brought on record from evidence of parties. The position reflected in the ocular evidence is fundamentally contradictory to the recitals in the Will of Hiroo @ Hiraji Laxman Jadhav. This raises a serious doubt as to whether the testator was really aware about the contents of the Will or not. Instead of clearance and removal of all legitimate doubts regarding suspicious circumstance of unnatural, improbable and unfair disposition of the property under the Will, evidence of PW1 Kumud as such shrouds the Will in grave suspicion. By applying “arm chair rule” it cannot be said that a testator

who was looked after by all his family members during prolonged period of his illness will disinherit them by conferring his entire estate on his one son and family of that son. This disposition of property under the Will, as such, does not appear to be result of free will and mind of the testator. It is most unlikely that a person having wife, another son, one married and another unmarried daughter, all sharing cordial relations with him, would make a Will which would practically disinherit them all. For these reasons, it is not possible for us to agree with submission of the learned counsel for respondents that as the wife, son and unmarried daughter all of a sudden deserted the testator and as PW1 Kumud was looking after him, the property is bequeathed in favour of PW1 Kumud, her husband and son.

25 At the cost of repetition, it needs to state that evidence on record shows that testator Hiroo @ Hiraji Laxman Jadhav was unable to use left side of his body right from the year 1985 because of paralytic attack and thereafter in the year 1988 he suffered massive paralytic attack. This is clear from evidence of PW1 Kumud. Because of this, he was literally bedridden, as cross-examination of Kumud shows that he was required to answer nature's call in the bed itself. He died because of heart attack in the month of September 1990 i.e. within a

period of two years after alleged execution of the Will by him. Evidence on record does not show that testator Hiroo @ Hiraji Laxman Jadhav, prior to his death or at or about alleged execution of the Will was in sound state of mind. There is nothing on record to show that he was interacting with other residents of the locality or friends. On the contrary, it appears that he was confined to bed because of paralytic stroke which rendered his entire left portion of the body immobile. Paralytic stroke is caused when there is a disturbance to the blood supply to the brain, due to lack of blood or leakage of blood. The affected area of the brain stops functioning normally. This results in inability to move limbs on one side of the body, to formulate speech or to see one side of the visual field. Paralytic stroke causes neurological damage which leaves patient incapacitated for life. In the case in hand, evidence of PW1 Kumud shows that the testator had suffered the massive paralytic stroke. Naturally, therefore, he must be taking medical treatment, as at the time of alleged execution of the Will he was bedridden. In the wake of the disease suffered by the testator which was causing neurological damage and adversely affecting the capacity to speak, it was incumbent on the part of prepounders of the Will to examine a doctor to prove that the testator was in sound disposing state at the time of alleged execution of the Will. However,

this was not done by plaintiffs. Having suffered from such a physical condition from the year 1985, it is hard to believe that the testator while in bedridden condition was in sound disposing state in September 1988. On the contrary, with such prolonged serious ailment, condition of his mind must be very feeble and debilitated. Heavy burden was on plaintiffs who are the propounders of his Will to bring on record clear, cogent and trustworthy evidence to show that testator Hiroo @ Hiraji Laxman Jadhav was having mental capacity with sound disposing state of mind to execute the Will. However, no such evidence is forthcoming. Unproved photocopy of police statement at Exhibit D2 pointed out by the learned counsel for respondents cannot be read in evidence to infer that the testator was in sound state of mind at the relevant time.

26 Provisions in the Will set out in foregoing paragraphs show that the testator had made provisions even for unborn child of deceased plaintiff Subhash and his wife plaintiff Kumud. However, at the same time, no provision whatsoever was made for his grandchildren from another son i.e. defendant Padmakar. Mental frame of Hindus towards his siblings is noted by the Hon'ble Supreme Court in the matter of **Ram Piari (supra)** in these words :

“Soft corner for grand-children or like ability for a son or daughter or their issues is not uncommon to our society. Rather at times it becomes necessary either to provide for the lesser fortunate or to avoid the property from passing out of the family. But when disputes arise between heirs of same degree, and the beneficiary even chooses to deny the blood ties, and that too unsuccessfully, then court's responsibility of performing its duties carefully and pains-takingly multiplies.”

No provisions whatsoever was made in the Will in respect of grand-children of the testator from his another son Padmakar. Undoubtedly, there is absolute freedom to bequeath one's own property and legatee can also be a stranger. However, in order to demonstrate testamentary capacity or disposing state of mind of the testator, prepounders of the Will are required to establish that the testator at the time of disposition knew and understood the property he was disposing and persons who were to be beneficiaries of his disposition. To satisfy the test of a prudent person, there must be satisfactory reasons for denying benefits to those who are also entitled for the estate of the testator, as they had similar relations with him. Absence of such reasons shrouds the Will with suspicion and indicates that the disposition of property under the

Will was not the voluntary act of the testator. In the case in hand, exclusion of grandchildren from another son i.e. defendant Padmakar and at the same time making provisions for even unborn child of another son Subhash cast a serious shadow of doubt on the Will.

27 Now let us examine whether prepounders of the Will of testator Hiroo @ Hiraji Laxman Jadhav had taken a lead role in preparation of the Will and in its execution. As deceased plaintiff Subhash and his family is the only legatee under the alleged Will of testator Hiroo @ Hiraji Laxman Jadhav, the onus lied heavily on them to remove the suspicion attending the execution of the Will and to demonstrate that they were neutral and had not taken any role in its making and execution. We have already pointed out what PW1 Kumud has stated while in the witness box. Her version shows that it was her husband Subhash who allegedly arranged meeting of Advocate A.G.Shah with testator Hiroo @ Hiraji Laxman Jadhav for initially preparing a draft and then for approving the same. Evidence of PW1 Kumud also shows that she arranged for visit of the Sub-Registrar to her house for registration of the Will. This happened in the backdrop of the fact that testator Hiroo @ Hiraji Laxman Jadhav was immobile

and bedridden due to paralytic stroke right from the year 1985. Evidence of PW1 Kumud shows that she as well as her husband Subhash were very much present in the house with the testator on 3rd December 1988 when the Will was allegedly engrossed, executed and then registered. There is nothing in evidence of PW1 Kumud to show how the testator was acquainted with Advocate A.G.Shah since the beginning. This witness was not even knowing that her father-in-law Hiroo @ Hiraji Laxman Jadhav had ever met Advocate A.G.Shah at any point of time prior to execution of the Will. Evidence of PW1 Kumud further shows that the only attesting witness examined by plaintiffs namely Jayant Kamani was friend of her husband Subhash. With this evidence, let us have a look at the Will at Exhibit D1.

28 The Will (Exhibit D1) has been typed on three full scape papers on both sides and the typed portion runs into five pages. It is obviously drafted by a lawyer named A.G.Shah. The Will is in legal language with all legal jargon. The lawyer who has drafted the Will and then engrossed it after alleged approval to the draft by the testator has also acted as attesting witness to it. Cross-examination of PW1 Kumud – the propounder of the Will shows that Advocate A.G.Shah

was very much alive during the course of recording of evidence in the suit. Chief examination of PW1 Kumud reveals that her husband i.e. deceased plaintiff Subhash had called Advocate A.G.Shah for meeting the testator on request of the testator. Then, initially after instruction from the testator, the draft was prepared and on its approval, the same was engrossed by Advocate A.G.Shah. PW1 Kumud claims to have witnessed these events. PW1 Kumud admitted that another attesting witness Jayant Kamani is the best friend of her husband – deceased plaintiff Subhash. It is also elicited from cross-examination of DW1 Padmakar that PW2 Jayant Kamani – an attesting witness had attended birthday party of son of deceased plaintiff Subhash and plaintiff Kumud. This points out the fact that he is close friend of deceased plaintiff Subhash. Evidence of PW1 Kumud reveals that it was she who had been to the Office of the Sub-Registrar and undertook necessary formalities and brought the Sub-Registrar to their residence for registration of the Will on 3rd December 1988.

29 It is, thus, seen that the prepounders of the Will of testator Hiroo @ Hiraji Laxman Jadhav who are sole legatee under the said Will have taken lead and played a prominent role in preparation and

execution of the Will in question. This evidence does not justify the finding of the learned Single Judge that the Will had been duly executed by the testator by understanding the nature and effect of the disposition under the Will. Viewed from the context of apprehension of Indira – widow of the testator, reflected from her complaints dated 25th October 1988 and 28th October 1988 (Exhibits A and B) to the effect that her son Subhash is making all possible efforts for grabbing the flat and money of the testator, this position of taking lead role in preparing the Will of the testator by plaintiffs does not allow us to hold that the Will was duly executed by the testator for conferring his estate on plaintiffs. To crown all this, cross-examination of PW1 Kumud shows that initially there was nomination in respect of Flat No.B/15, Swapna Safalya, of Hiroo @ Hiraji Laxman Jadhav in favour of his wife Indira. However, evidence on record shows that this nomination was got changed even prior to alleged execution of the Will by the testator Hiroo @ Hiraji Laxman Jadhav, in favour of deceased plaintiff Subhash. This is a circumstance to indicate that prepounders of the Will anyhow wanted to mutate the flat owned by testator Hiroo @ Hiraji Laxman Jadhav in their name.

30 We have mentioned the effect of paralytic stroke on the testator making him immobile right from the year 1985. A paralytic stroke impairs mental faculty as well as speech of a person. PW1 Kumud claims that on instructions of the testator, Advocate A.G.Shah attended, took his instructions, prepared a draft of the Will and thereafter on approval of the draft, Advocate A.G.Shah engrossed the same. In the wake of objections raised by defendants, pointing out suspicious circumstances surrounding the Will, in their caveat, and when the testator was suffering from paralytic stroke from the year 1985 itself, impairing his speech, it was incumbent on the part of the plaintiffs / propounders of the Will to examine Advocate A.G.Shah, who allegedly drafted the Will and subsequently engrossed it apart from acting as an attesting witness thereto. This was necessary to dispel the suspicion as to whether really the testator was in a position to give instructions while his ability to speak was impaired as a consequence of suffering a paralytic stroke. Examining Advocate A.G.Shah was also necessary in order to ascertain whether really the testator had instructed him in the matter and whether the testator had really asked him to engross the Will bequeathing his entire property to one son and family members of that son. When other evidence adduced by plaintiffs in support of the Will is wholly unsatisfactory, the

fact of non-examination of Advocate A.G.Shah assumes importance and gives an indication that he was deliberately not examined by propounders of the Will as his evidence might not have supported their cause. Capacity of the testator could have also been brought on record by examining the Sub-Registrar who registered the Will on 3rd December 1988. A draft which was allegedly approved by the testator ought to have been placed on record to demonstrate validity of the Will and to remove the suspicion. However, this is not done by the plaintiffs for the reasons best known to them, particularly, when the Will sought to be propounded is totally unnatural as plaintiffs are sole legatee under the Will.

31 The Will in question is a registered Will. However, mere registration of a Will is not a fact to prove its genuineness. In the matter of H.Venkatachala Iyengar (supra) and Balkrishna Das Agarwal (supra) it is settled that even in absence of raising a plea, the propounders of the Will is enjoined to explain all suspicious circumstances to satisfy conscience of the court. Perusal of the Will at Exhibit D1 shows that though it is a registered document, internal page six thereof bears a rubber stamp probably put on it by the Sub-Registrar

while registering the Will, which merely contains the material that the executor of the document admits that a Will Deed has been executed. Other rubber stamps impressed on it are in respect of receipt of payment of fees of registration. The Will does not reveal that the Sub-Registrar had disclosed the contents of the Will to the testator or the fact that the document of which he was admitting the execution is a Will disposing of his property in favour of his only one son and family members of that son. Perusal of the Will at Exhibit D1 does not show that the Officer registering it had read over the contents thereof to the testator and then after knowing the disposition, the testator admitted the execution of the Will. The learned counsel for appellants rightly relied on the judgment of the Hon'ble Apex Court in the matter of **Rani Purnima Debi (Supra)** and relevant portion of paragraph 23 of that report reads thus :

“If the evidence as to registration on a close examination reveals that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a will disposing of his property and thereafter he admitted its execution and signed it in token thereof, the registration will dispel the doubt as to the genuineness of the will.

But if the evidence as to registration shows that it was done in a perfunctory manner, that the officer registering the will did not read it over to the testator or did not bring home to him that he was admitting the execution of a will or did not satisfy himself in some other way (as, for example, by seeing the testator reading the will) that the testator knew that it was a will the execution of which he was admitting, the fact that the will was registered would not be of much value.”

These observations apply with full force to the case in hand as in the instant case also the registration appears to have been done in a perfunctory manner indicating that the testator may not be knowing what he was registering. As such, the mere fact that the Will is registered Will is not sufficient to dispel suspicion which is attached to the execution and the attestation thereof.

32 The learned Single Judge has placed reliance on photocopy of the statement of testator Hiroo @ Hiraji Laxman Jadhav recorded on 30th September 1988 by marking it as Exhibit D2 with an observation that the said statement is read in evidence at the request of both the counsel appearing for the parties. Perusal of the photocopy of the statement at Exhibit D2 shows that the same appears to be recorded by

Police Sub-Inspector of Worli Police Station under Section 161 of the Cr.P.C. The Police Sub-Inspector who has recorded this statement is not examined as witness by the parties to the suit. What was filed on record of the suit is the photocopy of the police statement of Hiroo Jadhav. The record does not indicate that the same was admitted by the contesting parties. Chapter XII of the Cr.P.C. deals with information to police and their powers to investigate. Sections 161 and 162 of the Cr.P.C. falls under Chapter XII in the Cr.P.C. As per Section 161 of the Cr.P.C., prescribed Police Officer can examine orally any person supposed to be acquainted with the facts and circumstances of the case under investigation. He may reduce into writing any statement made to him in the course of examination of such person. Section 162 of the Cr.P.C. deals with use of such statements recorded by the prescribed Police Officer under Section 161 of the Cr.P.C. Such statements recorded by the Police Officer can be used by the accused and with permission of the court, even by the prosecution in order to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872. Police statement recorded under Section 161 of the Cr.P.C. cannot be used as substantive evidence.

33 Section 162 of the Cr.P.C. creates bar for use of such statement except for the limited purpose set out in the proviso to said section, at any inquiry or trial in respect of the offence which was under investigation, at the time when such statement was recorded. However, this bar is not applicable in a civil proceeding and a statement made before a Police Officer in the course of investigation can be used as evidence in civil proceedings, provided the same is otherwise relevant under the Indian Evidence Act. Section 145 of the Indian Evidence Act permits cross-examination of a witness as to his previous statement made in writing or reduced into writing and relevant to the matter in question, without such writing being shown to him or being proved. Section 145 of the Indian Evidence Act nowhere exclude statement made by witness in writing or reduced to writing during investigation, inquiry or trial. However, though police statement of a witness can be used in civil proceedings, the same is required to be duly proved by adducing necessary evidence. In the case in hand, even certified copy of police statement of Hiroo @ Hiraji Laxman Jadhav was not placed on record and photocopy of his statement placed on record by defendant Padmakar Jadhav was not proved by taking necessary steps in that regard. Maker of this statement i.e. the testator is not available for confronting him with his

alleged previous statement recorded under Section 161 of the Cr.P.C. Therefore, the learned Single Judge ought not to have read the photocopy of police statement of the testator in evidence. It is, thus, seen that inadmissible evidence was considered by the learned Single Judge by reading the photocopy of the police statement for coming to the conclusion that there was justification for excluding other legal heirs from the estate of the testator.

34 We have carefully perused the ruling in the matter of **Smt.Malkani (supra)** cited by the learned counsel for the respondents. That matter proceeded on its own facts. The learned trial court in that matter had held on consideration of evidence that due execution of the Will as well as its attestation were proved and that there were no suspicious circumstances surrounding its execution which creates doubt as to testamentary capacity of the testatrix, or tend to show that she did not make the disposition of her own free will. The appeal was dismissed by the High Court and the Hon'ble Supreme Court held that it is difficult to interfere with the findings of fact reached by the trial court and confirmed by the High Court. It was observed in that matter that evidence on record justifies that the testatrix was determined in bequeathing the property to her husband's brother's sons to the

exclusion of the plaintiff. However, case in hand is totally different and we have found that there are several suspicious circumstances surrounding the execution of the Will, even creating doubt as to testamentary capacity of testator Hiroo @ Hiraji Laxman Jadhav.

35 For all these reasons, we are unable to concur with the view expressed by the learned Single Judge while holding that the testator had duly executed the Will bequeathing the property in favour of his son Subhash and family members of Subhash, to the exclusion of other legal heirs. For reasons quoted in the foregoing paragraphs, we allow the appeal with costs throughout and set aside the impugned judgment and order of the learned Single Judge. Consequently, the Testamentary Suit No.37 of 1990 is dismissed.

(A. M. BADAR, J.)

(A. S. OKA, J.)