
(1992) 12 KL CK 0047
In the High Court Of Kerala
Case No : A.S. No. 545 of 1990

R. Radhakrishnan Nair

APPELLANT

Vs

Sreedevi and others

RESPONDENT

Date of Decision : 14-12-1992

Acts Referred:

Succession Act, 1925 — Section 59

Citation : (1993) 2 KLJ 670

Hon'ble Judges : P.K. Balasubramanyan, J

Bench : Single Bench

Advocate : N. Nandakumara Menon and N. Anil Kumar, for the Appellant; P. Sukumaran Nair (Sr. Advocate) and B. Radhakrishnan, for the Respondent

Final Decision : Allowed

Judgement

P.K. Balasubramanyan, J.—The first defendant is the appellant. He is the only son of one Dr. Ramakrishna Pillai who died on 4-9-1978. The plaintiff in the suit the first respondent herein and second defendant in the suit respondent No. 2 herein are the daughters of Dr. Ramakrishna Pillai. Defendants 3 and 4 in the suit who are respondents 3 and 4 herein are the sisters of Dr. Ramakrishna Pillai. Dr. Ramakrishna Pillai admittedly executed a will dt. 7-4-1975 and registered on 12-9-1978 marked by me as Ext. X8 in the appeal. Though PW4 an attessor to this will was examined and this will was not disputed the will as such was not produced before the trial court though it is seen that some steps were taken for its production from the Registrar's office. Whatever that be the will had not been produced in the trial court or proved in evidence. For a proper disposal of the appeal I thought it necessary to call for the said will on an application by the plaintiff and the said will was produced by the Registrar before this court and in the light of the evidence of PW4 who had already spoken to its due execution and in the light of the fact that both the parties admitted the will and requested this court to admit it in evidence I have marked it in evidence as Ext X8. Under Ext. X8 Dr. Ramakrishna Pillai broadly bequeathed the ground floor and the second

floor of a building wherein he was residing and conducting a pharmacy by name Ramakrishna Pharmacy to the plaintiff and bequeathed to his son the first defendant the first floor. The sisters were also given some properties therein and a small extent of 21/2 cents in the property in which the pharmacy building stood was also bequeathed to the second defendant daughter.

2. The plaintiff filed the present suit for what is described as partition of the plaint schedule property which is the pharmacy building and the land appurtenant thereto and separating what is described as B schedule to the plaint and allotting it to her. She pleaded a variation of the bequest under Ext. X8 will by a codicil which is marked Ext X3 dt. 2-9-1978 which she claimed had been duly executed by Dr. Ramakrishna Pillai and attested by PW2 and one Karunakara Menon. According to her the bequest of the pharmacy building and the land appurtenant thereto was modified by Dr. Ramakrishna Pillai by allotting to her a portion of the first floor the whole of which had been allotted to the first defendant son under Ext. X8 will and also an extent out of the 218 cents allotted to second defendant daughter. It is therefore the case of the plaintiff that the property covered by Ext. X8 will as modified by the codicil Ext. X3 which has been bequeathed to her should be separated and delivered to her from the joint possession of herself, the plaintiff and the second defendant. This suit was resisted by the first defendant who belatedly challenged the codicil Ext. X3. The trial court has held that it has been proved that Dr. Ramakrishna Pillai had duly executed the codicil Ext. X3 and that therefore the plaintiff is entitled to relief in the suit. The trial court thought that a decree for partition as such is not necessary but granted a decree to the plaintiff for separation of the B schedule property claimed by her from the rest of the property and delivery to her. It is this decree that is challenged by the first defendant before this court.

3. Certain facts are not in serious dispute. Dr. Ramakrishna Pillai was suffering from cancer in his mouth for about 5 years prior to his death. He had radiation treatment at the cancer institute, Adayar. He had reached more or less the final stage of his illness. He was 84 year old at the time of his death. Just before his death a ryle tube has been fixed so as to enable him to take food because otherwise he was not in a position to take food. He died on 4-9-1978 two days after the alleged codicil. He had a fall prior to his death though there is dispute as to the nature and the effect of that fall. After the death of Dr. Ramakrishna Pillai it was the first defendant who took the envelope in which the codicil had been kept to the Registry office and sought its registration. But before it was registered he himself raised objection stating that Dr. Ramakrishna Pillai had not executed any such codicil and did not have the mental capacity to do so. This resulted in the codicil not being registered and that has necessitated the suit by the plaintiff for establishing her right in terms of the codicil said to have been executed by Dr. Ramakrishna Pillai.

4. In the suit itself the first defendant did not seriously question the mental capacity or the valid execution of the codicil in his written statement. After the

witnesses on the side of the plaintiff were examined the first defendant purported to seek an amendment of the written statement by specifically questioning the due execution and the validity of the codicil Ext. X3. The trial court rejected that application. But in revision this court allowed the first defendant to amend his written statement but on condition that he would not be entitled to examine any witness not already included in the witness list filed by him dt. 17-9-1983. Except going to the box again and giving evidence in support of his further allegations the first defendant did not examine even the witnesses included by him in the original list of witnesses submitted by him. This resulted in some sort of a lop sided trial in that while the witnesses for the plaintiff were examined there was no concentration on the question of mental capacity. Even after the amendment of the written statement no further attempt was made to establish that fact. In this appeal in addition to calling for and marking Ext. X8 on the application of the plaintiff I also passed an order dt. 15-10-1992 in CMP 7688/1992 permitting the plaintiff to cite and examine Dr. R. Kesavan Nair who it was alleged by the first defendant was treating Dr. Ramakrishna Pillai. and who was also a long standing friend of Dr. Ramakrishna Pillai. On my allowing that application summons was issued to Dr. R. Kesavan Nair who gave evidence before me as PW6. It is in the light of the evidence taken by this court as well that the question that falls for decision in this case has to be decided.

5. The main question that requires to be considered in this appeal is as to whether the codicil Ext. X3 has been proved to be duly executed by Dr. Ramakrishna Pillai at a time when he possessed the requisite testamentary capacity. There is no case of undue influence or coercion made out by the first defendant - appellant so that if it is shown that the codicil Ext. X3 was duly executed by Dr. Ramakrishna Pillai when he possessed the testamentary capacity to do so the decree of the trial court would have only to be confirmed. On the other hand if ultimately it is found that the codicil Ext. X3 has not been proved by Dr. Ramakrishna Pillai duly and while possessing the testamentary capacity then the decree of the court below has to be reversed.

6. Some of the relevant aspects have to be noticed first. The signature in Ext. X3 is not very firm. It may be natural because it is that of a man who is already 84 years old and who was also suffering from cancer. But the signature especially in page 2 is written on the name of Dr. Ramakrishna Pillai typed on it and not above it. The same is the case at page 3 where the name is again written across the name of Dr. Ramakrishna Pillai typed at that page. Whether a signature of Dr. Ramakrishna Pillai after the signature of the attesting witnesses was necessary is not very clear. Whatever that be what has to be noticed here is that the signature is not very firm and the signature is not affixed clearly and above the name of the attestor which has been typed in a typewriter. In addition the draft from which Ext. X3 was prepared was not produced and the person who typed Ext X3 has also not been examined. It is also seen that Ext. X3 does not give the date of Ext. X8 will but only mentions that the will had been executed in April 1975. The year of the death of the wife of Dr. Ramakrishna Pillai's wrongly

shown as 1976 in Ext. X3 whereas she really died on 15-1-1977 as evidenced by Ext. B3, The attestation of the two witnesses PW2 and Karunakara Menon do not occur immediately at the bottom of page 2 where the codicil ends and where Dr. Ramakrishna Pillai's signature overlaps his typewritten name. The attestation is in a separate page marked as page 3 It is where as noticed by me already that the further signature of Dr. Ramakrishna Pallai is affixed across his name which is typed.

7. Dr. Ramakrishna Pillai was running Ramakrishna Pharmacy and residing in the property scheduled to the plaint. He was occupying the entire first floor a portion of which has been used for the purpose of the pharmacy and the rest for the purpose of residence. His wife and the first defendant were residing with him. The rooms that are the subject matter of the bequest under the codicil in favour of the plaintiff were used by Dr. Ramakrishna Pillai for his residence. His wife had a right to reside in that portion as per Ext. X8 will. The plaintiff had been given the ground floor and the second floor with right of entrance from the ground floor to the second floor, under Ext. X8, That had been altered by the codicil so as to give her the residential part of the first floor as well, along with extent of property from out of that bequeathed to the other daughter the second defendant under Ext. X8. That in short is the alteration that is brought about by the codicil. It can thus be seen that the main beneficiary under the codicil is the plaintiff the daughter who is the propounder of the codicil. The burden is therefore on her to establish that Ext. X3 codicil was duly executed by Dr. Ramakrishna Pillai while he possessed the mental capacity for executing the codicil. The trial court has found that she has discharged that burden and has given the plaintiff relief on the basis of the codicil. It is this finding that is specifically attacked before me by the learned counsel for the appellant.

8. The learned counsel for the appellant Mr. Nandakumara Menon submits that the execution of the alleged codicil is surrounded by suspicious circumstances. According to him the following are the suspicious circumstances surrounding Ext. X3 codicil.

- (1) The testator died at the age of 84 after suffering from cancer for 8 years.
- (2) A nasal tube was inserted to enable him to drink water. At the relevant time he could not even take solid food or to talk.
- (3) The testator had been undergoing radiation therapy for a number of years and his capacity had been debilitated thereby.
- (4) The testator had died just two days after the alleged execution of the codicil.
- (5) The testator had a fall on 2-9-1978 the date on which he is said to have executed the codicil and according to the appellant stitches had to be put on his forehead and in which he sustained injuries to his head.
- (6) The alleged attester PW2 does not say that the contents of the codicil was dictated to him by Dr. Ramakrishna Pillai who speaks something about the draft

of the codicil for the first time only in re-examination.

(7) PW2 the alleged attesor speaks of others being present at the time of execution of the codicil. None of them is examined.

(8) PW 4 who attested Ext. X8 will and who was a lawyer and who used to advise Dr. Ramakrishna Pillai about such matters and who according to the appellant was consulted at the time of execution of Ext. X8 was not consulted or informed about execution of the codicil inspite of his visiting Dr. Ramakrishna Pillai on 3-9-1978.

(9) PW4 was an attesor of the original will was not asked to attest the codicil as well.

(10) No cogent reason given in the codicil to upset the just equitable and fair disposition in the will dt. 7-4-1975.

(11) The propounder of the will is the main beneficiary of the codicil and was living with the testator at the time of his death.

(12) Incalculable hardship caused to the first defendant the only son in the codicil and therefore disposition there in is unnatural, improbable and unfair.

(13) The will Ext. X8 is written by Dr. Ramakrishna Pillai himself whereas Ext. X3 is a typed one and the typist is not examined.

(14) Total absence of medical evidence regarding the mental condition of the testator and his testamentary capacity.

(15) The draft of the codicil is not produced.

(16) The beneficiary under the codicil comes to Trivandrum one month prior to the death of the father and according to her she did not treat or look after the father. Still she is unduly preferred and the only son who was with the father throughout is wholly disinherited.

(17) The mistakes in the codicil regarding the year of death of the wife of Dr. Ramakrishna Pillai, the date of Ext. X8 will and the vagueness regarding the undivided portion left to the second defendant under Ext. X8 will and a reference to running Bharat Medicals which had already been dissolved in December, 1976.

(18) The reallocation of the property is unfair and no prudent father would have done it making it impossible for his only son to reside in the building and to conduct the pharmacy especially in the context of the fact that the first defendant was all the while residing there with his family and the father.

(19) The signature in the codicil is shaky and in addition it overlaps the typing of the name.

(20) The attestation is on a separate page obviously indicating that it was not intended to be an attestation of the will which terminates at page 2 and where

normally the attestation should have been made.

The learned counsel submits that in the light of the principles settled by the decisions reported in *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*, , AIR 1964 SC 529, AIR 1982 SC 133; 1992 (2) S.C. C. 1959 and ILR 1982 (2 Ker. 159, the propounder the plaintiff has clearly failed to remove he suspicion surrounding the execution of the alleged codicil and that therefore the trial court was clearly in error in finding that the codicil had been duly executed by Dr. Ramakrishna Pillai.

9. PW2 is an attester to the codicil. In chief examination PW2 speaks about the fact that he knew Dr. Ramakrishna Pillai and that Dr. Ramakrishna Pillai had executed a codicil, that he and Karumakara Menon were the attestors to that codicil that the testator signed the will in their presence and that they signed it in his presence, that he had the capacity to understand what he was doing at the relevant time. In cross examination he admitted he was not aware whether Dr. Ramakrishna Pillai had a fall and was injured in the head, that he subsequently came to know that Dr. Ramakrishna Pillai had a fall, that he did not know prior to his death hat Dr. Ramakrishna Pillai had a fall, that he got the codicil typed, that Dr. Ramakrishna Pillai give him three sheets from his letter pad and asked him to write in his handwriting, that he suggested to Dr. Ramakrishna Pillai that he will got it typed, that he went and got it typed and when he brought it back the doctor had asked him whether he had got it typed and then he got up from bed, put the papers on a teapoy nearby and he signed the codicil. He agreed that for the purpose of typing the will there was a draft available. He was not in a position to say in whose possession that draft was He asserted that as far as he knew Dr. Ramakrishna Pillai retained consciousness until his death and that various other persons were when the codicil was beings executed He denied the suggestion that he was a party to the creation of the codicil in collusion with the plaintiff. It was only in re-examination he stated that it was Dr. Ramakrishna Pillai who gave the instruments for preparing the codicil. As noticed by me already the evidence of PW 2 is available to the plaintiff in so far as it supports the case of the plaintiff and so far as he speaks of typing of the codicil, the signing of the same by Dr. Ramakrishna Pillai and the attestation of the same by himself and Karunakara Menon. His evidence is not sufficient to establish the mental condition of Dr. Ramakrishna Pillai though he has asserted that. Dr. Ramakrishna Pillai retained all his mental faculties at the time he executed the codicil. PW4 who was a legal practitioner and who was closely acquainted with Dr. Ramakrishna Pillai and who attested Ext. X8 will after reading it and telling Dr. Ramakrishna Pillai that it was in proper form was not consulted regarding the codicil. He gave evidence that he too saw Dr. Ramakrishna Pillai a day prior to his death and as far as he could see there was no impairment in the mental capacity of Dr. Ramakrishna Pillai. But he admitted that he came to know that the day previous to his visit Dr. Ramakrishna Pillai had a fall. PW5 is the plaintiff herself. She gave evidence that the codicil was executed by giving her a portion of the first floor so as to enable her to live comfortably in the building. She also said

that her father possessed his mental faculties at the time of execution of the codicil. In cross-examination she admitted that her father was 84 years old at the time of his death, that he died of cancer, that he was suffering from cancer for about 8 years, that he was bedridden for two days prior to his death, that even at the time of Dr. Ramakrishna Pillai's death the pharmacy was running in the building, that her father was the doctor in that nursing home assisted by one Dr. Varma, that the codicil was executed on 2-9-1978, that she cannot remember exactly at what time her father signed the codicil that she was present when he signed the codicil, that to her recollection it was in the morning that Dr. Ramakrishna Pillai signed the codicil that Dr. Ramakrishna Pillai fell down on the morning of 2-9-1978 in his bed room and not in the bath room that he was injured in the head, that the injury was in the forehead, that she did not know whether stitches had to be put because she was downstairs that she heard that stitches were put, that she saw her father after the stitches were put, that her father was under the treatment of Dr. Kesavan Nair one week prior to his death that the ryle's tube was fixed so as to give him liquid food that she had seen the codicil, being attested by PW2, that she had read the codicil, that under the codicil she was given a portion of the first floor where Ramakrishna Pharmacy was being run that she knew that as per the codicil she is the main beneficiary and that the codicil was not executed due to any influence exerted by her on the father. As noticed at the instance of the plaintiff I summoned and examined Dr. Kesavan Nair who it was said had fixed the ryle's tube to Dr. Ramakrishna Pillai. The doctor examined as PW8 stated that he had seen Dr. Ramakrishna Pillai only about 10 days prior to his death as he was called for by Dr. Varma, that he advised Dr. Ramakrishna Pillai to have the nasal tube inserted so as to enable him to be artificially fed so that he would not starve, that the decision to insert the tube was taken by him and it was agreed to by Dr. Ramakrishna Pillai. He stated that Dr. Ramakrishna Pillai was generally a soft spoken person and after the insertion of the tube he could speak only in a very low voice. He further stated that he did not talk to him much. He said that he finally saw him at the time of the insertion of the tube. In cross-examination he stated that he could not say what will be the mental condition of a cancer patient who was 84 years old and who had reached the terminal stage of his disease. He said that that will depend upon the patient and no general answer can be given. He said that he had advised Dr. Ramakrishna Pillai to undergo treatment at the Cancer Institute, Madras. He denied the suggestion that the ryle's tube was fixed two days prior to the death of Dr. Ramakrishna Pillai and stated that he did not know the exact date of death of Dr. Ramakrishnan Pillai and therefore he could not say the date on which he inserted the tube and the interval between the insertion of the tube and the death of Dr. Ramakrishna Pillai. He stated that he could not remember whether he was informed of any fall that Dr. Ramakrishna Pillai had. But he was certain that he had not visited Dr. Ramakrishna Pillai in connection with the fall just before his death. When he met Dr. Ramakrishna Pillai about 10 days prior to his death Dr. Ramakrishna Pillai could not talk properly. He explained that Dr. Ramakrishna Pillai was always a soft spoken man and did not speak loudly. Since

he did not want Dr. Ramakrishna Pillai to exert himself he did not talk to him. He stated that he could not say whether Dr. Ramakrishna Pillai could have been in a position to concentrate on anything or not at about that time. He candidly told the court that he could not say anything about the mental condition of Dr. Ramakrishna Pillai. He also stated that he was not treating Dr. Ramakrishna Pillai as such and all that he did was to insert the ryle's tube. He stated that the only thing was that Dr. Varma who used to work with Dr. Ramakrishna Pillai used to inform him occasionally about the condition of Dr. Ramakrishna Pillai. In re-examination PW6 stated that he could not state whether Dr. Ramakrishna Pillai was attending to his work in his pharmacy when he saw him last to insert the ryle's tube. He further stated that when he saw Dr. Ramakrishna Pillai he could see even from the expression on Dr. Ramakrishna Pillai's face that he was having pain. To a question by court as to whether he could say what was the mental condition of Dr. Ramakrishna Pillai at the time he inserted the ryle's tube or at the time of his death he categorically answered that he could not say because he did not examine him in that way.

10. The first defendant examined as DW1 admitted that he had taken the cover containing the alleged codicil to the Sub Registrar's office with a request to open and register the codicil. According to him it was only later he came to realise that his father could not have executed the codicil and therefore he objected to its registration. He gave evidence to the effect that his father had a fall and that since the ryle's tube has been fixed his father could not speak. He stated that he was told by one Damodaran Nair that the plaintiff and Govinda Pillai PW2 had got Dr. Ramakrishna Pillai to sign some papers, that on enquiry he came to know about the contents of the codicil and that at the relevant time his father Dr. Ramakrishna Pillai did not have the mental capacity to think about or make such disposition as are found in Ext. X3. Confronted in cross-examination with the absence of a plea in the original written statement and his own action in producing the envelope containing the codicil before the Sub Registrar DW1 did not have any satisfactory answer except stating that he produced the envelope containing the alleged codicil at the instance of PW2. After this court permitted him to amend the written statement he again got himself examined and attempted to say that his father's fall resulted in stitches having to be put in the forehead and in using ice for cold compress. He stated that the fall occurred prior to the codicil being got signed by him and that Dr. Ramakrishna Pillai was in a semi conscious condition after his fall. He also spoke to the fact that it was Dr. Varma who was looking after his father. He took the stand that the codicil was signed at a time when the father was not aware of what he was doing. In cross-examination he admitted that it was he who produced the codicil before the Sub Registrar and applied for its registration. He stated that the plaintiff had come back to India from England one month prior to the father's death. He stated that he was not present when Dr. Ramakrishna Pillai executed the alleged codicil. He stated that he was there in the house only upto. about 3 PM and thereafter he went out. He said that he went out after seeing that his father was lying in a

semi conscious state. He stated that after the death of the father PW2 gave him the codicil stating that it had been signed by Dr. Ramakrishna Pillai and he presented it to the Sub Registrar's Office. He stated that PW4 Gopalapillai an attester to Ext. X8 will was his father's close friend and that he used to come almost everyday to see his father. A reading of his evidence as a whole would indicate that he has no definite stand regarding the codicil. It is not very clear whether his case that his father had not signed the codicil at all or that even though it had been got executed the father did not have the testamentary capacity. An over all reading of his evidence would indicate that his case appears to be that though a paper was got signed by Dr. Ramakrishna Pillai it cannot be held to be a valid codicil in view of the fact Dr. Ramakrishna Pillai did not have the mental capacity. His evidence has to be appreciated on a reading of his original written statement and his failure to raise the necessary pleas therein and his conduct in taking the codicil to the Sub Registrar's office for depositing with a request for its registration. There is some justification in the submission of the learned counsel for the plaintiff that DW1 is only attempting to take advantage of some of the circumstances obtaining in the case and was in fact aware of the execution of the codicil by the father and had in fact accepted the execution of such a codicil by his prior conduct.

11. The burden to prove the testamentary capacity of Dr. Ramakrishna Pillai at the relevant time and to remove the suspicion that may surround the execution of the codicil is on the propounder, the plaintiff. Therefore notwithstanding the unsatisfactory features in the case of the first defendant and the inference that may arise from his own actions it may not be possible for a court to uphold the codicil unless the propounder satisfies the conscience of the court that the codicil Ext. X 3 was in fact executed by Dr. Ramakrishna Pillai and that he had the testamentary capacity at the relevant time. No doubt in appreciating the evidence on the side of the plaintiff, the propounder, the conduct and the admissions of the first defendant may have relevance. But it is not possible to accept the contention that in view of the prior conduct of the first defendant and his failure to prove any undue influence or coercion in the matter of the execution of Ext. X 3 codicil the same has to be upheld.

12. The learned counsel for the plaintiff has not disputed that the burden is on the propounder to satisfy the court that there was a due and valid execution of Ext. X3 codicil. The learned counsel submits that a reading of the codicil would itself indicate that it has specifically referred to the relevant paragraphs in Ext. X 6 will and this could have been done only if the codicil was prepared at the instance of Dr. Ramakrishna Pillai who had himself written Ext. X8 will. The learned counsel also placed reliance on the admission of the first defendant as DW1 that what was available in the house was only the receipt showing the deposit of the original will Ext. 8 and submits that therefore it was clear that no copy of the will was available so as to enable anyone else to prepare or give instruction for the preparation of Ext. X3 codicil. The learned counsel also points out that the action of the first defendant in himself lodging the codicil with the

Sub Registrar and seeking registration thereof coupled with the absence of any case of absence of mental capacity or other vitiating circumstances surrounding the execution of the codicil in the original written statement would clearly show that Ext. X3 codicil was in fact duly executed by Dr. Ramakrishna Pillai. The learned counsel also refers to a petition filed by the first defendant himself before the Sub Registrar marked as Ext. X1 wherein the first defendant had admitted that Dr. Ramakrishna Pillai had left behind a codicil. He also points out that on the back of Ext. X3 the first defendant himself has signed it while it was deposited with the Sub Registrar. He also refers to Ext. X2 the deposition given by the first defendant before the Sub Registrar on 20-9-1978 in which he had specifically stated that the codicil was signed and kept by Dr. Ramakrishna Pillai himself. He also points out that the first defendant filed Ext. X6 dt. 28-3-1979 before the Sub Registrar objecting to the registration. Even in the written statement filed in the court on 17-9-1981 there was no case for the first defendant that the codicil was bad in law. All that was stated in paragraph 4 of the written statement was that he denied the execution of the codicil. It is also pointed out that the amendment of the written statement was sought only after the first defendant himself was examined as DW1 on 26-9-1983. The learned counsel therefore submitted that as the case proceeded his obligation was only to prove the due execution and attestation of Ext. X3 codicil and that he had done it by examining PW2 who was himself a Retired District Registrar and who was admittedly acquainted with Dr. Ramakrishna Pillai. It is also pointed out that the first defendant as DW1 had no case that PW2 had any partiality towards any of the children of Dr. Ramakrishna Pillai. It is also pointed out that DW1 has no case that PW2 the attesor of the codicil was aware of the details of the disposition contained in Ext. X8 will. It is also pointed out that while cross-examining PW2 there was not even a suggestion of any motive for him to take part in the concocting of any codicil or of inducing Dr. Ramakrishna Pillai to execute any codicil. It is also submitted that in the cross-examination of PW4 who was an attesor to the original will and who was a friend of Dr. Ramakrishna Pillai, in cross-examination by the first defendant, questions were asked of mental capacity and PW4 has categorically stated that Dr. Ramakrishna Pillai retained his mental capacity and that he was capable of cogent speech and discussion. It is also pointed out that Karunakara Menon the other attesor to the codicil was Dr. Ramakrishna Pillai's business partner and hence a natural witness and there was no suggestion that he was party to any conspiracy to create a codicil. It is finally submitted by the learned counsel that it could be clearly seen that the challenge to the codicil by the first defendant was belated and was merely an after thought and was obviously an unholy attempt to take advantage of the illness of the father and some of the circumstances that emerged during the trial of the case.

13. There may be some substance in these submissions made on behalf of the plaintiff. But the fact remains that the burden is on the plaintiff the propounder to establish to the satisfaction of the court that a codicil was duly executed by Dr.

Ramakrishna Pillai while he was in possession of all his mental faculties. The fact that Dr. Ramakrishna Pillai was 84 years old and he was suffering from cancer for about 8 years and during the last stages had to be nasally fed, that he had a fall about the time the codicil was alleged to have been executed and that he died two days after the alleged execution of the codicil all place fairly heavy burden on the plaintiff to prove to the satisfaction of the court that Dr. Ramakrishna Pillai did duly execute a codicil and that he had the mental capacity to do so. The fact that the only son who under the original will Ext. X8 had been bequeathed the entire first floor where he could reside alongwith continuing the pharmacy which his father was running is deprived of the residential part of the first floor coupled with the shakiness of the signature in Ext. X3 and the way the signature is placed at page 2 and 3 of the codicil and the attestation in page 3 a separate sheet after the codicil is concluded at page 2 and the mistakes that are seen made in the codicil all call for proper explanation from the propounder. Thus notwithstanding the subsequent development of the case by the first defendant and notwithstanding his failure to raise the necessary pleas at the appropriate time and notwithstanding the fact that he himself deposited the codicil before the Sub Registrar and sought its registration, it is for the plaintiff to show that Dr. Ramakrishna Pillai at the relevant time did have the requisite mental capacity to execute the codicil.

14. The learned senior counsel for the plaintiff Mr. P. Sukumaran Nair submitted that a reading of Ext. X8 will alongwith the codicil Ext. X3 would show that the alteration in the dispositions made under Ext. X3 are by a rational mind and for appropriate reasons. It is submitted that when the original will Ext. X8 was executed the wife of Dr. Ramakrishna Pillai was alive and Dr. Ramakrishna Pillai had conferred a life interest in her to reside in the residential portion of the first floor allotted to the son, the first defendant. The wife had died and the life interest had come to an end and therefore Dr. Ramakrishna Pillai thought of altering the provision regarding the residential portion in the first floor and had bequeathed it now to the daughter to whom the ground floor and the second floor had been allotted so as to enable her to enjoy her bequest in a more useful manner and at the same time seeing to it that the business of Ramakrishna Pharmacy which has to be continued by the son the first defendant is not in any way disturbed. It is submitted that the soundness of mind is closely related to the nature of the disposition made by Dr. Ramakrishna Pillai in the disputed codicil and if the question be approached in that form it can be seen that the codicil was executed by a rational man who at the relevant time possessed the requisite mental capacity. With particular reference to Section 59 of the Indian Succession Act read with Explanation IV and Illustration 3 the learned counsel pointed out that the mere fact that Dr. Ramakrishna Pillai had been suffering from cancer for about 8 years and was not in good health would not by itself affect his disposing power unless there is evidence on the side of the first defendant to show that there had been any impairment of faculties of Dr. Ramakrishna Pillai. The learned counsel also places reliance upon the decision

reported in *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*, to emphasise that the nature of the dispositions should be considered in the light of the circumstance surrounding the dispositions originally made and the alteration subsequently made and that in the light of the relevant circumstances it can only be held that Dr. Ramakrishna Pillai possessed the testamentary capacity at the time of executing the codicil. He also pointed out that the first defendant has not adduced any direct evidence on the mental capacity or the lack of it of Dr. Ramakrishna Pillai. According to the learned counsel the modification made in the codicil were necessitated by the circumstances that were obtaining and there is no reason to suspect that the mind of the testator did not follow the dispositions contained in Ext. X3, He also points out that the codicil is a simple and straight forward document and it contains clear dispositions and the dispositions are natural and warranted by the circumstances. He submits that these facts must be appreciated in the light of the conduct of the first defendant himself in seeking originally a registration of the codicil and then his belated attempt to take up a controversy as to the mental capacity of Dr. Ramakrishna Pillai. The learned counsel also submits that every circumstance is not a suspicious circumstance and when the dispositions are natural there is no reason for the court to probe further on the testamentary capacity of the testator. The learned counsel also refers to paragraph 10 of the decision reported in *Smt. Indu Bala Bose and Others Vs. Manindra Chandra Bose and Another*, to point out what are the suspicious circumstances which ought to be considered by the court. As regards the suspicious circumstances relied on by the learned counsel for the appellant, the learned counsel for the respondent submits that even though at the time of the suit originally filed Dr. Varma was available since the first defendant did not question the mental capacity of the testator, the plaintiff had no occasion or reason to examine Dr. Varma as a witness. By the time the belated challenge to the testamentary capacity was raised by the first defendant, Dr. Varma had died and it is common Case that Dr. Varma alone had been attending on Dr. Ramakrishna Pillai and was also assisting him in his practice, It is pointed out that the first defendant could have very well examined Dr. Varma to show the mental condition of Dr. Ramakrishna Pillai. It is also submitted that the signature is steady for a man of 84 in Ext. X3 and that the fact that the signature at page 2 is put across the typed name and the attestation is on a separate sheet in Ext. X3 would not by itself generate any suspicion regarding the proper execution of Ext. X3, He places particular reliance on the fact that Ext. X3 could have been prepared and the disposition altered only by a person who was aware of the original disposition contained in Ext. X8 will and that on the evidence it is clear that Dr. Ramakrishna Pillai alone was aware of the details of the earlier will and therefore the alterations made by him could have been only as directed by him and that therefore this fact goes a long way in removing any suspicion that the court may have on the testamentary capacity of Dr. Ramakrishna Pillai. He also points out that while allotting a portion of the first floor to the plaintiff by taking it out of the bequest of the first defendant the testator had chosen to disinherit his brother carrying on a business calles Bharat Medicals and gave his own share

to the first defendant. This according to the learned counsel was intended to compensate the first defendant for the loss that is caused to him by taking away a portion of the first floor and bequeathing it to the plaintiff. I have anxiously considered the submissions made on behalf of the plaintiff. In this case the court is confronted with a situation where an old man of 84 who had been suffering from cancer and had reached the final stages of his disease and who could not properly articulate because of the fixing of a nasal tube for his feeding and who was obviously in a weak health due to his inability to take food orally is said to have executed the codicil just two days prior to his death. It is also conceded that he had a fall probably on the morning of the day on which codicil is alleged to have been executed. There is the evidence that stitches had to be put on his forehead. No doubt PW4, a friend and casual legal adviser of the deceased Dr. Ramakrishna Pillai had spoken to the fact that Dr. Ramakrishna Pillai retained his faculties until his death. There is also the assertion by PW2 that Dr. Ramakrishna Pillai was mentally alert. But at the same time it is not possible to ignore the inherent shakiness of signature in Ext. X3 and the placing of the signature at pages 2 and 3 of the codicil not in its proper place but across the name of Dr. Ramakrishna Pillai typed in a typewriter. There is also the difficulty created by the fact that the attestation to Ext. X3 is found on a separate paper and not at the bottom of page 2 of Ext. X3 where the dispositions end and the testator's signature occurs.. It is obvious that the codicil Ext. X3 is not a formally drawn up document after obtaining legal advice, but it is typed by typist unknown, in the letter head of Dr. Ramakrishna Pillai. The draft of the codicil has also not been produced and it is not possible to hold on the materials now available that as a matter of fact Ext. X3 codicil was typed out as instructed by Dr. Ramakrishna Pillai. The evidence of PW2 regarding :be instructions for preparation of the codicil by Dr. Ramakrishna Pillai is not clear or satisfactory. The failure to produce the draft or to explain the non-availability of the draft is also a circumstance that is relevant in this context. There is also the absence of clear evidence of Dr. Ramakrishna Pillai having given the necessary instructions for preparing the codicil. Even going by the submissions of the learned counsel for the plaintiff there can only be an inference that Dr. Ramakrishna Pillai must have given the necessary instructions for the preparation of the codicil. Though the conduct of the first defendant himself may not be satisfactory or fully honest that by itself cannot enable this court to positively hold that all the suspicious circumstances surrounding the codicil Ext. X3 has been removed by the propounded Whether there was any challenge initially to the mental capacity of Dr. Ramakrishna Pillai or not, according to me, it behoved the plaintiff, the propounded to have examined Dr. Varma at least to show that Dr. Ramakrishna Pillai retained all his mental faculties. The evidence of PW 6 taken in this court has unfortunately not helped the case of the plaintiff in removing the suspicion in the mind of the court regarding the testamentary capacity of Dr. Ramakrishna Pillai at the relevant time. On the other hand, the evidence of PW 6 would show that it cannot be taken for granted that Dr. Ramakrishna Pillai retained all his mental faculties two days prior to his death. There are also the mistakes in Ext.X3 which taken by

themselves may not be very material but have some relevance in considering the question if the mental capacity of Dr. Ramakrishna Pillai and the question as to whether he himself gave instructions for the preparation of the codicil. The reasons for the additional benefit conferred on the plaintiff and the reason for curtailing the bequest of the son are also not clearly made out. Obviously under Ext. X8 Dr. Ramakrishna Pillai intended that his son should run the pharmacy in the first floor while residing there. He had bequeathed the ground floor and the second floor to the daughter. The additional preference shown to the daughter to the detriment of the son without any particular reason also creates some suspicion in the mind of the court. The controversy regarding the existence or otherwise of the interest of the testator in Bharat Medicals, which is purportedly given to the son after curtailing his interest in the first floor of the pharmacy building is also not resolved in the evidence properly. The suggestion that Dr. Ramakrishna Pillai alone knew about the original disposition in Ext X8 and hence he alone could have given instructions for attestation could not be accepted in the light of the fact that PW2, PW4 and the plaintiff herself could have been aware of the dispositions in the will. PW4 was in any event aware of it. In this state of evidence it is not possible for me to hold with confidence that Ext. X3 has been proved to be the codicil duly executed by Dr. Ramakrishna Pillai while in possession of all his faculties. The result is that I am constrained to reverse the decision of the trial court and hold that it has not been proved that Ext. X3 codicil was duly executed by Dr. Ramakrishna Pillai while he retained his testamentary capacity. Though at one point of time I was toying with the idea of remanding the matter for the purpose of enabling the plaintiff to adduce further evidence to establish the mental capacity of deceased Dr. Ramakrishna Pillai it has turned out that he was not treated by PW6 whose evidence has already been taken by me and the only other person who was attending on him was Dr. Varma who is no more. Under those circumstances the case has to be decided on the materials now available and if that be so I am not in a position to agree with the finding of the trial court that Ext. X3 has been proved to be a valid codicil executed by Dr. Ramakrishna Pillai. In the light of this finding the plaintiff is not entitled to have the plaint B schedule property separated from the rest of the properties and delivered, over to her. The decree passed by the trial court is therefore liable to be vacated. As per the disposition under Ext. X8 no relief has been claimed by the plaintiff. I make it clear that it is open to the plaintiff to claim any relief that she may be entitled to on the basis of the will Ext. X8 and the same will not in any way be affected by the finding rendered herein that the codicil Ext. X3 has not been proved. With this clarification the only course open to this court at this stage is to dismiss the suit filed by the plaintiff. In the result I allow the appeal, set aside the decree and judgment of the trial court and dismiss the suit. In the circumstances of the case and the relationship between the parties and taking note of the delay in raising appropriate defence on the part of the first defendant, I direct the parties to suffer their respective costs in both the courts.