

(2017) 03 KL CK 0030

In the High Court Of Kerala

Case No : RSA.No. 161 of 2010 (C), (Against Judgment dated 10-09-2009 in AS 5/2008 of Sub-Court, Quilandy against Judgment dated 23-10-2007 in OS 198/2006 of Munsiff Court, Quilandy)

Chelathukandy Meenakshi Amma

APPELLANT

Vs

Parappurath Unni Nair

RESPONDENT

Date of Decision : 09-03-2017

Acts Referred:

Contract Act, 1872 — Section 14
Specific Relief Act, 1963 — Section 34

Citation : (2017) 2 KerLJ 247

Hon'ble Judges : Mr. B. Kemal Pasha, J.

Bench : Single Bench

Advocate : Sri. P.B. Krishnan, Sri. P.M. Neelakandan, Sri. P.B. Subramanyan, Sri. Sabu George and Sri. S. Nithin (Anchal), Advocates, for the Appellant; Sri. G. Sreekumar (Chelur), Advocate, for the Respondent No. 2; Sri. K.M. Firoz and Smt. M. Shajna, Advocates, for the Respondent Nos. 1 to 3

Final Decision : Disposed Off

Judgement

B. Kemal Pasha, J.—(1) Is there any importance in medical evidence to arrive at the presence of or lack of the mental element of disposing state of mind ?

(2) Whether the case pleaded by the plaintiff is the lack of free consent in the execution, or the denial of execution of Ext.B1 ?

(3) Is there any difference in the manner of proof of a gift deed when lack of free consent in the execution is pleaded or where the execution as such is denied ?

(4) Is this a case wherein a simple suit for partition, maintainable ?

(5) If entitled, what should be the share to which the plaintiff is entitled ? Precisely, these are the matters arise for consideration in this Second Appeal.

2. O.S.No.198/2006 of the Munsiff's Court, Koyilandy is filed as a simple suit for

partition, seeking partition and separate possession of the ? share of the plaintiff over the plaint schedule properties by metes and bounds and for mesne profits.

3. The plaintiff and late Madhavi Amma are the only two daughters of late Rarappan Nair and his wife. His wife pre-deceased Rarappan Nair. Madhavi Amma also predeceased Rarappan Nair. Rarappan Nair died on 17.05.2006. The first defendant is the husband of late Madhavi Amma. Defendants 2 and 3 are daughters of the first defendant and Madhavi Amma. The plaintiff and defendants 1 to 3 are the legal representatives of Rarappan Nair.

4. O.S.No.198/2006 was dismissed by the Munsiff's Court, Koyilandy by finding that Ext.B1 settlement deed executed by Rarappan Nair in respect of the plaint schedule property has taken away the right of the plaintiff to claim any share over the plaint schedule property. Aggrieved by the judgment and decree, the plaintiff preferred A.S.No.5/2008 before the Subordinate Judge's Court, Koyilandy. The lower appellate court also concurred with the findings entered by the Munsiff's Court, and dismissed the appeal.

5. This court has admitted this second appeal on the following substantial questions of law :

"(1) Whether the execution of B1 deed is done after fulfilling the mandatory requirements under Section 58 of Registration Act ?

(2) Whether the denial of expert opinion with regard to disputed signature is proper under Section 73 of the Evidence Act ?

(3) Whether the attesting witness's evidence identifying the signature of the Sub Registrar as that of the executant of B1 is sufficient to prove the execution of B1 ?

(4) Whether non examination of identifying witness in absence of examining the second attesting witness or any other witness who had direct knowledge on the preparation or execution of B1 is sufficient to prove the execution of B1 under the Evidence Act ?"

6. Heard the learned counsel Sri. P.B. Krishnan for the appellant and learned counsel Sri. G. Sreekumar Chelur and learned counsel Smt. M. Shajna for the respondents.

7. The learned counsel for the appellant has argued that both the courts below have not approached the questions involved in the suit in its correct perspective, and were carried away by the fact that Ext.B1 is a registered settlement deed. It has been argued that the case forwarded by the plaintiff in the suit is not one of lack of free consent or the exercise of vitiating elements of free consent such as fraud, coercion, undue influence or misrepresentation; and whereas, what has been pleaded is the lack of execution as such. It has been argued that almost for two years, immediately preceding his death, Rarappan Nair was bedridden, weak and physically incapable even to move or travel. He had no disposing state of mind or even sound state of mind during the period in which Ext.B1 was

allegedly executed. He was incapable of giving any instructions for the preparation of Ext.B1 or any document. It has been specifically pleaded in the plaint that Ext.B1 was not one executed by Rarappan Nair; whereas the same was falsely and fraudulently fabricated by defendants for forwarding false claims over the plaint schedule property, and to cheat and defraud the plaintiff.

8. Per contra, the learned counsel for the respondents has argued that there is absolutely nothing to doubt about the genuineness of Ext.B1, when the execution and attestation of the same has been adequately proved. It has been argued that in a suit like this, the plaintiff ought to have sought for a relief of declaration of her right to shares in the property, or for the cancellation of Ext.B1. It has also been argued that Rarappan Nair had sound state of mind and a disposing state of mind at the time of execution of Ext.B1, and the said document was prepared as instructed by Rarappan Nair. It was also argued that deceased Rarappan Nair directly wanted to settle the plaint schedule property on defendants 2 and 3, who were looking after all his affairs, and further by considering that defendants 2 and 3 are the daughters of his deceased daughter.

9. The case of the plaintiff is that the scheduled properties had devolved on her father late Rarappan Nair through sale deed No.1356/1978 and the release deed No.2189/78 of the Baluserry Sub Registry Office. According to the plaintiff, Rarappan Nair was suffering from serious ailments and he was not in a position even to move, for more than two years prior to his death. He was hospitalised and was undergoing treatments at various hospitals, and finally, he died on 17.05.2006. According to the plaintiff, she is entitled to half share in the plaint schedule property and defendants together are entitled to half share. It has been pleaded that the plaintiff along with defendants 2 and 3 are in joint possession and enjoyment of the property, and after the death of Rarappan Nair, defendants started residing at the house situated in the plaint schedule property. Thereafter, defendants 2 and 3 stopped giving the share of the income from the property to the plaintiff, and consequently, she wanted to get her share separated through a partition by metes and bounds. Therefore, she caused to issue lawyer's notice on 09.12.2006 to the defendants, calling upon them to have a partition by metes and bounds.

10. On getting such notice, the defendants caused to issue reply notice dated 19.10.2006, whereby contending that Ext.B1 settlement deed dated 14.11.2005 was executed by late Rarappan Nair in favour of defendants 2 and 3, thereby gifting the said properties to them exclusively. It was contended that actual physical possession of the property was also delivered to defendants 2 and 3 by Rarappan Nair and they accepted the gift.

11. According to the plaintiff, Rarappan Nair was very weak and was suffering from serious illness and he had no disposing state of mind and not even a sound state of mind. He could not have given instructions for the preparation of Ext.B1. It is also specifically pleaded that Rarappan Nair did not execute, sign or cause to be registered Ext.B1, and the same has been falsely and fraudulently fabricated

by the defendants. The executant and the attestors are hailing from distant places and they were strangers. According to the plaintiff, Ext.B1 is void and is not binding on the plaintiff or plaintiff schedule property and therefore, the same is liable to be ignored.

12. Defendants contended that Ext.B1 was executed by Rarappan Nair with his free will, that too voluntarily, and that defendants 2 and 3 accepted the gift. According to the defendants, the execution of Ext.B1 was known to the plaintiff on the date of its execution itself. Plaintiff has no right to claim any share from the plaintiff schedule property. There is no question of any joint possession also. According to the defendants, Ext.B1 is a valid document and therefore, the plaintiff is not entitled to partition and separate possession as claimed.

13. On the side of the plaintiff, PWs 1 to 5 were examined and Exts.A1 to A23 were marked. On the side of the defendants, DW1 to DW3 were examined and Exts.B1 to B17 were marked. Exts.X1 to X3 were also marked.

14. The learned counsel for the appellant has taken this Court through the evidence adduced by the parties and also to the documents, especially the contents of Exts.B1, B15, B16, B17, A20, A23, and Exts.X1 to X3. According to the learned counsel for the appellant, DW1 has admitted that Rarappan Nair was admitted at the hospital due to weakness of a portion of his body in December 2004. According to her, during the month of December, 2004, right side of his body became paralytic and thereby, his right side became disabled. His right hand became disabled and suffered severe shivering. Therefore, from the admissions of DW1, it can be seen that Rarappan Nair suffered severe illness and in fact, he became partially paralytic from December, 2004 onwards.

15. Now, the medical evidence relating to the illness of Rarappan Nair has also to be considered. PW2 is Dr. M. Sankaran, who was a Civil Surgeon of the Community Health Centre, Baluserry. He admitted that Ext.A23 was issued by him. According to him, Rarappan Nair was suffering from cerebro vascular accident(CVA) and chronic obstructive pulmonary disease(COPD), and there were bedsores on his body. He has explained that CVA is a condition wherein there was hemorrhage. Hemorrhage has occurred at the brain. It has come out that he was suffering from old CVA and therefore, he had the said illness even prior to the preparation of Ext.A23. He was admitted at the hospital on 04.05.2006, and he died on 17.05.2006 while undergoing treatment. He proved Ext.X1 as the copy of the case records maintained at the hospital. According to PW2, at the time of admission itself, there were badly infected bedsores on the body of Rarappan Nair, and all the old conditions of illness persisted.

16. According to PW2, he had gone through the records in the hospital, which show the old CVA suffered by Rarappan Nair. Ext.X3 also shows that he had suffered CVA. Ext.X3 is the case sheet produced from the Medical College Hospital, Kozhikode. As per Ext.X3, Rarappan Nair was admitted at the Medical College Hospital, Kozhikode on 16.12.2005.

17. PW3 is Dr. K.K. Mohanan, who was running a hospital named K.K. Hospital at Baluserry. According to him, he has been running the said hospital for the last 20 years. Ext.X2 is the case sheet and outpatient card of Rarappan Nair. He had undergone treatment in the said hospital from 11.12.2004 to 15.12.2004 as in-patient. According to PW3, Rarappan Nair was suffering from hypertension, CVA, and right hemiplegia with coronary heart disease.

18. Even though there is an attempt to challenge the said versions of PW3, in the light of the clear admissions by DW1 regarding the said illness of Rarappan Nair, there is absolutely nothing to disbelieve the contents of Ext.X2 as well as the versions of PW3 regarding the said illness. Even according to DW1, during the month of December, 2004, Rarappan Nair had suffered right hemiplegia. According to PW3, Rarappan Nair had suffered right hemiplegia because of hemorrhage occurred in the brain on account of high blood pressure. He has stated that it is not possible for such a patient to carry on with his daily avocations. At the time of discharge, he was in a stuporous stage. He was advised to undergo neurological consultation at the Medical College Hospital, Kozhikode. No surgery was conducted on Rarappan Nair for removing the hemorrhage from his brain. According to PW3, it may not be possible for a patient of such an age to get cured through a brain surgery. According to PW3, Rarappan Nair thereafter reached the hospital for review, on 4.3.2005. Even at that time, his condition had not improved, and he was incapable of carrying out his daily avocations.

19. The aforesaid evidence clearly throws light to the fact that deceased Rarappan Nair was suffering from utter physical disabilities for the period from December, 2004 onwards. It had never improved and finally, he met with his death while undergoing treatment. It has clearly come out in evidence that he had suffered hemorrhage in his brain and thereby he suffered right hemiplegia and he became partially paralytic during December 2004. PW3 has clearly stated that it may not be possible for such a person to carry out all his daily avocations. In such case, when a person had suffered hemorrhage in his brain, it not only affects his physical disability, but certainly will affect his mental capacity also.

20. Ext.A23 is, in fact, the death certificate of Rarappan Nair issued by the Medical Officer attached to the CHC, Baluserry. It has been stated therein that Rarappan Nair was admitted at the hospital on 04.05.2006 and he died on 17.05.2006 in the said hospital. Over and above it, it has been clearly stated in it that "Rarappan Nair was suffering from old CVA and COPD and bedsores, which culminated in his death."

21. Apart from the above, the contents of Ext.X3 also assume great importance. He was admitted at the Medical College Hospital on 16.12.2005. Ext.B1 was allegedly executed on 14.11.2005. It was just after one month of the so-called execution of Ext.B1, he was admitted at the Medical College Hospital. At the time of admission, it was found that the patient was drowsy and was not oriented.

22. Regarding the execution of Ext.B1, the learned counsel for the appellant has pointed out that there are a series of suspicious circumstances, which throw light to the fact that the same was not executed by Rarappan Nair. On a perusal of Ext.B1, it could be seen that something is shown in the form of signature as against the name of Rarappan Nair on all the three pages of Ext.B1. In the last page, two such marks are there against his name. There is no similarity between any of those marks. It is evident from those marks affixed as signatures of Rarappan Nair that he was not capable of affixing signatures. Strangely enough, even though such marks are shown as signatures of Rarappan Nair, such an exercise was not done in the presence of the Sub Registrar at the time of registration of the document. Without affixing such a mark, the left thumb impression was affixed on the over leaf of the first page of Ext.B1 at the time of registration.

23. On this aspect, the learned counsel for the appellant has invited the attention of this Court to Exts.B15 and B16. Ext.B15 is the attested photocopy of Vakalat nama allegedly executed by deceased Rarappan Nair as the second party, and the 2nd defendant herein as the first party. The 2nd defendant has affixed her signature. At the same time, Rarappan Nair has not affixed any signature in it. His left thumb impression was taken. Ext.B15 is dated 23.08.2005. Beneath the thumb impression, the following certification was made by the learned counsel, who accepted the Vakalat: "Executant No.1 duly executed and illiterate executant No.2 read over the contents, admitted and put his left thumb impression before me at Quylandy on 23.08.2005." The signature of the advocate, with the said date is also shown. Therefore, from Ext.B15 also, it is evident that as on 23.08.2005, Rarappan Nair was incapable of affixing his signature. It was such a person who had allegedly affixed his signatures in Ext.B1 allegedly executed on 14.11.2005.

24. Ext.B16 is the written statement filed by the 2nd defendant herein and Rarappan Nair in O.S.No.113/2005. The same is also dated 23.08.2005. Ext.B16 also does not contain signatures of Rarappan Nair; whereas, it contains his left thumb impressions.

25. The learned counsel for the respondents has relied on Ext.B17 sale deed executed by Rarappan Nair and his wife Kunhi Amma in favour of the first defendant on 17.11.2004. In Ext.B17, some marks are shown against the name of Rarappan Nair as well as Kunhi Amma, styled as signatures. As in the case of Ext.B1, the said signatures are also not similar. Ext.B17 was highlighted by the learned counsel for the respondents to point out that Rarappan Nair used to affix signatures also in documents. The said document is one procured by the first defendant. The marks shown as signatures of Rarappan Nair in Ext.B1 have no similarity with such marks shown as signatures of Rarappan Nair, in Ext.B17.

26. Now, the evidence regarding the execution and attestation of Ext.B1 has to be considered. DW2 is one Narayanan Nambiar, who is shown as the first attestor in Ext.B1. It seems that the trial court has believed the versions of DW2 and

relied on his evidence to find execution and attestation of Ext.B1. To the utter dismay of this Court, it can be seen from the observations made by the lower appellate court in paragraph 31 of the judgment rendered by it that "DW2 is an attesting witness who has given cogent and convincing evidence regarding the execution of the disputed gift deed." It was further observed that "on a searching cross-examination nothing substantial has been brought out to discredit him." This Court is at a loss to understand as to how the lower appellate court could make such observations. Evidently, the lower appellate court might not have gone through the deposition of DW2 and that may be the reason why such fantastic observations were entered by the lower appellate court.

27. It has clearly come out from the evidence of DW2 that there was no acquaintance between him and deceased Rarappan Nair; whereas he has acquaintance with the first defendant. From the evidence of DW2, it has come out that the first defendant is the person who is behind the execution of Ext.B1. DW2 has clearly stated that he had not gone through the affidavit filed by him in lieu of his chief examination. According to DW2, the signature shown in the affidavit was affixed by him as directed by the first defendant. When a suggestion was put to the witness that Ext.B1 was not prepared or executed with the knowledge of Rarappan Nair, he answered that he did not know it. DW2 admitted that he had appeared before the court below for examination as directed by the first defendant.

28. Apart from the above, DW2 has deposed that the overleaf of the first page of Ext.B1 contains the signature of Rarappan Nair. Strangely enough, he identified the signature of the "Sub Registrar Abdullakutty" as the signature of Rarappan Nair. When the signature of the Sub Registrar appears at the lower part of that page was again shown, the witness identified the said signature also as that of Rarappan Nair. Rarappan Nair was identified before the Sub Registrar by DW2 and also by the first defendant, as is evident from the entries and signatures on the overleaf of the first page of Ext.B1. The signatures or marks shown as signatures affixed by Rarappan Nair in Ext.B1 were shown to DW2 and he was asked whether any of those signatures were affixed by Rarappan Nair in the presence of the Sub Registrar, the witness admitted that he could not say it. When he was asked whether he know Rarappan Nair had affixed any signatures in the presence of the Sub Registrar, he answered that he did not know it. According to him, he heard someone reading out the document to Rarappan Nair at the "Kakshippura". But, he does not know as to who was the person who read it over to Rarappan Nair. He does not know the wife of Rarappan Nair or as to how many children Rarappan Nair has. On going through the deposition of DW2, it is evident that his testimony is unworthy of credit. He does not even know the contents of his chief examination and he had not gone through the affidavit in lieu of chief examination filed in his name. By that mere fact itself, it can be said that his evidence is of no use at all. Apart from that, the said evidence militates against the contentions of the defendants.

29. As per Section 123 of the Transfer of Property Act, 1882, "for the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses". Therefore, it is evident that it is a document, which comes under Section 68 of the Indian Evidence Act, 1872. When a document which is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. Within the meaning of the proviso to Section 68 of the Evidence Act, if the execution of such a document is specifically denied, it is necessary that one of such attesting witness should be examined to prove such a document. Here, in this case, from the evidence of DW2, it can clearly be said that the execution of Ext.B1 is not proved in terms of Section 68 of the Indian Evidence Act.

30. Apart from the above, other suspicious circumstances are also there in the execution of Ext.B1. As stated above, Rarappan Nair was suffering from serious ailments. He had suffered right hemiplegia. He was incapable of affixing his signature. Even then, some marks were deliberately shown against the name of Rarappan Nair in all the three pages of Ext.B1 as his signature. At the same time, such a signature was absent at the time of the registration of the document before the Sub Registrar. Section 58(a) of the Registration Act, 1908 clearly contemplates the signature for admission of such registration. When some marks, which are totally dissimilar, are shown in Ext.B1 as the signatures of Rarappan Nair, the defendants, who propounded it, ought to have explained as to why such exercise was not done before the Sub Registrar at the time of registration. If the signatures shown in Ext.B1 as the signatures of Rarappan Nair were affixed by Rarappan Nair, definitely, he could have affixed such a mark by way of signature in the presence of the Sub Registrar also. On going through the medical evidence as aforesaid, it is easily discernible that Rarappan Nair was incapable of giving any instruction to the preparation of Ext.B1. He was incapable of executing the document and incapable of admitting it before the Sub Registrar for registration.

31. The learned counsel for the respondent has found fault with the appellant in not seeking either the relief of declaration or the cancellation of Ext.B1. It is true that in case a document suffers from voidability, the party who want to challenge the said document, has to seek the cancellation of such document or a relief to get such document set aside. When a document is per se illegal, in the sense that it is void ab initio, a party need not seek for the cancellation of such a document. Suppose a person executes a sale deed in respect of a property on which he has no right or title and especially when title belongs to other person, the vendee will not get anything. At the same time, it cannot be said that the true title holder of the property should go for the cancellation of such a document. In such case, the document is void ab initio and, therefore, such a document is liable to be ignored, since it will not cause any cloud on title of the

true title holder.

32. The learned counsel for the respondent has argued that apart from taking up a contention that Ext.B1 was not executed by Rarappan Nair, the appellant has a case that the said document is vitiated by fraud. Section 14 of the Indian Contract Act, 1872 says that-

"Consent is said to be free when it is not caused by - (i) coercion, as defined in section 15, or

(2) undue influence, as defined in section 16, or

(3) fraud, as defined in section 17, or

(4) misrepresentation, as defined in section 18, or

(5) mistake, subject to the provisions of sections 20, 21 and 22."

33. Fraud is defined under Section 17 of the Contract Act, which states:

"Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :-

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact;

(3) a promise made without any intention of performing it;

(4) any other act fitted to deceive;

(5) any such act or omission as the law specially declares to be fraudulent."

34. The plaintiff has no case that Ext.B1 is devoid of free consent. It is the specific case of the plaintiff that Rarappan Nair was a person, who was incapable of executing any document and that he was a person suffering from serious ailments and that he had no sound state of mind or any disposing state of mind. It was also pleaded specifically in the plaint that the defendants have falsely and fraudulently fabricated Ext.B1. The fraud alleged in the appeal memorandum is in respect of that plea taken in the plaint and not in respect of the fraud defined under Section 17 of the Indian Contract Act.

35. The learned counsel for the respondent has invited the attention of this Court to the decision in Narayani Ammal v. Sanjeev [2001 (2) KLT 588], wherein it was held in that particular case that the plaintiff ought to have sought for a relief for getting the said documents set aside. The document concerned was a sale deed. The said decision is not applicable to the facts and circumstances of this case since a sale deed is not a document, the proof of execution of which is coming under Section 68 of the Indian Evidence Act, 1872.

36. Relying on the decision in *Balachandran v. Sujatha* [2014 (1) KLT 82], the learned counsel for the respondents has argued that the burden to prove the genuineness of the deed arises only on the plaintiff's placing materials before court substantially discharging the burden cast upon him in showing prima facie that there are suspicious circumstances to doubt the execution of the deed in question. On the strength of *Balachandran* (supra), it has also been argued that in the absence of reasonable proof over the facts alleged by the plaintiff imputing the execution of deed in question, the failure of the defendants to prove the genuineness of the deed in terms of Section 68 of the Indian Evidence Act cannot be given much weight. This is a case wherein initially the plaintiff caused to issue a lawyer's notice demanding partition and separate possession. It was on getting the said notice, defendants 1 and 2 caused to issue a reply stating that Ext.B1 was executed in their favour by Rarappan Nair. Since the plaintiff was sure that Rarappan Nair could not have executed any such document, and was incapable of even moving around, the plaintiff believed that the said document was not one executed by Rarappan Nair. Therefore, the plaintiff filed the suit for partition and has not sought for any relief to get the said documents set aside. In such case, when the defendants are harping upon Ext.B1 and defendants 2 and 3 are clinging upon the said document to claim title over the plaint schedule property, it is for them to press into service Ext.B1. It is for them to prove the execution of Ext.B1 in terms of Section 68 of the Indian Evidence Act. The failure of the defendants to prove Ext.B1 in terms of Section 68 of the Indian Evidence Act cannot be cured by attempting to thrust upon the plaintiff, the unnecessary liability to prove the suspicious circumstances in the execution of Ext.B1.

37. Apart from the above, the plaintiff has clearly brought out the suspicious circumstances exist in the execution of Ext.B1. Medical evidence is there as adduced by PW2 and PW3 coupled with Exts.X1, X2, X3, B15 and B16. Over and above it, the learned counsel for the appellant has invited the attention of this Court to Exts.A20 and A23. Ext.A20 is a summons dated 04.07.2005 issued by the Munsiff's Court, Koyilandi in O.S. NO.113/2005. The officer of the court, who approached the house of Rarappan Nair to serve the summons, has made a detailed note in Ext.A20, which shows that the house remained closed, and on enquiries in the neighbourhood, he was informed that Rarappan Nair was hospitalised and his wife alone was with him at the hospital, and there were no other persons at the house. It is the case of the plaintiff that the defendants were residing in another house till the death of Kunhi Amma and only subsequent to the death of Kunhi Amma, the defendants shifted their residence to the house of Rarappan Nair situated in the plaint schedule property. The endorsements of the officer of the court in Ext.A20 also clearly prove the said plea taken by the plaintiff. Apart from Kunhi Amma, no other persons were there with Rarappan Nair at the hospital. No other persons were residing at the house of Rarappan Nair.

38. Even though it has been contended by the defendants that the plaintiff was aware of the execution of Ext.B1 from the date of its execution onwards, no

evidence is forthcoming from the part of the defendants on that aspect. There is absolutely nothing to show that the plaintiff was aware of the execution of Ext.B1 at any time prior to the reply notice caused to be issued by defendants 2 and 3.

39. In *Sarojini v. Ratnamma* [2015 (1) KLT 602], a learned Single Judge of this Court has held that if a document is void, it is not at all necessary for the aggrieved person to get a declaration that it is void. But, if it is only voidable, it has to be set aside.

40. The very same dictum was laid down by another learned Single Judge of this Court in *Gomathy v. Kesavan Neelakantan* [2013 (3) KLT SN 43 (Case No.47)].

41. The learned counsel for the appellant has invited the attention of this Court to the decision in *Laxmanan v. Padmini* [2009 (1) KLT 29 (SC)], wherein the Apex court had considered a deed of Will and a Gift allegedly executed by the very same person on the very same day. In that particular case also, it was a simple suit for partition, even when the said two documents were propounded by the opponent. Even though such contentions were taken in the written statement, regarding the existence of a Will as well as a gift deed, the plaint was not amended and any other reliefs were not incorporated. The propounder of the Will failed to dispel the suspicious circumstances existed in the execution of the Will. Same was the case with the gift deed also. Both the said documents were registered documents. Even then, the Apex court found that the suit for partition disregarding and ignoring the said two documents was maintainable, and the decree was granted.

42. In *Krishna Mohan Kul alias Nani Charan Kul and another v. Pratima Maity and others* [(2004) 9 SCC 468], the Apex Court was dealing with a case where an old, ailing, illiterate person was stated to be the executant of a document, and where no witness was examined to prove the execution of the deed or putting of the thumb impression. It was held in paragraphs 16 and 17 as follows:

"16. At this juncture, a classic proposition of law by this Court in *Kharbuja Kuer v. Jang Bahadur Rai* needs to be noted:

"It is, therefore, manifest that the rule evolved for the protection of pardahnashin ladies shall not be confused with other doctrines, such as fraud, duress and actual undue influence, which apply to all persons whether they be pardahnashin ladies or not."

17. The logic is equally applicable to an old, illiterate, ailing person who is unable to comprehend the nature of the document or the contents thereof. It should be established that there was not mere physical act of the executant involved, but the mental act. Observations of this Court, though in the context of a pardahnashin lady in *Kharbuja Kuer v. Jang Bahadur Rai* are logically applicable to the case of old, invalid, infirm (physically and mentally) and illiterate persons."

43. In *Krishna Mohan Kul* (Supra), it was held that the age or capacity of the person conferring the benefit, and nature of the benefit, are of very great

importance in cases of execution of such documents. It was held that the court sets aside such gift unless the donee can prove that the gift was the result of free exercise of the donor's will, and that should be the criteria. Here is a peculiar case wherein it stands proved that Rarappan Nair was suffering from chronic serious illness. There was old CVA right from December 2004 onwards. He suffered right hemiplegia evidently on account of clotting of blood in his brain due to severe hemorrhage. He was very old. He was weak and he suffered shivering of his right hand. When he was lastly admitted, old severely infected bedsores were found on his body, which evidently points out that he was bedridden for long, that too without any capacity to move. In such case, it is for the propounder of such a gift deed allegedly executed by Rarappan Nair, to prove that Rarappan Nair had sufficient capacity to exercise his free will to execute such a document.

44. It is a fact that the 1st defendant was behind all these moves. Even then, he had not chosen to mount the box. DW1 has clearly admitted that her father, the 1st defendant, was present at the court at the time when she was examined as DW1. Even then, he had not chosen to depose regarding the execution of Ext.B1. When DW2, who was allegedly the first attester in Ext.B1, failed in his attempt to prove the due execution and attestation, the 1st defendant could have stepped in to explain all the circumstances when the 1st defendant was an identifying witness at the time of registration. In fact, the 1st defendant wanted to avoid unpleasant questions and that is the reason why he has chosen to keep away from the box. He was instrumental in getting Rarappan Nair admitted at various hospitals. He was aware of his illness.

45. From all the discussions made above, this Court is satisfied that both the courts below have committed grave error in non-suiting the plaintiff. Ext.B1 is a void document. The defendants, who propounded Ext.B1, have failed to prove the execution of Ext.B1 in terms of