Calcutta High Court
Ajit Chandra Majumdar vs Akhil Chandra Majumdar on 23 December, 1959
Equivalent citations: AIR 1960 Cal 551, 64 CWN 576
Author: P Mukhabji
Bench: P Mukharji, H Bose
JUDGMENT P.B. Mukhabji, J.

1. This is an appeal from the judgment and order of P.C. Mallick J., dismissing the propounder's petition for probate of a holograph will of the testator who outlived the will by about sixteen years, on the ground that the conscience of the Court had not been satisfied.

2. The propounder Ajit Chandra Majumdar is the youngest son of the testator Adhar Chandra Majumdar. The testator had four sons, Akhil, Anil (the caveator), Ajit and one Arun who predeceased the testator. The predeceased son left a widow and four children, none of whom is contesting the will. The eldest son Akhil did not fife any affidavit In support of the caveat. The second son Anil, who is a doctor, is the caveator and he filed an affidavit in support of his caveat. Anil alone gave evidence at the trial of this contentious cause. Akhil neither filed any affidavit nor gave any evidence in Court and Anil's evidence in support of his caveat was ordered to be taken as the Written Statement of both Akhil and Anil against Ajit's petition for probate, regarded as the plaint in this contentious cause. The position, therefore, is that of all the four sons of the testator, one is the propounder, the predeceased son's children are not contesting while the other two are opposing the will but even out of them one has kept himself away from the box nor has affirmed any affidavit challenging the will. The dispute, therefore, mainly is between Anil and the propounder Ajit.

3. The testator made the will on 8-1-1939. It is a holograph will written entirely by the hand of the testator in firm handwriting and in English. The testator was a retired Government servant and a pensioner. He lived for 16 years after the execution of the will and died on 20-12-1955. The will was attested by four attesting witnesses of whom Gobinda Madhab Chatterji and Devi Prosad Lahiri came to give evidence before the Court. The disposition in the Will which has provoked this opposition is due to the fact that the testator left the most valuable, if not the only substantial property of his estate to the youngest son Ajit only depriving others. This property is a house in Calcutta at 17F. Nalin Sarkar Street. Out of the total valuation of the assets of the testator at about Rs. 44,915/-this house alone is valued at about Rs. 44,060/-.

4. On behalf of the caveator, the Will is challenged on the ground of undue influence and coercion. It is said that the propounder Ajit is a bully who used to threaten the testator and who had a complete hold upon his father. It is also alleged against the propounder that he was of criminal disposition and rough. Incidentally, Ajit is a businessman who runs an electrical shop by the name of Central Electrical Works. It is said by the caveator that Ajit procured the Will. The Will is also challenged as unnatural and as containing an unjust disposition by the testator. The case of the cavetor is that the father was equally affectionate towards all the sons and there was no reason why he should give almost all his properties only to one depriving the others.

5. The learned trial Judge has found that the Will was duly executed by the testator. He has also found that it was duly attested. He holds than the Will was executed at Puri. But the learned trial Judge refused probate of the Will on the ground that the propounder Ajit exercised undue influence and procured the Will and that the Will was not the Will of the testator as a free agent.

6. Now, the case for undue influence, coercion and threat as pleaded in the affidavit in support of the caveat contains no particulars of such undue influence, coercion and threat. What is worse, the trial was allowed to proceed without even framing any issue at all on undue influence.

7. The result, therefore, is that we have to gather the case of undue influence from the evidence given at large and appreciation of it in the judgment under appeal, (After discussing evidence His Lordship proceeded)

8. It will be appropriate here to record our reasons why we consider in this case that the will has been proved to be duly executed and it is the Will of the testator as a free agent and why we cannot uphold the caveator's contention that the Will was executed under the undue influence of Ajit. Broadly speaking, I find eight compelling reasons to hold that there was or could be no undue influence by Ajit on the testator in respect of this Will.

9. The very first reason is that the will is a holograph will. The whole of this Will was written in the hand by the testator himself in English. The handwriting is clear and firm. The law makes a great presumption in favour of the genuineness of a holograph will for the very good reason that the mind of the testator in physically writing out his own Will is more apparent in a holograph will than where his signature alone appears to either a typed script or to a script written by somebody else. The learned trial Judge has not drawn this presumption in this case on what he says to be the ground that the testator was an old man at the time and was living under the shadow of the aggressive personality of Ajit. The testator was certainly an old man of 74 years while he was at Puri but it is nobody's case that he was physically or mentally in any way incapable of making a Will for in fact he went to Puri and lived there all by himself, without even his wife accompanying him and he had only a servant with him and he lived up to the good old age of about 90 years. I have already given my reason why I hold that Ajit's aggressive personality has not been established. Therefore the learned trial judge was in error in failing to give due consideration to the holograph character of the Will.

10. Secondly, at the time while the testator was executing the Will at Puri, Ajit was not present at Puri at all. Ajit was then in Calcutta. It was, therefore, an exaggeration to say that the testator was living at the time under the shadow of the aggressive personality of Ajit. The learned trial Judge realised this difficulty but in order to avoid that difficulty, I think, he came to the impossible conclusion when he says:

"Having failed to persuade his father to execute the will in Calcutta, he persisted in his endeavour to persuade his father to execute the Will at Puri. In this matter, he must have procured the assistance of Debi Prosad who was well-known to Ajit, if not his friend."

11. This is a wholly unwarranted conclusion based on mere suspicion and on no evidence at all. There is no scintilla of legal and dependable evidence to prove any of the conclusions the learned Judge arrived at, namely, (1) that Ajit exercised any persuasion on his father to execute any Will either at Calcutta or at Puri and (2) that Ajit procured the assistance of Debi Prosad Lahiri or that he was his friend or that he exercised a kind of remote control from Calcutta to Puri through the agency and instrumentality of Debi Prosad Lahiri.

12. Thirdly, this will was a copy of the draft prepared by a Solicitor of this Court by the name Abhoy Pada Das since deceased. Abhoy Pada DAS was a friend of the testator (see Ajit's answer to Qq. 6 to 14 and Qq. 244 to 245). The learned trial Judge came to the conclusion that the instruction to prepare the draft had not been proved to have been given by the testator. That conclusion is clearly wrong for many reasons. A man who copies the draft does not copy it for the sake of any exercise in handwriting. If the testator had not approved the draft, there was no point in actually copying it out in executing the Will. In that event, he could have altered the draft which he did not approve. Therefore, copying the Will from the draft means, in the facts of this case, approval of the draft.

13. Fourthly the learned trial Judge failed to consider on this point that in the letter of 10-1-1939, written within two days after the execution of the will, the testator himself says "the thing has been done exactly in the manner and in accordance with the advice given by Abhoy Babu in that regard". That letter was signed by the testator himself. To my mind it proves conclusively the testator's approval of the advice and draft of Abhoy Pada Das.

14. Fifthly, there are corrections in the draft will which the testator himself made in his own hand in 1944 marking the incidents that had taken place since the execution of the will in 1939. These corrections were made on 8-8-1944 and the date and the initials of the testator appear on those corrections. These corrections indicate that the testator had not only approved the draft and executed the will but was also intelligently following the course of events subsequent to the will. For instance, on the draft he makes the correction that reference to his wife Basantilata Devi had become unnecessary as she had died since the will.

15. Sixthly, if the Will had been executed under the undue influence of Ajit, that the testator had found plenty of time and years to indicate that fact to his other sons, including the caveator, that he had been forced to make such a Will, for he was living at the same house with all his sons during the relevant tune. But he did not do so. It would have been most natural for him to have informed his other sons because according to the caveator's case he was equally disposed towards all the sons and equally affectionate to all of them. Admittedly, therefore, the testator lived not only in the same premises with the caveator, but the testator is never supposed to have told anything about the forced Will although he lived for sixteen years thereafter and had made corrections on the draft will to indicate the dates of events taking place subsequent to the Will. All these facts prove conclusively that there was or could be no undue influence by Ajit. The testator not only could have told the caveator and others about the forced execution of a Will under the undue influence of Ajit but he also could have made a Will revoking this forced will.

16. Seventhly, the Will remained with the testator from 1939 to 1941, and it was handed over by him to Ajit on 25-9-1941. Retention of the will by the testator himself for two years after the execution thereof also shows that there was or could be no undue influence from Ajit and even if there was any, its effect could have been undone by the testator himself during those two years. Non-revocation of the Will also shows that there was no undue influence in making the Will.

17. Lastly, no one from the family has come to give evidence to support and corroborate Anil's evidence. Even the eldest son has not given evidence on oath. Anil's testimony is interested and biassed testimony, because there was great bitterness and animosity between Anil and Ajit. The only other evidence that the caveator called was that of Kali Kumar Majumdar, a nephew of the testator but even he did not say a word against the propounder, Ajit or the alleged undue influence exercised by him on his father. In answer to Court he says that the testator had no dispute with any of his sons. In fact, he did not even mention the alleged rude and rough behaviour of the propounder to his father. This witness Kali Kumar Majumdar says that he was on visiting terms with the family of the testator all through and he even stayed with them while in Calcutta and yet he did not utter any word of allegation that Ajit had got a will executed by his father by undue influence or that Ajit had an aggressive personality which could overbear his father. In fact, Kali Kumar in his evidence says that the testator did not discuss anything at all about the Will.

18. Mr. Ghosh, learned Counsel for the respondent, argued, that the learned trial Judge's finding that the Will was executed at Puri was erroneous, although there was no cross-objection on the point by his clients. His argument, briefly, is that if the testator had executed the Will in 1939, why did he hand it over two years after in 1941 to Ajit? Therefore, he says that the Will was executed in Calcutta in 1941. No one has proved that the testator had executed any Will in Calcutta, in 1941. It is a mere suggestion in cross-examination. If the testator was living in Calcutta with all his sons in the Calcutta house and was going to execute the Will in Calcutta, I am sure independent testimony would be available to show that so important an event in the family had occurred. None, however, is forthcoming. The testator may have kept the Will for two years in his possession for many reasons. In fact, he may have wanted to keep it with himself all the time but when he found that the brothers were quarrelling with one another it was best to keep it in the custody of the son who had the major benefit under the Will. There may be other reasons on which it would be idle to speculate in the absence of evidence. Secondly, Mr. Ghosh argued why the testator an old man, a resident of Calcutta, should go to Purl to execute the Will. Here again, it is a speculative argument. Reasons may be many. It is in evidence that the testator was a religious type of person, who had been almost to all the places of pilgrimage in India (See Ajit's evidence in answer to Q. 599 and even Narayan's evidence in answer to Q. 37). He may also have liked to make his Will away from the atmosphere of quarrel in the family house in Calcutta or at the place of pilgrimage like Puri or for many other reasons which it would be idle to investigate. I am, therefore, unable to hold in the absence of any legal proof and evidence of the slightest kind, that the Will was executed in Calcutta on 25-9-1941. I am satisfied that there, is overwhelming proof that the Will was executed at Puri.

19. The Will having been executed at Puri, far away from the presence of Ajit and other members of the family, there is no reason to hold that there was any kind of undue influence on the testator by Ajit in the matter of making or execution or attestation of the will. Ajit was not present when the

Will was made, and therefore, in our opinion, it is one of the strongest reasons, in addition to those enumerated above, to hold that he exercised no undue influence on the testator.

20. For these reasons, I have no hesitation in holding that Ajit exercised no undue influence on his father in the preparation, execution or attestation of the Will and the testator voluntarily and as a free agent gave the best part of his estate to the propounder.

21. This disposes of the appeal on the facts of the case. Before I conclude, it is necessary to refer to some law on the point discussed in the judgment under appeal.

22. A Court of Probate does not make a Will of its own. The Court is not the testator. Its function is to see if the Will proposed by the propounder was duly made and executed by a capable testator. In order to do that if the Court of Probate has to sit in the arm-chair of the testator, he has also to sit there with the mind of the testator and with the surrounding circumstances and context of the testator's family and other environment very much in the forefront of its deliberations.

23. It is also well settled in Barry v. Butlin, (1838) 2 Moo P. C. 480, that the onus probandi lies upon the party propounding a Will who must satisfy the conscience of the Court that the instrument so propounded is the last Will of a free and capable testator and also that if a party writes and prepares a Will, under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the Court and calls upon it to be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true Will of the deceased.

24. This doctrine was extended in Tyrrell v. Painton, 1894 P. 151 by applying it to all cases in which circumstances exist and whatever their nature may be, so that it is for those who propound this Will to remove such suspicion and to prove affirmatively that the testator knew and approved all the contents of the document and it is only when that was done that the onus was thrown on those who opposed the Will to prove fraud and undue influence to displace the case for proving the Will.

25. Now in this case on the facts it is not proved or established at all that the propounder, Ajit, had anything to do with the instruction of the Will or making of the draft of the Will or making of the final Will and its execution and attestation. It is true that he has received the largest benefit under the Will. Applying the test mentioned above, the question before this Court of Appeal is whether he has removed all reasonable suspicions from the mind of the Court and has satisfied its conscience. We are of opinion that he has done so. We are also of the opinion that the caveator who opposed the Will on the ground of undue influence has failed to discharge the onus upon him in the language of Lindley. L. J. in 1894-P. 151.

26. It is necessary to emphasise that the standard of proof to establish a Will is not an absolute or a perfect one but such as will satisfy a prudent man. That will be clear from the observations of the Judicial Committee of the Privy Council in Shunmugaroya v. Manikka Mudaliar, 36 Ind App 185: ILR 32 Mad 400. The burden of proving undue influence is not discharged by merely establishing

that the person had power unduly to overbear the Will of the testator. It must be shown that in any particular case that power was, in fact, exercised and that it was by means of exercise of that power that the Will was obtained as laid down by the decision of the House of Lords in Craig v. Lamoureux, 1920 A. C. 349: (AIR 1919 P. C. 132) and of the Privy Council in Mt. Gomtibai v. Kanchhedilal . We have already held that it has not been established on evidence that the propounder, Ajit, in this case had even the power to overbear unduly the Will of the testator. We are also of the opinion that in this case the place, time and manner of the execution of the Will and the subsequent facts of the testator outliving the Will by 16 years and making corrections in the draft Will recording events and happenings since the execution of the Will but before his death, are so compelling that the Will, in fact, could not possibly have been obtained by means of the exercise of that power, even if Ajit had that power.

27. The Court's duty to exercise vigilance in cases coming within (1838) 2 Moore PC 480 and (1894) P. 151, has been misconceived & overdone in many cases to the point of actually holding that the fact that a propounder gets the major benefit under the Will is by itself a legal proof that the Will is invalid. Neither (1838) 2 Moo P. C. 480 nor (1894) P. 151 said that; nor is there any authority to support that proposition. That circumstance is only a circumstance which should make the Court vigilant to examine the evidence with great suspicion but no more. It provides no legal bar and is no authority for saying that the very fact that the propounder gets the largest benefit under the Will, that by itself makes a Will invalid in law.

28. The Privy Council gave a wholesome warning to the Courts in Harmes v. Hinkson AIR 1946 P. C. 156 by saying in the words of Lord du Pareq at page 163:

"Those 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."

We cannot help feeling that the learned trial Judge in refusing probate in this case on the ground of undue influence said to have been exercised by Ajit has failed to observe this wholesome caution against obdurate persistence in disbelief and impenetrable incredulity. He has allowed suspicion to prevail over evidence and circumstances.

29. In the recent decision of the Supreme Court in Venkatachala Iyengar v. B.N. Thimmajamma , after reviewing many authorities the law has been clearly expounded and summarised by Gajendragadakar, J., in the following terms:

"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 also 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 that, as observed by Lord du Parcq in AIR 1946 PC 156 "Where a Will is charged with suspicion, the Rules enjoin a reasonable scepticism and not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances or grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to 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."

30. It will also be appropriate here to refer to yet another decision of the Supreme Court reported as Naresh Chandra Das Gupta v. Paresh Chandra Das Gupta, , where Venkataram Ayyar, J. at p. 364, observed:

"The main question that arises for our decision is whether the Will in question was executed under the undue influence of respondent 1. When once it has been proved." observed Lord Granworth in Boyse v. Rossborough, (1854-57) 6 H.L.C. 2, "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. See also AIR 1919 PC 132: 1920 AC 349. In the present case, it is not in dispute that the testator executed the Will in question and that he had the requisite mental capacity at that time. The burden, therefore, is on the appellant to establish that the Will was the result of undue influence brought to bear on him by the respondent 1."

31. Applying this test, we are satisfied on the facts in this appeal that the burden has not been discharged by the caveator to prove his case of undue influence by Ajit on the testator.

32. The Supreme Court in the above case in (S) emphasises the point that it is elementary that law does not regard or characterise every influence which is brought to bear upon the testator as undue. It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour, and if the testator retains his mental capacity, and there is no element of fraud or coercion, the Will cannot be attacked on the ground of undue influence. Not all importunities are undue influence. The Supreme Court at page 366 of that report quoted the classic observations of Lond Penzance in Hall v. Hall, (1868) 1 P. and D. 481 at p, 481:

"But all influences are not unlawful. Persuasion, appeal to the affections or ties of kindred, to a sentiment of gratitude for past service, or pity for destitution, or the like, these are legitimate and may fairly be pressed on the testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a Species of restraint under which no valid Will can Be made.....In a word, a testator may be led but not driven; and his Will must be the offspring of his own volition and not the record of some one else's.

33. Except malting a bare reference to the Privy Council decision in Sarat Kumari Bibi v. Sakhi Chand, 56 Ind App 62: (AIR 1929 PC 45), it will be unnecessary to multiply other authorities on this point.

34. The will has been challenged on the ground that it is an unnatural Will because the testator prefers one son to others. On the question of unnatural and officious Will a Court of Probate has to act with great caution. The testator who has full testamentary powers and a disposing mind cannot be dictated by the Court as to what is a fair and an unjust disposition. The Will is the Will of the testator and he has, under the law, the freedom to give his property to whomsoever he likes. What strikes the Court as an eccentric or an unjust or an unnatural disposition can certainly be taken as a consideration on the main question of finding out whether the testator was acting as a free agent and with a sound disposing and understanding mind. But once it is established that the testator was free and had a sound disposing mind, then it is no longer the duty of the Court to go further to inject its own ethics of what is or is not a moral or a fair disposition according to the Court's own standards. Judged by that test, many a Will by a father depriving his sons would be unjust and indeed many a Will exhibits man's iniquity against his nearest and dearest relations and yet not on that ground alone have those Wills been declared by this Court invalid. Such wrongs, however grievous, are not for the temporal courts of justice to correct and are better left to Him Who adjusts all wrongs and non-justiciable iniquities, and under whose munificence the testator and the disinherited alike live and die.

35. A strong warning is given by the Privy Council in C. Harwood v. M. Baker, (1840) 3 Moo PC 282 at pp. 290-291 on this subject of unjust exclusion and Will still bear the following quotation:

"The question which their Lordships propose to decide in this case, is not whether Mr. Baker (testator) knew when he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property. If he had not the capacity required, the propriety of the disposition made by the Will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice might cast some light upon the question as to his capacity."

36. Now in this case the testator had full physical and mental powers. He had a sound disposing mind. He had ample opportunities of independent advice of a Solicitor, a draft of a Will and also enough time to consider his disposition. We have also held that he was under no undue influence from Ajit. The disposition in the Will, and circumstances both antecedent and subsequent to the Will show that he deliberately chose the propounder. Therefore, he comes within the rule of the Privy Council that the injustice of the exclusion of other sons would not affect the validity of the disposition.

37. Rightly or even wrongly, but I think rightly, the testator asserted even in the letter of 10-1-1939, written within two days after the execution of his Will, that one of the reasons for the major bounty to go to the propounder was that he had helped the testator in building up the house. It must always be remembered that the Will which the Court has to grant a probate of is the Will of the testator and not a fancied Will of the Court, according to Court's ideas of the testator's duty to the members of his family. The learned trial Judge, therefore, in our opinion, was not justified in refusing to grant a probate of the Will, because Ajit took the best part of the estate of the testator thereunder.

38. The learned trial Judge finds that the legacy of the Calcutta house was given on certain consideration which is not of natural love and affection but payment by Ajit of only a small fraction towards the construction of the house and he also holds that the other sons helped the testator in the construction of the house and that the house was partly built by moneys contributed by other sons as well, and in doing so the Judge relied only on the evidence of the interested Caveator Anil. There is no proof to support the alleged contributions of the other sons to the father or to the joint family. In fact, Anil who spoke about "common pool" in answer to Q. 24 has not even produced any books of account to show that he paid any money to the father or to any joint till out of which any part was in fact spent for the building of the house. Nor do the testator's diaries show any contribution by Anil. In fact, the diaries show to the contrary that when the testator was messing with Anil, Anil was charging him for his meals. On the other hand there is clear admission of the testator in his letter of 10-1-1939 that Ajit had helped him in building the house.

39. Apart from the definite evidence of Ajit that none of his other brothers contributed anything towards the construction of the building in answer to Q. 125, there are other pieces of evidence which support Ajit's testimony. The memo of consideration in the Schedule to the Indenture of 13-8-1934 between the India Provident Co. Ltd. and the testator, shows a cheque for Rs. 5621/8/- drawn on the Bank of India Ltd., by the Central Electric Works in favour of the India Provident Co. Ltd. The Central Electric Works is run by the propounder Ajit and in fact has not been claimed by the caveator in these proceedings as part of the estate of the deceased although we are told that during the pendency of these proceedings the caveators had filed a separate suit claiming even this business as joint. Then followed two cheques dated 28-10-1942 and 27-10-1942 respectively for Rs. 6,110/- and Rs. 6,109/9/- in favour of the India Provident Co. Ltd., on the banking account of the propounder, Ajit. These three amounts alone will come to more than Rs. 17,000/-. The cheque for Rs. 6,110/- is also corroborated in the testator's diary entry on 28-10-1942. The counterfoil's of these cheques show that they were spent on account of the house. In addition to these sums, interest on the loan was paid from Ajit's banking account. A suggestion has been made that the testator did not have his own banking account but kept his money with the banking account of the business, Central Electric Works. That suggestion is difficult to accept; first because the testator himself being a Government servant drawing pension could easily have his own banking account and, secondly, because to use the business account of Ajit himself and not of other sons, is rather a proof of Ajit's case than of the caveator's case. I do not, therefore, consider that in the facts and circumstances of this case the Will was in any way unnatural or officious.

40. For these reasons, I set aside the learned Judge's finding that Ajit exercised undue influence on his father, the testator, to obtain this Will. I also set aside his judgment dismissing the suit for the reasons recorded above. The suit is decreed and the appeal is allowed with costs against the caveator. The lower court's order for costs however is left undisturbed. Certified for two Counsel.

Bose, J.

41. I agree.