**(1998) 02 KL CK 0037**

**High Court Of Kerala**

**Case No:** A.S. No. 598 of 1991

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| Marci Celine D''Souza and Another | | APPELLANT |
| | Vs | |
| Renie Fernandez and Others | | RESPONDENT |

**Date of Decision:** Feb. 3, 1998

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 32 Rule 15
- Contract Act, 1872 - Section 16
- Registration Act, 1908 - Section 34
- Transfer of Property Act, 1882 - Section 123

**Citation:** AIR 1998 Ker 280 : (1998) 2 CivCC 492 : (1998) 3 RCR(Civil) 278

**Hon'ble Judges:** D. Sreedevi, J

**Bench:** Single Bench

**Advocate:** K.C. John and K.K. John, for the Appellant; S. Venkitasubramonia Iyer, Giri V. and P.B. Suresh Kumar, for the Respondent

**Final Decision:** Dismissed

**Judgement**

D. Sreedevi, J.

This appeal is directed against the decree and judgment in O.S. No. 133 of 1985 of the Sub-Court, Kollam. Defendants 1 and 2 are the appellants and the second plaintiff and defendants 3, 4 and 6 are the respondents.

2. The plaintiffs filed the above suit for setting aside Ext. A1 settlement deed executed by the first plaintiff in favour of defendants 1 and 2. The suit was filed by the second plaintiff for and on behalf of the first plaintiff on the allegation that the first plaintiff is mentally infirm and incapable of protecting his interests. According to the plaintiffs, Ext. A 1 is vitiated by fraud and undue influence and hence it is liable to be set aside. The plaintiffs also prayed for an injunction restraining the defendants from executing documents in respect of the plaint property.

3. Defendants 1 and 2 contested the suit. The second defendant filed written statement through his power of attorney. They contended that the first plaintiff is not mentally deranged, that he is capable of protecting his interests, that the suit has been laid without the consent of the first plaintiff, that no permission has been obtained from the Court to institute the suit, that the second plaintiff is not the legal guardian of the first plaintiff, that Ext. A1 is valid and that the suit is not maintainable.

4. The fifth defendant, who was an attester to Ext. A 1, supports the other defendants. The first plaintiff died during the pendency of the suit. The second plaintiff and defendants 1 to 6 are recorded as his legal representatives.

5. The trial Court after taking evidence held that the first plaintiff was mentally infirm and that he was incapable of protecting his interests. The Court below granted a decree in favour of the second plaintiff. Aggrieved by the said decree and judgment, this appeal has been filed.

6. The learned counsel for the appellants submitted that the suit is not maintainable as it is hit by Order XXXII, Rule 15 of the Code of Civil Procedure. The suit has been filed by the second plaintiff for and on behalf of the first plaintiff on the allegation that the first plaintiff is old and mentally infirm and is incapable of protecting his interests in his properties. The defendants deny those allegations. According to them, the first plaintiff is a man of robust health and that he is capable of protecting his interest and as such the second plaintiff has no right to represent the first plaintiff and to file a suit for and on behalf of the first plaintiff. Order XXXII, Rule 15 provides that the Court must hold an enquiry and come to a conclusion as to whether the first plaintiff is capable of protecting his interests. According to the defendants, no such enquiry has been conducted by the Court before entering a finding that the first plaintiff is not capable of protecting his interests. The Court has appointed the second plaintiff as the guardian of the first plaintiff to prosecute the suit.

7. Admittedly, the first plaintiff was 73 years of age on the date of filing of the suit viz., 14-10-1985. The learned trial Judge directed the second plaintiff to produce the first plaintiff in Court. The Court recorded the following :

" 1st plaintiff is produced by the 2nd plaintiff. It appears that he is weak. Court put questions to the 1st plaintiff, but he did not reply to the questions....."

On the above, the Court found that the second plaintiff is entitled to prosecute the suit for and on behalf of the first plaintiff. It is true that the Court has not made an elaborate enquiry as to whether the first plaintiff is competent to file the suit. The defendants have no case that the second plaintiff has any adverse interest against the first plaintiff. She has filed an affidavit as contemplated u/s 212 of the Civil Rules of Practice. Therefore, the Court found that the second plaintiff was competent to represent the first plaintiff. The Court is not expected to conduct an elaborate

enquiry under Order XXXII, Rule 15 of the Code of Civil Procedure. Before a next friend can represent a person incapable of protecting his rights it 1s not necessary that there should be a preliminary enquiry and a finding that person by reason of unsoundness of mind or mental infirmity is incapable protecting his interests. All that is needed is that there must be some prima facie proof such as to satisfy the Court that the person was by reason of infirmity incapable of protecting his interest, because an order permitting the next friend to represent such a person is not final. It is always open to the defendants to take out another application to have the order revoked when the Court can fully go into the matter. The Court below has raised an issue in this case. It is admitted by both the parties, that the first plaintiff was sick and was undergoing treatment. PW-2, who was examined in this case, is a Cardiologist attached to Benzigar Hospital, Kollam. He has deposed that he has treated the deceased plaintiff as an in-patient from 27-4-1984 to 16-5-1984 and 22-5-1984 to 10-7-1984. He issued Ext. A11 medical certificate. According to him, the first plaintiff was suffering from hypertension and cerebral vascular accident, right hemplegia and asphyxia. During hospitalisation, he showed slight improvement by way of recovery of paralysis from right side. But he was disoriented and dysphasic. He was discharged in that condition on 16-5-1984. He was readmitted on 22-5-1984 with sub acute intestinal obstruction and was in the hospital till 10-7-1984. During this period of slay also he was disoriented and dysphasic and hence was advised to go to neurologist for further treatment. According to him, the first plaintiff was not able to speak. The plaintiff also relied on Ext. A 14 letter dated 8-6-1984 issued by DW-1. It was a letter written by DW-1 to the second defendant, wherein it is stated that the first plaintiff''s condition is very bad, that he simply lies in bed and rolls with pain, that he lost control over his kidneys that everything is done unconsciously and that his speech is not clear. PW-5 is the Professor and Head of Neurology Department. He has deposed that the first plaintiff was under his treatment from July, 1984 onwards. According to him, his blood circulation in the brain was defective; The first plaintiff, who is now no more, developed stroke, as a result of which speech problem was caused to him. The first plaintiff was also not able to move alone. He proved Exts. A 12, A 12(a) and A 12(b). Ext. A 12 is of the year 1985. He states that since July, 1984, he was treated for defuse cerebral artherosclerosis with dementia and dysarthria. Cerebral arteriorcleros is a syndrome characterised by progressive memory loss, confusion and child like behaviour. Dementia is an irreversible organic brain disease causing memory and personality disorders, deterioration in personal care, impaired cognitive ability and disorientation. Dysarthria causes neuromuscular disorder affecting the actual formation and articulation of words. AH these go to show that the first plaintiff was mentally infirm and as such he was not able to protect his interests. I do not find anything wrong in the finding of the Courts below, regarding the mental capacity of the deceased first plaintiff. Therefore, the finding on issue No. 2 is upheld.

8. Since the defendants have no case that the second plaintiff has any adverse interest against the first plaintiff, the finding on issue No. 3 regarding the question whether the 2nd plaintiff is the proper person to act as next friend is also upheld.

9. The next question to be looked into is whether the settlement deed, Ext. A1, is liable to be set aside due to reasons mentioned in the plaint in paragraph 8. The plaint schedule property is 48 cents in extent, with a building known as "Millie Lodge". The said property originally belonged to the parents of the deceased first plaintiff. On the death of his parents, the property devolved on the second plaintiff, first defendant, fifth defendant and their brothers and sisters. The fifth defendant for himself and as power of attorney holder of the other brothers and sisters released their right in favour of the first plaintiff as per Ext. A3. While he was thus in possession and enjoyment of the property as absolute owner, he had executed a settlement deed on 24-7-1984 in favour of defendants 1 and 2, reserving a right of residence in favour of the fifth defendant his brother. According to the plaintiff, the said document was brought into existence by exercise of fraud, undue influence and misrepresentation, as the first plaintiff was not in a sound state of mind to execute the document due to old age and serious ailments. According to the second plaintiff, the transaction is prima facie unconscionable as the first plaintiff has not consented to the Registrar for its execution. He has not purchased any stamp paper for its execution. According to her, the Sub-Registrar colluded with defendants. 1 to 5 and got the document registered. The first plaintiff has not signed any such document or affixed his thumb impression in the document. Therefore, the 2nd plaintiff prays for setting aside the document. In order to set aside the document, the plaintiff relies on the testimony of P.Ws. 1 to 8 and Exts. A1 to A23 as also Exts. X-1 series and Ext. X-2.

10. It is an admitted fact that the deceased first plaintiff was undergoing treatment and that he was not in a sound state of health. The second plaintiff was employed in Kuwait. Defendants 1 and4 to 6 were residing in the Millie Lodge along with the deceased first plaintiff. The second plaintiff and second defendant were employed. The third defendant was residing with her husband, who is the power of attorney holder of the second plaintiff. The execution of Ext. B1 is specifically denied in the plaint. It is a registered document. The plaintiff examined P.W. 4 Sub-Registrar, who has registered Ext. B1 (Ext. A1)., P.W. 6 is the scribe and P.Ws. 7 and 8 are identifying witnesses. P.W. 4 has deposed that he had gone to Millie Lodge for registering Ext. B 1 settlement deed. There is only a bald assertion in the plaint that the first plaintiff has not requested the Sub-Registrar to come to Millie Lodge to register the document. There is absolutely nothing to show that P.W. 4 has colluded with defendants in registering Ext. B1. Since the document was registered undergoing all the formalities prescribed by the Registration Act, I can only find that Ext. B1 was registered at the residence of the first plaintiff.

11. The next question to be looked into is whether the settlement deed, is vitiated by fraud, misrepresentation, undue influence or collusion. According to the second plaintiff Ext. B1 is vitiated by undue influence. Section 16 of the Indian Contract Act defines undue influence: "A contract is said to be induced by undue influence, where the relationship subsisting between the parties is such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other". Here, in this case, the first plaintiff was residing with defendants 1 and 2. Ext. A14 letter written by the defendant goes to show that the first plaintiff''s condition was very bad. The letter reads, "he simply lies in bed and rolls with pain. He has lost control cover his kidneys and also that everything is done unconsciously, even the speech is not clear at all." This letter is dated 8-6-1984. P.W. 5, the Professor and Head of Neurology Department, has deposed that the first plaintiff was under his treatment from 2-5-1984 and he developed stroke. He had speech problem. P.W. 2 Cardiologist attached to the Benzigar Hospital, Kollam also has deposed that from 27-4-1984 he was admitted to the hospital for hypertension and cerebral vascular accident. All these go to show that the condition of the deceased was very bad in April, 1984. His cognitive ability has been impaired and was always under disorientation, The defendants were looking after the deceased. Therefore, it can be seen that the defendants were in a position to dominate the will of the deceased. It is also evident from the evidence of P.Ws. 2 and 5, that the first plaintiff was not in a position to speak. He was also not in a condition to think over, as he was affected by brain disease, memory and personality disorders. The first plaintiff has to depend on the defendants for his existence. The defendants 1 and 2 have no case that any other person was looking after him. Admittedly, D.W. 1 was married in 1982. The defendants had a case that prior to her marriage, there was an agreement between the second plaintiff and the deceased, the fifth defendant and her children, that as all the properties of the fifth defendant had to be given to her children, the properties of the deceased plaintiff will be divided among his children equally. It is also contended that in fulfilment of the oral agreement and having regard to the fact that defendants 1 and 2 had to meet the entire expenses for treatment, he had executed Ext. B1 reserving the right of residence in favour of defendants 4 to 6. Exts. B3 to B5 are the gift-deeds executed by the sixth defendant in favour of the plaintiff and the third defendant. They rely on those documents to show that they were executed in pursuance of the oral agreement. But it is see that Exts. B-3 to B-5 came into existence after the relationship between the parties have become strained. There were disputes between the parties, which can be seen from Exts. B-6 and B-7. To prove the said oral agreement there is absolutely no evidence.

12. The plaint property is the one wherein the residential building is situate. The fifth defendant, who had no right over the plaint property, got la right of residence under Ext. B-1. It is provided in Ext. B-1 that in the event of their jointly selling the plaint schedule property, they should pay Rs. 10,000/- each from the sale proceeds to the plaintiff and the third defendant. From this, it is clear that the plaintiff and the

third defendant will not get anything if the property is not sold, or if the right of either defendants 1 and 2 is released in favour of the other. Thus, the defendants obtained unfair advantage under Ext. B-1. The Court below has correctly appreciated the evidence, both oral and documentary and came to the conclusion that Ext. B-1 is vitiated by undue influence.

13. Another argument advanced by the plaintiff is that the settlement deed is in effect a gift and that it was not attested by two witnesses. It is submitted on behalf of the defendants, that there are two attesting witnesses in the document. Learned counsel for the appellant submitted that the finding of the Court below that Ext. B-1 was not properly attested is not correct. According to the plaintiff, Ext. B-1 is not properly attested as contemplated by law and hence it is invalid. D.W. 2 is the first attestor and P.W. 6 the scribe is the second attestor to Ext. B-1. The essential conditions of a valid attestation u/s 3 of the T. P. Act are, two or more witnesses must have seen the executant signing the instrument or have received from him personal acknowledgement of his signature, and with a view to attest or to bear witnesses to this fact, each of them has signed the instrument in the presence of the executant. It is essential that the witnesses should have put the signature animo-testandi, i.e., for the purpose of attesting he has seen the executant sign or has received from him personal acknowledgement of his signature. If a person has put his signature on the document for some other purpose, for example, to certify that he is the scribe or an identifier or a registering officer, he is not an attesting witness. The registering officer puts his signature in the document in the discharge of his statutory duty u/s 59 of the Registration Act and not for the purpose of attesting it or certifying that he has received from the executant personal acknowledgement of his signature. The Sub-Registrar has put his signature not with the intention of attesting it. It is not proof that he signed Ext. B-1 in the presence of the executant. Therefore, he cannot be considered to be an attesting witness. P.Ws. 7 and 8 are identifying witnesses. It is not shown that they put their signature for the purpose of attesting the document. Therefore, they are not attesting witnesses The Court below has correctly held that P.W. 6 cannot be regarded as an attesting witness. A gift is a document which requires two attesting witnesses. Since it does not comply with the requirements u/s 123 the gift deed is invalid. Therefore, the settlement deed is liable to be set aside on the above ground also. The learned Sub-Judge has appreciated the evidence, both oral and documentary, and decreed the suit in favour of the plaintiff. I do not find any reason to set aside the decree and judgment of the Court below. I confirm the decree and judgment of the Court below.

14. In the result, the appeal is dismissed. No costs.