Michael Lorence Lopis And Ors (To ... vs Joseph Lorence Lopis And Ors on 7 November, 2014

Equivalent citations: AIR 2015 (NOC) 209 (BOM.), 2014 (6) ABR 785

Author: R.D. Dhanuka

Bench: R.D. Dhanuka

Kvm

1/64

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 48 OF 1994

DIST. THANE

1. Michael Lorence Lopis,)
aged 70 years, occupation : retired)
Agriculturist)

2. Anton Lorence Lopis,)

Age : 56 years, occupation : Service/)
Agriculturist ig)

3. Paul Lawrence Lopes since deceased)
through his heirs and legal representatives)

3-A. Mary Paul Lopes,)
Aged : 62 years, Occupation : Housewife)

3-B. Crispina Fredy Gonsalves,)
Age : 38 years, Occupation : Service)

3-C. Suvas Paul Lopez,)
Age : 36 years, Occupation : Service)

3-D. Winson Paul Lopez,)
Age : 33 years, Occupation : Service)
All residing at Manikpur, Tal. Vasai,)
Dist. Thane) ..... Appellants

VERSUS

1. Joseph Lorence Lopis,)
Age : 44 years, Occupation : Agriculturist)

2. John Lorence Lopis,)
Age : 63 years, Occupation : retired)
Agriculturist)

Kvm

3. Atibai K.D'Mello,)
Age : 58 years, Occupation : Household)

All residing at Manikpur, Vasai,)

Dist. Thane) ..... Respondents

Mr.A.J.Almeida for the Appellants.

Mr.P.S.Dani, Senior Advocate, a/w. Mr.Pratap Mandlik for Respondent no.1.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 8th OCTOBER, 2014
PRONOUNCED ON : 7th NOVEMBER, 2014

JUDGMENT

This appeal is directed against the judgment dated 14th December, 1993 passed by the learned Civil Judge Senior Division, Thane allowing the suit filed by the respondent no. 1 for letters of administration with the will annexed of the deceased Mr. Joseph Lorence Lopis (hereinafter referred to as the said deceased).

Some of the relevant facts for the purpose of deciding this appeal are as under :

> 2. The respondent no. 1 was the original plaintiff. The appellants were the original defendant nos 1, 3 and 4 respectively. Respondent no. 2 herein was original defendant no. 2. Respondent no. 3 herein was the original defendant no. 5.

During the pendency of the appeal the original appellant no. 3 expired. By an amendment permitted by this court by order dated 18 th November, 2008, his legal heirs are brought on record. Original Appellants and the respondent no. 1 and 2 were the sons of the said deceased. Mr. Joseph Lorence Lopis. Respondent no. 3 is the daughter of the said deceased. It is the case of the respondent no. 1 that the said deceased had executed a will on 23 rd June, 1983. The said deceased and the parties to this proceedings are governed by the provisions of Indian Succession Kvm FA48.94 Act, 1925 being Christians. The said will was registered with the sub registrar's office. On 9th November, 1987, the said testator expired leaving behind the appellant no. 1 and 2, the original appellant no. 3 and the respondents as heirs and legal representatives.

3. On 10th March, 1988, respondent no.1 herein filed an application for letters of administration with will annexed. All the legal heirs of the said deceased were served with the citation of the proceedings. The appellants filed written statement challenging the genuineness of the will on

various grounds. In the said written statement, it was alleged that the purported will was either a fraudulent document and/or got by undue influence and coercion and did not express the true or last wishes of the deceased. It was alleged that the respondent no.1 herein got the alleged will executed by the deceased who was under his absolute control by exercising undue influence and coercion upon the said deceased. The deceased was at the time of alleged execution of the will 85 years old. It was alleged that the testator was not in sound mental condition or health. It was alleged that the entire property that the deceased had purported to will was an ancestral property and therefore, all the heirs of the said deceased had equal share in those properties. It was further alleged that Mr. S.P. D'mello, a relation of the respondent no. 1 herein from his wife's side had scribed the alleged will and in collusion and conspiracy with the respondent no.1 had got the alleged will executed by the deceased without the deceased being aware of the contents and the implications of the alleged will. 80% of the estate under the will of the deceased had been allegedly bequeathed to respondent no.1 and his family members.

4. It is alleged that the will did not appear to be natural, fair and probable instrument. The respondent no.1 had taken undue advantage of the old age and Kvm FA48.94 feebleness of mind of the deceased and transferred two of the valuable properties of the family to the name of the wife of the respondent no. 1 acting and signing as constituted attorney of the said deceased on a single day i.e. 6 th June, 1986. There was a provision made in the said alleged will in respect of the said properties. The appellants had already filed a suit being Suit No. 607 of 1989 before the learned Civil Judge, Senior Division Thane inter alia praying for partition and cancellation of the sale deeds both dated 6 th June, 1986 executed by respondent no.1 in favour of his wife.

5. It was alleged in the written statement that the said will had been prepared by respondent no.1 and Mr. S.P. D'mello and merely a signature of the said deceased on the last page with intention to grab the entire property of the family to the exclusion of other heirs was obtained. Though there were number of corrections on the alleged will on number of pages on no page or on correction, there was only initial by the testator. It was alleged in the written statement that the deceased was ailing and had shortness of breath and in feeble state of mind at the relevant time. The respondent no. 1 and his wife had created prejudice in the mind of the said deceased against the appellants and as a result thereof the said deceased was induced to bequeath more than 80% of the estate to respondent no.1 and his family members. In the month of November, 1985 the said deceased was walking with the help of a stick.

6. It is case of appellants that the respondent no. 1 had given a public notice in the newspaper on 19th July, 1986 that the deceased was not in a sound and proper frame of mind and nobody should rely upon him. The appellants came across the writing after the death of the said deceased in the handwriting of the said deceased dated 3rd July, 1986 wherein the said had cancelled and/or revoked the alleged will Kvm FA48.94 dated 23rd June, 1983. The other legal heirs of the said deceased did not oppose the reliefs claimed by respondent no. 1 and did not file any written statement.

7. Respondent no. 1 did not examine himself as a witness though he was propounder of the will. He however, examined one doctor namely Dr. Kirit Sutaria, (PW No. 1), Mr. Johny Rodrigues (PW. No.

2) who was one of the alleged attesting witness of the will and one Mr. S.P. D'mello (P.W. No.3) who was alleged scribe of the said alleged will. On behalf of the appellants, the appellant no. 1 was examined as a witness. After considering the pleadings filed by the parties, the trial court framed the following issues :

ig ISSUES

1. Does the petitioner prove the Will dt. 29.6.83 executed by deceased Lorens Manwel Lopies is legal and valid and he had a power to dispose off the said property mentioned in the Will?

2. Does respondent prove that said will is revoked by the said testator by writing date 3.7.86?

3. To what relief Petitioner is entitled for?

4. Whether Petition is not maintainable for non-compliance of provisions of section 281 of Indian Succession Act of 1925?

5. What decree and order?

8. The trial court rendered a finding that the petitioner had proved the will dated 29th June, 1983 executed by the said deceased which was legal and valid and he had a power to dispose of the properties mentioned in the will and accordingly answered issue no.1 in the affirmative. The trial court held that the respondents in Kvm FA48.94 the said proceedings had not proved that the said will was revoked by the said deceased by writing dated 3rd July, 1986. The trial court also rendered a finding that there was no non-compliance of provision of section 281 of the Indian Succession Act, 1925 and thus the petition was maintainable. The trial court ordered that the will was not an outcome of undue influence but the said will shall be operated to the extent of the property which still remained undisposed of. The trial court directed that the letter of administration be issued to the respondent no. 1 herein. Being aggrieved by the said judgment dated 14th December, 1993 the appellants have filed this appeal. Mr. Almeida learned counsel appearing for the appellants invited my attention to the pleadings, various documents, evidence, led by the parties, findings of the trial court and various judgments of supreme court and this court in support of the submissions.

9. The respondent no. 1 examined Dr. Kirit Sutaria as one of the witness. In his examination-in-chief the witness deposed that he was knowing the said deceased as a patient. He deposed that on 23 rd June, 1983 the said deceased came to his dispensary with one Mr. D'Mello at about 9.30 a.m. and he told him that he wanted to execute a will and asked him about his physical fitness and mental alertness It is deposed that after careful examination of the testator, he found that the testator was competent physically and mentally to execute the will. The testator showed him a copy of the will written in Marathi. The doctor certified the fitness of the testator on the said copy of the will. He identified endorsement on copy of the will, rubber stamp and his signature. The witness deposed that when he put endorsement on the copy of the will, it was not signed by any one. Witness deposed that the certificate given by him on the said will on his physical and mental condition was correct.

Kvm FA48.94

10. In the cross-examination of the said witness he deposed that one Mr. S.P. D'Mello was his patient and not his friend. He however did not remember the date, month and year on which the said Mr. D'Mello attended his dispensary for the first time as a patient. He was occasional patient of the said witness. He deposed that the said Mr. S.P. D'Mello had been to his dispensary on 2-3 occasions only since 1975 as his patient only. The witness deposed that he examined the testator for about five minutes and during that period he asked him 2-3 questions. When the witness examined the testator, the age of the testator was 70 years old. It is deposed that the testator when came to his dispensary, he was walking without any stick. The witness deposed that he could not tell whether he had reduced to writing the information history given by the said testator and what he had found after his examination. The witness admitted that he was preserving the case papers for about 5 to 7 years but it was not possible for him to produce the case paper of the testator for his examination.

11. It is deposed that the endorsement at the bottom of the will bearing his signature was not in his hand writing. As per his dictation the said Mr. D'Mello had written the said endorsement certificate. The said witness deposed that in the body of the certificate the space for date is provided but it is not mentioned but under that certificate and to the left side of his signature the date - 23.6.1983 is mentioned in blue ink. The witness deposed that he could not assign any reason as to why the certificate was not in his own hand writing. It is deposed that before the witness dictated the contents of the certificate he was knowing that the said Mr. D'Mello was knowing English as the witness knew that the said Mr. D'mello was tax consultant. The witness knew him since about 1977. The witness admitted that he was not a family doctor of the testator. He had not visited the house of the testator.

Kvm FA48.94

12. The witness did not remember whether the testator had visited his dispensary after 23.6.1983. The witness did not know any of the sons of the testator or as to how many sons the said testator had. The witness did not ask Mr. S.P. D'Mello about his relation with testator or did not ask the testator as to why any of his children did not accompany him. The testator was of moderately built. The said witness deposed that on 4-5 occasions he had given such type of certificate. In all the four cases, he had dictated the contents of the said certificate. The witness denied the suggestion that the said Mr. D'Mello was his close friend and at his instance the witness had given the said certificate and was never his patient.

13. Mr. Almeida, learned counsel invited my attention to para 22 of the cross examination of Mr. S.P. D'mello who deposed that he did not know Dr. Kirit Sutaria. Once he had gone to this doctor to get his blood pressure checked. The next time when the testator took him to the dispensary of the said doctor and except the above visit referred in that para he had no occasion to visit Dr. Sutaria.

Mr. S.P. D'Mello in para 24 deposed that on 23.6.1983 at 9.50 a.m. he went to meet the testator who took him to Dr. Sutaria. After 10 minutes of the examination Dr. Sutaria came out and asked whether the said Mr. S.P. D'Mello could write the certificate which he wanted to dictate. Mr. D'Mello

agreed to take dictation and wrote the certificate, what was dictated to him by Dr. Sutaria. The witness deposed that he did not know why the doctor did not write the certificate himself and also did not know how many times the doctor signed the will in his presence.

14. Learned counsel for the appellant submits that there is inconsistency in the evidence of Dr. Sutaria and Mr. S.P. D'Mello on this issue. It is submitted that Mr. S.P. D'Mello himself had prepared the doctor's certificate and obtained his Kvm FA48.94 signature. Learned counsel submits that the evidence of Dr. Sutaria as well as Mr. S.P. D'Mello on the alleged certificate given by the doctor cannot be relied upon as the same is inconsistent, unnatural, improbable and false. The learned counsel submits that admittedly Dr Sutaria was not a family doctor of the said deceased. He could not produce any documents/record to show that the deceased was his patient or had examined the said deceased on 23.6.1983 before issuance of such alleged certificate.

15. Mr. Almeida, learned counsel invited my attention to the evidence led by Mr. Jony Thomas Rodrix, the alleged attesting witness to the alleged will. In his examination-in-chief the said witness deposed that since 1975 he was knowing the testator as he used to visit his maternal uncle Mr. Antony D'Silva.

The said witness used to call the said testator as "Lawrence Uncle." The witness deposed that the said testator was introduced to him by his maternal uncle and told him that he was a good person. The said witness in the examination in chief deposed that the said testator had executed a will on 23.6.1983. He had to put his signature on the said will as an attesting witness. On that day, he had been to Vasai Court in connection with his case. When he was coming outside the Court gate, at about 11.30 a.m. he saw the testator and three other persons i.e. Mr. Dabare Advocate, Mr. Sudhir Dhuri and Mr. S.P. D'Mello uncle. The testator told him to put his signature on the will as an attesting witness. He deposed that he then read that will and put his signature on the will in the chamber of the Sub-Registrar. The said will was in hand writing and in Marathi. The witness deposed that when he read that will for the first time, except signature of the doctor there were no signature of other persons on the will. All the above persons and the testator were present in the chamber of the Sub-Registrar at the time when the testator had put his signature on the will. The Kvm FA48.94 witness identified his signature on the said will. It is deposed that the attesting witness Mr. Dhuri had put his signature and then the witness had put his signature on the will. The Sub-Registrar asked the testator whether he had read the will and whether he admitted the same. The testator told the Sub-registrar that he had read the will and its contents were correct.

16. In his cross-examination the said witness deposed that he came to know Mr. D'Mello for the first time on 23.6.1983 and had not met him since the execution of the will till last date. Mr. S.P. D'Mello was Accountant. In para 4 of the evidence the witness deposed that for the first time in 1975-76 in his maternal uncle's house, he met the executant of the will. In 1975, the age of the executant of the will was about 60 years. In para 5 of the evidence the witness deposed that on the day of execution of will, he had gone to Court in one criminal case, as accused. His case was adjourned on that day at about 11.00 a.m. The witness deposed that his jeep was attached by police at Bordi as he was carrying the liquor in the jeep. The witness deposed that his relations with Mr. S.P. D'mello were cordial. The witness deposed that he came to know for the first time about the will when he came

into the witness box in the suit. In para 9 of the cross-examination the witness deposed that he met the testator in 1975 to 1983 about 8-10 occasions in Tahsildar Office and on 2 occasions at his maternal uncle's house. He did not remember the name of any son or daughter and did not feel it necessary to ask the testator as to why none of his sons was present at the time execution of will as it was his desire.

17. The witness deposed that in the presence of the Sub-Registrar, the testator had put his signature on the will and thereafter attesting witness Dhru had put his signature on it and then he had put his signature on it as attesting witness.

Kvm FA48.94 Advocate Dabare had also put his signature on the will. The entire work in the Sub-Registrar chamber was completed within half an hour. The witness denied the suggestion put to him that he was a friend of Mr. S.P. D'mello or was deposing falsely and he had read over the will. The witness also denied the suggestion that he had put the signature on will outside the chamber of the Sub Registrar at the instance of Mr. S.P. D'mello and Joseph Lopis and that he was not knowing anything about the said will.

18. Mr. Almeida, learned counsel submits that the said Mr. Jony Thomas Rodrix had gone to Court for criminal case and had deposed that he came to know about the will when he came to give the evidence. At the same time, the witness had deposed that he had read the will before attesting the said will. It is submitted that the said witness has made various false and incorrect statements in the evidence. Learned counsel submits that the evidence of this witness would indicate that he was a chance witness and he had good relation with Mr. S.P. D'mello.

19. Learned counsel for the appellant submits that there are various contradictions in the evidence of the alleged attesting witness and the evidence of Mr. S.P. D'mello and scribe of the alleged will on the material aspect such as registration of the will. The registration had been made in a perfunctory manner. There was no signature and/or initial of the testator or witness on any of the pages and/or to the corrections except the solitary signature on the last page. There was no endorsement at the bottom of the will "the will was read over to the testator or read by witness" or that the testator had signed before the sub-registrar. Learned Counsel submits that the certificate of sound mind was not obtained from Dr.Nabar, who was neighbor of the testator and was attending him when he was Kvm FA48.94 sick.

20. Learned counsel submits that though the testator was educated and had number of sons and friends, it was unlikely that the testator would take a person involved in a criminal case for attestation of his will. This is one of the suspicious circumstances surrounding the execution of will in question. Learned counsel submits that except the propounder of the will all the four sons of the testator were well educated. The eldest son had retired as Assistant Registrar from Esplanade Court, Bombay. Mr. John another son had retired as Judicial Clerk from Small Causes Court, Bombay. Mr. Anton, son of the deceased was working with Insurance Company. Mr. Paul, another son was graduate and was working with Bank as an officer. A grand child of the deceased was practicing as a Chartered Accountant. It was most unlikely that if the testator wanted to execute the will, he would not consult his children and would not have told them about execution of the alleged will when

admittedly relation between the testator and all his family members was cordial.

21. Mr. Almeida, learned counsel then invited my attention to the oral evidence of Mr.Sabestin P. D'mello (EW-3) examined by respondent no.1. The said Mr. S.P. D'mello deposed that he was scribe of the will. In his examination-in- chief the witness deposed that his mother and the wife of the deceased were maternal sisters. The wife of Anton (appellant no.2) was related to him from his mother's side. Wife of Mr. Paul, the original appellant no.3 and wife of this witness were cousins. Original appellant no. 3 was God child of the father of the witness. Wife of the respondent no.1 was also related to the witness from his wife's side. It is deposed that the said deceased being related to him often used to visit to him and witness used to visit the said deceased. On 22.6.1983 the Kvm FA48.94 testator came to him and expressed his desire to make a will and requested him to write the will. The witness consented for the same.

22. The witness went to the residence of the testator at about 9.15 a.m. when the testator took him to his own room. The testator closed the door and told him that they shall commence with the writing of his will. In the said room only the testator and the said witness was present. The testator gave him the dictation about the scribe about the content of will in Marathi and he went on writing as per his dictation. It took them more or less 3 hours to complete the writing process. The testator thereafter instructed him that he should accompany the testator on 23.6.1983 to execute the will. Witness deposed that he did not suggest anything to the testator. The witness when was asked as to why testator did not write the will, he answered that as the deceased was quite old of 85 years he could not write. He could write only 7-8 lines and not more than that. On 23.6.1983 the testator first took the witness to Dr. Sutaria. The testator went inside the chamber of doctor. The witness was sitting outside. After 5-10 minutes the doctor came out from his examination room and asked who had accompanied the said testator. The witness answered that he had come with him.

Dr. Sutaria requested him whether he could write a certificate in his hand writing to which the witness agreed. The doctor then dictated the contents of the said certificate. The doctor failed to give him the date of the certificate and perhaps kept the date blank.

23. The witness deposed that the testator met one Mr. Dabare, Advocate and one witness by name Mr. Sudhir K. Dhuri. The testator thereafter told that he needed one more witness. In the mean time he saw one Mr. John Thomas Rodrix coming out of the Court premises. Till that date, he was not knowing Mr. John Kvm FA48.94 Thomas Rodrix. The testator went to him and talked to him. Thereafter they all went to Sub-Registrar's office. The Sub-Registrar questioned the witness whether they had read the will or not. In all persons present beside the staff in the Sub-

Registrar office were testator, Mr. Dabhare Advocate, Mr.D'mello and two attesting witnesses Mr. S.K. Dhuri and Mr. John Thomas Rodrix. The witness deposed that the two attesting witnesses read the will. The sub registrar told the testator to sign the will and then told the witnesses to sign. The advocate also identified the testator. The sub-registrar passed an official receipt for executing the will. The witness volunteered that the sub-registrar asked the testator whether it was his own will and he made with free consent. The testator answered in affirmative.

24. In his cross examination the witness deposed that he was a tax consultant and was practicing since last about 20 years. The witness denied that he was dealing in land transaction as a broker. His son was builder and developer and estate agent. The witness however never entered into any rent transaction or acted as an agent. The testator was graduate in Arts and retired from the office of Income Tax. He deposed that the testator had the friends of his age or around that age. The witness disclosed the names of various friends in paragraph 5 of the cross examination who were educated. The witness admitted that four sons of the testator were educated. His relations with all the parties to the proceedings was of the same nature and affinity. The witness denied the suggestion that he had acted as advisor to the family of the testator. The witness admitted that the deceased had large number of properties. On the date of execution of the Will the testator was residing with Mr.Joseph, the respondent no.1 herein. The witness deposed that he did not know about the nature of relations between the testator and his sons and understanding about their properties. But the testator was visiting everybody's Kvm FA48.94 house after the execution of Will.

25. The witness deposed that when the property was being sold by the testator, the witness was called for income tax purpose in January 1981. The witness did nothing except advising the testator on the income tax matter. The ultimate purchaser was Mr.Suresh Keshwani and his wife. After five years the purchaser came alongwith Mr.Keshwani and the witness was called on the date of sale deed in his old house in 1986. He did not demand any fees from the testator. The agreement was signed in his office. The stamp paper was taken from his office on loan basis. The agreement of sale of the said property took place in his office. The witness deposed that the deceased wanted to effect that transaction in the office of the witness and therefore it was effected in his office. As a relative, the deceased had faith in him.

26. In paragraph 12 of the evidence the witness deposed that he had accompanied Mr.Joseph (respondent no.1). Mr.Joseph was holding the power of attorney of the deceased. It is deposed that one of the agricultural land was transferred in the name of wife of the respondent no.1. Deceased also transferred one building near Zilla Parishad School in the name of wife of the respondent no.1. They got the sale deeds written from a bond writer. As a constituted attorney of the said deceased, respondent no.1 transferred two properties of the testator to his wife's name during the lifetime of the testator. The said witness had signed that document as a witness.

27. In paragraph 13 of the evidence the witness deposed that he did not know whether there was any public notice to the effect that the deceased testator was of unsound mind in July 1986. In paragraph 16 of the evidence the witness deposed Kvm FA48.94 that he did not remember that the respondent no.1 had transferred the two properties with the help of power of attorney. As a relative, he had signed both the documents at the request of the respondent no.1. The witness had gone through those documents before signing those documents on that day. Both those properties might fetch more than Rs.6 lacs. He did not ask the respondent no.1 that he being the tax consultant, why should he sign as a witness.

28. In paragraph 18 of the evidence the witness deposed that sometime in the month of December 1980, the agreement for sale in respect of Achole land of the deceased was executed. He however did not remember the time when the agreement for sale was executed in his office. He was one of the

signatory for the agreement of sale executed in 1980 as a witness. The testator was the vendor and Mr.Babulal P.Shah as a purchaser. It is deposed that he did not receive any fees or remuneration either from Mr.Suresh Keshwani or testator but he had received some incidental charges of Rs.10,000/- to Rs.15,000/- in cash from Mr.Babulal P.Shah.

In paragraph 19 the witness admitted that the objections in respect of the said Achole land property were to be received in the office of the witness. The witness deposed that after sale deed he had correspondence with Mr.Suresh Keshwani. He did not reply to the letter dated 7 th September, 1982. The witness deposed that he never addressed any letter to the testator at any point of time. The witness ultimately admitted that he had written a letter to the testator which was marked as Ex.64.

29. In paragraph 21 of the evidence the witness deposed that at the time of Will, the testator was residing with respondent no.1 herein but he did not know whether respondent no.1 was taking care of testator or that whether testator was completely dependent upon applicant for all the purposes. The witness did not know with Kvm FA48.94 whom the deceased was residing in the year 1980. In paragraph 22 of the evidence the witness deposed that he did not know Dr.Sutaria and met Dr.Sutaria only once when he went to him to check his blood pressure. That was the only visit to Dr.Sutaria before the witness was taken to the dispensary of Dr.Sutaria by the testator.

30. In paragraph 23 of the evidence, the witness deposed that on 22 nd June 1983 the testator had approached him for the first time for the Will. Three hours were spent to write the Will. He did not question the testator for locking the door from inside. He did not feel it suspicious why he locked the door from inside and the will was prepared so secretly. Two copies were prepared of the Will. After completion of writing Will, testator requested him to accompany him next day for registration of Will. The testator did not say anything about witnesses. He did not take any acting part in the Sub-Registrar's office. The Sub-Registrar had put some questions to the testator but the witness did not know what were those questions.

Sub-Registrar asked some questions to the witness as to the Will but this witness did not know what where the questions put by the Sub-Registrar to the witnesses to the Will. The witness deposed that he did not know any special reason for taking him to Sub-Registrar's office by the testator. In paragraph 26 of the evidence the witness deposed that at the time of sale deed of Achole land, the testator was residing with John Lawrence, the respondent no.2 herein. That tenure was about six months. The witness admitted that except the period of six month duration when the testator was staying with respondent no.2 herein, he was staying with the respondent no.1 Mr.John from 1983 till his death.

31. Mr.Almeida, learned counsel for the appellants then invited my attention to the evidence laid by the appellant no.1 herein. In his examination in chief, the Kvm FA48.94 witness deposed that he was the eldest son of the deceased and had retired as Assistant Registrar from the office of Chief Metropolitan Magistrate, Bombay. The respondent no.1 herein i.e. Mr.Joseph was non earning member in the family and had studied upto 9th standard. He was never in service at any time. His family was maintained out of the family income and the salary of four brothers. The deceased was a

graduate of Bombay university and was working as income tax officer with the income tax department. In paragraph 4 of the evidence, the witness deposed that in the year 1970 all were staying as a joint family and were messing together. In view of the increase in the family members, the deceased advised his sons to reside separately. In respect of one piece of agricultural land at Achole, the names of his sons were recorded as owners as the testator had distributed that property between his sons. It was decided to effect a partition in respect of the other remaining property like Achole property. As the brothers were in service, they gave a power of attorney to father to manage the said property. The said power of attorney was signed by all the brothers.

32. In paragraph 5 of the evidence, the witness deposed that his mother died in the month of January 1981 and as a result thereof the said deceased father became completely broken and started residing with respondent no.1 herein. Due to the death of the mother of the witness, health of the father was impaired. The respondent no.1 started harassing the father for money and since the father was dependent on him, he submitted to whatever respondent no.1 demanded from him.

Father was completely under great tension and therefore could not maintain the balance of his mind. It is deposed that respondent no.1 took advantage of the said situation. The respondent no.1 took under his control all the family income. The father had no choice of his own mind. He was not allowed to go out of house by the respondent no.1. It is deposed that the respondent no.1 also warned them not to Kvm FA48.94 visit their father. The other brothers had no contact with the father because of such warning.

33. In paragraph 6 of the evidence, the witness deposed that in respect of Achole property, respondent no.1 had obtained the signature of his father on an agreement of sale. Mr.S.P.D'mello had helped respondent no.1. The father signed the agreement for sale on the strength of power of attorney. When the brothers came to know about the said transaction, they revoked the power of attorney given to the father. In paragraph 8 of the evidence the witness deposed that in the month of November 1985 probably, he had occasion to meet his father. The witness wished his father and he responded. When the witness enquired about his health, his father started weeping and was in painful and chocked voice. He told that he was ruined by respondent no.1 at the instance of Mr.S.P.D'mello. The witness came to know about the Will when he was served with summons.

34. In paragraph 10 of the evidence the witness deposed that he came across the public advertisement about mental condition of his father. The respondent no.1 had given that advertisement. The witness deposed in paragraph 11 that whenever his father used to be unwell, Dr.Nabar used to attend him whose dispensary was one minute walk to his father's house. The witness referred to Special Civil Suit No.607 of 1989. The witness deposed that the approximate value of the properties under two sale deeds of the year 1986 was about Rs.80 lacs in so far as Khar land was concerned and was about Rs.10 lacs in respect of the non agricultural land (two chawls). Wife of the respondent no.1 had no source of income of her own. Mr.S.P.D'mello used to visit his father and used to threaten him. The said Mr.S.P.D'mello was also a close associate/relative of respondent no.1 and got himself pushed into the family affairs of the parties and created disharmony Kvm FA48.94 amongst them. In paragraph 12 of the evidence the witness deposed that the Will was a got up document and such absurd Will could not have been made by the father.

Father had great attachment with all the sons. The father could have consulted all the sons as he had done in the past. The father had number of friends and anyone out of them could have acted as attesting witness of that Will. His father had many lawyer friends from whom he could have taken advice.

35. The appellant no. 1 in his cross examination, deposed that the appellant were not in good terms with the respondent no. 1 and since the year 1981 their relations with respondent no. 1 were strained. In the year 1989, the appellant no. 1 along with appellant no. 3 had filed a partition suit against respondent no. 1 and others. The witness admitted that prior to 1970 the property at Achole was standing exclusively in the name of the deceased father. In the mutation record, names of all the brothers and sister was entered on the basis of the statement given by the testator. After the said mutation, immediately the power of attorney was executed.

All the executants were not serving at that time. Witness denied the suggestion that till the demise of the father, the said Achole property was owned by him and all the children were ostensible owners. The witness admitted that the appellants had issued a notice to the testator. It is also admitted that the appellant no. 1 along with John, Paul and Anton caused a public notice to be issued in daily Mumbai Sakal in its edition dated 23rd October, 1981 as the appellants apprehended that the deceased father would sell the said Achole property to the third person. The father had replied to the said notice. It is however, deposed that the said reply was at the instance of respondent no. 1.

36. The father got the said Achole property retransferred in his name by approaching the revenue authority and in pursuance to the mutation effected Kvm FA48.94 bearing No. 2940 to 2944. The said mutation was challenged by the appellants by filing RTS Appeal before Sub Divisional Officer. The respondent no. 1 was with the appellants herein as one of the appellant. However, he withdrew subsequently from the said proceedings. The said RTS proceedings were dismissed in favour of the father in the year 1983 or 1984. The said order was not challenged by the appellants. The witness admitted that the dispute was going on between the deceased on one hand and the appellant no.1, Mr. John, Mr. Paul and Mr. Anton on the other hand in respect of the Achole property since 1981. Witness admitted that till the death of the father the opponent (appellants herein) never challenged the transaction of Achole property. The witness admitted that there was no document on record to show that the father acted under the pressure of the respondent no. 1 or under the pressure of Mr. S.P. D'mello.

37. In para 17 of the evidence, the appellant no. 1 admitted that there were cases between the father and the tenants but he could not say before 1983. He had no knowledge that the deceased father was prosecuting in Vasai Court all his cases.

The certified copy of the deposition in Regular Civil Suit No. 15 of 1975 was shown. The witness deposed that he could not say how his father was cross examined in the year 1983. The witness deposed that he had no idea whether the deceased father used to attend the Vasai Court to withdraw amount deposited by the tenant in court in the year 1983. The witness admitted that it was their information only that due to the death of the mother of the appellants and respondent no. 1, their father's health was not good, mentally and physically. The witness admitted that except his oral

evidence and one document, he had no other evidence to show that his father was under pressure and tension during the period in question. The witness did not take any steps to prevent the respondent no.1 from restricting his father to go out. Till the beginning of 1982, the witness used to Kvm FA48.94 visit the house of respondent no. 1. The witness did not take any steps to relieve his father from tension or any steps to prevent the entry of appellant no. 1 to the house of respondent no. 1. The witness admitted that he had no other evidence to show that his father was weeping and made some representation when he met him in the year November, 1985. the witness did not take any steps after the alleged instance of November, 1985.

38. In Paragraph 18 of the cross examination, the witness admitted the signature of the testator on the will Exh. 46 shown to him. It is deposed that the respondent no. 1 was under the shelter of father at all times. The food was provided to the father at his own cost by the respondent no. 1 after demise of mother. The witness admitted that respondent no. 1 was looking after the father after demise of the mother during the period between 1981 to 1987. The witness denied the suggestion that the respondent no.1 or Mr. S.P. D'mello had never published any public notice regarding anything.

39. Mr. Almeida learned counsel for the appellant invited my attention to a letter dated 16th July, 1986 addressed by Mr. S.P. D'mello to the testator making various allegations against the testator about a property transaction and demanding fees and threatened of consequences. Mr. Almeida learned counsel for the appellants submits that Mr. S.P. D'Mello who was examined as one of the witness and was alleged scribe of the will, had played prominent role in the property transactions of the deceased. In his cross examination he admitted that he was witness in some of the transactions and the transactions were completed in his office. It is submitted that the letter addressed by the said Mr. S.P. D'Mello to the testator itself would indicate about their relations.

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40. It is submitted by the learned counsel that even during the life time of deceased father, respondent no. 1 who did not have any source of income and was totally dependent on his father, had fraudulently transferred two valuable property of the deceased father in favour of his wife by exercising the powers under the alleged power of attorney. That itself would indicate that the propounder of the said will was controlling the said deceased. Learned counsel also invited my attention to the letter addressed by Mr. Suresh Keshwani, a builder to the respondent no. 1 in support of his submission that the said builder and respondent no. 1 were controlling the deceased testator.

41. Mr. Almeida learned counsel also placed reliance on the oral evidence of respondent no. 1 in Special Civil Suit No. 607 of 1989 which was filed by the appellants for partition. In Paragraph 9 of the examination in chief the respondent no.1 deposed that he came to know about the will executed by the father after his death. In paragraph 10 of the said deposition respondent no.1 deposed that as per instruction of father he had sold the two properties under two separate sale deeds to his wife for concessional consideration. In para 33 of the evidence the witness deposed that as per advice of his advocate he had approached Mr. S.P. D'Mello and from the said Mr. D'Mello he came to know the names of the witnesses. In Para 34 of the evidence the witness admitted that till the death of his

father he was looking after his properties as per his instructions. The witness deposed that he did not take any steps against the notice published in dainik "Navakal" and he did not know by whom such notice was published. The witness deposed that he did not know as to why the father told him to sell the land to his wife which properties were bequeathed to the witness under the alleged will. Relying upon the evidence led by respondent no. 1 in the partition suit, learned counsel for the appellants submit that such evidence clearly proves that the properties of the father were Kvm FA48.94 managed by the respondent no. 1 and Mr. S.P. D'Mello.

42. Mr. Almeida, learned counsel submits that the bare perusal of the alleged will and particularly the tenor of the drafting, flattering language, repeated assertion in support of the bequest in favour of respondent no. 1, consent and approval by respondent no. 1 to certain bequest clearly indicates that the will was surrounded by suspicious circumstances. It is submitted that once the testamentary proceedings were contested, provisions of Code of Civil Procedure, 1908 would be attracted. The pleadings in the plaint were required to be proved. It is submitted that since the respondent no. 1 was propounder of the Will, he ought to have entered the witness box and not having entered the witness box, the trial court ought to have drawn adverse inference against him and the suit ought to have been dismissed. In support of this submission the learned counsel placed reliance on the judgment of this court in case of (1) Rajmal Ramnarayan Versus Budansaheb Abdulsaheb AIR 1922 Bombay 81, (2) judgment of Privy Council in the case of Sardar Gurbaksh Singh Vs. Gurdial Singh AIR 1927 Privy Council, 230 (3) Ramchandiram Mirchandani Vs. India United Mills Limited AIR 1962 Bombay 92, (4) Gopal Krishna Ketkar Vs. Mohamed Haji Latif 71 BLR 48 (5) Judgment of MP High Court in the case of Kasturchand Chhotmal Vs. Kapurchand Kevalchand AIR 1975 MP 136, (6) Judgment of this court in case of Nathuji Narayanrao Udapure Vs. Narendra Vasanjibhai Thakkar 1981 MhLJ 446 and (7) Judgment of Supreme Court in case of Enuga Lakshmamma Vs. Vennapusa Chinna Malla Reddy AIR 1985 SC 658, (8) Judgment of Supreme Court in case of Ishwarbhai C. Patel Vs. Harihar Behera AIR 1999 SC 1341, judgment of Gujarat High Court in case of Heirs Kantilal P. Patel Vs. Dahiben J. Rathod AIR 2003 Guj. 82 and (9) Judgment of Supreme Court in case of Lateefa Begam Vs. B.G. Kirlosker (2005) 11 SCC

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43. The next submission of Mr. Almeida, the learned counsel for the appellant is that the document propounded by respondent no. 1 purports to give several properties during the life time of the deceased and was thus could not be considered as a Will but could be termed only as a family settlement. In support of this submission, the learned counsel placed reliance on the judgment of this court in case reported in 20 Indian Decisions BOM 210 (Full Bench) and the judgment of Supreme Court in case of Namburi Basava Subrahmanyam Vs. Alapati Hymavathi and Ors. (1996) 9 SCC 388.

44. Mr. Almeida learned counsel then submits that since the will was surrounded by various suspicious circumstances, surrounding the execution of will, there was heavy burden cast upon the propounder to remove or dispel all the suspicious circumstances either alleged or exist to the satisfaction of the conscience of the court before the court could make an order in favour of the propounder for granting the probate of the alleged will. It is submitted that the respondent no. 1

who was propounder of the will ought to have entered the witness box and ought to have dispelled or removed all such suspicious circumstances alleged in the written statement and forming part of the record. In support of this submission the learned counsel placed reliance on following judgments :-

(1) AIR 1959 SCC 443 H.Venkatachala Iyengar vs. B.N.Thimmajamma and others.

(2) AIR 1965 SC 354 Ramchandra Rambux vs. Champabai and others.

(3) AIR 1977 SC 74 Smt.Jaswant Kaur vs. Smt.Amrit Kaur and others. (4) AIR 1990 SC 396 Kalyan Singh vs. Smt.Chhoti and others. (5) AIR 1990 SC 1742 Ram Piari vs. Bhagwant and others. (6) (1996) 11 SCC 626 Kartar Kaur and another vs. Milkho and others.

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45. Learned counsel placed reliance on the judgment reported in AIR 1962 SC 567 in case of Rani Purnima Debi and another vs. Kumar Khagendra Narayan Deb and another, 1994 (5) SCC 135 in case of Bhagwan Kaur w/o.Bachan Singh vs. Kartar Kaur w/o.Bachan Singh and others, 1998 (2) SCALE 649 in case of Gurdial Kaur and others vs. Kartar Kaur and others and would submit that mere fact that the will is registered will that itself will not be sufficient to dispel suspicion regarding it, where suspicion exists before submitting the evidence of registration for close examination. Learned counsel submits that even the evidence regarding registration would show that it was done in perfunctory manner. The registering authorities will not ask a testator or witnesses whether he had read the will or not before registering such will.

46. Per Contra Mr.Dani, learned senior counsel for the respondents submits that the writing executed by the testator was not a family settlement as alleged by the appellants but was a Will. My attention is invited to various clauses of the said writing and it is submitted that the intention of the testator was very clear that all the request made in the said writing were to be made effective only after the death of the testator. It is submitted that entire document has to be read and not few clauses in isolation.

47. On the issue whether there was any suspicious circumstances surrounding the Will is concerned, it is submitted that the appellants have admitted the signature and execution of the Will. In support of this submission, learned senior counsel invited my attention to the written statement and the oral evidence led by the witness examined by the appellants. It is submitted that issue as to whether execution was under any misrepresentation or coercion, burden was on the appellants which the appellants failed to discharge. Since the appellants could not Kvm FA48.94 prove any suspicious circumstances nor any such suspicious circumstances existed when the Will was executed, the propounder was not required to dispel any such alleged suspicious circumstances. Nothing had happened in presence of the propounder i.e. whether dictation of the Will or the execution and attestation thereof. Examination of the propounder therefore was not fatal. It is submitted that the first attesting witness examined by the respondent had duly proved the attestation of the Will by

himself and also by another attesting witness. Learned senior counsel submits that since the scribe of the Will and the attesting witness were examined by the respondent, examination of the respondent propounder was not necessary nor would be fatal to the execution and attestation of the Will or to dispel any alleged suspicious circumstances.

48. Learned senior counsel submits that Will has to be produced before the court either through the propounder or anybody else including Registrar of Sub- Assurances if the Will is registered. Best possible evidence has to be brought before the Court. The respondent had already examined the doctor who had examined the testator and had issued a certificate, the scribe who had written the Will in his own handwriting as dictated by the testator and had examined one of the attesting witness. The respondent had already discharged the onus cast on the respondent by examining these three witnesses and thus examination of the propounder was not required.

49. In so far as evidence of Dr.Sutaria is concerned, it is submitted that the said doctor had examined the testator and had found him fit for execution of a Will. The appellants did not put any suggestion to the said witness for testing his veracity on this aspect. It was not the case of the appellants that the testator was confined to bed or was not having sound and disposing mind at the time of Kvm FA48.94 execution of Will. The testator was attending the court proceedings regularly which were filed by him against the tenants. The testator was pursuing those proceedings against tenants right upto the date of his death. The testator was cross examined in those proceedings. The record of such cross examination in one of the matter was produced before the trial court. All these facts would clearly indicate the mental alertness of the testator and ability to pursue day to day function in court. The testator had mental capacity to understand what he was doing. It was not the case of the appellants in the written statement that the testator had no mental capacity to understand what he was doing or that the Will was executed without knowing the contents thereof or without understanding the same. The testator was withdrawing the rent deposited by the tenants in various courts which would also indicate that he was mentally alert.

50. It is submitted by the learned senior counsel that in respect of Achole property, all the sons of the testator had executed power of attorney in favour of the testator for sale of the said property. The testator was aware of the requirement of power of attorney from all the sons for sale of the said property which also shows the disposable state of mind of the testator.

51. Learned senior counsel invited my attention to the public notice issued by the appellants against the testator making various allegations which notice was duly replied by the testator before execution of the Will. Even in the RTS proceedings filed by the appellants against the testator, the said testator had succeeded which orders were not challenged by the appellants. The testator was completely aware of day to day financial transactions. He used to give reply to the pleadings filed by the tenants, reply to public notices with a view to protect his own interest, used to file litigations which would show the state of mind of the Kvm FA48.94 testator.

52. Learned senior counsel submits that admittedly the Will in question was a registered Will. The attesting witness examined by the respondent deposed that he was present in the chamber of Sub-Registrar who had asked the testator whether he had read the Will and the contents thereof

were correct. The testator had answered in affirmative. In cross examination of the said witness, veracity of the witness on this part was not tested or that part was not shattered. Advocate Dabre had identified the testator by affixing his signature before the Sub-Registrar. The entire execution and attestation procedure took place in the chamber of the sub-registrar in presence of testator, attesting witnesses and others. It is submitted that except putting a suggestion to the attesting witness on his deposition what transpired in the office of the sub-registrar, appellants did not pursue any further cross examination on this aspect and thus execution, attestation and the deposition that the testator had read the Will and contents thereof was correct has been proved.

53. It is submitted that the office of the registrar and the court was in the same premises. The testator had already three other people with him i.e. advocate Dabre, S.P.D'mello (scribe) and the attesting witness. The other attesting witness was already in court and knew the testator. The execution of the Will and attestation was duly proved and the Will was registered. The testator was fully aware of the contents of the Will and was having sound and disposing mind at the time of execution of Will.

54. In so far as submission of the appellants that the testator could have consulted and/or disclosed about the Will to the appellants is concerned, it is submitted that testator would not like to disclose the Will to family members. It Kvm FA48.94 was for the testator to choose any person of his confidence who need not be from his family. Court has to apply arm chair rule. The second attesting witness was not a complete stranger. Learned senior counsel also invited my attention to the endorsement made by the Sub-Registrar on the Will from the record and proceedings.

55. In so far as evidence of Mr.S.P.D'mello (scribe) is concerned, it is submitted that the said witness was relative of all the parties including the appellants and was well versed with the entire family. The testator had trusted the said Mr.S.P.D'mello who was not only his relative but was a chartered accountant by profession.

Testator had taken his help for transfer of his properties. There was no allegation and/or evidence produced by the appellants that Mr.S.P.D'mello had coerced the testator to execute a Will or to draft Will so as to favour the respondent no.1, the propounder of the Will. The evidence led by Mr.S.P.D'mello thus cannot be discarded by this court.

56. In so far as submission of the appellants that the dictation of the alleged Will took three hours though the testator could not have written 7-8 pages is concerned, it is submitted that the testator who retired as income tax officer and was mentally alert and had all the details of his properties only could give such details of the property minutely. The Will therefore was of 14 pages. There is nothing wrong if the testator was secretive and had not disclosed about such Will to the appellants.

57. Learned senior counsel submits that under the Will in question, none of the sons of the testator are debarred completely. The Will cannot be considered as an unnatural Will. Appellants being three sons of the testator had contested the Will whereas two sons and one daughter did not contest. There was disposition in Kvm FA48.94 favour of all the six children of the testator in the said Will. The testator had given clear reasons in the Will as to why he had given major portion of properties

to the propounder of Will. The testator was staying with the propounder who was taking all the care of the testator. The propounder was given larger share since he was not settled in life as his other sons were. The propounder was not physically competent or educated. Other five brothers of the propounder were residing separately.

58. Learned senior counsel submits that merely because minute details are given in the Will about the properties, it cannot be a ground of suspicious circumstances as such minute details could be known only to the testator and not the scribe. The testator was educated and retired as income tax officer and was mentally alert all throughout.

59. It is submitted that the dispute between the appellants and the testator had already arisen much before execution of the Will in respect of Achole property.

The appellants had issued notices and had also filed RTS proceedings which were opposed by the testator. The testator thus bequeathing larger portion of the property to the respondent no.1 who was staying with the testator and was taking his care cannot be construed as an unnatural Will. It is submitted that though the appellants had litigated with the testator, the testator had not excluded the appellants from the estate of the deceased. Learned senior counsel submits that the testator had made a provision in the Will for the grandchildren i.e. children of the respondent no.1 to enable those children to get education since the respondent no.1 was not able to maintain his family.

60. In so far as transfer of the two properties by the propounder in favour of his Kvm FA48.94 wife during the lifetime of the testator is concerned, it is submitted that the testator had retained the advantage of those properties in the Will and even otherwise those properties were bequeathed in favour of the propounder. The testator would not take any action against the propounder for transfer of such properties by the propounder in favour of his wife.

61. In so far as inconsistency in the evidence of Dr.Sutaria or Mr.S.P.D'mello pointed out by the appellants is concerned, it is submitted that the deposition of both these witnesses was not untruthful or grave that their entire evidence could be discarded. There cannot be air tight testimony. Court has to consider the entire evidence to ascertain whether it can be believable or not. Mr.S.P.D'mello had already stated about his past transactions with the testator. Even appellants wanted that the Achole property to be sold to a third party and had taken assistance of Mr.S.P.D'mello for the same.

62. In so far as public notice alleged to have been issued by the propounder about the alleged state of mind of the testator after execution of Will is concerned, it is submitted that the said alleged document was not exhibited as not proved and thus no reliance thereon can be placed by the appellants.

63. Learned senior counsel submits that merely because the testator was about 85 years old at the time of execution of Will, that itself is not conclusive to discard such Will since the testator was mentally alert and was capable of understanding and was of sound and disposing mind.

64. Mr.Dani, learned senior counsel distinguished the judgments relied upon by Mr.Almeida on the ground that the facts in those judgments were totally different.

Kvm FA48.94 Mr.Dani learned senior counsel placed reliance on the judgment of Supreme Court in case of Rabindra Nath Mukherjee and another vs. Panchanan Banerjee (1995) 4 SCC 459 and submits that Supreme Court has culled out the circumstances which can be regarded as suspicious circumstances in the said judgment. None of the circumstances alleged by the appellants as suspicious circumstances fall under any of those categories carted out by the Supreme Court.

Learned senior counsel placed reliance on the judgment of this Court in case of Mrs.Jerbanoo Khurshed Cursetji and others vs. Adi Khurshedji Cursetji 1993 (2) Bom.C.R. 67 and would submit that merely because the appellants are not given the legacy at par with the respondent no.1, that cannot be a ground to declare such will invalid. Relations between the appellants and the testator were strained and thus giving a larger portion to the propounder who was taking care of the testator and giving a smaller portion to the appellants cannot cast any doubt about the genuineness of the Will. The learned senior counsel placed reliance on the said judgment also in support of the submission that since the appellants failed to discharge the burden on the issue of undue influence of the respondent no.1 on the testator by leading any cogent evidence, the learned trial judge has rightly upheld the Will. Reliance is placed on paragraphs 14, 16, 19 and 24.

65. Learned senior counsel for the respondents also placed reliance on judgment of this court in case of Bandopant Sitaram Bapat and others vs. Sankar Sitaram Bapat and others 1996 (1) Bom.C.R. 304 and would submit that the Will can be proved by examining one of the attesting witness and second attesting witness is not required to be examined. Reliance is placed on paragraph 7 of the said judgment.

66. Mr.Dani learned senior counsel also placed reliance on sections 40 and 41 of Kvm FA48.94 the Registration Act, 1908 in support of his submission that the registering authority could register the Will only if he was satisfied with the conditions setout in section 41 (2) of the Registration Act, 1908. The Sub-Registrar in this case had enquired with the testator and the witnesses whether they had read the Will. The testator was asked whether he had understood the contents who answered in affirmative. Only after the Sub-Registrar was satisfied of compliance of conditions of section 41(2) of the Registration Act, 1908, the Sub-Registrar had registered the Will. Such register Will thus cannot be declared as invalid merely because the appellants have made some vague allegations of suspicious circumstances in execution of Will which they have failed to prove.

67. In rejoinder Mr.Almeida, learned counsel for the appellants submits that in view of section 141 of Code of Civil Procedure, 1908 read with section 295 of Indian Succession Act, 1925, the proceedings were contested and were tried as suit and thus the plaintiff ought to have entered the witness box and not having entered into the witness box, adverse influence was liable to be drawn against the plaintiff propounder of the Will.

68. Learned counsel submits that the judgments relied upon by the respondents are clearly distinguishable on the ground that none of the judgments relied upon by the respondents had

considered the law laid down by the larger benches of the Supreme Court or of this court. Learned counsel submits that the partition of the properties was already proved and thus even otherwise the testator could not have bequeathed any of such properties under the alleged Will.

REASONS AND CONCLUSION

69. Both the parties have relied upon various judgments of Supreme Court, this High Court and other High Courts which are referred to aforesaid in support of Kvm FA48.94 their respective submissions. I shall first deal with the issue raised by the appellants whether the alleged writing can be construed as a Will or was a family settlement on the ground that the testator had alleged to have issued directions in the Will in respect of few properties for distribution during his lifetime.

70. With the assistance of the learned counsel appearing for parties I have perused the provisions made in the Will. In my view with a view to ascertain whether a writing can be construed as a Will or a family settlement, court has to read the entire document to gather the intention of the writer of the document. Few clauses in the document cannot be read in isolation. A perusal of the writing executed by the testator does not indicate that any of the properties are given to any of the parties under the said document during the lifetime of the deceased. The implementation of the Will can be made only upon the death of the testator and not during his lifetime. A perusal of the document clearly indicates that the testator had issued various directions in the said writing to distribute his estate to various family members to be made effective only upon his death and not during his lifetime. There were no other parties to the said document. The said document thus in my view cannot be construed as a family settlement. The argument of the appellants on this issue is thus devoid of merits and is rejected.

71. The next issue which arises for consideration is whether the propounder of the Will had duly proved the execution and attestation of the Will and such document was legal and valid and whether the testator had power to dispose of the property mentioned in the Will. In so far as the issue framed by the trial court whether the testator had power to dispose of the properties mentioned in the Will is concerned, in my view a testamentary court does not decide the title in respect of the properties mentioned in the Will and the same can be decided only by a civil Kvm FA48.94 court in appropriate proceedings. The testamentary court thus in my view could not have gone into the issue whether the testator had power to dispose of the properties mentioned in the Will or not in so far as title in respect of such properties is concerned.

72. In so far as the issue whether the alleged Will dated 29 th June 1983 was legal and valid or not is concerned, the propounder had examined the scribe of the Will and one of the attesting witness. A perusal of the cross examination of the appellant no.1 and more particularly deposition in paragraph 18 indicates that the witness of the appellants has admitted the signature of the testator on the Will (Exhibit 46). The propounder has also examined Dr.Sutaria to prove that the testator was of sound and disposing mind at the time of execution of Will and was certified as fit by the said doctor who had examined him before issuing a certificate endorsed on the copy of the Will.

73. A perusal of the evidence of Mr.Jony T.Rodrix who was one of the attesting witness indicates that the said witness was present in the chamber of the Sub- Registrar at the time of execution and attestation of Will. The witness deposed that he alongwith other persons were present in the chamber of Sub-Registrar at the time when testator had put his signature on the Will. The witness identified his signature as well as signature of testator as well as other attesting witness. The witness also deposed that the Sub-Registrar had asked the testator whether he had read the Will and whether he admitted the same, the testator answered in affirmative. In cross examination the said witness deposed that in the presence of Sub-Registrar, the testator had put the signature on the Will. The witness denied the suggestion that he was the best friend of Mr.S.P.D'mello or that he had put his signature on the said Will outside the chamber of Sub-Registrar at the instance of Kvm FA48.94 Mr.S.P.D'mello and respondent no.1.

74. In so far as evidence of the attesting witness is concerned, the submission of the appellants is that the testator being educated and had several educated friends including advocates and had five sons, the testator could have consulted the appellants or could have requested his educated friends or relatives to be attesting witness to the Will and would not have in ordinary course asked Mr.Johny Rodrix who was not known to the testator or had come to the court for attending a criminal matter to act as attesting witness. The evidence of the said attesting witness indicates that the said witness had met the testator in past in the house of his uncle Mr.Anthony D'silva. In my view there is no provision under the Indian Succession Act which provides that the attesting witness has to be a known or educated person. Fact remains that the Will in question itself was executed and attested in the office of the Sub-Registrar. Such endorsement had been duly made by the Sub-Registrar on the Will itself and factum of execution and attestation is proved by the evidence of Mr.Johny Rodrix and also Mr.S.P.D'mello who also was present in the office of the Sub-Registrar at the time of execution, attestation and registration of the Will. Merely because the said witness was already available in the court premises and had come to attend a criminal matter cannot be a ground for rejection of his evidence or to arrive at a conclusion that the Will was not properly attested or that it creates any suspicion about the execution and attestation of the Will.

75. In my view it was for the testator to decide as to who should be attesting witnesses. It is not the case of the appellants that the respondent no.1 was also present when the Will was dictated by the testator to the scribe or that he was present in the office of the Sub-Registrar at the time of execution, attestation and Kvm FA48.94 registration of Will. In my view there is thus no merit in the submission of the learned counsel for the appellants that there was any suspicious circumstances in execution of the Will on these ground and the same is rejected.

76. In so far as evidence of Dr.Sutaria is concerned, it is vehemently urged by the learned counsel for the appellants that Dr.Sutaria was not a family doctor of the testator. It is urged that Dr.Sutaria himself had not written the alleged certificate certifying that the testator was fit when he was examined by the doctor. It is also urged that the deposition of the said doctor and more particularly on the issue whether he already knew Mr.S.P.D'mello as a patient or not was contradictory and inconsistent with the evidence of Mr.S.P.D'mello. It is urged that Dr.Nabar who was a family doctor of the testator could have been approached for such certificate.

77. A perusal of the evidence led by Dr.Sutaria indicates that the testator alongwith Mr.S.P.D'mello had come to his consulting room. It is deposed by the said doctor that he had carefully examined the testator and had found him competent physically and mentally to execute the Will. The said witness also identified his endorsement, rubber stamp and his signature on the said Will. The said doctor also deposed in cross examination that Mr.S.P.D'mello had been to his dispensary on two three occasions only since 1975. The said witness could not produced the case papers of the testator since the examination of the testator by the said doctor was prior to 5 to 7 years on the date of recording his evidence.

78. Though in my view Mr.Almeida, learned counsel for the appellants is right in his submission that there is inconsistency in the deposition of Dr.Sutaria and Mr.S.P.D'mello on the issue as to whether Mr.S.P.D'mello was his patient or not, in my view even if there was any such contradiction on this issue, it would have no Kvm FA48.94 bearing on the issue whether the testator was fit and was of sound and disposing mind at the time of his examination by the doctor one day prior to the date of execution of the Will. There is no requirement in law that a certificate from a doctor certifying that the testator was fit and was of sound and disposing mind at the time of execution of Will has to be obtained or that the Will must contain such certificate as a condition precedent to prove the sound and disposing mind of the testator on the date of execution of Will. In my view thus there is no merit in the submission of Mr.Almeida, learned counsel for the appellants on this issue.

79. In so far as evidence of Mr.S.P.D'mello is concerned, it is urged by the appellants that the said Mr.S.P.D'mello was himself a witness and/or involved in various property transactions of the testator and in collusion with the respondent no.1 had coerced, pressurized and had undue influenced the testator to execute a Will and give more than 80% of his properties to the respondent no.1. Learned counsel also took great pains to canvass that the testator being 85 years old could not have given dictation for three hours to Mr.S.P.D'mello when he was not in a position to write even 7 - 8 lines even according to the said witness. It is also urged that the minute details and description of various properties in the Will itself would indicate that the same was not dictated by the said testator but the same was the result of the collusion and conspiracy of Mr.S.P.D'mello with the respondent no.1. It is also urged that the sub-Registrar would not ask the testator or witnesses to read the Will or to state that whether the Will was with free consent of the testator. It is urged that this deposition on the part of S.P.D'mello and the attesting witness itself would indicate that the same would indicate an unusual and unnecessary procedure alleged to have been followed by the Sub-Registrar. It is also urged by the learned counsel that the deposition of Mr.S.P.D'mello was false and misleading. He had falsely deposed that there was no dealing in the land Kvm FA48.94 transaction between him and the testator or that he never acted as an agent or broker. It is submitted that the deposition of the said Mr.S.P.D'mello was contrary to the correspondence exchanged between Mr.S.P.D'mello and the testator which would indicate that he was involved in various property transaction of the testator with other parties and was personally involved in sale of some of the properties.

80. A perusal of the evidence led by Mr.S.P.D'mello indicates that he was relative of all the parties including the appellants and respondent no.1. He was already associated with the testator in number of property transactions. Mr.S.P.D'mello was educated and was a tax consultant by profession. The

said witness deposed as to how the testator expressed his desire to execute the Will and requested him to take dictation. The said witness identified his handwriting on the Will and was also present at the time of execution, attestation and registration of the Will in the office of the sub-Registrar. The witness deposed that the deceased was quiet old of 85 years and he could not write the Will. The said witness also deposed that he had accompanied the testator to the consulting room of Dr.Sutaria who gave him dictation of the certificate prepared by him after examining the testator.

81. It is not in dispute that the said Mr.SP.Dmelo was relative of all the parties and was associated with the testator in one or the other manner in property transactions. In my view if the testator has taken assistance of his relative and a known person and man of his confidence for scribing the Will by not disclosing the same to his family members, that cannot be construed as one of the suspicious circumstances to discard such Will. It was not the suggestion of the appellants that the said Mr.S.P.D'mello was in any manner benefited by scribing the Will or that the same was with a view to and for the benefit of the respondent no.1. It is also Kvm FA48.94 not the case of the appellants that the respondent no.1 was also present when such dictation was given by the testator to Mr.S.P.D'mello.

82. In so far as submission of Mr.Almeida, learned counsel that the testator not having disclosed about the execution of the Will to the appellants or not having taken assistance of his educated friends and lawyers which create a suspicion is concerned, in my view it is for the testator to decide whether to disclose his intention to execute a Will to his family members and friends or to be secretive about execution of a Will. The assistance taken from Mr.S.P.D'mello in my view thus cannot be a case of suspicious circumstances.

83. It is not in dispute that the said testator expired after more than three years of the execution of the Will. If there was any pressure, coercion, undue influence from Mr.S.P.D'mello or the respondent no.1 on the testator in execution of the Will, the testator himself would have cancelled the said Will or would have executed a Codicil. The appellants could not prove that the said testator had executed any other Will or have cancelled the earlier will. If there would have been any pressure, undue influence and/or coercion from Mr.S.P.D'mello on the testator, the testator could have placed the same on record in reply to the letter addressed by Mr.S.P.D'mello to the testator during his lifetime and after execution of the Will or would have filed a complaint against him.

84. Supreme Court in case of Rabindra Nath Mukherjee and another vs. Panchanan Banerjee (supra) has considered the registered Will made by a 90 year old lady who was explained the contents of the Will by the Sub-Registrar and by the said Will she had deprived her natural heirs. Supreme Court held that the whole idea behind execution of the Will is to interfere with the normal line of Kvm FA48.94 succession and that itself cannot raise any suspicion. It is held that the natural heirs would be debarred in every case of Will, it may be that in some cases they are fully debarred and in others only partially. In the said judgment it is also held that where a Will is registered and the sub-Registrar had certified that the said Will had been read over to the executor who on doing so, admitted the contents, the fact that the witnesses to the document were interested loses significance. Paragraphs 3 to 6 of the said judgment of the Supreme Court in case of Rabindra Nath Mukherjee and another vs. Panchanan Banerjee (supra) read thus :-

3. A perusal of the two impugned judgments shows that the following were regarded as suspicious circumstances:

(1) Deprivation of the natural heirs by the testatrix.

(2) Identification of the testatrix before the Sub-registrar by an Advocate of Calcutta who had acted as a lawyer of one of the executors in some cases.

(3) The witnesses to the documents were interest in the appellants.

(4) Active part played by one Subodh, a close relation of Rabindra, one of the executors, in getting execution of the will. He has been described as ubiquitous.

4. As to the first circumstance, we would observe that this should not raise any suspicion, because the whole idea behind execution of will is to interfere with the normal line of succession. So natural heirs would be debarred in every case of will; of course, it may be that in some cases they are fully debarred arid in others only partially. As in the present case, the two executors are sons of a half-blood brother of Saroj Bala, whereas the objectors descendants of a full blood sister, the disinheritance of latter could not have been taken as a suspicious circumstance, when some of her descendants are even beneficiaries under the will.

5. As to the identification by a lawyer of Calcutta, it may be stated that this could have been regarded as a suspicious Kvm FA48.94 circumstance, if a wrong person would have been identified as Saroj Bala. That, however, is not the case of the objection. So, there is no bane in this circumstance.

6. Insofar as the third circumstance is concerned, we may first observe that witnesses in such documents verify whether the same had been executed voluntarily by the concerned person knowing its contents. In case where a will is registered and the Sub-registrar certifies that the same had been read over to the executor who, on doing so, admitted the contents, the fact that the witnesses to the document are interested loses significance. The documents at hand were registered and it is on record that the Sub-registrar had explained the contents to the old lady. So, we do not find the third circumstance as suspicious on the facts of the present case.

85. In this case none of the legal heirs are fully deprived of the estate by the testator. A perusal of the Will indicates that all the natural heirs are provided with a legacy though may not be equivalent to what is provided to respondent no.1. In my view even if the testator had provided for larger share in the property in favour of the 1st respondent who was staying with the testator and was taking his care, it cannot raise any suspicion which would warrant discarding of the said Will. In this case also the Sub-Registrar had explained the contents of the Will to the testator and had enquired whether he had understood the contents thereof which the testator had replied in affirmative. I am respectfully bound by the judgment of the Supreme Court in case of Rabindra Nath Mukherjee and another (supra) which applies to the facts of this case.

86. This court in case of Mrs.Jerbanoo Khurshed Cursetji (supra) has held that merely because the Will does not make any provision in favour of one or the other of the children of the testator, Will does not become invalid. This court has held that the relations of one of the legal heirs was strain with the testator and therefore Kvm FA48.94 not providing any bequest in favour of such child cannot cast any doubt about the genuineness of the Will. In the facts of this case also it is clear that the appellants had issued notices to the testator making various allegations prior to the date of execution of Will which notice was replied by the testator. RTS proceedings were also filed by and between the appellants and the testator prior to his death. The appellants were staying separately. It is admitted in the cross examination of the one of the appellants that the appellants did not take any steps to prevent the respondent no.1 from meeting the testator or to take out the testator from the clutches of respondent no.1 though there were such allegations made in the evidence.

87. This court in the said judgment of Mrs.Jerbanoo Khurshed Cursetji (supra) has also held that the testator is entitled to bequeath all his property in faovur of anyone he likes and even to the exclusion of all his children. The court is required to merely consider as to whether the Will represents the free decision of the testator and as to whether the testator had a sound disposing mind at the time of execution of the Will. The burden of proving issue of undue influence is on the caveator and in absence of any cogent evidence to prove use of undue influence on the testator, the court must uphold the Will once it is proved that the Will was duly executed and attested after due understanding of the documents by the testator. In this case the appellants though led evidence could not prove that there was any undue influence or coercion on the part of the respondent no.1 or Mr.S.P.D'mello on the testator in execution of the Will and to deprive the appellants of the legacy of the larger or equal share. Paragraphs 11, 13, 16, 23, 24 and 26 of the said judgment read thus :-

> 11. On the issue of due execution and attestation of the Will I have no hesitation in accepting the evidence of Jerbanoo Khurshed Cursetji and evidence of attesting witnesses Rusi N. Kvm FA48.94 Sethna, Bhikhabhai Chimanlal Bengali and Samuel Lawrence Lewis. The said evidence is reliable. I hold that Dr. Cursetji was of sound disposing mind at the time when he executed the Will and the said three codicils. It appears from the evidence of the caveator Adi Khurshed Cursetji that since 10/15 years the testator was not keeping very good health since last 10-15 years prior to his death. The caveator has in terms stated in his evidence at page 46 that the testator was suffering from Cancer since about 10 years prior to his death. In the next breath the caveator stated that it can be even 15 years prior to his death.

One of the testicles of the testator was removed, by Dr. K.N. Dastur. It is possible that the testator was not in perfect health during the last 10 years prior to his death. No one is in perfect health at late stage in life. The question to be asked as to whether there is any material on record to show that the testator was unable to comprehend the meaning and contentions of the documents signed by him particularly when he was guided by Advocates of his choice. After carefully going through the oral and documentary evidence in this case I have reached the conclusion that the testator was mentally alert at the time when he executed the Will and each of the three codicils. The mental faculties of the testator were in fact at time of execution of the Will and each of the codicils. Merely because a person is admitted to hospital, it does not follow that he has lost all his physical and mental

faculties. No such presumption can be drawn. The cases of execution of the Will or the codicils by the testator in hospital are not unknown. The deceased considered and reconsidered his decision during a span of about 15 years. The deceased cannot be considered as lacking in disposing capacity merely because the deceased appointed petitioner No. 2 as an executing or merely because one of the legacy earlier in favour of the caveator was revoked.

It is obvious from the evidence that the deceased used to obtain expert legal advice from the Advocates and Solicitors of his choice from time to time. The Will and the codicils were prepared by well known firm of Advocates and Solicitors in the city of Bombay in ordinary course of their law practice. It is of considerable significance that the testator had written a letter to the caveator entirely in his hand which has been now marked as part of exhibit MM. It is obvious from the contents Kvm FA48.94 of the said letter that the said letter was written by the testator soon after execution of the first codicil dated 3rd November 1970. The petitioner No. 1 had deposed to at the trial that the said letter was entirely in the handwritten of the testator and the contents thereof are correct. The said letter was to be handed over to the caveator after the death of the testator. The said letter was ultimately forwarded to the caveator by M/s. Vachha & Co., Advocates representing the estate of the testator, with a forwarding letter dated 5th February 1985. If a Will is written entirely in the handwriting of the testator, law makes very-very strong presumption in respect of genuineness of the Will or the codicil as the case may be. Similar would be the situation in the case of a handwritten letter of the testator written few days after execution of the Will and the codicil, confirming directly or indirectly the said documents. The contents of the said letter reveals the mind of the testator and leave no scope for conjunctures, speculation or suspicion. The testator stated in the said letter that he had executed his Will dated 22nd January 1968 and the codicil dated 3rd November 1970. The said letter is in conformity with the contents of the Will dated 22nd January 1968 and the codicil dated 3rd November 1970. The testator stated in the said letter that the testator was not bound to give any explanation to anyone as to how he dealt with his property because he had made every penny of it. The testator stated in the said letter that the testator had always helped the caveator as the caveator was his only son i.e. inter alia by handing over the entire amount received by the testator from his late father i.e. about Rs. 65,000/-. In the said letter, the testator stated that the testator had helped the caveator in respect of establishing his business of Mic Products Co. and constructing of a flat for, out of the passage of 3rd floor Kamal Mansion. The testator stated that the testator had provided jewellery worth Rs. 30,000/- to the wife of the testator besides wedding clothes and saris etc., at time of the marriage of the caveator. The later part of this letter states that the testator was very much hurt by reasons of strained relations and conduct of the caveator depicting lack of care, lack of respect for old parents etc. In the said letter the testator wrote as under :

> I have never expected anything from you in return excepting Kvm FA48.94 your affection and respect.
>
> Unfortunately in recent years you gave neither of them. By the said letter the testator expressed his injured feelings and sentiments due to undesirable conduct of the caveator. Ultimately the testator stated in the said letter as under :

> "All this distressed me and your mother very much and made us extremely unhappy and quite naturally I felt that it is only fair that the remaining part of my property should go to Meher who has loved us and respected us as a daughter."

13. The only particulars of alleged undue influence etc. given in para 6 of the affidavit in support of caveat is that Mr. Rusi Dalal had made a pre-condition to his marriage with the petitioner No. 2 that the entire estate of both the parents must go to him. In the said para of the said affidavit it is further alleged by the caveator that Mr. Rusi Dalal used to threaten the parents of the caveator to the effect that he would abandon the second petitioner unless the parents of the caveator succumbed to his threats. Neither the Will nor any of the codicils provided for any bequests in favour of Rusi Dalal. Mr. Rusi Dalal has not abandoned the second petitioner. The petitioner No. 2 and Mr. Rusi Dalal are living happily. Nothing has happened.

There are three children of marriage of petitioner No. 2 with Mr. Dalal. The petitioner No. 2 and her husband Rusi Dalal have been living normal life as husband and wife. The allegations made in para 5 of the said affidavit appears to me to be imaginary and fictitious. The said allegations have remained unproved and indicate that the testator and petitioner No. 1 did not approve the conduct of the caveator in making unpleasant and unfair remarks against Meher and her husband. The testator must have been reasonably fed up with this attitude of the Caveator.

16. At this stage it shall be convenient to summarise relevant portion of the evidence of the caveator. The caveator has stated in his evidence at page 43 that since the marriage of Meher with Rusi Dalal, relation of the caveator with his mother were strained. The caveator wants the Court to believe Kvm FA48.94 that the relations of the caveator with his mother were strained but the relations of the caveator with his father was quite cordial. Having regard to the facts of the case and in view of the handwritten letter of the deceased marked as Exhibit MM and other evidence on record I am satisfied that the evidence of the caveator is untrue and unreliable. In my opinion, the caveator had hurt both of his parents and the relations between the testator and the caveator were equally strained for 10-15 years, if not more. It is the case of the caveator in his evidence that till about 1980, the caveator and his wife used to go to his parents' place for dinner. Since then all visits at the residential place of parents were stopped by the caveator. Does it not indicate that the relations between the caveator and the testator were strained? It appears to me from the analysis of his evidence that the testator and his wife P.W. 1 had equal affection for petitioner No. 2 upto about the year 1970. The petitioner No. 2 had brain fever when she was at the age of 3 or 4 years. It is possible that the petitioner No. 2 does not possess ideally and completely developed brain. Even if it is so, the caveator cannot go on defaming his own sister and brother-in-law and exaggerate the matters. The conduct of the caveator in making all sorts of allegation against his sister and his brother-in-law is unfair. The conduct of the caveator in hurting his sister and brother-in-law must have created further bitter relations between the testator and the caveator. I find part of the evidence of the caveator as totally irresponsible. The caveator was shown the handwritten letter forwarded to me with covering letter dated 5th February 1985 marked exhibit 'MM' once again in his cross examination and was asked question as to whether the said letter was in handwriting of his father. Jerbanoo has stated in her evidence that the entire letter was in the handwriting of the testator. The caveator replied that he did not know whether the letter was in the handwriting of his father-testator

as he was not a handwriting expert and such letter was not written in his presence. The caveator was asked as to whether the caveator was familiar with his father's signature. The caveator replied that the caveator had not seen the documents written by his father and he will not be able to identify his handwriting. In my humble opinion, this part of testimony of the caveator is in nature of an attempt to Kvm FA48.94 hoodwink the Court and evade answering relevant questions. To my mind the caveator knows that the said letter is in handwriting of the testator and the caveator has attempted to evade answering question of the Court and the Counsel.

23. Shri Makhija, the learned Counsel for the plaintiffs relied upon the judgment of the Hon'ble Supreme Court in the case of Naresh Charan Das Gupta v. Paresh Charan Das Gupta and another, MANU/SC/0113/1954 : [1955]1ITR1035(SC) . In this case it was held by the Apex Court as under :

> "When once it has been proved that a Will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it."

It was also held in this case that every influence which was brought to bear on a testator could not be characterised as "undue influence". It was also held by the Court that it was open to a person to plead his case before the testator and to persuade him to make a disposition in his favour. It was held by the Apex Court that if the testator retained his mental capacity, and there is no element of fraud or coercion, the Will could not be attached on the ground of undue influence. In the ultimate analysis undue influence is required to be brought under the categories of fraud or coercion. In this case Venkatarama Ayyar, J., speaking for the Bench of the Hon'ble Supreme Court referred to well-known observation of Lord Penzance in Hall v. Hall, and approved the observations of Lord Penzance as under :

> "In a word, a testator may be led, but out driven; and his Will must be the off spring of his own volition and not the record of some one else's".

The Hon'ble Supreme Court referred to section 61 of the Indian Succession Act and illustration (vii) in support of its view. The said statutory illustration (vii) provides that "If a testator in consequence of the intercession and persuasion, but in the free exercise of his judgment and volition, makes his Will in the manner recommended by "B". The Will is not Kvm FA48.94 rendered invalid by the intercession or persuasion of "B". Applying the ratio of this judgment to the facts of this case, Mr. Makhija contended that even if petitioner No. 1 or petitioner No. 2 had put forward their point of view before the testator, the Will could not be invalidated unless the Court reached the conclusion that the testator had not applied his own mind and free exercise of the judgment of the testator was in any way hampered or obstructed. It is open to the parties to persuade the testator to make the Will in a particular manner.

24. Shri Makhija rightly relied upon the judgment of the Hon'ble Supreme Court in the case of Smt. Sushila Devi v.

Pandit Krishna Kumar Missir and others, MANU/SC/0485/1971 : AIR1971SC2236 . This case dealt with the effect of non-bequests of property to children of the testator. Hegde, J., speaking for the Bench observed as under :

> "If the bequests made in a Will appears to be unnatural the Court had to scrutinise the evidence in support of the execution of the Will with a great degree of care than usual."

If on such scrutiny the Will is proved to be the Will of the testator, it cannot be declared as invalid merely because of non-bequest in favour of one or other child of the testator.

26. Shri Makhija has also relied upon another judgment of the Privy Council in the case of Gomtibai v. Kanchhedilal, MANU/PR/0018/1949. Sir Madhavan Nair speaking on behalf of the Privy Council observed that "undue influence in order to invalidate a Will must amount to coercion or fraud. It was observed by the Privy Council in this case that the burden of proving undue influence was not discharged by merely establishing that a person has the power to unduly overbear the Will of the testator. It must be shown that such a power was in fact exercised and that the Will was executed by exercise of such power. In this case, the Will was assailed by the caveator on the ground that the provision was made for the wife under the Will was totally inadequate. It was held by the Privy Council that the grounds set forth by the caveator were not sufficient to show that the tester was not of a sound or Kvm FA48.94 disposing mind or was under undue influence of his natural father while executing the Will.

88. This court in case of Bandopant Sitaram Bapat (supra) has held that merely because the testator was said to be not keeping good health prior to her death, it cannot be concluded that at the time when she executed her Will, she was not having disposing state of mind. This court held that if there being no evidence on record showing existence of any suspicious circumstances surrounding execution of the Will, court has to accept such Will as valid and grant probate. Paragraph 7 of the said judgment reads thus :-

> 7.

It is correct that Mr. Limaye, the other attesting witness to the said Will of Bhagirathibai has not been examined. However, S. 63 of the Act required the respondents to prove the said Will of Bhagirathibai by examination of one of the attesting witnesses thereof which the respondents did. It was not incumbent upon the respondents to adduce additional evidence of Mr. Limaye so long as the respondents considered the examination of one witness as sufficient. Moreover, in his evidence, the 1st appellant has admitted that the signatures of the said Bhagirathibai appearing at three places on the Will were of Bhagirathibai. The said Will of Bhagirathibai has been registered with Sub-Registrar and she herself had gone to the Sub-Registrar's Office for the purpose of presenting the Will and when the Will bears the endorsement in that respect, the respondents are entitled to the presumption as regards the proper execution thereof as warranted by S. 58 read with S. 60 of the Indian Registration Act. Though it is alleged that on the day when the Will of Bhagirathibai was executed on 8th May, 1970, the said Mr. Limaye was at Sangli, there is nothing to show that Mr.

Limaye was not present at Ashta when he attested the execution thereof by the said Bhagirathibai. The 1st appellant himself was admittedly not present at the time of execution of the said Will by Bhagirathibai and as such cannot have personal knowledge as to whether Mr. Limaye was or (was) not present at the time of execution of the said Will by Bhagirathibai and attestation thereof by witness Mr. Kore.

Kvm FA48.94 Though the respondents did not examine Mr. Limaye, yet nothing prevented the appellants to examine Mr. Limaye if the appellants so desired. There is nothing to show that Mr. Kore was interested witness. The scribe was not examined by the respondents since it was not obligatory for the respondents to examine him as their witness to prove the Will in facts of the case. Merely because Bhagirathibai was said to be not keeping good health prior to her death, it cannot be concluded that at the time when she executed her Will on 8th May, 1970 she was not having disposing state of mind. There is no evidence on record to show that the said Bhagirathibai was not having disposing state of mind at that time when she had executed her Will on 8th May, 1970. Some doubt was sought to be created by reason of similarity of contents in the said Will of the deceased and that of the said Bhagirathibai. It is an admitted position that Bhagirathibai was a literate lady. If at the time of dictating her Will, Bhagirathibai had with her the said Will of the deceased, surely nothing prevented her from adopting the contents of the said Will of deceased for getting the same incorporated in her said Will. The similarity of contents do not prove that the Will of Bhagirathibai was not valid. In my view, the evidence on record do not show existence of any suspicious circumstances surrounding execution of the said Will by Bhagirathibai. As held by trial Court, the Will of Bhagirathibai as propounded by the respondents was properly and validly executed by Bhagirathibai and respondents have discharged the onus of proving the same.

89. Supreme Court in case of Rani Purnima Debi (supra) has held that if a Will has been registered, that is a circumstances which may having regard to the circumstances prove its genuineness but the mere fact that the Will is registered will not by itself be sufficient to dispel all suspicion regarding it where suspicion exist, without submitting the evidence of registration to a cross examination. It is held that if the evidence as to registration shows that it was done in a perfunctory manner, the officer registering the Will did not read it over to the testator or would not bring home to him that he was admitting the execution of the Will or did not Kvm FA48.94 satisfy himself in some other way 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.

90. In the facts of this case the Sub-Registrar while registering the Will has followed the appropriate procedure provided under sections 41 and 42 of the Registration Act and has made appropriate endorsement on the Will. The procedure followed by the Sub-Registrar has been also proved by two witnesses examined by the respondent no.1 who were present in the office of Sub-Registrar at the time of execution, attestation and registration of the Will. Since the appellants in, my view have failed to prove or demonstrate any suspicion in execution of Will and/or registration, such registered Will has to be considered in support of the plea that the Will was duly executed and attested in the office of the Sub-Registrar. Paragraph 23 of the judgment of the Supreme Court in case of Rani Purnima Debi (supra) read thus :-

23. There is no doubt that if a will has been registered, that is a circumstance which may, having regard to the circumstances, prove its genuineness. But the mere fact that a will is registered will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists, without submitting the evidence of registration to a close examination. 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 is 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 Kvm FA48.94 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. It is not unknown that registration may taken place without the executant really knowing what he was registering. Law reports are full of cases in which registered wills have not been acted upon (see, for example, Vellasaway Sarvai v. L. Sivaraman Servai (), Surendra Nath Lahiri v.

Jnanendra Nath Lahiri MANU/WB/0025/1932 :

AIR1932Cal574 and Girji Datt Singh v. Gangotri Datt Singh) MANU/SC/0092/1955 : AIR1955SC346 . Therefore, the mere fact of registration may not by itself be enough to dispel all suspicion that may attach to the execution and attestation of a will; though the fact that there has been registration would be an important circumstance in favour of the will being genuine if the evidence as to registration establishes that the testator admitted the execution of the will after knowing that it was a will the execution of which he was admitting.

91. Supreme court in case of Bhagwan Kaur vs. Kartar Kaur (supra) has after considering the oral evidence led by the parties held that there was contradictions in the evidence led by the witnesses of the propounder and in the facts of that case held that the endorsement made by the Sub-Registrar did not satisfy the requirements of section 63 of the Indian Succession Act and does not reach upto the level of proof as required under section 68 of the Indian Evidence Act and thus mere registration of Will is of no consequence. In the facts of this case, the appellants could not prove any suspicious circumstances in execution, attestation and registration of the Will. The factum of execution of the Will is not disputed by the appellants. The witnesses examined by the propounder has proved not only the execution but also attestation and the registration of the Will which was done after complying with the requisite procedure under the provisions of Registration Act. The judgment of the Supreme Court in case of Bhagwan Kaur (supra) relied upon by Mr.Almeida, learned counsel is distinguishable with the facts of this case and Kvm FA48.94 does not assist the appellants.

92. Supreme Court in case of Gurdial Kaur (supra) has held that some of the natural heirs had been disinherited in the Will without any reason and thus registration of the Will by itself was not sufficient to remove the suspicion. In this case the appellants could not prove the existence of any suspicious circumstances.

None of the appellants are disinherited in the Will by the testator. The testator had given reasons in the Will as to why the respondent no.1 was given larger share in the properties. The judgment of Supreme Court in case of Gurdial Kaur (supra) relied upon by Mr.Almeida learned counsel for the appellants is thus distinguishable in the facts of this case and does not assist the appellants.

93. In so far as judgment of Supreme Court in case of Kartar Kaur and another (supra) relied upon by Mr.Almeida, learned counsel for the appellants is concerned, the court had rendered a finding that the documents formed part of conspiracy hatched by the propounder to deprive the other heirs or their rightful successors. Such suspicious circumstances were proved by leading evidence by such legal heirs who were deprived of their succession. The facts of that case are distinguishable with the facts of this case and does not assist the appellants.

94. In so far judgment of Supreme Court in case of Ram Piari (supra) relied upon by Mr.Almeida, learned counsel for the appellants is concerned, the Supreme Court held that mere execution of Will by producing scribe or attesting witness or proving genuineness of the thumb impression of the testator by itself was not sufficient to establish validity of Will unless suspicious circumstances, usual or special are ruled out and the courts conscience is satisfied not only on execution but about its authenticity. There can not be any dispute about the proposition laid Kvm FA48.94 down by the Supreme Court. However in the facts of this case in my view except making bare allegations of suspicious circumstances, the appellants could not prove whether any suspicious circumstances existed at the time of execution of Will. The said judgment of the Supreme Court thus does not assist the case of the appellants.

95. The appellants placed reliance on various judgments referred to aforesaid in support of the submission that the contested testamentary proceedings were in the nature of suit and thus provisions of Code of Civil Procedure, 1908 were attracted and applicable to such proceedings. It is submitted that since the respondent no.1 who was propounder of the Will was not examined as a witness, this court shall draw adverse inference against the respondent no.1, shall take a view that the Will was surrounded by suspicious circumstances and discard such Will. There is no dispute that the provisions of Code of Civil Procedure, 1908 are applicable to the testamentary proceedings. The proof of Will has to be in accordance with the provisions of Evidence Act and Indian Succession Act. The propounder had already examined the scribe of the Will, one of the attesting witness and also the doctor who had issued certificate of fitness. The Will was registered after following the requisite procedure. In the facts of this case therefore merely because the propounder of the Will who had played no role and was neither present at the time of dictation of the will by the testator or at the time of execution and attestation of the Will, his deposition was thus not necessitated and thus no adverse inference on these ground can be drawn as canvassed by Mr.Almeida, learned counsel for the appellants. There is no dispute about the proposition of law laid down in the judgments relied upon by the learned counsel for the appellants.

96. Supreme Court in case of H.Venkatachala Iyengar vs. B.N.Thimmajamma Kvm FA48.94 and others AIR 1959 SC 443 has at great length considered what circumstances could be considered as suspicious circumstances and what are the duties of court while appreciating the evidence on the issue of proof of Will, onus of proof etc. It is held that what circumstances would be regarded as suspicious circumstances cannot be precisely defined or exhaustively enumerated. It is held that for deciding material question of facts which arise in applications for probate or in actions on Wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It is held that a propounder of the Will has to prove the due and valid execution of the Will and that if there are any suspicious circumstances surrounding the execution of the Will, the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence. It is held that if a propounder himself takes a prominent part in the execution of the Will which confer on them substantial benefits, that itself is generally treated as a suspicions circumstances attending the execution of the Will and the propounder is require to remove the said suspicion by clear and satisfactory evidence.

97. In my view the appellants have neither pleaded that the respondent no.1 had taken any prominent part in the execution of the Will nor has proved the same either by documentary evidence or by oral evidence. Paragraphs 19 to 22 and 39 which are relevant read thus :-

> 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 Kvm FA48.94 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.
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> 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 Kvm FA48.94 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.

21. Apart from the suspicious circumstances to which we have just referred, in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word 'conscience' in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true Kvm FA48.94 that, as observed by Lord Du Parcq in Harmes v. Hinkson , "where a will is charged with suspicion, the rules enjoin a reasonable scepticism, not an obdurate persistence in disbelief. They do not demand from the judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth". It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect.

39. In this connection we would like to add that the learned trial judge appears to have misdirected himself in law inasmuch as he thought that the proof of the signature of the testatrix on the will raised a presumption that the will had been executed by her. In support of this view the learned judge has referred to the decision of the Calcutta High Court in Surendra Nath Chatterji v. Jahnavi Charn Mukerji . In this case no doubt the Calcutta High Court has held that on the proof of the signature of the deceased or his acknowledgment that he has signed the will he will be presumed to have known the provisions of the instrument he has signed; but Mr. Justice B. B. Ghose, in his judgment, has also added that the said presumption is liable to be rebutted by proof of suspicious circumstances and that undoubtedly is the true legal position. What circumstances would be regarded as suspicious cannot be precisely defined or exhaustively enumerated. That inevitably would be a question of fact in each case.

Unfortunately the learned trial judge did not properly asses the effect of suspicious circumstances in the present case to which we have already referred and that has introduced a serious infirmity in his final conclusion. Incidentally we may also refer to the fact that the appellant obtained a power of attorney from the testatrix on the same day; and that has given rise to the argument that the appellant was keen on taking possession and management of the properties under his control even before the death of the testatrix. There is also another circumstance which may be mentioned and that is that the Sub-Registrar, in whose presence the document was registered on the same day, has not been examined though he was alive at Kvm FA48.94 the date of the trial. On these facts then we are inclined to hold that the High Court was justified in reversing the finding of the trial court on the question of the due and valid execution of the will.

98. In so far as judgment of Supreme Court in case of Rani Purnina Debi (supra) is concerned, it is held by the Supreme Court after considering the fact that there was nothing to show that the Will was read over to the testator by the registrar before he admitted execution of the Will and since the propounder was unable to dispel the suspicious circumstances surrounding the execution and attestation of the Will, no letter of administration in those circumstances could be granted on the basis of it. In my view the said judgment is clearly distinguishable with the facts of this case. The fact that the Sub-Registrar has followed the requisite procedure before registration of Will has been proved by the attesting witness and which evidence has not been shaken in the cross examination. The said judgment does not assist the appellants.

99. In so far as submission of Mr.Almeida that considering the age of the testator at the time of execution of Will, he could not have given such dictation for three hours of the will and was not of sound and disposing mind is concerned and the testator could not have given larger portion of the properties to the respondent no.1 in comparison to the appellants is concerned, a perusal of the oral evidence clearly indicates that the appellant no.1 has admitted that the appellants were not in good terms with the respondent no.1 and their relations with respondent no.1 were strained. The witness also admitted that the proceedings were already going on between the appellants and the testator prior to the execution of the Will. The appellants had also raised objection against the testator from selling the Achole property and had also issued a public notice on 23 rd October, 1981 as they Kvm FA48.94 apprehended that the deceased father would sell the said Achole property to the third person. The said notice was replied by the father. The RTS proceedings were dismissed in favour of

the father which order was not challenged by th appellants.

During the lifetime of the testator, the appellants did not challenge the transaction of Achole property.

100. The appellant no.1 also admitted in the cross examination that there were cases between the testator and the tenants. The certified copy of the deposition in Regular Civil Suit No. 15 of 1975 was shown to the witness. The witness deposed that he could not say how his father was cross examined in the year 1983. In my view the overall evidence produced on record including the cross examination of the appellant no.1 clearly indicates that the testator was active, alert and fit and was able to understand what he was doing. He was attending the court proceedings, was receiving the rent deposited by the tenants in the court, had replied to the notice issued by the appellants, prosecuted RTS proceedings filed by and between the appellants and was attending the court for recording of the evidence and was cross examined in the year 1983, the year in which the Will was executed. The appellant no.1 has admitted in the cross examination that it was their information only that due to the death of the mother of the appellants and respondent no.1, health of the testator was not good mentally and physically. He also admitted that he had no other evidence to show that his father was under pressure and tension during the period in question. A perusal of the record indicates that it was not the case of the appellants that the testator was confined to bed or was not having sound and disposing mind at the time of execution of Will. In my view, the deceased testator was of sound and disposing mind and was able to understand what he was doing.

Kvm FA48.94

101. Though the appellant no.1 was visiting the house of the respondent no.1 where the testator was staying till the beginning of 1982, the appellant no.1 did not take any steps to relieve his father from alleged tension or did not take any steps to prevent the entry of appellant no.1 to the house of respondent no.1.

102. In so far as the alleged public notice issued by the respondent no.1 after execution of Will by the testator is concerned, the appellants could not prove the existence of such notice by examining the proper person including the publisher thereof and the said notice was thus not exhibited and rightly so in my view. No reliance on such notice thus can be placed by the appellants.

103. In so far as submission of Mr.Almeida that the respondent no.1 having sold two of the properties fraudulently as a constituted attorney of the testator to his wife and that would indicate that the testator was completely under control of the respondent no.1 is concerned, in my view subsequent acts of the respondent no.1 after execution of Will would not be conclusive to consider such circumstances as suspicious circumstances and more particularly in view of the fact that those properties were bequeathed by the testator in favour of respondent no.1. It is not in dispute that the testator expired after more than four years of execution of the Will. The testator did not take any action against the respondent no.1 during his lifetime for setting aside such sale which was effected after execution of Will and during the lifetime of the testator.

104. In my view the appellants have thus failed to prove that the Will was surrounded by any suspicious circumstances and thus cannot be accepted for the purpose of granting any relief in favour of the propounder. The trial court has dealt with all the aspects in the impugned judgment properly and does not require Kvm FA48.94 interference. In my view the propounder of the Will has proved the execution and attestation of Will in question and the same is legal and valid. Appellant has failed to prove that the Will dated 29 th June, 1983 is revoked by writing dated 3 rd July, 1986 or any other writing. Learned counsel for the appellant did not advance any arguments on issue no.4 framed by the trial court, hence finding of the trial court on that issue is not interfered with.

105. I, therefore pass the following order :-

First appeal is dismissed. There shall be no order as to costs.

ig (R.D. DHANUKA,J.)