A NIRANJAN UMESHCHANDRA JOSHI

v.

MRIDULA JYOTI RAO AND ORS.

DECEMBER 15, 2006

B [S.B. SINHA AND MARKANDEY KATJU, JJ.]

Succession Act, 1925—Will—Execution of—Allegations of suspicious circumstances—Sustainability of—Held: Probate cannot be granted since execution of Will was surrounded by suspicious circumstances—Circumstances C *in which Will was prepared, attested and executed raised doubt about its genuineness, though Will bears the signatures of the testator—Disposition made in Will by testator unnatural and unfair—Propounder took part in execution of Will being sole recipient of legacy—Also non-examination of independent witnesses—Thus, order of courts below calls for no interference.*

D **Deceased was survived by his wife, seven sons and three daughters. He appointed appellant-one of his sons as the executor and trustee of his Will and bequeathed his residuary estate absolutely to him. Appellant filed application for probate. Both the Single Judge and the Division Bench of High Court held that though the Will bear the signatures of the deceased and might** E **have been attested by the advocate and the doctor, but circumstances surrounding the execution of the Will were suspicious and the appellant could not remove the same, thus rejected the prayer for grant of probate. Hence the present appeals.**

Dismissing the appeal, the Court

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HELD: 1 No case has been made out to interfere with the findings of both the Single Judge as also the Division Bench of the High Court.

[1233-A-B]

2.1. Section 63 of Evidence Act lays down the mode and manner in which G **the execution of an unprivileged Will is to be proved. Section 68 postulates the mode and manner in which proof of execution of document is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. While making attestation, there must be an *animus attestandi,* on the part of the**

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attesting witness, meaning thereby, he must intend to attest, and extrinsic evidence on this point is receivable. A Will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient. [1231-C-F] A

2.2. The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. [1231-F-H; 1232-A] B C D

Madhukar D. Shende v. *Tarabai Shedage,* [2002] 2 SCC 85 and *Sridevi and Ors.* v. *Jayaraja Shetty and Ors.,* [2005] 8 SCC 784, relied on.

2.3. Several circumstances described as suspicious circumstances are when a doubt is created in regard to the condition of mind of the testator despite his signature on the Will; when the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances; and where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit. [1232-B-D] E

H. Venkatachala Iyengar v. *B.N. Thimmajamma and Ors.,* AIR (1959) SC 443 and *Management Committee T.K. Ghosh's Academy* v. *T.C. Palit and Ors.,* AIR (1974) SC 1495, relied on. F

2.4. The Court must satisfy its conscience as regards due execution of the Will by the testator and the court would not refuse to probe deeper into the matter only because the signature of the propounder on the Will is otherwise proved. The proof a Will is required not as a ground of reading the document but to afford the judge reasonable assurance of it as being what it purports to be. There exists a distinction where suspicions are well founded and the cases where there are only suspicions. Existence of suspicious circumstances alone may not be sufficient. The court may not start with a suspicion and it should not close its mind to find the truth. A resolute and G H

A impenetrable incredulity is demanded from the judge even there exist circumstances of grave suspicion. [1232-E-H]

B. Venkatamuni v. *C.J. Ayodhya Ram Singh and Ors.*, (2006) 11 SCALE 148, relied on.

B 3.1. From the evidence, it appears that the deceased knew that he had been suffering from cancer for 10-15 years prior to his death as he claimed that he was cured of his disease because of his practices in yoga. He was suffering from other ailments which were serious ones as was expressed by Dr G in his deposition. Dr G happened to be a long standing friend of the appellant who himself was a gynecologist doctor. He admitted to have met the C deceased only once or twice but never treated him; even never examined him. Dr P student of the appellant, a young doctor had been regularly checking up the deceased medically. Deceased although was not taking any allopathic medicine, he could be persuaded to be hospitalised. Dr. P assured him that he would be hospitalized only for one night. He was admitted in ICU. The treatment D started immediately. [1226-A-D]

3.2. If the deceased was aware of the fact that he would remain in the hospital for one day only, it does not appeal to any reason as to why he would think of execution of a Power of Attorney as also of execution of a Will in favour of appellant at the same time. The very fact that he wanted to execute E a Power of Attorney clearly shows that he did not believe that he would meet his end soon. It was expected that he would think of execution of any document only after he came back home. He asked the appellant only to contact a lawyers firm. He did not say about a particular advocate was said to have been deputed by the firm. No evidence to that effect was led. Admittedly, advocate was known to the appellant. Advocate came with appellant. He was accompanied by a Clerk. F They were allowed to enter ICU without any prior appointment. There is nothing to show that permission of the hospital authorities had been taken in regard to the visit of persons who were not his relatives. In the small cubicle of ICU which was separated by curtains only and there were other serious patients, Power of Attorney and the Will were said to have been drafted and the same G was executed by the deceased. The execution of the Will was allegedly deferred by a day as deceased wanted to consult his wife. According to her, she raised no objection to the execution of the Will in favour of appellant. It is not known whether the youngest son and other children were taken into confidence or not. Thus, the story of the Will being drafted in the cubicle of ICU of the Hospital cannot be believed. In all probabilities, Will was drafted by Advocate H

in his Chamber. The deceased could only sign in English, question of his dictating the Will and at least the term thereof was wholly unlikely. Will has been drafted by a professional. [1226-D-H; 1227-A-C; 1229-C-D] A

3.3. Deceased was admitted in the hospital on an emergency basis. He chose to execute the Will, though he did not have any document with him for the purpose of instructing the Advocate effectively and in details. No document had been handed over to the advocate by the appellant and the deceased. It is unnatural that he would remember all the details of his assets including the amount of cash and the amount lying in bank as also the details of his liabilities etc. [1229-A-B] B

3.4. Dr P deposed that the deceased had not known him very intimately. Thus, why he had been called as an attesting witness is a mystery. He, however, walked almost immediately after the Will was drafted. He attested the signatures of testator. [1227-B-C] C

3.5. Why other terms of the Will had to be inserted is not known. There were two schedules in the Will. Schedule II details his liabilities to each of such persons named therein. Both the schedules of the Will were meticulously drafted. Therefore, an inference can be safely drawn that appellant had a role to play in execution of the Will. [1228-A; 1229-A-C] D

3.6. Although the amount of cash in hand had already been disclosed in the first schedule of the Will but when he came back, he asked his wife to count the cash once over again. What was the amount, if any, found in the cash-box is not known. The contesting respondents did not examine themselves, but apart from his mother and friends, nobody was examined on behalf of Appellant also. If the other sons had implicit faith in their father and accepted that the Will was genuine, they could also have been examined. They indisputably signed consent letters. It is not known under what circumstances, consent letters were obtained. Only son P had given consent in the Solicitor's office; others gave their consent at a later stage. [1229-E-G] E F

3.7. What was the frame of mind of the deceased could have been best stated by the Doctor who was attending on him. Appellant curiously even was not aware of the ailments, the deceased was suffering from. It is expected that he would have known at least the ailments of his father. His other three sons, particularly S had been helping the deceased in carrying on the business. There is no averment in the Will how the business and the Trust would be run. Some directions in regard to running of the Trust were also expected to G H

A **be given in the Will. The theory set up by the propounder that he believed that the appellant would carry out his charitable activities is not reflected from the Will. No reason has been assigned as to why he had chosen appellant alone for taking the entire benefit of the legacy. [1229-G-H; D-E; 1230-A-B]**

3.8. The manner in which the death certificate of the deceased had been B **issued also raises some suspicions. [1230-B-C]**

3.9. The Single Judge of High Court noticed that there are documents to show that the deceased was being treated by several other doctors. All the persons including his wife curiously did not know the nature of ailments the C **deceased was suffering from and the period of his illness. In her deposition, she was confronted with her affidavit in earlier litigations but she profusely denied the averments and contents thereof. She had also denied the signatures of persons on the documents pertaining to earlier litigation other than herself and her husband on various documents with which she was confronted with. [1230-H; 1231-A-B]**

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3.10. The conduct of Appellant in executing the deed of assignment in favour of brother S even before filing the application for grant of probate cannot also be appreciated. Before the grant of probate, he had no legal authority in that behalf. [1231-B-C]

E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5060 of 2005.

From the final Judgment and Order dated 4.2.2004 of the High Court of Judicature at Bombay in Appeal No. 606 of 1996 in Testamentary Suit No. 31/1987 in T.I.J.P. No. 176/1986.

F Shanti Bhushan, Chirag Balsara, S. Sukumaran, Dev Kumar and K. Rajeev for the Appellant.

Anil Srivastav for the Respondent No.1.

Sunil Kumar Gupta, Malika Chaudhuri, Kunal Tandon and Vikas Mehta G for the Respondent No. 2.

C.N. Sree Kumar for the Respondent No. 3 and impleading parties.

The Judgment of the Court was delivered by

S.B. SINHA, J. Appellant is the son of Late Umeshchandra Madhav H Joshi (hereinafter referred to as "the deceased"). He owned considerable

properties. A Charitable Trust by the name of "Umesh Yoga Charitable Trust" was created by the deceased in his native village at Manor. For the said purpose, he donated 7 acres of land of his own. 4 acres of land was said to have been donated by the appellant herein. Deceased purchased a residential house at Dadar named "Umesh Dham" in 1949. The first floor of the said house was used for residence, which he also used for holding Yoga classes and also for manufacture of Hair Oil. Deceased started yoga classes. He also started manufacture of hair oil, namely, (Ramtirth Brahmi Hair Oil). Sometime thereafter, he along with his children shifted his residence to the ground floor of the said house. He had 7 sons and 3 daughters. Appellant herein is his second son. Respondent No. 2 allegedly eloped and married a Muslim boy. Respondent No. 1, however, had an arranged marriage. The relationship amongst the brothers and sisters, except respondent No. 2 was said to be cordial. Sudarshan, Jagdish and Pravin were allegedly helping the testator in management of the business of manufacture of hair oil. All his sons, namely, Sudarshan, Dr. Vishnu, Jagdish, Arvind, Sunil and Tarabai (respondent No. 2) lived together at the same house known as 'Umesh Dham'. Appellant herein and another brother Sunil were not married. Appellant is a doctor of repute. He is a Gynaeocologist and Obstreticist and his qualifications are M.D. (Obst. and Gyt.), FISC, FCPC, D.G.O.D.F.P. He started his practice in 1971. He opened a clinic and hospital at Parel.

From the records, it appears that the deceased was suffering from malignancy Liposercoma (sic). There are some evidences on record to show that he was also suffering from left ventricular failure with Ischemia heart disease. The deceased is said to have no faith in the allopathy system of medicine. He had developed some respiratory problem. He was investigated by Dr. Panikar, a student of Appellant. He was taken to ICU of Breach Candy Hospital on 13.11.1983 by Appellant and his wife.

On 14.11.1983, the deceased expressed his desire to execute a Power of Attorney as also a Will. On his purported instructions, Appellant contacted Mr. M.K. Mahimkar, Advocate, who was working with M/s Ramesh Shroff & Co. Mr. Mahimkar and Appellant visited the testator at Breach Candy Hospital. Deceased instructed Mr. Mahimkar to draft a Power of Attorney before drafting the Will as he expressed a desire to speak to his wife before executing the Will. He allegedly spoke to his wife. The Will was drafted the next day. While the Will was being drafted he asked Appellant and Pravin, his another son to wait outside the room. Appellant and Mr. Mahimkar visited the

A hospital during non-visiting hours for execution of the Will. It was drawn up in Mr. Mahimkar's handwriting allegedly at the spot. They and one Mr. Phadke, classmate of Mr. Mahimkar entered the cubicle of ICU of the Hospital at 3.30 p.m. for execution of the Will. The deceased sent for Dr. Bhupender Gandhi, a friend of Appellant for attesting the Will. He reached the cubicle at about 4.30 p.m. The Will thereafter was executed.

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Indisputably, the deceased was under the treatment of one Dr. Udwadia. of the said Hospital. Appellant neither treated him nor did he examine him at any point of time. He even did not know of the diseases he had been suffering from. On 21.11.1983, the deceased was discharged from the hospital. He received visitors on 22.11.1983. In the early morning of 23.11.1983, he C allegedly asked his wife Tarabai to count the cash lying in the almirah. He died soon after having asked his wife for coffee.

After cremation of the dead body, the factum of execution of the Will by the deceased was disclosed. A meeting of the family members was D arranged in the office of Mr. Mahimkar for inspection of the Will; consent letters were also prepared; Pravin signed the same at the spot as he was to leave for Manore. Xerox copies of the consent letters were prepared. First Respondent herein also signed the consent letter. On 7.12.1983, a joint consent letter was given by sons of the deceased. Sunil also gave his consent letter on the said day separately.

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However, no step was taken for obtaining a probate soon thereafter. On 1.4.1985, a deed of assignment in regard to the manufacturing unit of Hair Oil was executed in favour of Sudarshan for a consideration of Rs. 4 lakhs. As per the deed of assignment, a sum of Rs. one lakh (hereinafter as Will) was to be paid on or before 31.12.1986 and the rest of the amount was to be paid F on or before 31.3.1988.

A Testamentary Application was filed by Appellant on 21.12.1985. On 8.1.1987, a joint consent letter was filed by Tarabai, Dr. Vishnu, Arvind and Sunil in the said Testamentary Application.

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On 14.1.1987, a Promissory Note for Rs.3 lacs was executed by Sudarshan in favour of Appellant in furtherance of the said deed of assignment. On 10.3.1987, a Caveat was filed by Mridula, first Respondent without affidavit and on 28.4.1987 an Affidavit was filed by her withdrawing the "no objection" earlier given for grant of probate. She was allowed to do so after she affirmed

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on an affidavit in support thereof. A

The second respondent also filed a caveat. Thereafter a Testamentary Suit was filed by Appellant before the Bombay High Court wherein respondents herein were parties. The hearing was taken up in 1994. Recording of evidence in the matter commenced on 7.11.1984. It continued upto 8.11.1994. Arguments were heard and concluded in December 1994. Appellant examined himself in B the said proceeding. He had examined his mother Tarabai and also the attesting witnesses viz., Mr. Mahimkar and Dr. Bhupender Gandhi. He also examined Dr. Vijay Kumar Panikar.

A learned Single Judge of the High Court by a judgment and order C dated 28.11.1995 dismissed Appellant's application for grant of probate, *inter alia,* opining that 'although respondents herein could not prove that the signatures of the testator appearing in the Will as also those of the attesting witnesses, were not theirs; the circumstances surrounding the execution of the Will were so suspicious that it was impossible to believe that the Will had been executed at the place, time and in the manner suggested by Appellant'. D In arriving at the said conclusion, the learned Single Judge took into consideration the purpose for which the Will was proposed to be executed, the manner in which the same was drafted and executed, the effect thereof and various other circumstances and in particular the one that Appellant was totally ignorant of the ailment(s), the deceased was suffering from. The E learned Single Judge concluded that no case for grant of probate had been made out.

An Intra-court Appeal was filed by Appellant thereagainst. During the pendency of the Appeal, Purnima, another sister of Appellant took out Chamber Summons, revoking her consent to the Probate Petition on 16.6.2003, *inter* F *alia,* on the allegations that she had doubts about the genuineness of the alleged Will and wished to support the respondents herein. Chamber Summons had also been taken out by Jagdish, Pravin and Dr. Vishnu in the pending appeal. They also revoked their consent to the probate petition and prayed to be joined with Respondents herein. In support thereof, an affidavit was affirmed by Jagdish in July 2003 not only questioning the genuineness of the G Will but also expressing his shock and surprise at the fraud played on all the family members by Appellant. By reason of the impugned judgment dated 4.2.2004, a Division Bench of the High Court affirmed the judgment and order of the learned Single Judge.

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A Mr. Shanti Bhushan, learned Senior Counsel appearing on behalf of Appellant raised the following contentions in support of the appeal :

(1) Execution of the Will having duly been proved, the High Court committed an error in passing the impugned judgment. The fact that all the brothers and sisters of Appellant had given their B consent, except Respondent No. 2 herein, who was under the influence of her husband, who was a Muslim boy clearly established that the Will was genuine.

(2) Subsequent withdrawal of the consent by Mrudula would also show that she had changed her mind only on the ground of not C having been paid an amount of Rs.50,000/- as was allegedly promised to her which cannot be relied upon.

(3) The evidence brought on records clearly show:

(i) The deceased was of sound mind and, thus, had the capacity of making his Will on 15.11.1983. D

(ii) Indisputably, the deceased having executed the Will and the same having been attested by Shri Mahimkar and Dr. Gandhi, the genuineness thereof could not have been questioned.

(iii) The background of hospitalization of the deceased had not been E appreciated by the High Court in its proper perspective, as it failed to consider that he had always been reluctant to take allopathic drugs and was, thus, expected to be in the hospital for a short period.

(iv) The deceased was kept in the ICU, not because his condition F was serious but because no bed was available. elsewhere.

(v) Although she was suffering from cancer, the same being within tolerable limits, it was not necessary to put him under any sedative.

(vi) Deceased left hospital in good health. He was brought home by Niranjan. He went to his office on the first floor and met all his G family members. On 22.11.1983, he signed a letter of authority addressed to the Punjab National Bank. He had also expressed his desire to go to the village after his discharge from the hospital.

(vii) On 22.11.1983, he met many of his friends and enquired about their various activities. On 23.11.1983 at 3.00 a.m. he asked H

Tarabai, his wife to prepare coffee for him.

(viii) Mrudula has been visiting her father during his illness and at least she should have testified in the witness box to depose that in regard to the deceased's mental condition and having not done so, she now should not be permitted to take a different stand.

(4) Despite overwhelming evidence of his being in a proper state of mind, no evidence was adduced on behalf of Appellant.

(5) The High Court committed a serious error insofar as it failed to take into consideration that Appellant did not play an unprominent role in the preparation of the Will and was not even present at the time when instructions were being given for its preparation on 15.11.1983 as also at the time of execution thereof.

(6) He never visited his father and did not know anything about the ailments his father was suffering from, which cannot be said to be unnatural, particularly when he was only a gynecologist and not an oncologist.

Mr. Rajiv Dutta and Mr. Sunil Kumar Gupta, learned Senior counsel appearing on behalf the first and second Respondents respectively, on the other hand, submitted :

(1) Both the learned Single Judge and Division Bench of the High Court having arrived at a concurrent finding of fact, this Court should not interfere therewith.

(2) The circumstances in which the Will was prepared, attested and executed, namely, in a cubicle of ICCU raise serious doubts about the genuineness thereof.

(3) No independent witness having been examined, for reasons being known to the appellant, the impugned judgment cannot be faulted as particularly non-examination of the doctor who had been attending the deceased at Breach Candy Hospital having not been explained, the case must be held to be shrouded in mystery.

(4) Both the attesting witnesses Dr. Gandhi and Mr. Panikar being known to the Appellant for a long time, no reliance has rightly been placed on their evidence by the High Court.

A (5) There was no reason as to why the deceased would not leave anything for his other children, particularly when he was running a business and the residential house was not being used for any charitable purpose.

(6) Like Appellant, Sunil, who was the youngest of all, was also B unmarried and having been residing with his father and unemployed, it was unnatural that no arrangement was made for him.

(7) Deceased having been suffering from a serious ailment, it was unlikely that he expressed his desire to execute a Power of C Attorney and Will at the same time.

(8) No reason has been assigned and no explanation has been offered as to why no step was taken immediately for grant of probate despite the fact no objection was raised by any of the legal heirs, except the second respondent.

D (9) No explanation has been offered as to why the business of manufacture of hair oil would be transferred to Sudarshan for valuable consideration.

(10) The fact that another sister and three brothers of Appellant revoked their consents and expressed doubts as regards the E genuineness of the Will also establishes that the execution of the Will was surrounded by suspicious circumstances.

(11) Theory set up by the propounder that the Will was executed in furtherance of the Charitable Trust activities having been found to be not correct and the property of the deceased comprised not F only of a business but also a residential house clearly goes to show that the High Court was correct in opining that the execution of the Will has not been proved by Appellant.

Before adverting to the rival contentions of the parties, as noticed herein before, we would place on record that three brothers of appellant, G namely, Arvind, Vishnu and Sunil had filed interlocutory applications before this Court for their impleadment in this Appeal. Mr. Jaideep Gupta, appearing in support of the said application submitted that they are supporting the appellants.

The learned Single Judge as also the Division Bench of the High Court H

had taken great pains in analyzing the evidence, both oral and documentary, brought on records. A

The learned Judges proceeded on the basis that the Will in question bear the signatures of the deceased and might have been attested by Mr. Mahimkar, Advocate and Dr. Bhupender Gandhi, but circumstances surrounding the execution of the Will being suspicious and the appellant having not been able to remove the same, the prayer for grant of probate should not be granted. B

The circumstances enumerated by the learned Division Bench in affirming the judgment and order passed by the learned Single Judge are as under : C

(i) The Propounder took part in execution of the Will, being sole recipient of the legacy.

(ii) The dispositions made in the Will by the testator are unnatural, unfair and improbable as wife and grand children were excluded from the benefit thereof despite the fact that he had love and likings for all. D

(iii) There is no recital in the Will that Respondent No. 2 was to be specifically excluded.

(iv) Why the Will had been executed by the testator within 24 hours of his hospitalization has not been explained. E

(v) Witnesses to the Will were interested persons, and evidence adduced in support of execution of the Will was unsatisfactory, particularly when the doctor treating him had not been examined.

(vi) The ailment from which the testator had been suffering was not being disclosed which shows that he might have been terminally ill as within eight days from execution of the Will, he died. F

(vii) There was no satisfactory evidence to show as to why the testator sent for Dr. Gandhi for attestation of the Will although he did not have much acquaintance with him. G

(viii) No satisfactory evidence was brought on record as regards the cause of death of the deceased.

(ix) There is no explanation as to why the appellant and others visited the hospital during non-visiting hours in the ICU cubicle H

A for execution of the Will.

From the evidence brought on record, it appears that the deceased knew that he had been suffering from cancer for 10-15 years prior to his death as he claimed that he was cured of his disease because of his practices in yoga. Admittedly, he was suffering from Liposarcoma which is a malignancy of fat B cells. He was also suffering from left ventricular failure. The ailments were serious ones as was expressed by Dr. Bhupender Gandhi in his deposition. Dr. Gandhi happened to be a long standing friend of the appellant. He admitted to have met the deceased only once or twice but never treated him; even never examined him. Dr. Panikar was a student of the appellant. He was a young doctor. He had regularly been checking up the deceased medically. C From the evidence of Panikar, it appears that the deceased knew that he had been suffering from cancer but according to him as he used to do yogas, he was cured of the said disease. He was suffering from respiratory trouble also. Deceased although was not taking any allopathic medicine, he could be persuaded to be hospitalised. Panikar assured him that he would be hospitalized D only for one night. Whether necessary or not, he was admitted in ICU. The treatment started immediately. Presumably because he would not take any oral allopathic drugs, he was put on intravenous fluid. If he was aware of the fact that he would remain in the hospital for one day only, it does not appeal to any reason as to why he would think of execution of a Power of Attorney as also of execution of a Will in favour of Appellant at the same E time. If he was under the impression that he was no longer suffering from cancer, it was expected that he would think of execution of any document only after he came back home. He asked the appellant only to contact M/s. Shroff & Co. He did not say about Mr. Mahimkar. Mr. Mahimkar was said to have been deputed by the firm. No evidence to that effect was led. Admittedly, F he was known to the appellant since 1976. He had handled the Habeas Corpus petition before the Bombay High Court filed by the husband of Respondent No. 2. Mahimkar came with Appellant. He was accompanied by a Clerk. They were allowed to enter ICU without any prior appointment. There is nothing to show that permission of the hospital authorities had been taken in regard to the visit of persons who were not his relatives. In the small G cubicle of ICU which was separated by curtains only and there were other serious patients, Power of Attorney and the Will were said to have been drafted. The execution of the Will was allegedly deferred by a day as deceased wanted to consult his wife. According to her, she raised no objection to the execution of the Will in favour of Appellant. Whether the H youngest son and other children were taken into confidence or not, is not

known. Power of Attorney would have served the necessity of representing the deceased before various authorities and banks. The very fact that he wanted to execute a Power of Attorney clearly shows that he did not believe that he would meet his end soon. Ordinarily, a person would not think of execution of a Power of Attorney and a Will simultaneously. Although, he chose to execute the Will, he evidently did not have any document with him for the purpose of instructing the Advocate effectively and in details. No document had been handed over to Mr. Mahimkar by the appellant and the deceased. He came to the hospital with a Clerk, dictated the Will then and there and the same was executed by the deceased. Dr. Gandhi although a friend of the appellant deposed in his evidence that the deceased had not known him very intimately. Why, thus, he had been called as an attesting witness is a mystery. A nurse had allegedly tried to contact him. Whether he could be contacted or not is not known. He, however, walked almost immediately after the Will was drafted. He attested the signatures of testator.

In his Will, the deceased had, *inter alia,* declared:-

"I, Umeshchandra Madhav Joshi of Bombay, Indian Inhabitant, aged 76 years, residing at Umeshdham, 27, 2nd Vincent Square Street, Dadar, Bombay 400 014, do hereby revoke all my former Wills and testamentary dispositions and declare this to be my last Will and Testament.

1. I appoint my son Dr. Niranjan Umeshchandra Joshi to be the Executor and Trustee of this my last Will.

1. Whatever movable and immovable estate I am seized and possessed of or otherwise well and sufficiently entitled, the same belong to me absolutely and no one has any claim or interest whatsoever to or in the same or any part thereof and I am entitled to make such dispositions thereof as are hereinafter contained."

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"7. I declare that all the rest and residue of my estate wheresoever situate, after payment of funeral expenses, debts, liabilities, probate duty, costs, charges and expenses of management and administration is hereinafter referred to as my "Residuary Estates".

8. I devise and bequeath my residuary estate to my son Dr. Niranjan Umeshchandra Joshi absolutely.

A 9. I authorize and empower my executor and Trustee to postpone the realization, sale and/or conversion of my estate or any part thereof for so long as he shall think fit."

Why other terms of the Will had to be inserted is not known. There were two schedules in the Will. The first schedule thereof reads as under:-

B Valuation of the movable and immovable property of the deceased in the State of Maharashtra

1.	Cash in the house	Rs. 2,434.00
2.	Household goods, furniture	Rs. 1,000.00
3.	Cash in Bank: i) Punjab National Bank, Khodadad Circle, Dadar, Bombay 400 014 Current A/c No. 1835	Rs. 3,56,465.85
	ii) Punjab National Bank, Khodadad Circle, Dadar, Bombay 400 014 A/c No. 8794	Rs. 32,316.47
4.	Leasehold property consisting of Leasehold land with building standing thereon known as Umeshdham, Vincent Square, Street No.2, Dadar, Matunga Estate, Dadar, Bombay 400 014, as per the Valuation report of M/s. Design Collaboration, Architects, Bombay	Rs. 4,00,000.00
5.	Securities: Deposits with Bombay Electric Supply And Transport Undertaking as security For payment of energy bill etc. paid Under Receipt No.61253 dated 27.5.80	Rs. 4,850.00
		Rs. 8,12,066.32
	Deduct amount shown in Schedule No.II	Rs 4,77,605.30
	Net Total	Rs.3,34,461.02

Schedule II details his liabilities to each of such persons named therein, amounting to Rs.4,77,605.30. Mr. Mahimkar or Dr. Gandhi do not say that documents required to prepare the Will were with the deceased. Deceased was admitted in the hospital on an emergency basis. Evidently when he was admitted in ICU, he would not be permitted to carry documents with him. It is unnatural that he would remember all the details of his assets including the amount of cash and the amount lying in bank as also the details of his liabilities etc.

Both the schedules of the Will were meticulously drafted. Tarabai in her deposition did not say that she or Appellant had furnished all those details to Mahimkar in advance. Except they, in the given situation, no other could do so. An inference can, therefore, be safely drawn that Appellant had a role to play in execution of the Will. Story of the Will being drafted in the cubicle of ICU of the Hospital, thus, cannot be believed. In all probabilities, Will was drafted by Mahimkar in his Chamber. It may also be borne in mind that as the deceased could only sign in English, question of his dictating the Will and at least the term thereof was wholly unlikely. Will has been drafted by a professional. The theory set up by the propounder that he believed that the appellant would carry out his charitable activities is not reflected from the Will. No reason has been assigned as to why he had chosen Appellant alone for taking the entire benefit of the legacy.

It is of some interest to notice that although the amount of cash in hand had already been disclosed in the first schedule of the Will but when he came back, he asked Tarabai to count the cash once over again. What was the amount, if any, found in the cash-box is not known.

It is true that the contesting respondents did not examine themselves, but it is equally true that apart from his mother and friends, nobody was examined on behalf of Appellant also. If the other sons had implicit faith in their father and accepted that the Will was genuine, they could also have been examined. They indisputably signed consent letters. We do not know under what circumstances, consent letters were obtained. Only Pravin had given consent in the Solicitor's office; others gave their consent at a later stage.

What was the frame of mind of the deceased could have been best stated by the Doctor who was attending on him. Appellant curiously even was not aware of the ailments, the deceased was suffering from. It is expected

A that he would have known at least the ailments of his father, particularly when he was diagnosed to be suffering for ventricular failure. His other three sons, particularly Sunil had been helping the deceased in carrying on the business. There is no averment in the Will how the business and the Trust would be run.

B Some directions in regard to running of the Trust were also expected to be given in the Will.

The manner in which the death certificate of the deceased had been issued also raises some suspicions. Although, he expired at his own house, and he was declared dead by Dr. Panikar; the death certificate was prepared C in a printed form. It was filled up in hand but the time of death was shown as 7.00 a.m. The cause of death is said to be respiratory failure. How the printed form was filled in, may better be stated in the words of the learned Single Judge:

D "The next important document is the Medical Certificate showing the cause of death given by Dr. Panikar. It is a printed form which is filled in hand wherein the time of death is shown as 7 a.m. and against "Disease of condition directly leading to death" the following is written in hand: "Respiratory failure"and as against "approximate interval between onset and death" 8 days are mentioned. Under E "Antecedent Cause" and "Morbid conditions, if any, giving rise to the above cause, stating the underlying condition least" "Bronchopneumonia & Liposarcoma" in hand are entered into and as against "Approximate interval between onset and death" '20 days' are mentioned. It is signed by Dr. Panikar with his full name written under the signature and as against "Address or rubber stamp of the F institution". Rubber stamp showing "Parel Hospital, 94, Shri Parmar Guruji Marg, Parel, Bombay-400 012" is affixed."

Who had filled up the form in not known. It is nobody's case that Dr. Panikar was attached to Parel Hospital.

G Even in the death report entered into the Municipal record of the Bombay hospital the cause of death was shown to be Bronchopneumonia and Liposarcoma.

The learned Single Judge has also noticed that there are documents to H show that the deceased was being treated by several other doctors including

Dr. Anibhut P. Vohra. All the persons including 'Tarabai' curiously did not know the nature of ailments the deceased was suffering from and the period of his illness. In her deposition, she was confronted with her affidavit in earlier litigations but she profusely denied the averments and contents thereof. She had also denied the signatures of persons on the documents pertaining to earlier litigation other than herself and her husband on various documents with which she was confronted with. There is no reason as to why she should do so particularly when her categorical stand in the earlier litigations was that deceased had been suffering from various ailments since a long time.

The conduct of Appellant in executing the deed of assignment in favour of Sudarshan even before filing the application for grant of probate cannot also be appreciated. Before the grant of probate, he had no legal authority in that behalf.

Section 63 of the Indian Evidence Act lays down the mode and manner in which the execution of an unprivileged Will is to be proved. Section 68 postulates the mode and manner in which proof of execution of document is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A Will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Indian Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an *animus attestandi*, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of

A fraud, coercion or undue influence is raised, the burden would be on the caveator. See *Madhukar D. Shende* v. *Tarabai Shedage,* [2002] 2 SCC 85, and *Sridevi & Ors.* v. *Jayaraja Shetty & Ors.,* [2005] 8 SCC 784, Subject to above, proof of a Will does not ordinarily differ from that of proving any other document.

B There are several circumstances which would have been held to be described by this Court as suspicious circumstances :-

(i) When a doubt is created in regard to the condition of mind of the testator despite his signature on the Will;

C (ii) When the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;

(iii) Where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit.

[See *H. Venkatachala Iyengar* v. *B.N. Thimmajamma & Ors.,* AIR (1959) D SC 443 and *Management Committee T.K. Ghosh's Academy* v. *T.C. Palit & Ors.,* AIR (1974) SC 1495.]

We may not delve deep into the decisions cited at the Bar as the question has recently been considered by this Court in *B. Venkatamuni* v. *C.J. Ayodhya Ram Singh & Ors.,* (2006) 11 SCALE 148, wherein this Court E has held that the court must satisfy its conscience as regards due execution of the Will by the testator and the court would not refuse to probe deeper into the matter only because the signature of the propounder on the Will is otherwise proved.

F The proof a Wille is required not as a ground of reading the document but to afford the judge reasonable assurance of it as being what it purports to be.

We may, however, hasten to add that there exists a distinction where suspicions are well founded and the cases where there are only suspicions G alone. Existence of suspicious circumstances alone may not be sufficient. The court may not start with a suspicion and it should not close its mind to find the truth. A resolute and impenetrable incredulity is demanded from the judge even there exist circumstances of grave suspicion. [See *Venkatachala Iyengar* (supra)].

H

Even if we apply the tests laid down by this Court in large number of decisions, including the ones referred to hereinbefore, we are of the opinion that no case has been made out to interfere with the findings of both the learned Single Judge as also the Division Bench of the High Court. A

In *Venkatamuni* (supra), this Court has also opined that the appellate court while exercising its jurisdiction would ordinarily not interfere with the finding of fact arrived at by the learned Trial Judge if the view taken by it is reasonable. We, therefore, agree with the conclusions arrived at by the High Court. B

The appeal is dismissed with costs. Counsel's fee assessed at Rs. 25,000/-. C

N.J. Appeal dismissed.