

SSM

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY & INTESTATE JURISDICTION
TESTAMENTARY SUIT NO. 97 OF 2011
IN
TESTAMENTARY PETITION NO. 832 OF 2010

- 1. JITENDRA SINGH RAJENDRA
SINGH KUSHWAHA**
- 2. SUMAN JITENDRA SINGH
KUSHWAHA**
- 3. NISHA JITENDRA SINGH
KUSHWAHA,**
All of Mumbai, Hindu Inhabitants,
permanently residing at 381-A,
Kalbadevi Road, Narottam Wadi, 3rd
Floor, Room No. 31 to 35, Mumbai –
400002 and temporarily residing at
502, Rajdeep Apartments, 3/9 Tank
Lane, 5th Floor, Santacruz (West),
Mumbai – 400054, being the Executors
and Administrators named in the last
Will and Testament of the deceased. ... Plaintiffs

versus

**SURESH RAJENDRA SINGH
KUSHWAHA,**
Of Mumbai, Hindu Inhabitant, residing at
381A, Kalbadevi Road, Narottam Wadi, 3rd
Floor, Room No. 31 to 34, Mumbai - 400002 ... Defendant

APPEARANCES

FOR THE PLAINTIFFS	Mr. Shailesh Shah, Senior Advocate, <i>with Ms. Mamta Sadh & Ms. Ujwala Deshmukh, i/b M/s. Zohair & Co.</i>
FOR THE DEFENDANT	Mr. Zubin Behramkamdin, <i>with Mr. Jacob Kadantot & Mr. Ajit Shah, i/b Nitin Parkhe</i>

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

JUDGMENT RESERVED ON : **25th June 2015**

JUDGMENT PRONOUNCED ON : **23rd March 2016.**

JUDGMENT:

1. Rajendra Singh Kushwaha (“**Rajendra**”; “**the Testator**”; “**the deceased**”) died in Mumbai on 18th December 2009. The Plaintiffs are his elder son, Jitendra; Jitendra’s wife, Suman; and their daughter, Nisha. All three Plaintiffs are Executors named in Rajendra’s Will dated 10th May 2006. They seek probate to this Will. They are opposed by Rajendra’s younger son, Jitendra’s brother, Suresh.

2. Rajendra’s wife, Damayanti, died before him in 1985. She bequeathed her entire estate to Rajendra, her husband. Rajendra and Damayanti had five children, three daughters and two sons. The three daughters, Prafulla Devendrapal Singh Chauhan (“**Prafulla**”), Aruna Dinesh Jayant (“**Aruna**”) and Bina Nishikant Singh

Chauhan (“**Bina**”) are all married and have children. Jitendra and Suman have four children: Nisha (Plaintiff No. 3), Ajit, Manisha and Anjali. Suresh (Rajendra and Damayanti’s younger son; Jitendra’s brother) is married to Nita Suresh Kushwaha (“**Nita**”). They have two children, Yashraj and Swati.

3. Rajendra was a practicing advocate till the 1960’s, and it shows: the alleged Will is punctilious, and meticulously organized. It has eight sections, styled as paragraphs. The first paragraph, “*Myself and My Sound Mind*”, as its heading suggests, declares the document to be his last Will, made in sound health and state of mind and without any influence. Paragraph II, “*I Have Not Made Any Will*” states that the document is his first and last Will. In paragraph III, “*All My Properties Are Self-Acquired*”, he makes it clear that all of his property is capable of being bequeathed in his Will. He outlines in IV, “*Nobody Has Any Interest or Title in My Properties*”, the previous gifts that he has made to his relatives, and reiterates that all of his property is self-acquired. In paragraph V, “*My Family*”, he lists his immediate heirs. Paragraph VI, “*My Properties*” lists all of his properties, both movable and immovable, a total of 13 entries. In paragraph VII, “*Appointment of Executors and Their Duties*”, he appoints Jitendra, Suman and Nisha, the Plaintiffs, as the Executors and Administrators of his Will, and lists their rights and duties. In the eighth and final paragraph, “*Directions*”, he makes his bequests.

4. Most relevant for our purposes are Clauses 5 and 6. In Clause 5, he states that he has given instructions to Jitendra about the amounts to be given to each of his relatives; these amounts are not set out in the Will itself. In Clause 6, he bequeaths all of his

property, subject to the various conditions enumerated in paragraph VI(2), to Jitendra; if Jitendra predeceases him or dies before he can take charge of the properties, they are to go to Suman; and if both predecease him, they are to go to Ajit, Jitendra's son.

5. The attesting witnesses to the alleged Will were one Dhirajlal Ramaji Kothari ("**Dhirajlal**"), a Chartered Accountant, and one Dr. Shashikant Rasikbhai Kothari ("**Dr. Kothari**"), a doctor. The Plaintiffs say that the Will was registered before the Sub-Registrar of Assurances under Serial No. 6489/2006.

6. The Petition for probate was filed on 29th July 2010. Suresh entered a Caveat on 23rd August 2011 with an accompanying Affidavit in Support dated 29th August 2011. The Petition was then renumbered as a suit, to be tried as such. Suresh was, for some reason, also allowed to file a 'Written Statement' on 31st October 2011, though there is no such procedure prescribed. In any case, this is *verbatim* his Affidavit in Support.

7. In his opposition (the Affidavit in Support of the Caveat and the Written Statement), Suresh alleges that the signature on the alleged Will is not that of Rajendra, his deceased father; that Rajendra was not of sound mind; that the properties Rajendra purported to distribute were not his self-acquired properties and thus were not his to bequeath; and that the Will was procured by undue influence.

8. Issues were framed on 23rd August 2012. These are reproduced below, with my findings against each. At that time, only three issues were framed. Issues were not framed on the questions of undue influence or of the Will being unnatural, though both these grounds were specifically taken. Suresh's Affidavit in Support of the Caveat has a specific plea of undue influence, and in his Affidavit in Lieu of Examination-in-Chief filed on 18th March 2013 there is a case set up of both undue influence and of the Will being unnatural. I found that the parties had, in fact, proceeded to trial on the basis that these issues did arise. Both Mr. Shah for the Plaintiffs and Mr. Behramkamdin for the Defendant agreed that these issues did arise and would have to be framed. They addressed me on these at some length. I framed additional issues accordingly. The consolidated issues finally framed are set out below, with my findings against each.

SR. NO.	ISSUES	FINDINGS
1	Whether the last Will and testament of the deceased Rajendra Singh Chhatrasal Singh dated 10th May, 2006 was validly executed?	Yes.
2	Whether the deceased was in sound state of mind at the time of execution of the Will?	Yes.
3A	Whether the deceased's Will was unnatural?	No.
3B	Whether the Defendant proves that the deceased's Will was obtained by undue	No.

influence exercised by Plaintiff No.

1?

3 What relief, if any, is the Plaintiff Suit
entitled to? decreed.

Overview of Findings

9. I have heard Mr. Shah and Mr. Behramkamdin at length, considered the material with their very able assistance and the authorities they cited. I do not propose in this judgment to refer to every single one of those; many are on well-established principles and seem to be cited as a matter of course even when there is no dispute about those principles. Both sides tendered detailed Written Submissions. I have considered these as well.

10. The burden of proving Issues Nos. 1 and 2 is on the Plaintiffs. They led the evidence of both attesting witnesses, who testified that they saw the deceased sign the Will, and that they then signed it in his presence. The Will was also registered. After an examination of the evidence, I have answered Issue No. 1 in the affirmative.

11. With regard to Issue No. 2, both attesting witnesses testified that the deceased was of sound mind at the time of the execution of the Will. Plaintiff No. 1, Jitendra, chose not to step into the box and lead any evidence in this regard. Mr. Behramkamdin said this was in itself a suspicious circumstance. A substantial portion of the arguments before me centred on this. Given that Rajendra had

admittedly been living with Jitendra since 1982; i.e., for about 24 years preceding the Will, it seemed to be clear that Jitendra was in the best position to give evidence about Rajendra's mental condition and soundness of mind. He chose not to. Mr. Behramkamdin therefore submitted that the best evidence was withheld; and, consequently, invited an adverse inference. Mr. Shah's response was that Jitendra's evidence was unnecessary. The Plaintiffs had discharged their burden: they led the evidence of the two attesting witnesses and also adduced certain additional materials, including Consent Terms signed by the deceased in Court a mere five days before the execution of his Will. That done, the burden then shifted to the Defendant to prove unsoundness of mind. The Plaintiffs, Mr. Shah argued, reserved the right to lead evidence in rebuttal, but the Defendant gave them no cause to do so. I have found merit in this response. The Defendant did not lead the evidence of any witness but himself; he failed to provide any specifics of the incidents that he claimed showed Rajendra's unsoundness of mind; and he did not produce any medical records or the evidence of any doctors to substantiate his case. I have therefore found that the Plaintiffs' evidence was sufficient to discharge their preliminary burden, and that the Defendant's evidence failed to shift that burden back in such a manner as would have compelled Plaintiff No. 1 to lead his evidence. Parties may have any number of personal reasons for not wishing to enter the box, and so long as the burden is sufficiently discharged through other means, this ought not to be made into a fatal deficiency. I have therefore answered Issue No. 2 in the affirmative.

12. The burden of proving Issues Nos. 3A and 3B is on the Defendant. The Defendant failed to lead any convincing evidence to show that the Will is unnatural; rather, the evidence led by the Plaintiffs demonstrates quite clearly that the relationship between the Defendant and the deceased was strained. None of the three sisters who are also excluded from the Will chose to file Caveats; the Defendant is the sole Caveator. We also have some evidence from the Will itself about Rajendra's reasons for the manner of his dispositions. I have therefore answered Issue No. 3A in the negative. I have also found that the Defendant failed to prove that the Plaintiffs unduly influenced the deceased in the making of his Will. Mr. Behramkamdin says there are some suspicious circumstances concerning the execution of the Will; I will turn to these presently. On considering closely his arguments and material, I am not persuaded that these circumstances are such as would trouble a judicial conscience. I therefore answer Issue No. 3B in the negative. In the result, I have decreed the suit and granted probate.

Re: Issue No:1: Due Execution of the Will

13. The Affidavits in Lieu of Examination-in-Chief of the two attesting witnesses are almost identical. Dr. Kothari's Affidavit is dated 12th July 2012 and that of the Chartered Accountant, Dhirajlal, is dated 13th July 2012. In these Affidavits, the attesting witnesses say they were present at approximately 11 a.m. on 10th May 2006 at Dr. Kothari's residence at Geeta Building, Gowalia Tank Road, Mumbai 400 007 for the execution of the Will. They

saw the deceased sign the Will and add the date on the last page of the Will. Each of them then signed the Will, affixed their stamps, and wrote their respective names, the date, and in the case of Dhirajlal, his address (which was not a part of his stamp, as it was for Dr. Kothari) in the presence of the deceased and of each other. In the Affidavit he filed in Support of the Petition on 29th July 2010, Dr. Kothari also said that the Will was registered before the Sub-Registrar of Assurances in Bombay on 29th June 2006 under Serial No. 6489/2006. This is not mentioned in either his or Dhirajlal's evidence. But the Will does bear two stamps with the seal of the Sub-Registrar and the serial number on each page.

14. An additional examination-in-chief of Dr. Kothari was taken. His responses in this provide much grist to Mr. Behramkamdin's mill: he says that in itself, this additional evidence points to inconsistencies and suspicious circumstances never properly explained. For instance: When asked to identify Rajendra's signature on the Will, he identifies it as his own.¹ When the question is asked again, he answers, "I can identify my signature but I cannot identify this signature", meaning the testator's.² When asked about his own signature on the Will, he first states then it is not his signature, and then clarifies that it is.³ When asked who signed the Will dated 10th May 2006, he says "The will must be signed by Mr. Kushwaha... No?"⁴ He also says that he does not know who wrote the date "10th May 2006" on the last page of the original Will under

¹ Qn. 5, *p.* 70

² Qn. 6, *p.* 70

³ Qn. 7, *p.* 71

⁴ Qn. 11, *p.* 71

the typed name “Rajendra Singh Kushwaha”,⁵ despite identifying it as the testator’s writing in his Affidavit in Support of the Petition dated 29th July 2010. In his cross-examination, after confirming that he signed the Will after the deceased signed the Will, he fails to mention that Dhirajlal also signed it in response to the question, “Did anything else happen on 10th May 2006 regarding this Will?” and simply responds, “No.”⁶ This is unfortunate, but I do not think that too much needs to be made of it. At the time of his cross-examination, six years after the execution of the Will, Dr. Kothari was 83 years old. In his cross-examination, he reiterates that he saw Rajendra sign the Will, and that he then signed the Will.⁷ He insists on this again when the Defendant puts his case to him.⁸

15. We also have Dhirajlal’s evidence in this regard, which is very confident and thorough. He describes the entire process of Rajendra’s correction of mistakes on the Will, his medical examination by Dr. Kothari, Rajendra’s initialling of all of the pages, Rajendra’s signing of the Will, his own signing of the Will and Dr. Kothari’s signing of the Will.⁹

16. [REWORK AND EXPAND THIS] Mr. Behramkamdin pointed out some inconsistencies in the evidence of Dr. Kothari and Dhirajlal, both internal as well as by comparison with each other, to do with whether or not the deceased read the Will on that day, the

⁵ Qn. 12, *p.* 71

⁶ Qn. 87, *p.* 85

⁷ Qn. 94, *p.* 85

⁸ Qns. 112-113, *p.* 87

⁹ Qn. 201, *p.* 108

duration of Dr. Kothari's medical examination of the deceased, the use of the chits by the deceased for making corrections on the Will, and some others, but again, these are very minor and overall inconsequential.

17. At this stage, I must note that while both attesting witnesses spoke of the Testator's initials on each page and of his having 'signed' the Will on the execution page, neither of them explains how it came to be that the execution page has not one but three signatures said to be of the Testator. Mr. Behramkamdin makes much of this fact: if there is one thing that demands an explanation, he says, it is this. Neither of the two witnesses has a word to say about this. There may be several possible explanations, perhaps legitimate; but these needed to form part of the evidentiary record, and the court cannot be expected to speculate why the testator signed not once but three times. When were each of these three signatures made? Was it because the Testator was unhappy about his signature? Were one or more made earlier and already existed before the witnesses signed the Will? There are no answers to these questions, he submits; and that is sufficient to dislodge the Will itself. Given the other factors, this is an important suspicious circumstance.

18. Further, Mr. Behramkamdin submits, the defence taken by Suresh in his Affidavit in Support of his Caveat and Affidavit in Lieu of Examination-in-Chief, that the signatures on the Will are not those of the deceased, must be seen in this context. The allegation is not of forgery, but is something slightly lower: a dispute about the genuineness of the signature. An allegation of forgery would involve

evidence of some person having made a false signature. Suresh does not go quite so far. He only says that the signatures are not proved to be genuine. To my mind, this is an over-subtle distinction and is an attempt to deflect the burden of proving a hard assertion squarely made in the Affidavit in Support of the Caveat. That assertion, repeated in Suresh's Evidence Affidavit, is that the signatures of the deceased on the execution page are not his. Therefore, it was Suresh to show this; and, indeed, Suresh himself understood his burden in just this way, for he produced in evidence a certified copy of a Deed of Indenture dated 22nd March 1984 that was signed by the deceased for comparison. By an Order dated 11th March 2014, only the signature was marked in evidence.¹⁰ For myself, I see no great or glaring discrepancies between the signatures. To the contrary, they seem to me to be very similar, with no more variation than might reasonably be expected in the signatures of any person allowing for differences in time and age. Suresh did not lead the evidence of any handwriting expert; it is only his assertion that the two are markedly different. I do not think this is at all correct. There are other documents on record with the Testator's signature, such as the Consent Terms dated 5th May 2006 between Jitendra, Suresh and their father, the Testator. These Consent Terms have his signature at the foot of each page.¹¹ Even a cursory examination shows the Testator's signatures on these pages to be very similar to those on the Will, with no more than normal variations.

¹⁰ Exhibit D-1.

¹¹ Exhibit P-4

19. The Defendant also makes specific averments about the differences between the three signatures on the Will in his examination-in-chief:¹²

Q. 8 What do you want to say about the signature on the purported Will of the deceased?

A. I say that there are three different signatures. My father never used to sign "R.C. Kushwaha". He always used to sign "RCKushwaha" in running writing. There were never any full stops in his signatures between the letters R and C and C and K.

20. It appears that two out of the three signatures on the Will are in the cursive writing to which the Defendant refers as the norm. The third — the one directly above the name of the deceased — has full stops, but still appears to be in his hand. I do not think Mr. Behramkamdin's submission is correct. There are, as he himself agrees, several plausible reasons for the appearance of not one but three signatures. On their own, the fact that there are three is inconsequential when both attesting witnesses repeatedly assert that the Testator did sign the Will in their presence. I do not find any suggestion put to either of the two attesting witnesses that any of the three signatures existed before 10th May 2006. In any event, more importantly, the Defendant did not lead the evidence of a handwriting expert. This would have been necessary to establish the defence squarely taken. Mr. Behramkamdin cites a judgment of the

¹² Qn. 8, p. 133

Kerala High Court in *Kanakku Veettil K.P. Sankarankutty Menon v Malathy Amma and Ors.*¹³, in which, although the Will contained three signatures, the attesting witnesses spoke only to one signature. The Court observed that without proof of all of the signatures, the proof of execution is itself incomplete. That case clearly turned on its own very peculiar facts: the will therein was not registered; there was no reason given for the disinheritance of some of the heirs of the deceased in the will; the signatures on the will bore no resemblance to the admitted signatures of the testator; and the propounded in that case had practically admitted to having forged the signature of the testator on another document. I have already held, particularly in the absence of the evidence of a handwriting expert, that all three signatures are of the deceased; in that context, I do not think it a compelling argument that simply because a testator signs multiple times, and the attesting witnesses do not specifically depose to this, that I must find that a will was improperly executed. Nowhere in their cross-examination is this case actually put to them; they are not asked how many times the deceased signed, or why he chose to sign three times, or why they failed to mention the multiple signatures in their evidence. The deceased may simply have done so by way of abundant caution; one signature is to the left of the name “Rajendra Singh Kushwaha” and the remaining two are above it. In any event, it is unclear what advantage two additional signatures would give to a forger of the Will; it would only serve to draw unwanted attention to the document. If this is a forgery (and there is no case expressly placed of it being one), then it is a remarkably clumsy one. I believe Mr. Shah is on sure footing in relying on the

¹³ AIR 1991 Ker 123

decision of the Supreme Court in *Hazara Bradri and Ors. v Lokesh Dutta Multani*,¹⁴ in which it was held quite clearly that the fact that a testator had signed some pages twice is not a good ground to hold that the will is suspicious and should be set aside. The Plaintiffs only need to prove one signature for the Court to hold that the Will was properly executed.

21. The first issue must be answered in the affirmative.

Re: Issue No. 2 — As to soundness of mind

22. Suresh claims that at the time of the Will, 10th May 2006, the testator was not of sound mind. Both attesting witnesses say to the contrary. The initial burden of proof to show that a testator was of sound mind is undoubtedly on the propounder of a will. If this is discharged, the burden of showing unsoundness of mind shifts to the Caveator. Both Mr. Shah and Mr. Behramkamdin drew on much learning, but I take this principle to be too well settled to justify reference to authorities.

23. However, before I turn to the evidence led by the Plaintiffs, I must briefly mention one of the Defendant's arguments on this issue, as I reject it outright. The Defendant's contention is that several of the properties enumerated in paragraph VI are not capable of being bequeathed in a Will; some because they are ancestral

¹⁴ AIR 2006 SC 370: (2005) 13 SCC 278

properties, and not self-acquired, as the deceased states in his Will; and some because they do not belong to the deceased. This, the Defendant alleges, shows the testator's unsoundness of mind, because he made statements that were patently incorrect and bequests that could not be carried into effect. The Defendant provides extensive details of the history, character and ownership of these properties in his Affidavit in Lieu of Examination-in-Chief and in his further oral Examination-in-Chief to substantiate this submission. This is untenable. It is now far too well settled that testamentary matters do not decide questions of title. Accordingly, by an Order dated 29th October 2013, the learned Single Judge of this Court held that Paragraphs 3, 4, 13, 14, 15, 16 and 17 of the Defendant's Affidavit, which advance this argument, were not to be read in evidence.¹⁵ An appeal failed.¹⁶ So did a review petition.¹⁷ It is very unfortunate that there were attempts to re-introduce the facts and submissions contained in those paragraphs in the further oral Examination-in-Chief of the Defendant conducted on 14th March 2014, 21st April 2014 and 16th June 2014.¹⁸ They are not relevant to the case at hand. The inclusion of any particular property is not, except perhaps in a truly egregious case, evidence of lack of testamentary capacity. A probate court will not investigate title, even for such a collateral purpose.

¹⁵ Order dated 29th October 2013 (R.D. Dhanuka J).

¹⁶ Order dated 10th December 2013 in Appeal (L) No. 474 of 2013; I was a member of that Appeal Bench with S.J. Vazifdar J, as he then was.

¹⁷ Order dated 8th April 2014 in Review Petition (L) No. 1 of 2014 (R.D. Dhanuka J).

¹⁸ Qns. 4-7, *pp.* 131-132; Qns. 10- 17, *pp.* 136-148; Qns. 24-28, *pp.* 145-146.

24. It is an admitted position that the deceased was living with the Plaintiffs at the time of the execution of the Will and had been living with them since 1982. It is then indisputable that the Plaintiffs were in the best position to prove the soundness of mind of the testator. Only they were able to lead evidence of his daily routines, his medical check-ups, his hospital visits, and the overall mental acuity evidenced in their interactions with him. Only they would have been able to supply the detail and colour missing from the evidence of the attesting witnesses. There is no argument advanced that Plaintiff No. 1 was too ill to give evidence; in fact, he was present in person at most of the hearings before the Court Commissioner. There is no explanation whatsoever. Section 114 of the Indian Evidence Act, 1872 says:

Section 114: Court may presume existence
of certain facts

The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

(a) ...

(b) ...

(g) That evidence which could be and
is not produced would, if

produced, be unfavourable to the person who withholds it;

25. Thus, an adverse inference may be drawn by a Court when a party does not lead the best evidence available to it. I will consider first whether the Plaintiffs have discharged their burden of proving the soundness of mind of the testator through the other evidence that is led by them; and then, if they do, whether I should still draw an adverse inference from their failure to examine any one of themselves.

26. The Plaintiffs led the evidence of the attesting witnesses, Dr. Kothari and Dhirajlal. The latter states in his Evidence Affidavit that the deceased was of sound and disposing state of mind. He confirms this in his cross-examination. His response to Q. 254 is particularly relevant:

Q. 254) I put it to you that on 10th May 2006, the deceased was of unsound mind.

Ans: I deny. He was of sound mind. We talked during the journey. He used his brain by bringing a chit to make the corrections and he wants us to witness him making the corrections.

27. The journey to which Dhirajlal refers to is the drive to Dr. Kothari's residence with the deceased and Jitendra on 10th May

2006 for the execution of the Will.¹⁹ Dhirajlal lives in Prabha Devi;²⁰ Dr. Kothari lives in Gamdevi, at Gowalia Tank²¹ Such a journey would likely have taken half an hour to an hour at 10 or 11 a.m., especially on a weekday.²² This, I think, is an adequate length of time for determining, with a fair degree of certainty, whether or not an individual is of sound mind, especially given that Dhirajlal specifically says that they talked during the drive. The reference to the making of corrections is also relevant. Both Dhirajlal and Dr. Kothari say in their Evidence Affidavits that the deceased made corrections on the Will and affixed his initials next to each correction in the margin. Dhirajlal states in his cross-examination that the deceased carried out these corrections in his and Dr. Kothari's presence.²³ Dr. Kothari does not volunteer that he witnessed the corrections himself; but there is no specific question put to him on this either, and Dhirajlal's evidence mentions both of them. There were twelve corrections in all, the majority spelling or typographical errors. Dhirajlal states in his cross-examination that Rajendra had written down his corrections on a chit because he wanted Dr. Kothari and Dhirajlal to witness him making the changes:

Q. 244) So according to you, the
deceased read the Will,
identified the mistakes, carried
out the corrections and

¹⁹ Qn. 199, *p.* 108

²⁰ Qn. 200, *p.* 108

²¹ Qn. 196, *pp.* 107-108

²² 10th May 2006 was a Wednesday.

²³ Qn. 201, *p.* 108; Qn. 244, *p.* 115

initialled the same all in a span of 5-10 minutes?

Ans: No. He did not read the Will at that time. He had brought a chit on which the required corrections were states and he wanted to make the corrections in our presence.

The chit is not produced in evidence, but this is hardly remarkable, and certainly not suspicious. Mr. Behramkamdin submits that the making of corrections from a chit shows that the testator was acting on somebody else's instructions, but the changes are so innocuous that this does not seem tenable. The bringing of the chit and the making of such corrections in front of the attesting witnesses does demonstrate a certain presence of mind.

28. Dr. Kothari also states in his Affidavit dated 12th July 2012 that he examined the deceased prior to the execution of the Will; this is corroborated by Dhirajlal's evidence. In his cross-examination, he explains why he did so and what he did:

Q. 52) Can you tell us why the deceased would have asked you to examine him on 10th May 2006?

A. I examined him on my own as I wanted to give a certificate of fitness.

Q. 53) Why did you want to give a certificate of fitness?

A. Because he had come to me for signing the Will.

Q. 54) What examination did you conduct on the deceased?

A. Full examination i.e. pulse, blood pressure, chest and abdomen.

29. The medical certificate dated 10th May 2006 is on Dr. Kothari's letterhead, is signed by him, and was annexed to the Will. It states as follows:

This is to certify that Mr. RAJENDRASINGH KUSHWAHA is known to me since last 50 years. He is of 85 years old aged. This is to further certify that he has made a Will dated 10.5.2006 with his sound and conscious state of mind, in my presence.

30. However, Dr. Kothari admits that he ceased medical practice some seven years before the date of the Will.²⁴ This does not *per se* imply incompetence to conduct a thorough medical examination, but he also admits that he had met the deceased only five or ten times over the last decade.²⁵ He was therefore admittedly unaware of the medical history or condition of the deceased. There is also some confusion about whether or not he was, in fact, Rajendra's family doctor: as Mr. Behramkamdin points out, he states in his Affidavit that he had been the family doctor of the deceased for the

²⁴ Qn. 56-57, p. 80

²⁵ At p. 74

40 years²⁶ but admits in his cross-examination that the deceased never came to him as a patient²⁷ and that he was treating the deceased's wife, not the deceased.²⁸ I therefore do not think that much evidentiary value need be attached to the medical certificate. Mr. Behramkamdin attempts to argue that the failure to secure a medical certificate from a practicing doctor is a suspicious circumstance; but this is going entirely too far. Suffice it to say that the certificate is not very relevant in the overall scheme of things. Similarly, the Plaintiffs produced seven photographs of the deceased.²⁹ As evidence, these may be inconclusive and no part of this decision turns on those.

31. We have one final piece of evidence from the Plaintiffs: the Order of the learned Single Judge in this very Court dated 5th May 2006 in Suit No. 1830 of 2000,³⁰ recording Consent Terms entered into between the deceased, Plaintiff No. 1 and the Defendant,³¹ a mere five days before the execution of the Will. Jitendra, the present Plaintiff No. 1 was the Plaintiff in that suit. Suresh, the present Defendant, and the Testator were Defendants Nos. 1 and 2. The suit was for dissolution of a partnership firm, M/s Ramchandra Lalji & Company. Jitendra and Suresh had lawyers. The Testator, Rajendra, appeared in person. The order of 5th May 2006 (S. C. Dharmadhikari J) notes this in part of paragraph 2:

²⁶ Para 3, *p.* 66

²⁷ Qn. 50, *p.* 79

²⁸ Qn. 78, *p.* 83

²⁹ Marked collectively as Exhibit P-9

³⁰ Exhibit P-3

³¹ Exhibit P-4

"2. ... Defendant no. 2 appearing in person, is present in the Court. The terms have been explained to him and he is agreeable to them. He has signed the same."

32. Suresh does try to dispute this in his cross-examination. When asked whether his father was present at the time of the passing of the Order, he simply says "Yes."³² It is only ten questions later,³³ and after his advocate has raised objections to the questions concerning the Consent Terms, that he volunteers:

(Witness Volunteers) "My father was brought to Court by Plaintiff No. 1 and he was asked to sign the Consent Terms. At that time he did not know what was happening and he was asking weird questions to me and to Plaintiff No. 1 and at that moment Plaintiff No. 1 told my father, not to ask questions and pointed out where to put the signature."

This comes entirely too late, and the Defendant admits in response to Q. 81 that he did not report this to the Mr. Justice Dharmadhikari at the time.³⁴

33. The recording in the Order of the explaining of the terms to the deceased, and his comprehension and acceptance of them, is, I think, an important piece of evidence as to soundness of mind for

³² Qn. 71, *p.* 158.

³³ At *p.* 161

³⁴ Qn. 87, *p.* 163

the execution of the Will a mere five days later. Is this evidence sufficient to prove the soundness of mind of the testator? I think it is. Both Dhirajlal and Dr. Kothari testify to the soundness of mind of the deceased. Their evidence also contains details of the deceased's corrections on the Will and a conversation during a reasonably long car journey. We have objective evidence in the form of the Order dated 5th May 2006 that records the deceased's presence in a court of law and his comprehension of and agreement with certain consent terms, five days before he executes his Will. This evidence, I think, when examined in totality, is adequate. In *Dr. Feroze Homi Duggan v Jean Duggan*³⁵, the propounder of the will led only the evidence of one of the attesting witnesses, and chose not to examine himself. The attesting witness's testimony was recorded as follows:

"37. She further deposed that from the behaviour and talk of the deceased it was clear to her that the deceased was in a sound state of mind, memory and understanding and executed her Will voluntarily."

34. This Court ultimately held, *inter alia* on this evidence, that the propounder succeeded in proving the will. Now in *Duggan*, the propounder only lived with the deceased for a few days, whereas in the instant case, the Plaintiffs lived with the deceased for 24 years. The evidence of an attesting witness as to the soundness of mind of the testator is in a given case sufficient proof of soundness of mind for a testamentary purpose. In the Supreme Court's decision in

³⁵ 2011 (5) All MR 497

Shashi Kumar Banerjee & Ors. v Subodh Kumar Banerjee,³⁶ one of the reasons cited for holding that the testator was of sound mind was that he had executed documents as recently as six months prior to the execution of the will.

35. Am I still bound to draw an adverse inference against the Plaintiffs? Mr. Behramkamdin says I must because the 1st Plaintiff, Jitendra, is not just a beneficiary but also a ‘participant’, for he was present at the time of execution of the Will. The failure to give evidence is unexplained and, in Mr. Behramkamdin’s submission, is fatal.³⁷

36. To begin with, this conflates two separate issues. The question of ‘adverse inference’ arose in the context of the issues framed as to testamentary capacity, not as to undue influence. In the first, as to testamentary capacity, I follow the submission: after all, the Testator lived with the Plaintiffs for many years and they were best placed to depose to his state of mental and physical health right up to the date of his death. But undue influence is another thing altogether, and a defendant who sets up such a plea cannot cover up a lacuna in his own evidence and escape the consequences of his own failure to prove it by claiming that an adverse inference should be drawn only because the plaintiff led no evidence. That is surely putting the cart before the horse. The burden of proving undue influence is on the defendant who takes the plea. It is only if he discharges that burden that the onus shifts to the plaintiff, and the

³⁶ AIR 1964 SC 529

³⁷ *Ashok Kashinath Deshmukh v Gopala Kashinath Deshmukh & Ors.*, 2008 (1) Mh LJ 768

plaintiff's evidence may be necessary. If the defendant altogether fails to prove undue influence, then the mere failure of the plaintiff to lead evidence cannot assist the defendant or, by an invocation of Section 114 and the principles governing adverse inference, furnish evidence that the defendant failed to provide though bound to do so. There is no question of invoking this principle on the issue of undue influence.

37. In any case, as the Supreme Court said in *Municipal Corporation, Faridabad v Siri Nivas*,³⁸ no law or rule requires that an adverse inference *must* be drawn; on given facts, a Court may be invited to draw such an adverse inference; it is not compelled to do so:

"15. A Court of Law even in a case where provisions of the Indian Evidence Act apply, may presume or may not presume that if a party despite possession of the best evidence had not produced the same, it would have gone against his contentions. The matter, however, would be different where despite direction by a court the evidence is withheld. Presumption as to adverse inference for non-production of evidence is always optional and one of the factors which is required to be taken into consideration in the background of facts involved in the lis. The presumption, thus, is not obligatory because notwithstanding the intentional non-

³⁸ (2004) SCC (LS) 1062

production, other circumstances may exist upon which such intentional non-production may be found to be justifiable on some reasonable grounds. In the instant case, the Industrial Tribunal did not draw any adverse inference against the Appellant. It was within its jurisdiction to do so particularly having regard to the nature of the evidence adduced by the Respondent."

38. Thus, whether or not to draw an adverse inference is in the Court's discretion. I cannot exercise that discretion for the asking. I must address myself to the question of whether such an adverse inference is warranted at all. This means that it must be shown, in the first place, that were such sufficient suspicious circumstances left unexplained, or such a worthy case set up by the Defendant, that the onus, previously discharged, shifted back to the Plaintiffs. The mere failure to lead his own evidence, absent any requirement established by contrary evidence, is not enough to warrant an adverse inference.

39. We must, therefore, examine the evidence led by the Defendant to see if he has at all been able to set up a sufficient case against the Plaintiffs. Suresh makes some references in his cross-examination to incidents of the deceased not being able to recognize people³⁹ and of him losing his way while travelling,⁴⁰ but he is unable to provide specific dates. He provides some general evidence of the

³⁹ Qns. 150-151, *pp.* 175-176

⁴⁰ Qn. 21, *p.* 142

deceased's admission into hospitals, but is unclear on the details and again cannot pinpoint dates.⁴¹ Mr. Behramkamdin points out that Dhirajlal stated in his cross-examination that the deceased was admitted to a private nursing home between 2000 and 2006,⁴² but that is hardly proof of lack of dispositive capacity. Beyond a certain age, we should all expect ourselves to be frequent inmates of some hospice or the other. There is no mention of any mental deterioration. The Defendant produces no medical records, and leads no evidence of any doctor who tended to the deceased; this is despite the fact that he says that the deceased was operated on for a brain clot.⁴³

40. The law does not require every testator to be in peak physical and mental condition, or to be possessed of 'sound and disposing mind and memory' in the highest degree. Were it so, few would make testaments at all. It is not even necessary for a testator to be in the same state as once he used to be, for even this would disable most in the inevitable decline of life. Enfeeblement with age and a degree of debilitation is to be expected. So long as the testator has enough to discern and discreetly to judge the matters that enter into a rational, fair and just testament, that is surely enough.⁴⁴

41. It is within this matrix, then, that the Plaintiffs chose not to lead evidence themselves. The Defendant's evidence was scanty

⁴¹ Qns. 140-146, *pp.* 174

⁴² Qns. 175-177, *p.* 103

⁴³ Qn. 145, *p.* 174

⁴⁴ *Kanwar Sain v State & Ors.*, AIR 1976 Del 11; *Gordhandas Nathalal Patel v Bai Suraj & Ors.*, AIR 1921 Bom 193 (DB)

and unconvincing. He did not lead sufficient evidence to shift the onus back to the Plaintiffs. There was nothing to rebut. The Plaintiffs closed their case. In this context, I do not think that I am bound to draw an adverse inference against them for this. I should note that though the Plaintiffs did file a Chamber Summons (L) No.71 of 2015 in the middle of final arguments for leave to lead rebuttal evidence, this was withdrawn, leaving all contentions open.⁴⁵

42. A Will is to be proved in accordance with Section 63 of the Indian Succession Act read with Section 67 and the proviso to Section 68 of Indian Evidence Act. The law does not insist on the propounder giving evidence in each and every case. If the other evidence is sufficient, be it of a single attesting witness,⁴⁶ nothing more is needed.⁴⁷

43. I see no evidence at all of want of soundness of mind. The Testator was a trained lawyer, very much of the old school, given to paying close attention to detail and labouring over his material. There is much to be said for this ethic, one that seems to have become unfashionable now and replaced with an altogether more slapdash and unthinking approach. The Will is organized and detailed. It has the necessary ingredients. The fact that it makes

⁴⁵ Order dated 30th April 2015.

⁴⁶ *Ramabai Padmakar Patil v Rukminibai Vishnu Vekharde*, AIR 2003 SC 3109

⁴⁷ *Savita Dattatraya Karandikar v Nishikant Sadashiv Karandikar*, 2009 (6) Mh LJ 431

dispositions that do not favour the Defendant is not evidence of lack of capacity.

44. On the issue of testamentary or dispositive capacity, the testimony of both attesting witnesses is undisturbed in cross. We know, for instance, that the Testator travelled all the way from his house at one end of the city to Dr. Kothari's at virtually the other. Both attesting witnesses say that the Testator made corrections to the Will in their presence. This is, I think, ample evidence of his capacity. Read with the Testator's personal presence before this Court a mere five days earlier, when he told the Court that he had read and understood certain Consent Terms, I do not believe that there is the slightest doubt about his testamentary capacity.

45. Before I part with this section, I must address one question: what is it precisely on which an adverse inference would have to be drawn? It cannot be on the contents of the Will, for the Plaintiffs had nothing to do with that, and that is not shown. It cannot be on the question of execution of the Will, because there, too, the evidence of the two attesting witnesses is unshaken. Therefore, it can only be on the question of dispositive capacity, and here, as we have seen there is ample evidence *aliunde* of sufficient testamentary capacity, and no counter-evidence from the Defendant such as would serve to shift the onus back on the Plaintiffs. No question therefore arises of drawing any adverse inference merely on account of their failure to lead their own evidence, something that is, in any case, not an absolute requirement of law.

46. Issue No.2 is also answered in the affirmative.

Re: Issue No. 3A: Whether the will is unnatural

47. The plea of unnaturalness is raised for the first time in the Defendant's Evidence Affidavit dated 18th March 2013. Paragraph 18 of that Affidavit says:

"18. I say that the said alleged Will is unnatural Will as by the said Will the properties are distributed exclusively between the Plaintiffs rather than to the other children of the deceased i.e. to me and to three daughters without any apparent reason."

48. The burden of proof for Issue No. 3A is clearly on the Defendant. He points to the fact that all of the Testator's children and grandchildren, save the Plaintiffs, are disinherited in the Will, and that no reasons are given for this exclusion. Mr. Behramkamdin drew my attention to the cheque book counterfoils marked as Exhibit P-6 and Exhibit P-7, in which the deceased is shown to have made payments to Plaintiff No. 1; Plaintiff No. 2; his sister, Aruna; his niece, Chetna; and Ajit, Anjali and Manisha, the children of the first Plaintiff. This, he argues, shows that the testator loved all of his children and grandchildren equally, and that the dispositions contained in the Will are suspicious and unnatural. I do not think this is so. By definition, every Will disrupts the natural line of succession, and no law demands that a Will must follow, and always only follow, the natural order of succession. Were that so, Wills

would be unnecessary. The exclusion, therefore, of an heir or a number of heirs in a Will is not in and of itself sufficient to make it unnatural.⁴⁸ We must remember that the testator had five children: two sons and three daughters. The three daughters, Prafulla, Aruna and Bina did not enter any Caveats. Only the younger son did. Only one of the five children contested the Will. This is hardly evidence of the Will being unnatural.

49. Moreover, reasons in a Will for the exclusion of certain heirs render that exclusion a non-suspicious circumstance (and vice versa).⁴⁹ While the deceased's reasons for excluding the Defendant and his sisters are not explicitly spelled out, there is intrinsic evidence of them in the Will. He takes care to state in his paragraph IV:

"IV. NOBODY HAS ANY INTEREST OR TITLE IN
MY PROPERTIES

Whatever I have wished to give to my
elders, relations my wife and
children, grand children, great grand
children, daughters-in-law and sons-
in-law I have given. I have fulfilled
my duties in educating my family
members and I will continue to look
after their well being. Similarly, I

⁴⁸ *Rabindra Nath Mukherjee & Anr. v Panchanan Banerjee & Ors.*, AIR 1995 SC 1684; *Pentakota Satyanarayana & Ors. v Pentakota Seetharatnam & Ors.*, (2005) 8 SCC 67

⁴⁹ *Ammu Balachandran v Mrs. O.T. Joseph & Ors.*, AIR 1996 Mad 442; *Leela Rajagopal v Kamala Menon Cocharan*, AIR 2015 SC 107; *Ram Piari v Bhagwant & Ors.*, (1990) 3 SCC 364

have fulfilled all obligations whatsoever I have felt and was capable of towards my relations. I had given Rs. 3,50,000/- (Rupees Three lakhs fifty thousand only) to my daughter-in-law Nita Suresh Kushwaha to purchase a house at Ramesh Mahal, Juhu where he resides with his family. My son Suresh being Swedish Citizen cannot purchase properties in India. Thought my son Suresh had given consent in transferring tenancy rights of Kalbadevi residence he has filed a suit against me in Small Causes Court in Bombay vide Case No. 2250/1995 which is still pending. I distributed sarees of my wife after her death which were in good condition and her ornaments, silver utensils to my daughters and daughters-in-laws."

50. In the Will, therefore, the deceased first states that he made *inter vivos* such dispositions or gifts as he desired to his relatives. He then makes specific reference to the fact that he has already given ornaments and utensils to his daughters, and that he has given Rs. 3,50,000/- to the Defendant's wife for the purchase of a house in Juhu. Now, for whatever reason, the Defendant strongly contests this, but these denials are unconvincing. He denies that the deceased gave his wife Rs. 3,50,000/- for buying a house in Juhu,⁵⁰ but Exhibits P-6 and P-7 clearly show three payments made to Nita

⁵⁰ Qn. 53, p. 155

of Rs. 3,00,000/- on 16th July 1988, Rs. 10,000/- on 4th August 1988, and Rs. 30,000/- on 15th July 1988.⁵¹ No other reason for these payments is suggested. Suresh denies that his wife purchased an apartment in Juhu sometime in 1988⁵² and denies that there is a flat in Juhu with which he is concerned,⁵³ but then admits that Flat No. 17 in the building Juhu Ramesh Mahal Cooperative Housing Society stands in his wife's name.⁵⁴ It is irrelevant for our purposes if or when he resided there with his family, although it is worth mentioning that he is evasive about this;⁵⁵ what matters is that the evidence clearly indicates that an amount of Rs. 3,50,000/- did in fact flow from the deceased to Nita, and that Nita did own a house in Juhu; the vociferous denial of this by the Defendant is, in fact, downright suspicious.

51. Second, the deceased deliberately refers in his Will to RAD Suit No. 2250/1995 filed by Suresh against him in the Small Causes Court, despite the Defendant having consented to the transfer of tenancy rights in the Kalbadevi residence. He mentions it a second time under paragraph V, "My Properties"; stating that it is because of the Defendant that he is unable to stay in his home at Kalbadevi:

"4) (a) I am residing at 381-A Kalbadevi,
Narottam Wadi, 3rd floor, Room No.31, 32,

⁵¹ There seems to be a difference of Rs. 10,000/-, but this is not very significant.

⁵² Qn. 47, *p.* 153

⁵³ Qn. 48, *p.* 153

⁵⁴ Qn. 49, *p.* 153

⁵⁵ See Qns. 91-99, *pp.* 164-165; and *p.* 267 of P-8, which is the Defendant's evidence on 9th December 1997 in Case No. 225/P/95, where he admits to living in Juhu.

33, 34 with my elder son Jitendrasingh Kushwaha and his family. This is a tenanted premises and rent bill stands on my name. Previously my wife Damyanti Kushwaha made a note in her will regarding this premises and as per her wish tenancy, with consent of my all children, was transferred on my name. Since 1985, the said premises were in depleted conditions requiring heavy repairs, risky for life of people residing therein. After that we decided to stay at our flats at Rajdeep Apartment, 319, Tank road, Santacruz (W) and the building was undertaken for repairs under supervision of MAHDA. Meanwhile, my son Suresh filed a suit against me for this property. So even after repairs of flooring and walls, interior could not be made as matter became sub-judice. We could not stay there even when we had been given possession thereof and for the same reasons stated above, we continue to stay at Raj Deep Apartment."

52. This is clear evidence of strained relations and would explain the exclusion of the Defendant from the Will. By contrast, the same paragraph in the Will also mentions that several of his bank accounts, share certificates, and fixed deposits are held jointly with Plaintiff No. 1.⁵⁶ Mr. Shah relied on various authorities in support of his proposition that the disinheritance of a close relative does not always *per se* render the will unnatural. In *Seth Beni Chand v Smt.*

⁵⁶ At p. 15-19

*Kamla Kunwar & Ors.*⁵⁷, the Supreme Court held that because the relationship between the mother and son had deteriorated substantially over 30 years, it was not unnatural for the mother to exclude him from her Will. Similarly, in *Naresh Charan Das Gupta v Paresh Charan Dad Gupta*,⁵⁸ the testator practically disinherited his son, and recorded in his will that he was doing so because his son had married a woman from a different caste; the Supreme Court held that this was not an unnatural Will. Finally, in *Arnold Dominic Rodricks v Sunder Vinayak Navalkar & Anr.*,⁵⁹ this Court held that a mother's disinheritance of her son was not unnatural because she had recorded in her Will that there was a dispute between them with regard to his father's Will; that her son was not behaving in a loving and dutiful manner; and that she was therefore leaving her property to her daughter instead of her son.

53. We cannot see matters in isolation. When we assess a ground such as this, that the Will was 'unnatural', we are asked to turn the judicial minds to an evaluation, to the extent possible from the material on the record, to the nature of the relationships, the manner in which the parties led their lives and so on. We are required to see these lives not in the aridity of legal submissions, but fleshed out with context and texture; things that might be irrelevant in law might nonetheless be powerful motivating factors determining how a person chose to conduct his or her affairs. Conversely, matters that assume great proportion to lawyers are sometimes of no moment in the daily rounds and common tasks of

⁵⁷ AIR 1977 SC 63 : (1976) 4 SCC 554

⁵⁸ AIR 1955 SC 363

⁵⁹ AIR 1956 Bom 404

people. We know, in this case, that the testator chose to live with the Plaintiffs. There is no hint that he was compelled to do so. We also know that there were litigations between the Defendant, Suresh, and the testator. We also know that Suresh filed a Criminal Complaint No. 225/P/95 against Jitendra, the 1st Plaintiff in respect of an incident on 20th February 1995 under Section 325 of the Indian Penal Code, 1860. Jitendra was ultimately acquitted on 3rd March 1999.⁶⁰ In that order, the Court referred Suresh was cross-examined in that case. , and this cross-examination is annexed to the present suit as Exhibit P-8. In the Order, the Court referred to another Suit No. RAD 3027/95 filed by Suresh against his father, the testator, and Jitendra regarding their partnership firm. The testator filed an Affidavit on 31st January 1996 in Suit No. RAD 3027/95. A portion of this was put to Suresh in his cross-examination in the present case.⁶¹

"I say that on 20.2.95 I was sitting in my room i.e. suit premises with my son Jitendra Singh Rajendra Singh i.e. No. 7. The plaintiff (present witness) was there along with Shri Bakul Shah and asked me to give his half share in respect of my property. I refused and thereupon he abused me and I therefore, slapped him. Then plaintiff took a wooden chair lying in the said room and tried to hit me. I strongly defended his assault with my hand and one of the handles of the chair which

⁶⁰ Exhibit P-5

⁶¹ Exhibit P-8, pp. 273-274

he holded was broken and during the tussle
his finger might have been injured."

(Emphasis added)

When confronted with this, Suresh in his cross-examination says:

"I cannot say why my father has mentioned the above referred facts in his affidavit regarding the said incident. He might have done this as I filed the civil suit against him."

54. While this suit and incident do not find specific mention in the Will, they do serve to further illustrate the poor relationship between the deceased and Suresh. Thus, on the one hand, we have a son who initiated several litigations against the deceased, and who, it appears, was violent with the deceased on at least one occasion. There is no evidence led whatsoever to demonstrate such love, closeness and affection between the deceased and the Defendant as would make the bequests in the Will unnatural. On the other hand, we have the Plaintiffs, with whom the deceased lived from 1982; i.e., for the 24 years preceding the execution of his Will. The Defendant makes some vague references to the deceased's mistreatment⁶² at the hands of the Plaintiffs, but this is unsubstantiated, and he admittedly made no effort to bring his father to live with him, instead; his reasons for not doing so are flimsy.⁶³ Added to this is the fact that the three excluded sisters chose not to file Caveats.

⁶² Qns. 107-109, *pp.* 167-168

⁶³ Qns. 165-168, *p.* 185

55. The Will is not unnatural, and Issue No.3A is answered in the negative.

Re: Issue No. 3B: Undue Influence

56. The burden of proving undue influence is on the Defendant. In his Evidence Affidavit in Lieu of Examination-in-Chief dated 18th March 2013, Suresh says that when he used to visit his father prior to 2003, his father used to tell him that the Plaintiffs were not behaving properly with him, and that he was under the control, domination and influence of Plaintiff No. 1 and his family. He states that the deceased told him that he did not want to pursue the litigation against the Defendant, and was only doing so because of pressure from Plaintiff No. 1 and his family.⁶⁴ He also states that he had spoken to Plaintiff No. 1 several times about taking the deceased to a doctor, but Plaintiff No. 1 did not allow him to do so; in fact, in the year prior to the deceased's death, the Plaintiffs did not allow him into their home to meet the deceased.⁶⁵ In his further oral Examination-in-Chief conducted on 21st April 2014, Suresh says:

Q. 21) Could you give instances of undue influence exercised by Plaintiffs on the deceased and the unsound mind of the deceased?

⁶⁴ Paragraph 7, *p.* 126

⁶⁵ Paragraph 8, *p.* 126

Ans. The deceased was not able to recognize people whenever they visited him. He was not even able to recognize me, I had to remind him who I was. Many times he used to go down on the road and was unable to find his way home. On several occasions, while travelling he got down at Bhopal or Gwalior thinking that he has reached his destination Agra. And of undue influence I had to say that Plaintiff No. 1 barred me to visit the deceased at his residence i.e. Santacruz one year prior to his death and that the deceased also told me that Plaintiff No. 1 had forcibly taken him to some places and made him to sign some documents on two or three occasions.

Q. 22) Did you ask the deceased as to what the documents were?

Ans. Yes, I did ask.

Q. 23) In answer to Q. 22, you have stated that you did ask the deceased as to what the documents were. What did he answer you?

A. The deceased told me that he was not allowed to read and explain about the document and he was

asked to sign the document. He also told me that Plaintiff No. 1 told him not to tell anybody about this document and in future also, not to disclose where the deceased had put his signature.

57. As I have mentioned previously, the Defendant also stated in cross-examination that at the time of the signing of the Consent Terms dated 5th May 2006, Jitendra told the deceased not to ask questions, and told him where to sign.⁶⁶ This, however, as I have said, comes too late and is wholly unsupported by the order itself.

58. There is also the likelihood that the 1st Plaintiff was present at the time of the execution of the Will. This comes from the cross-examination of Dr. Kothari and Dhirajlal. Dhirajlal states that Jitendra and the deceased picked him up and accompanied him to the residence of Dr. Kothari for the signing of the Will:

Q. 197) On 10th May 2006, did you come to the residence of Dr. Kothari on your own or did you come with Jitubhai?

Ans: I came with Rajendra Singh Kushwaha accompanied by his son Jitubhai.

Q. 199) So did you get picked up by Rajendra and Jitubhai from your residence and then all of three

⁶⁶ Page 161

of you came together or did you pick them up?

Ans: They picked me up.

59. Dr. Kothari's responses to Q. 66-70 are quite clear:

Q. 66) Who fixed this meeting at your residence on 10th May 2006?

A. Deceased's son Mr. Jitubhai.

Q. 67) What did Jitubhai tell you when he fixed the meeting?

A. He wanted my signature on the Will as a witness.

Q. 68) Anything else?

A. No.

Q. 69) Who else were present at your residence on 10th May 2006 at 11 a.m.?

A. My family members were there.

Q. 70) Anybody else?

A. Somebody came with Jitubhai as his C.A.

60. Moreover, when he is asked in Q. 95 if the 1st Plaintiff signed the Will, he simply answers "No";⁶⁷ he does not deny the suggestion that Plaintiff No. 1 was present. Since he and his family

⁶⁷ At p. 85

are the sole beneficiaries under the Will, the Supreme Court tells us that Jitendra's presence at or significant involvement in its execution is a suspicious circumstance that needs to be explained by the propounder.⁶⁸ But merely being present without anything further elicited from the attesting witnesses in cross-examination is surely insufficient. We have nothing that shows that Jitendra was in any way involved in the preparation of the Will or its contents; and we do not even have firmly established his presence at the very place (i.e., the room, chamber or desk) at which the execution took place. He accompanied his father to Dr. Kothari's residence; that is all that is established. I do not think this is sufficiently 'suspicious' to dislodge the Will.

61. But Mr. Behramkamdin does not stop at that. He turns to paragraph VIII of the Will, "My Directions":

"5) I have given instructions what amount
be given to each of my relations to
my son Jitendra."

This is also said to be suspicious, because no evidence has been led about the deceased's instructions or whether the first Plaintiff carried them out. But this takes us nowhere. It is an argument that relates to the contents of the Will or the probity of a particular disposition, something with which this Court is not concerned unless it is demonstrable evidence of importunity or unsoundness of mind. It is neither. What the Defendant seeks is information or evidence of what those instructions might have been; that, surely, is

⁶⁸ *H. Venkatachala Iyengar v B.N. Thimmajamma & Ors.*, AIR 1959 SC 443.

not a suspicious circumstance. As a general rule, Courts tend not to lean to interpretations that would result in intestacy;⁶⁹ and certainly not on so thin a thread.

62. Undue influence cannot be presumed. It must be pleaded and proved. I have been generous as regards the pleading; I framed the issue on the basis of the Evidence Affidavit and because both sides say the issue as arising. But proof of undue influence surely required something more than this. The Defendant needed to show that the Testator was wholly under Jitendra's domination, and acted on his dictates at least in the matter of the making of the Will; and that, but for this undue influence, the Testator would not have been moved to make such a Will. Of course the evidence will be largely circumstantial and inferential; but evidence there must be.

63. I think it noteworthy that there is no attempt to hide or obfuscate the fact that Jitendra was present at the time of the Will's execution, at least in Dr. Kothari's house and possibly in the room. Both witnesses answer whatever is asked in cross-examination truthfully. There is no mention anywhere in their evidence of Jitendra compelling the deceased to sign the Will, or in any way exercising some form of force or influence or coercion over him; nor is such a case put to either of the attesting witnesses. There is no evidence of importunity. The Defendant seeks in his cross-examination to show that both of the attesting witnesses are friends of Jitendra rather than the deceased, but this is not borne out; the

⁶⁹ *Pearey Lal v Rameshwar Das*, AIR 1963 SC 1703; *Bajrang Factory Limited & Anr. v University of Calcutta & Ors.*, (2007) 4 SC 513.

ages of both witnesses are closer to that of the deceased; they both give accounts of how they know him and the long length of their relationship;⁷⁰ and Dhirajlal specifically denies that he was friends with Jitendra rather than his father, Rajendra.⁷¹

64. We do know that the deceased was 85 or 86 years old at the time of the execution of the Will, and that he had been living with Plaintiff No. 1 and his family since 1982. It seems plausible that he could not have travelled alone and that Jitendra accompanied him for that reason. I have held that the Will is not unnatural; this, by necessary consequence, makes the exercise of undue influence significantly less likely and more difficult to prove, because for influence to be undue, it must be something more than mere persuasion; it must be the exercise of such force as compels the testator to do something that he does not wish to do. As pointed out in a judgment of this Court cited by Mr. Shah, *Arvind s/o Bhaurao Gangashettiwar & Ors. v Smt. Indirabai W/o Balkrishna Gangashettiwar*.⁷²

"26 ...Mere presence of motive and opportunity for playing fraud or exercising undue influence are not sufficient to draw any inference in this respect."

⁷⁰ See, for example, Qns. 17, 21 and 24 of Shashikant's cross-examination at p. 73-74 and Qn. 170 at p. 102-103.

⁷¹ Qns. 188-193 of Dhirajlal's cross-examination at p. 105.

⁷² 2008 (5) All MR 651

Similarly, in *Naresh Charan Das Gupta v Paresh Charan Das Gupta*,⁷³ the Supreme Court held:

"13. It is elementary law that it is not every influence which is brought to bear on a testator that can be characterised as "undue". It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour. And if the testator retains his mental capacity, and there is no element of fraud or coercion - it has often been observed that undue influence may in the last analysis be brought under on or the other of these two categories - the will cannot be attacked on the ground of undue influence."

Finally, in a recent decision of this Court in *Charulata @ Renuka Haresh Lulla v Gul Khanchand Gidwani & Ors.*,⁷⁴ this Court held:

"24. The principle of the ambit of undue influence which can be practiced upon a testator has been considered for the last more than a century in England and later also in the Indian cases. The authority under the said subject is the case of *Hall v Hall* (1868) LR 1 P & D 481 which held thus:

Even a reprehensible placing of pressure on a testator will not

⁷³ AIR 1955 SC 363

⁷⁴ 2013 (2) All MR 261

always be undue influence so as to avoid the will: "To make a good will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affection or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like - these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping distress of mind or social discomfort, these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes is overborne will constitute undue influence, though no force is either used or threatened." And thus Sir Wilde concludes:

"In a word a testator maybe led but not driven and his must be the off-spring of his own volition and not the record of someone else's."

28. The defendants have not made out any case of fraud. They have not shown such coercion practiced by the plaintiff upon the deceased as to make him sign on the dotted line under her influence. They have, therefore, not shown any such misrepresentation made by the plaintiff. The fact of the plaintiff living with the deceased which led the deceased to make a will in her favour shows the course of the behaviour of the plaintiff. The deceased himself with a free mind decided to give her his properties under the will. The deceased had no other closer, better relative to bequeath his properties unlike in the cases cited above in which close family members themselves were disinherited."

(Emphasis added)

65. The Defendant does not lead convincing evidence of such coercion, fraud or importunity. The armchair of the testator is our vantage point. The mere presence of the 1st Plaintiff does not establish undue influence.

Conclusions and Final Order

66. Vast amounts of authority and precedent do not substitute for evidence. Ultimately, in matters such as this, every case will turn on

its own facts; and, too, on whether the judicial conscience is so outraged by the document in question that it cannot possibly uphold it. A probate Court's jurisdiction is not a jurisdiction of suspicion; it is a jurisdiction of caution, a very different thing. It is also, I think, a mistake too often made to use this phrase 'suspicious circumstance' to mean that every contested Will must be seen, merely by virtue of there being a contest, as unproved unless otherwise established. When the weight of established authority uses this phrase, I believe it does so not to imply that every single circumstance, taken in isolation, is sufficient to dislodge an otherwise properly made Will, but to indicate that the propounder of a contested Will has to discharge evidentiary burdens, varying in degree depending on the circumstances of each case, that he would not otherwise have to do if there was no contest. There are, of necessity, degrees of this 'suspicion'; and, again, when we use this phrase we must remember that we refer to circumstances that require explanation, not to assume that axiomatically all those circumstances are fatal. Regard must be had to the evidence overall; to the context of the lives before us. We must draw for ourselves an image or portrait of the testator, his family, his life, his work, his relationships, and his approach. We seat ourselves in his armchair. We have before us a man approaching his ninth decade, one who was a practicing lawyer some thirty years earlier, with an eye for detail. We have evidence of him being closer to one son and his family, and of having had to put some considerable distance between himself and his other son. There is evidence of acrimony between the Defendant and the testator, of suits filed, criminal proceedings and trials. None of this can have endeared the Defendant to the testator. Given this distancing, it is expected that the Defendant would not be close to

the testator and it is as unreasonable as it is unsafe to assume any affinity or closeness; indeed, none is shown. We have no material to show that the Defendant had anything of the kind of intimate knowledge of the testator's life, daily routine, affairs, health or well being as might be expected had they been close. We also have, conversely, no evidence at all of the Plaintiffs conducting themselves in such a way as to dominate the testator. That the testator lived with the Plaintiffs is not disputed. That they were his care-givers in his old age is also undisputed. Why then should the Testator not have favoured the Plaintiffs? The Testator's three daughters seemed to have accepted this. The only person who did not was the son with whom he had an established record of adversarial litigation. In this, we cannot ignore either the Defendant's prevarications about the statement of the Testator having given an amount to the Defendant's wife for the purchase of a house in Juhu; or the horrifying testimony given by the testator of an actual physical altercation between father and son over a property dispute. What shocks the conscience, at least mine, is not anything in the Will itself, but in the conduct of the Defendant, one that I find nothing more than incessantly grasping, rapacious and avaricious. What explanation have we of the testator's affidavit as to the Defendant's conduct? Only that this might have been the result of a litigation acrimony. That surely is sufficiently eloquent testimony about the Defendant's relationship with the Testator.

67. The so-called suspicious circumstances to which Mr. Behramkamdin refers and which he set out in a long chart, much of it needlessly repetitive, is unpersuasive. I find no evidence of importunity. I find no evidence of the Testator having been

influenced, duly or otherwise, or of being of unsound mind. Quite the contrary. There is then the fact that the Will is registered, a cautionary step that is not without its own evidentiary weight. I also find nothing so very fatal in the circumstances regarding the execution of the Will itself. As Mr. Shah says, the evidence of the two attesting witnesses, both disinterested and independent, is sufficient as to execution and also as to testamentary capacity. I note that no suggestion was ever put to either that they had any vested interest in the estate. Once it is shown that the Will was signed by the testator; he was at the relevant time in a sound and disposing state of mind; he understood the nature and effect of the dispositions; he put his signature to the testament of his own free will; and the Will is witnessed in accordance with the provisions of Section 63(c) of the Indian Succession Act, 1925, the propounder's onus is discharged.

68. In the result, the suit is decreed and the Petition is made absolute. There is no substance to the opposition to probate. The Registry shall proceed to issue probate. No order as to costs.

69. At the request of Mr. Behramkamdin, the operative part of this order is stayed for a period of four weeks.

About the Affidavits of Attesting Witnesses

70. A word about the evidence Affidavits and the Affidavits of the attesting witness accompanying such Petitions. Rule 374(c) says that a probate petition must be accompanied by the Affidavit of an attesting witness, if available, in Form 101 of the Bombay High Court (Original Side) Rules.⁷⁵ That form is materially incorrect. It says in sub-clause (3) that both attesting witnesses were present at the same time and saw the testator sign the will in their presence and that they did, in his presence, and in each other's, all being present at the same time, 'set and subscribe' their respective names and signatures at the foot of the testamentary paper as witnesses thereto. The Form suggests that this simultaneous presence of both witnesses is a requirement of law. It is not. Section 63(c) does not require both witnesses to be present at the same time. To the contrary, it specifically says that:

it shall not be necessary that more than one witness be present at the same time

71. The wording of Form 102 to the O.S. Rules cannot possibly supplant the substantive law in Section 63(c), nor can it add a restriction, limitation or requirement that is not to be found in that Section. What if both witnesses were not present at the same time? This would still be perfectly in accordance with Section 63(c), but not in accordance with Form 102. It can hardly be suggested that non-conformity with that Form, despite conformity with the

⁷⁵ Rule 375(c) makes a similar provision for Petitions for Letters of Administration with Will Annexed.

substantive statutory provision, would defeat a petition for Probate or Letters of Administration With Will Annexed. To the extent that Form 102 insists on a statement not to be mandated by Section 63(c), it is incorrect and contrary to law; and Rules 374(c) and 375(c) of the High Court (O.S.) Rules are also incorrect and contrary to law to the extent that they demand Affidavits in conformity with Form 102. Interestingly, Rules 374 and 375 say that the *petition* is to be in Form 97 “with such variations as the circumstances of each case may require”, but this qualification is missing in reference to Form 102. The Form shall have to be read as being a template, and as permitting such variations or modifications as may be necessary.

72. Indeed, the Registry cannot possibly insist on an affidavit in any particular form. The substantive law of succession and evidence does not require any particular form. There is also no reason at all why this Affidavit should say anything less than might be said in an Affidavit in lieu of Examination-in-Chief of the very same attesting witness. The two are required by our processes at different stages, but there is in law no distinction between the two. In the past, this has create needless controversies, with a particular attesting witness being asked in cross-examination why his or her Affidavit in lieu of Examination-in-Chief does not exactly match his Affidavit filed along with the Petition. There is no reason at all why the two should be different. They serve exactly the same purpose, and this purpose is compliance with Section 68 of the Evidence Act: proof of execution of a document required in law to be attested. If a document is required by law to be attested, it cannot be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. Whether the application is

contested or uncontested, the execution of the Will must be proved. If there is an attesting witness available, his evidence is required; if not, both the Evidence Act and our Rules make provision for other evidence. This is the only reason for insisting that the Affidavit of at least one Attesting Witness be filed along with the Petition; and, consequently, there is no distinction at all between such an Affidavit and an Affidavit in Lieu of Examination-in-Chief. Both serve exactly the same purpose. Therefore, the affidavit supporting the Petition should be as close as possible to an affidavit that the same witness might file of his examination-in-chief.

73. Therefore, till such time as this Form is rectified and the Rules amended, it shall be sufficient if the Affidavit complies with the requirements of Section 63(c), irrespective of whether or not it conforms exactly to Form 102. Fact-dependent variations and modifications are legitimate, and Rules 374 and 375 as also Form 102 are to be read as permitting such variations. An Affidavit accompanying a petition under Rule 374 or 375 may (and should) contain all the details that the attesting witness in question might be required to be place in an Affidavit in lieu of Examination-in-Chief if the matter is contested.

74. A copy of this portion of the order should be sent to the Prothonotary & Senior Master and the Additional Prothonorary & Senior Master for placing before the Administrative Committee of Hon'ble Judges for a suitable amendment to the Rules and the Form.

(G.S. PATEL, J.)