Kamalavathy A/P V.V Ratnam & Anor Thiruvebdran A/L Nadason v Vasantha Devi A/P V. Chelliah & Ors [2009] MLJU 1575

Malayan Law Journal Unreported

HIGH COURT (SHAH ALAM)

Dato' Zaleha Binti Yusof, JC

CIVIL SUIT NO (MT4) 22-598-2002

30 November 2009

Arunachalam Ramaya,

Shirin (MIs Arun & Co.),

David Gurupatham,

Satwant Kaur (M's David Gurupathm & ***Koay***

Dato' Zaleha Binti Yusof, JC

GROUNDS OF JUDGMENTBackground

The 1st plaintiff in this case is the wife of one Nadason all Chelliah, the deceased; while the 2 plaintiff is the deceased's son. The l defendant is the elder sister of the deceased and the 2' defendant is the jst defendant's husband, while the 3rd defendant is the son of the 1st and 2nd defendants and nephew of the deceased. The 4th defendant is an advocate and solicitor who prepared and witnessed the will dated 19.4.1996, exhibit D 39, which is the issue of this suit. The 3rd defendant was also said to have witnessed the same will. The 5I defendant was made a party merely in order for the plaintiff to obtain the medical report of the deceased, for the purpose of the trial of this suit.

2. The deceased passed away on 12.7.1997, about 1 1/2 months after the execution of the will. In the will the deceased had given all his properties to the 1st defendant who was named as his sole beneficiary. The deceased had also, in the will, named the 2 defendant as the executor and trustee of his will.

3. In their Statement of Claim, the plaintiffs are challenging the will on the following grounds:

(a) There was no signature of the deceased on the will, as the deceased was an educated person and always signed his name and never put his thumb print at any time;

(b) The 3rd defendant who was one of the witnesses to the will is the son of the jst defendant who is the beneficiary under the will;

(c) The thumb print on the will was not the deceased's.

(d) The last page of the will does not comply with *section 5* of the Probate and Administration Act wherein the deceased had no testamentary capacity to make the will as he was suffering from a kind of brain disease and other diseases and of unsound mind (memandangkan si mati telah menghadapi sejenis penyakit otak dan penyakit-penyakit lain dan tidak waras) or he had no testamentary capacity or otherwise to create or make or sign or affix thumb print in the said will nor to dispose all the properties or at all in the said will.

4. Based on those, the plaintiffs seek the following reliefs:

(i) A declaration that the will is void

(ii) An injunction to estop the jst and 2 defendants from disposing the assets under the will

(iii) An order that all the assets received by the 1st defendant be delivered to the plaintiffs.

Issue:

Whether the deceased had testamentary capacity

I. What is testamentary capacity had been explained intensively by the Court of Appeal in the case of *Lee Ing Chin & Ors v Gan Yook Chin & Anor* [2003] 2 CLJ 19. In that case, the Court of Appeal had quoted the former Federal Court in *Udham Singh v Indar Kaur* [1971] 2 MLJ 263 and the English case of *Banks v Good Fellow* [1870] L R 5QB 549 that "a person has testamentary capacity when he understands the nature of his act and its effect; the extend of the property of which he is disposing; the claim to which he ought to give effect; and, with a view to the latter object, no disorder of the mind must poison his affections, pervert his sense of right, or prevent his exercise of his natural faculties, and no insane delusion must influence his will in disposing of his property, and bring about a disposal of it which, if the mind had been sound, would not have been made.".

2. In Lee Ing Chin's case, supra, the Court of Appeal had inter alia held that "the medical evidence did not support a conclusion that the deceased suffered from unsoundness of mind at any time, in particular at the date of the will; that the mere fact that the deceased was seriously ill with cancer or that the first defendant being the propounder of the will was present at the execution of the will did not throw any doubt on the validity of the will. There was ample evidence that supported a finding in favour of the validity of the will.". The Court of Appeal also held that "the existence of suspicious circumstances in the making of the will was more than adequately explained by both DW2 and DW3. Once it was accepted that the deceased understood the dispositions of the will, and that it was duly executed by him as his will, there was an end to any and all of the so-called suspicious circumstances and all other collateral issues raised against the validity of the will.".

The Evidence and Findings

1. It is very important to examine the evidence adduced in order to understand the deceased frame of mind at the time of the execution of the will.

2. It is not disputed that the deceased was suffering from severe hypertension right up to the time of his death. He had been in and out of the hospital frequently. it is also not disputed that the deceased had a stroke and could not use his right hand.

3. The jst plaintiff, PWI had in her evidence said that her relationship with her husband was good. And yet she agreed that there was a judicial separation, and that her husband had left home since 1986 to live with his sister, the 1st defendant, DW2. If the relationship was good, why did he leave? She said her husband liked to wander about but admits that she never tried to search for him. At that time when he left, the deceased was still working with MAS as a storekeeper and yet PWI said she did not know where he was and went to apply for maintenance order from the court. To me; it does not make sense for her to take such a step if everything was well between her and the deceased.

4. PWI also said that the deceased never made any attempt to meet their son, and that the deceased told her that he did not want his son as the son did not look like him (the deceased). But her evidence contradicts with the evidence of their son, the 2' plaintiff, PW2. PW2 in his evidence had said that he used to visit his father at his work place at the age of 6, alone, as his father did not want her mother and his (PW2's) uncle to be there. He also said he used to speak with the deceased by phone, uninterrupted by his mother.

5. From my observation throughout the trial, I find PWI is a hot tempered person and would yell at the defendant's lawyer if he asked her questions which she did not like. I am not being presumptuous but I wonder could it not be a reason why the deceased leave her? In light of PW2's evidence, I tend not to believe PWI 's evidence when she said that her husband never made an attempt to see their son.

6. PWI did not dispute that the deceased was very close to his only sister, the jst defendant. She also did not dispute that the defendants cared for the deceased throughout his illness. PWI did not dispute that the defendant were always at the deceased's side at the hospital, taking care of him. She also did not dispute that the defendants had made arrangements to take the deceased to India to receive treatment and that they were the ones who made all the arrangements for the funeral and bore the costs. She also did not dispute that it was the 2nd defendant who took the deceased every week to the hospital for the deceased to receive dialysis.

7. Based on all these evidences and undisputed facts, it is my considered opinion that the deceased did not want to have anything to do with her for reason best known to both of them. The deceased, to my mind, knew of the son's

existence but purposely did not want to name him as a beneficiary even in his EPF and insurance. In my opinion, the deceased had made a conscious decision not to pay PWI anything when he left in 1986 and she had to get the court's order for maintenance. I also opine that the deceased also made a conscious decision to change the EPF nomination when he was still well and able.

8. PW3, a Consultant Neurologist in Subang Jaya Medical Centre, who was one of the doctors who treated the deceased when asked by the plaintiff's counsel whether the deceased can be said to be under a delusion or disorder of the mind had said this "I would rather say that he had a disorder of language or comprehension". During cross examination, he said that the plaintiff was not able to write with both hands. He also said he was not of unsound mind, as unsound mind is mentally disorder. He said the patient could communicate accurately and make accurate decision. He further said that at final stage, the deceased was aphasic i.e having disturbance of language and speech. Although in his note dated 26.2.1996 at page 178 of bundle K he wrote "he cannot understand completely what transpire", but during cross examination he said the deceased could understand some and if given proper attention, could recover and there was sign of recovery.

9. PW5, a nephrologist i.e kidney specialist practicing at Subang Jaya Medical Centre, was another doctor who had treated the deceased. He wrote a letter at the request of the plaintiff's solicitor, dated February 2, 2000 shown at page 136 of bundle K and marked as exhibit P23 which inter alia, contains the following sentence:

> Mr Nadason continued to have right hemiplegia and was aphasic. At times he was attempted to communicate with signs but was not able to do so with any degree of clarity.. ."

10. It was later pointed out by the defendant's counsel that the original hospital copy of the said letter did not have the words "and was aphasic. At times he was attempted to communicate with signs but was not able to do so with any degree of clarity".

11. It must be noted that according to his evidence, "right hemiplegia" means paralysis of right arm and right leg because of the stroke in the brain. He also explained that when one uses the word "aphasic" one implies that the patient has no speech at all or unable to articulate words.

12. PW5 later admitted that he amended the official hospital record one year later but backdated to the earlier date, to include those words at the request of the plaintiff's solicitor. Hence, even though I have admitted the exhibit earlier, I have no choice now but to treat the letter and its evidence as suspect. If what PW5 says is true, i.e that the amendment was made just for the purpose of clarification, he should not have amended it but issued a new letter to explain. One cannot amend an official hospital record and makes people believe that it is the original one. I therefore decide to ignore those additional words.

13. Even though in his evidence during examination in chief, PW5 had said that the deceased was not capable to make decision on his asset, but during cross examination he said it was possible for those who saw the deceased everyday to understand him. He confirmed that the deceased may respond to different people i.e he may not respond to the doctor but may respond to the nurses or his sister. He also agreed that according to the medical record dated 31.3.1996, at page 265 of bundle K, the deceased was able to accept what was being told to him by the surgeon. PW5 also agreed that according to the hospital records at page 145 of bundle K, exhibit D32, the deceased was aware and accepted the consent to treat form which he used him thumb print, It was not disputed that the deceased was right handed. It is also not disputed, as mentioned earlier, that the deceased had a stroke and could not use his right hand. This explains why he used his left thumb print on these hospital documents. The point is, if the thumb print was good enough for the hospital consent, how come now he is expected to sign? The plaintiffs never challenged the use of the deceased thumb print on the hospital document. To my mind, it is absurd for the plaintiff to want the court to expect or say that the will is void because the deceased used a thumb print instead of signature in light of this evidence.

14. There is also the evidence of the 4th defendant, DWI, the lawyer who prepared and witnessed the will. She confirmed that she spoke to the deceased alone to ascertain if the will was being done in his own free will and she was satisfied that it was so. She also said that she went through the list of the asset one by one with the deceased and the deceased was able to clearly point out to who the assets were to be disposed to in a room in the presence of the 1st and 2 defendants. He knew what were the assets as it was told to him one by one and he made his decision and communicated his intention by pointing. DWI also said she had specifically asked the deceased whether he wanted to bequeath anything to the plaintiffs to which she said the deceased shook his head from side

to side vehemently and looked displeased. This is the lawyer's direct evidence. When she testifies that the deceased made such disposition, the deceased, to my mind, had also clearly considered the plaintiffs.

15. I find there is no reason for me to disbelieve DWI's evidence. She said she only charged RM 100 for the will. Even the plaintiff confirmed that there was no disciplinary proceedings or police report lodged against DWI. The reasonable conclusion for this is that there was no fraud or mala fide in the preparation of the will. I accept that she has no reason to lie and that she is a disinterested witness with direct evidence. She is a professional and I believe she has made the assessment in a reasonable way. She explains what was transpired as follows:

A : I was taken into a bedroom by the 1st and 2J7d defendant. When I entered the room, I saw a man lying on a single bed, looked up at me.

A : The 2h1d1 defendant pulled a chair for me to sit close to the bed. I smiled at him and introduced myself as a lawyer. He nodded and smiled back. I asked him if he understood English and he nodded and said 'Yah'. 1 asked him what was his name. He mumbled his name in a slurred speech.

A : Then the 1st defendant gave me his Identity Card. I studied at it and asked him if he was Nadason au Chelliah. He nodded.

A : I asked him if he can understand me and he gave a sound "Yahhhhhhhhh" in a slurred manner.

A : Then I asked him if he wanted to draw a will. He nodded and said "Yahhhhhhhh" The 1st defendant handed me a list of assets and said those were his assets. I read out one by one on the list and asked him if those were his assets. He nodded.

A : I asked him if he was ready to do his will. He said 'Yahh

A : I told him they will require an executor to cariy out the duties in the will and who did he want to name as executor. He pointed to 2nd defendant.

A : I referred to his 1/3'' share in the property known as No. 24, Kawasan 9, 41200 Klang, Selangor Darul Ehsan and asked him to whom he wanted to will it to. He pointed at his sister, the 1st defendant. I asked him if he wanted to give this property to anybody else but he shook his head left to right and right to left vehemently.

A: Then I referred to his Maybank money and asked him to whom he wanted to will it to. He pointed at his sister, the 1st defendant. 1 asked him if he wanted to give this property to anybody else but he shook his head left to right and right to left vehemently.

A: Then I referred to his Koperasi Serbaguna Kakitangan MAS shares and asked him to whom he wanted to will it to. He pointed at his sister, the 1st defendant. 1 asked him if he wanted to give this property to anybody else but he shook his head left to right and right to left vehemently.

A: Then 1 referred to his MAS Malaysia Provident fund and asked him to whom he wanted to will it to. He pointed at his sister, the 1st defendant. I asked him if he wanted to give this property to anybody else but he shook his head left to right and right to left vehemently.

A: Then I referred to his AlA insurance and asked him to whom he wanted to will it to. He pointed at his sister, the 1st defendant. I asked him if he wanted to give this property to anybody else but he shook his head left to right and right to left vehemently.

A: Then I referred to his Employees Provident Fund and asked him to whom he wanted to will it to. He pointed at his sister, the 1st defendant. I asked him if he wanted to give this property to anybody else but he shook his head left to right and right to left vehemently.

A: Then I referred to his MAA insurance and asked him to whom he wanted to will it.to. He pointed at his sister, the 1st defendant I asked him if he wanted to give this property to anybody else but he shook his head left to right and right to left vehemently

A: I asked him if he was sure to give all those assets to his sister and he nodded very fast and said 'Yahhhhhh'

A: I asked if he wanted to give anything to his wife and son. He shook his head left to right and right to left. Then he turned his head away.

A: I asked the 1st and 2' defendant to leave the room and when I was alone with Nadason, I asked him if he was forced to do the will. He shook his head left to right to left and said 'Noh!'

A: I asked him if he had wife and children and he said 'Nooh!' and he shook his head left to right and right to left. But I said his sister told me he had a wife and a son. He did not move his head.

A: I asked him if he knew and understood what he was doing to his assets and he nodded with a "Yahhhhhhhhh'".

17. As I have stated earlier on, DWI is a disinterested witness and she has no reason to have concocted the story as she has nothing to gain from doing so. Even though the deceased was ill, it does not mean he did not have testamentary capacity. And the fact that the 1st defendant was present did not make the will void. Again I would like to quote the Court of Appeal's decision in Lee Ing Chin & Ors (Supra) at page 53 as follows:

> " The deceased was of course not in a state of perfect health because he was suffering from terminal cancer. But on the authorities, perfect health is not a sine qua non of testamentary capacity. In *Kishan Singh v Nichhattar Singh* AIR (1983) P&H 373, for example, a deaf and dumb person who was suffering from cancer of his back and head made a will. It was held that:
>
> The mere fact that the deceased was having cancer of the back did not mean that he was not in a fit mental condition to make the will. A testator of a will does not have to be found to be in a perfect of health to have his will declared valid. The only criterion is that the testator was capable of understanding the nature of his act, which was fully proved in this case. Further, the mere fact that the propounder of the will was present at the time of the execution of the will alone is not sufficient to doubt the genuineness of the will.
>
> So too here. The mere fact that the deceased was seriously ill with cancer or that the first defendant being the propounder of the will present at the execution of the will by the deceased does not in our judgment throw any doubt on the validity of the wilL In the present instance there is ample evidence, already adverted to, which supports a finding in favour of the validity of the will. ".

18. In this instance, based on the evidence aforementioned, it is my considered opinion that the plaintiff did have testamentary capacity to make the will. When he was still well, he did not even want to have anything to do with the plaintiffs and for the same reason I believe he purposely did not want to name the plaintiffs in his will.

Conclusion

It has already been explained why the deceased could not have signed the will. The plaintiff had also not shown that the thumb print did not belong to the deceased. it has also not shown that the deceased was suffering from any brain disease or of unsound mind. In fact, it has been shown that the deceased did have testamentary capacity. As such I am of the opinion that the will is valid. Having concluded so, I do not see any necessity for me to deal with other reliefs prayed for by the plaintiffs. Hence, the plaintiffs' claim is dismissed with costs. I must also say that even though I sympathise with the plaintiffs but this is the court of law and not the court of moral. The learned counsel for the 1st and 2nd defendants in his submission has stated that irrespective of the outcome of this case, the 1st and 2nd defendants are quite prepared to allow and assist to have the deceased half share in the property in Shah Alam to be transferred to the 2nd plaintiff at his costs. I just hope that this is not a mere rhetoric.