SETHAMBAL DORAIAPPAH & ANOR v. KRISHNAVANI MUNIANDY
COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD, JCA; MOHD GHAZALI YUSOFF, JCA; FAIZA THAMBY CHIK, J
CIVIL APPEAL NO: W-02-688-98
16 JANUARY 2004
[2004] 1 CLJ 869

***SUCCESSION**: Will - Validity - Suspicious circumstances surrounding making of will prior to death of testator - Testamentary capacity of testator - Whether trial judge failed to consider material evidence - Whether re-trial required*

The deceased/testator testator left behind a wife and young child of about four months at the time of his death. He had died of bone cancer. He purportedly made his will three days prior to his death. In the will he named his mother and brother (the 1st and 2nd appellants respectively) as executors and bequeathed his house to his mother and all moneys in his Employment Provident Fund ('EPF') and insurance policies to his child. The respondent was the sole beneficiary under the general legacy but she did not receive anything as there was nothing for distribution under the general legacy. The appellants petitioned for probate at the High Court and the respondent filed two caveats. The respondent also filed a civil suit against the appellants praying for a declaration that the will was *void ab initio*. The probate action was then consolidated with the civil suit. At the hearing of the trial, the learned judge concluded that the appellants failed to remove the suspicious circumstances surrounding the making of the will and also failed to prove the testamentary capacity of the deceased. The learned judge accordingly dismissed the appellants' probate petition and allowed the respondent's claim with costs. Hence, the appellants' instant appeal.

Held:

Per Abdul Hamid Mohamad JCA

[1] The burden is on the propounder of the will to establish the testamentary capacity and to dispel any suspicious circumstances surrounding the making of the will. The learned judge had taken the same approach and was correct in doing so. However, he erred when he concluded that the respondent failed to remove the suspicious circumstances surrounding the making of the will and that the respondent failed to prove the testamentary capacity of the deceased at the material time.

[2] The only suspicious circumstance surrounding the making of the will was the presence of the three brothers at the same time at the hospital where the deceased was admitted. The fact that the house, which was the only substantial property left by the deceased, was given to the mother was not suspicious. Further, evidence was given to show that the deceased left the house to his mother as it was his mother who had paid the deposit for the house and that was the only amount paid so far for the house. Unfortunately, the learned judge did not consider this factor at all. Also, the learned judge failed to give sufficient weight to the evidence of the solicitor who had prepared

the will upon the instructions of the deceased. The solicitor had no personal interest in the matter. He too gave evidence that the deceased had told him that he wanted to leave the house to his mother in view of the deposit paid by her.

[3] The learned judge relied on the medical report that was prepared one year after the death of the deceased. Nothing was mentioned therein about his mental condition. Further, the doctor who gave the medical report was not called to give evidence. It is settled law that very slight testamentary capacity is required for the making of a will. It need not be proved that a testator was in a perfect state of health or that his mind was so clear as to enable him to give complicated instructions. It is sufficient if it is proved that he was able to give the outlines of the manner in which his estate was to be disposed of and that he was able to understand that his instructions to his lawyer in the main had been complied with. In the instant appeal, the estate of the deceased consisted only of his house, his EPF and insurance policy wherein the house was given to his mother, and the EPF and insurance policy to his only child. There was nothing complicated about it.

*[**Bahasa Malaysia** Translation Of Headnotes*

Pewasiat simati telah meninggalkan seorang isteri dan anak kecil berumur lebih kurang empat bulan semasa kematiannya. Beliau meninggal dunia kerana kanser tulang dan telah membuat wasiat tiga hari sebelum kematiannya. Dalam wasiatnya itu simati telah menamakan emak dan saudara lelakinya (perayu pertama dan kedua masing-masingnya) sebagai wasi dan mewariskan rumah kepada emaknya dan semua wang dalam Kumpulan Simpanan Wang Pekerja ('KWSP') serta polisi-polisi insurans kepada anaknya. Responden adalah benefisiari tunggal di bawah legasi am tetapi beliau tidak mendapat apa-apa kerana tiada apa-apa untuk diagihkan di bawah legasi am tersebut. Perayu-perayu memohon probate di Mahkamah Tinggi dan responden memfail dua kaveat. Responden juga memfail guaman sivil terhadap perayu-perayu memohon deklarasi bahawa wasiat adalah *void ab initio* dan berikutnya tindakan probate telah disatukan dengan guaman sivil. Pada pendengaran perbicaraan, yang arif hakim mendapati bahawa perayu-perayu gagal melenyapkan keadaan syakwasangka yang menyelubungi pembuatan wasiat dan juga gagal membuktikan keupayaan simati untuk berwasiat. Yang arif hakim dengan itu menolak petisyen probate perayu-perayu dan membenarkan tuntutan responden dengan kos. Perayu-perayu dengan itu telah merayu.

Diputuskan:

Oleh Abdul Hamid Mohamad HMR

[1] Beban adalah atas pengaju wasiat untuk membuktikan keupayaan berwasiat dan untuk melenyapkan apa jua keadaan syakwasangka yang menyelubungi pembuatan wasiat. Yang arif hakim telah mengambil pendekatan yang serupa dan adalah betul dalam tindakannya itu. Bagaimanapun, beliau silap apabila mendapati bahawa responden gagal menyingkir keadaan syakwasangka yang menyelubungi pembuatan wasiat atau gagal membuktikan keupayaan berwasiat simati pada waktu material.

[2] Satu-satunya keadaan syakwasangka yang menyelubungi pembuatan wasiat adalah kehadiran di masa yang sama ketiga-tiga adik beradik pewasiat di hospital di mana pewasiat dimasukkan. Fakta bahawa rumah berkenaan, iaitu satu-satunya harta substantial yang ditinggalkan simati, telah diberi kepada ibunya bukanlah merupakan satu syakwasangka. Lagipun, keterangan telah dikemukakan yang menunjukkan bahawa

simati telah mewariskan rumah kepada ibunya kerana ibunya yang membayar deposit bagi rumah tersebut dan itulah sahaja amaun yang dibayar bagi rumah itu setakat ini. Sayangnya yang arif hakim langsung tidak mempertimbang faktor ini. Yang arif hakim juga gagal memberi tekanan yang mencukupi kepada keterangan peguamcara yang menyediakan wasiat setelah diarahkan oleh simati. Peguamcara tidak mempunyai kepentingan peribadi dalam hal ini. Beliau memberi keterangan bahawa simati telah memberitahunya bahawa dia hendak meninggalkan rumah kepada ibunya kerana ibunyalah yang membayar deposit bagi rumah tersebut.

[3] Yang arif hakim bergantung kepada laporan perubatan yang disediakan setahun selepas kematian simati. Tiada apa-apa disebut di dalamnya tentang keadaan mental simati. Selain itu doktor yang menyediakan laporan perubatan itu tidak dipanggil untuk memberi keterangan. Sudah menjadi undang-undang yang terpakai bahawa keupayaaan berwasiat yang sedikit adalah memadai dalam pembuatan wasiat. Tidak perlu dibuktikan bahawa pewasiat berada dalam keadaan kesihatan yang sempurna ataupun bahawa fikirannya sebegitu jelas sehingga ia mampu memberi arahan-arahan yang rumit. Adalah memadai jika ianya dapat dibuktikan bahawa beliau mampu memberi gambaran tentang bagaimana pesakanya patut dibahagikan dan bahawa beliau boleh memahami yang arahannya kepada peguamnya itu pada dasarnya telah dipatuhi. Dalam rayuan semasa, pesaka simati hanya mengandungi rumahnya, KWSP dan polisi insuransnya di mana rumah telah diberikan kepada ibunya dan KWSP dan polisi insurans kepada anak tunggalnya. Semua ini tidak melibatkan apa-apa kerumitan.

Rayuan dibenarkan; kes dibicara semula di hadapan hakim lain berkaitan isu keadaan syakwasangka yang menyelubungi pembuatan wasiat dan keupayaan berwasiat simati.]

Reported by Usha Thiagarajah

Case(s) referred to:

Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC ***(refd)***

Lee Ing Chin & Ors v. Gan Yoon Chin & Anor [2003] 2 CLJ 19 CA ***(foll)***

Tho Yow Pew & Anor v. Chua Kooi Hean [2002] 4 CLJ 90 CA ***(foll)***

Tryrell v. Painton [1893] PD 151

Other source(s) referred to:

Williams on Wills, 7th edn, p 35

Counsel:

For the appellant - Hamid Sultan Abu Bakar; M/s Hamid Sultan Loga Chitra & Assocs

For the respondent - Teh Poh Lian; M/s Teh & Assocs

JUDGMENT

Abdul Hamid Mohamad JCA:

There has been some confusion in the learned judge's grounds of judgment regarding the description of the defendants in the High Court and appellants here. In the Petition for Probate No S6-32-392-89, the writ of summons, indeed in all the pleadings, affidavits, judgment and the documents filed in the High Court, Sethambal d/o Doraiappah, the mother of the deceased was described as the 1st defendant and Balasingam a/l M. Veerasamy, the brother of the deceased was described as the 2nd defendant. The notice of appeal, the memorandum of appeal and all the documents filed in this court also describe them that way. So is the heading in the learned judge's grounds of judgment. However, in the text of the grounds of judgment, the learned judge made a mistake in describing the mother as the 2nd defendant and the brother as the 1st defendant. This is to be found at p. 1 and p. 5 of the grounds of judgment. At p. 1, for example, the learned judge said:

> In this purported will, the 1st and 2nd defendants, his (deceased's - added) **brother and mother respectively**, are named executors. There are 2 specific legacies:
>
> > (a) A dwelling house known as No. 9, Jalan 12/38A, Taman Sri Sinar, Segambut, Kuala Lumpur (the house) bequeathed to the 2nd defendant;...

There is no doubt that by "the 2nd defendant" the learned judge meant the mother but the description of "the 2nd defendant" by him is contrary to what is stated in the headings and texts of all the documents filed in the High Court and in this court. In all those documents" the 2nd defendant" or "the 2nd appellant" is the brother.

In this judgment of ours, we shall refer to the defendants or appellants as they appear in all those documents ie, the mother is the 1st defendant/appellant and the brother is the 2nd defendant/appellant.

Now, the facts. The deceased, Krishnan a/l Veerasamy died of bone cancer at the age of 36 leaving behind a wife (the plaintiff in the High Court and the respondent in this court) and a child of about four months old at the time of his death. He purportedly made a will on 1 August 1983, ie, three days before his death. In the purported will, the 1st and 2nd appellants, the deceased's mother and brother respectively, were named executors. There were two specific legacies:

> (a) a dwelling house known as No. 9, Jalan 12/38A, Taman Sri Sinar, Segambut, Kuala Lumpur which was bequeathed to the 1st appellant (the mother); and
>
> (b) all monies in Employees Provident Fund (EPF) and insurance policies which was bequeathed to his child.

The respondent is the sole beneficiary under the general legacy.

The original purchase price of the house was RM90,000. Even though only the deposit was paid by the deceased, it became fully settled upon his death by an insurance scheme in which he participated. The money in the EPF and the insurance scheme was worth about RM6,000. There was nothing for distribution under the general legacy. In short, the respondent gets nothing.

On 17 November 1989, the appellants petitioned for probate at the Kuala Lumpur High Court - Probate Petition No. S6-32-392-89. The respondent filed two caveats, the first on 30 June 1990 and the second on 13 April 1992. In the meantime, the respondent filed a civil suit against the appellants praying for a declaration that the purported will is *void abinitio*.

The probate action was consolidated with the civil suit. The learned judge heard both actions "as a contested matter".

In the civil action, the respondent alleged that:

> (1) the purported will was void and of no effect because it was not the will of the deceased;
>
> (2) the purported will was a forgery and the signature of the deceased was obtained by fraud committed by the appellants and deceased's two other brothers who attested the deceased's signature on the document.

In the alternative, it was alleged that

> (1) the deceased, when executing the purported will, was not of sound mind, memory and understanding;
>
> (2) that the signature was obtained by undue influence.

After a full trial, the learned judge dismissed the appellants' petition in S6-32-392-89 and allowed the respondent's claim in S5-22-502-91 with costs.

In his judgment, the learned judge first (as far as the appeal is concerned) dealt with the burden of proof. Referring to various authorities, he concluded that where there are circumstances which excites suspicion, the party propounding the will must "remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence or whatever else they rely on to displace the case made for proving the will", quoting Lindley LJ in *Tryrell v. Painton* [1893] PD 151.

The learned judge said:

> In my opinion the plaintiff's claim should be separated into two parts. This (sic) first is based on suspicious circumstances surrounding the making and attestation of the purported will and, if so made and duly attested, the deceased had no testamentary capacity at the material time. For this, the suspicious circumstances must first found to be in existence and thereafter, the onus is on the defendants to remove these suspicions.

> The second is the allegation of fraud and undue influence and towards this, the burden of proof is on the plaintiff. From the authority of *Tyrell v. Painton (supra)*, until the suspicions are removed, the plaintiff need not begin her task of proving fraud and undue influence.

Considering the evidence before him the learned judge concluded that as the appellants had failed to remove the suspicions and to prove testamentary capacity, there was no necessity for him to consider whether fraud or undue influence was proved by the respondent. As the propounders of the will had failed to prove the will itself, he made the orders that he did.

Because of the respondent's filing of the writ action when there was a petition pending and both actions being heard and considered together, a point was raised about the burden of proof. Learned counsel for the appellants submitted that there is "a fine distinction between the burden of proof in a civil suit seeking a declaration and a petition wherein the petitioner has to prove the testamentary capacity of the deceased. As far as the civil suit is concerned we know that the respondent failed to prove the allegation of fraud, undue influence and coercion and must be dismissed with costs."

From the cases referred to us, we notice that it seems to be the practice of solicitors in this country to commence writ actions for a declaration that the will is valid or void. In *Tho Yow Pew & Anor v. Chua Kooi Hean [2002] 4 CLJ 90* (CA) the executors and trustees first applied for a grant of probate. When it was challenged by the wife the executors and trustees took out a writ to propound the will to have it declared valid. The wife counter-claimed for a pronouncement against the validity of the will. The action was tried. It was against the decision in respect of the writ action that the appeal came up to this court. On the issue of burden of proof, the court, through Gopal Sri Ram JCA said:

> In other words if the propounder of a will wishes to succeed in obtaining probate, he must upon challenge being taken establish (a) testamentary capacity and (b) dispel any suspicious circumstances surrounding the making of the will.

In *Lee Ing Chin & Ors v. Gan Yoon Chin & Anor [2003] 2 CLJ 19* (CA), the deceased's daughters brought an action against the executors to have it declared invalid. From the order made by this court granting probate to the executors in Petition for Probate No. 32-36-97, besides dismissing the action, it appears that there was also a petition for probate. The judgment of the court, again written by Gopal Sri Ram JCA dealt at length with the burden of proof. The learned judge, *inter alia* said:

> It is settled law where the validity of a will is challenged, the burden of proving testamentary capacity and due execution lies on the propounder of the will as does the burden of dispelling any suspicious circumstances that may surround the making of the will. However the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lies on those who challenge the will in this case the plaintiffs.

In *Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153* (FC) the plaintiff applied for and, on 16 August 1983, obtained a grant of letters of administration in respect of the deceased's estate (1st action). The defendant petitioned the High Court at Ipoh for administration of the deceased's estate (2nd action). On 12 March 1984, the defendant presented a fresh petition in the same High Court, this time for grant of probate in his favour as executor and beneficiary of the deceased's estate (3rd action). On 21 August 1984, the

court ordered the grant of probate. On 15 October 1984 the plaintiff commenced proceedings in the High Court at Kuala Lumpur for the revocation of the order for the grant of probate made by the High Court at Ipoh (4th action). On 21 November 1985 the plaintiff commenced a writ action in the High Court at Ipoh seeking to have the consent order entered by the defendant and a third party declared a nullity (5th action). There was yet another action filed on 26 January 1985 (Probate Civil Suit No. 2105 of 1985 at Kuala Lumpur High Court) for a declaration that the alleged will was a forgery and for an order to revoke the grant of probation in favour of the defendant (6th action). The learned High Court Judge held that the will was genuine and dismissed the plaintiff's probate action.

The Federal Court criticised the multiplicity of proceedings. However, it is to be noted that the Federal Court in a judgment delivered by Anuar Zainal Abidin (CJ (Malaya)), agreed with the trial judge who ordered the defendant (in the writ action) to begin his case first that is, to prove the will. In other words, even in a writ action, the burden is on the propounder of the will to prove it.

It is clear to us from these authorities that even in a writ action in which the validity of the will is challenged, the burden is on the propounder of the will to establish the testamentary capacity and to dispel any suspicious circumstances surrounding the making of the will.

In this case, the learned judge had taken the same approach and he was correct in doing so. However, whether his conclusion that the respondent had failed to remove the suspicions and to prove testamentary capacity or not is another matter that we will now consider.

The principles of appellate intervention have been dealt with at length by this court in *Lee Ing Chin & Ors. v. Gan Yock Chin & Anor (supra)*. We adopt them and will not repeat except to quote one passage therefrom:

> No doubt, an appeal Court will be slow in disturbing a finding of fact recorded by the trial Court based on proper appreciation of evidence but it is also the duty of the appellate Court to disturb it if the burden of proof is not discharged by cogent, positive and acceptable evidence in the light of the law laid down by this Court. More so when there is non-consideration of material evidence and appreciation of evidence is not objective and one sided.

In the instant appeal, the learned judge analysed the "suspicious circumstances" under the heads of "The presence of three brothers at the same time," "observation of the witnesses" and concluded "The suspicions expressed by the plaintiff, in my opinion, are probably true, and I am not satisfied that the defendants have removed them."

Under the first head, the learned judge said.

> From the evidence adduced, all these three witnesses, DW1, DW2 and DW3, made no prior arrangement to meet during lunch hour on 1 August 1989 at the bedside of the deceased. They all affirmed that they did not see the plaintiff there. According to DW2 and DW3, they happened to visit the deceased at that material time when DW1 brought along the will, entirely on his own volition. Though I agree that it is not unnatural in our Asian customs to visit a close relative gravely ill in hospital at any time, but, surely one can recall the approximate hour of the day given the significance of the event where a will was signed and the testator, a brother, died two days later. Surprisingly none of

these witnesses can have such recollection except to state that it was around lunch time. This is strange considering that these witnesses were in employment where observation of working hours and strict hospital visitation period coupled with the unusual incident would have, at least, stimulated one of them to recall the approximate hour of their visit. Flowing from this, if there had been no prior arrangement to meet then who were intended to be the attestators of the purported will? There is evidence that DW1 just happened to walk in when DW2 and DW3 were there. If this was the case, who did DW1 or the testator intend to attest will if DW2 and DW3 were not there? These incongruous circumstances do indeed cast doubts on whether the attestators were actually there when the purported will was alleged to be signed by the deceased.

On the observation of the witnesses on the condition of the deceased at the material time, the learned judge discussed it under two heads ie, first, whether the deceased was with oxygen mask and on a drip and, secondly, the overall physical condition of the deceased. It must be noted in the first place, that the doctor who attended to the deceased "just before his death" was not called as a witness. The doctor is Dr. Ahmad Kamal bin Mohamad.

The learned judge relied on a medical report made on 9 July 1990 the content of which was not agreed even though it was agreed that the maker need not be called. This is one of the grounds raised by learned counsel for the appellant. He drew our attention to other documents pertaining to the condition of the deceased which were not averted too by the learned judge.

We think we should reproduce all the reports in chronological order.

The first, dated 17 August 1989 written by Dr. Ahmad Kamal bin Mohamed, the registrar of the Kuala Lumpur Hospital reads:

TO WHOM IT MAY CONCERN

Dear Sir/Dear Madam,

Re: ENCIK KRISHNAN A/L VEERASAMY

The above named patient was 1st seen at our unit on 13.2.1985 with a diagnosis of Adenoid Cystic Carcinoma of the submandibular salivary gland. Surgery was done for him and the patient was subsequently referred to us for radiotherapy. He was planned for 5,000 cGy of radiation treatment to the neck but the patient stopped treatment after 2,500 cGy and refused further radiation. He was then lost (sic) to follow up after 18.6.86.

On 27.7.89 the patient was referred to us from the Orthopaedic Unit of General Hospital, Kuala Lumpur with n/o backache of 1/12 duration. A bone scan done revealed secondary lesions in the vertebral bones ie, (T4, T5, L2, L3, L4). He was then planned for radiation to the vertebral bone.

On 3.8.89, the patient stopped breathing whilst in the wards and the patient was certified dead on on 3.8.89 at 10.50 a.m.

Thank you.

Regards,

Yours sincerely,

Sgd.

DR. AHMAD KAMAL BIN MOHAMMAD,

Registrar,

Inst. Of Radiotherapy, Oncology,

And Nyuclear Medicine, hospital

Kuala Lumpur.

A year later, on 9 July 1990 the same doctor gave a medical report on the deceased referred to by the learned judge. It reads:

MEDICAL REPORT OF KRISHNAN

A/L VEERASAMY (DECEASED) - RT. 85/713

The following is a Medical Report of the deceased from 2.8.89 till his death on the 3rd August 1989. The patient was actually admitted on 27.7.89 and was in our wards awaiting commencement of radiotherapy to the vertebral bones. On 1.8.89, the patient complained of difficulty in breathing. A Chest X-Ray done on the same day revealed patchy opacities in left upper zone and the right upper, middle and lower zone of the lungs. These were suggestive of lung secondaries but the patient was started on antibiotic treatment with intravenous ampicillin 500 mg. 6 hourly and gentamicin 80 mg 12 hourly. He was also afebrile. This B/P recordings were as follow:

2nd August 1989 3rd August 1989

BP PULSE BP PULSE

5.20 a.m. - 120/70 98 5.30 a.m. - 130/90 120

8.55 a.m. - 130/70 102 9.00 a.m. - 190/120 120

12.40 p.m - 110/70 98 9.30 a.m. - 150/30 110

4.00 p.m. - 120/80 96

8.15 p.m. - 120/80 100

10.40 p.m - 130/90 120

On 3 August 1989 at 10.40am, the patient stopped breathing and was certified dead

Yours sincerely

Sgd.

DR. AHMAD KAMAL BIN MOHAMED

Registrar.

On 22 December 1990, in response to the respondent's solicitor's letters, Dr. Gabriel Nonis gave another medical report on the deceased. The report reads:

Re: Medical of Krishnan a/l Veerasamy

I refer to your letters dated 21/11/90 and 12/12/90. I regret and apologise for this late reply.

I have review (sic) the case records of the above named in great detail especially on the 1st day of August 1989. I regret to inform you that the relevant information you are seeking especially on the mental state of the patient is unavailable and undocumented.

The only information available from the medical records on the 1st day of August 1989 is as follows:

CXR (Chest X-Ray) - General patchy opacities

(Is this infection or secondaries?)

But CXR 7.7.89 - Clear.

The above was written by Dr. Ahmad Kamal (Our Registrar then) in his morning rounds. He was the doctor in charge of the ward which the patient was admitted. He then proceeded to order antibiotics that is intravenous Ampicillin 500 mg. QID and Gentamicin 80 mg. Bd. For a duration of one week and ordered for the CXR to be repeated.

The temperature readings of the patient on the 1st day of August 1989 were as follows:

4.00 a.m. - 37°C

8.00 a.m. - 37-1°C

4.00 p.m. - 37-0°C

8.00 p.m. - 37.0°C

12 midnight - 37.0°C

No other information on the patient is available from the medical records.

It should be noted that the only information available from the records as recorded Dr. Ahmad Kamal was:

CXR (Chest X-Ray) - General patchy opacities

(Is this infection or secondaries?)

But CXR 7.7.89 - clear.

On 22 April 1991, again in reply to the respondent's solicitor's letter, Dr. J.G. Nonis wrote:

Re: MEDICAL REPORT OF KRISHNAN A/L VEERASAMY

I refer to your letter dated on 15.3.91 regarding the Medical Report of the above named. As I have mentioned in my letter dated on 22.12.90, the Medical Officer-In-Charge of the patient at that time was Dr. Ahmad Kamal who is now pursuing his post graduate degree in Scotland. I wish to also stress that there is no mention of the patient's mental status in the case notes during that period of admission.

However, he was in the terminal stage of his illness. As such it is reasonable to conclude that he was very ill and his higher faculties were to a certain extent compromised. Hence he was probably not fit to make any important decision.

I hope the above statements would be useful to you.

Note that Dr. J.G. Nonis did not attend to the patient. Neither was he called to be a witness. He had confirmed that "there was no mention of the patient's mental status in the case notes during that period of admission."

Then he went on to give an opinion:

However, he was in the terminal stage of his illness. As such it is reasonable to concluded that he was very ill and his higher faculties were to a certain extent compromised. Hence he was probably not fit to make any important decision.

Interestingly, he concluded by saying.

I hope the above statements would be useful to you. (emphasis added).

To us this piece of opinion has little value, if at all. The doctor did not see the patient. He relied on a two-line note recorded by another doctor which says nothing about the patient's mental status. He was not called as a witness. In any event, even if his opinion is to be taken as the true condition of the deceased, it does little to assist in the determination of the testamentary capacity of the deceased. However, in all fairness to the learned judge, he did not rely on this report.

Still unhappy, the respondent's solicitor on 7 May 1991, again wrote to Dr. Ahmad Kamal, who was then in Scotland, pursuing his postgraduate studies. The respondent's solicitor in this

letter requested the doctor "to certify whether the deceased was in fact fit on the first of August 1989 for the purpose of signing his alleged Last Will."

Two things caught our attention. First, the request was made more than two years after the material date. There appears to be no response to that letter which is quite understandable.

Even though the learned judge mentioned generally the existence of other reports, he only specifically mentioned Dr. Ahmad Kamal's report dated 9 July 1990. That report was made almost a year after the death. As pointed out by Dr. Joel Gabriel Nonis in his letter dated 22 December 1990, the only information available from the medical records were the two lines reproduced earlier and there was no mention of the deceased's mental state. As Dr. Ahmad Kamal was not called to give evidence. We do not know where the other information was obtained from by him.

However, what the learned judge did was to accept as "accurate" the statement of Dr. Ahmad Kamal as contained in his report of 9 July 1990 on the deceased's medical condition at the material time. He went on to conclude:

> I do not think he (the deceased - added) was well on 1.8.1989. The said medical report recorded him as complaining of difficulty of breathing and secondaries were detected in his lungs. The "secondaries" in the lungs must be associated with cancer in the bone DW1 confirmed that the deceased was suffering from; it had spread to the lungs. This immediately contradicts DW1's claim that the deceased was "suffering from only bone cancer and not lung cancer..."

For these reasons the learned judge could not accept the evidence of DW2 and DW3 that the deceased was "well", sat up in bed, had a conversation with them, read the purported will, requested them to attest the will and handed back the will to DW1. The learned judge held that the evidence of DW2 and DW5, was also contradicted by PW2, the brother of the respondent who described the deceased's condition as follows:

> His (the deceased's) condition was bad; he cannot get out of bed himself; he can't move his hands and legs and he cannot carry his load. He was very pale. I spoke to him. He said he can't eat and drink well.

The learned judge said he did not think this portrayal of the deceased's condition as an exaggeration. He concluded:

> With the deceased's experiencing breathing difficulty, there is probable truth in the assertion by the plaintiff of the presence of oxygen mask on the deceased.

On the question of whether the drip was applied to the deceased the learned judge held that it was in view of the evidence of PW2 (the respondent's brother) that the deceased was not eating and drinking well and the medical report that the deceased was experiencing breathing difficulty.

On these grounds the learned judge found that the appellants had not removed the suspicions.

Under the heading testamentary capacity the learned judge held that with the severity of the deceased's physical condition the suspicion of testamentary capacity of the deceased was

exceedingly high. He concluded that the deceased's testamentary capacity had not been established.

We find the judgments of this court in *Tho Yow Pew & Anor v. Chua Kovi Hean (supra)* and *Lee Ing Chin & Ors v. Gan Yook Chin & Anor (supra)* of great assistance to us. In *Tho Yow Pew*, Gopal Sri Ram JCA, delivering the judgment of the court, very clearly stated:

> Now the law upon the subject of a testator's testamentary capacity, we find to be well settled. The decided cases show quite clearly that very slight testamentary capacity is required for the making of a will. The cases in which wills have been held invalid for lack of testamentary capacity involve testators who were utterly insane either upon the finding of the probate court or by reason of an order appointing a committee on the ground of insanity of the testator.
>
> What the law requires to vitiate testamentary capacity is an insane delusion existing at the time of making of the will. This will include insanity at the time of the making or giving instructions for the making of the will. There are numerous authorities on the point. We find it quite unnecessary to deal with all of them here. We would merely refer to three.
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> In *Judah v. Isolyne Bose* [1945] AIR PC 174 Lord Goddard when delivering the advice of the Privy Council held that the mere fact that the testatrix was unwell when she executed her will is a long way from saying that she had no testamentary capacity.
>
> In *Williams on Wills* (7th edn) at p. 35, the editors of this leading text upon the subject make the following statement:
>
> > (i) Criterion of sound disposing mind sound testamentary capacity means that three things must exist at one and the same time: (i) The testator must understand that he is giving his property to one or more objects of his regard; (ii) he must understand and recollect the extent of his property; (iii) he must also understand the nature and extent of the claims upon him both of those whom he is including in his will and those whom he is excluding from his will. The testator must realise that he is signing a will and his mind and will must accompany the physical at of execution.

At p. 96 of the report Gopal Sri Ram JCA clarified "suspicious circumstances":

> It is clear from the foregoing passages, in particular from the passages in *Theobuld on Wills* that suspicious circumstances in the context of wills relate to circumstances surrounding the making of the will, not circumstances surrounding the testamentary capacity of the testator. In other words if the propounder of a will wishes to succeed in obtaining probate, he must upon challenge being taken establish (a) testamentary capacity and (b) dispel any suspicious circumstances surrounding the making of the will.
>
> An illustration of the latter is to be found in the case of *Wintle v. Nye* [1959] 1 All ER 552 where the solicitor who drafted the will for a 66 year old lady and who had been her legal adviser for several years was a substantial beneficiary under that will. Another illustration is to be found in the case of *Sarat Kumari Bibi v. Rai Sakhi Chand* [1929] AIR PC 45, where the writer of the will had taken a very active part in its preparation

> and had obtained a substantial advantage under it.

In that case, this court found that the learned trial judge had addressed his mind to what the learned judge termed as "suspicious circumstances relating to the testamentary capacity of the testator." "That approach" according to Gopal Sri Ram JCA, "falls well outside both principle and authority. It is a misdirection of law".

In the instant appeal too, the learned judge appears to have fallen into the same error when he talks about "the suspicion on the testamentary capacity of the deceased..."

Actually, in the instant appeal, the only factor relating to suspicious circumstances surrounding the making of the will is the presence of the three brothers at the same time at the hospital. In view of the order that we will make later, we shall not give our view on it. Again, without making a definite finding, it appears to us that, the fact that the house, the only substantial property left by the deceased, was given to the mother is not suspicious. There is the evidence of DW4 that he had asked the deceased specifically why he wanted to leave the house to his mother. The reason is because it was the mother who had paid the deposit for the house and that was the only amount paid. The fact that the mother had paid for the deposit for the house was corroborated by DW1. Unfortunately, from the judgment, the learned judge, failed to consider this factor at all.

The other factor that the learned judge appears to have failed to consider is that the will was prepared by a solicitor who gave evidence at the trial. He is DW4. To us DW4's evidence is the most important of all. He is an advocate and solicitor, he had no personal interest in the matter and he gave evidence in court. He very clearly said that the deceased was introduced to him by Balasingam (DW1), a brother of the deceased. Balasingam used to supply stationary to his former firm. He (DW4) said he met the deceased sometime in July 1989 at the General Hospital Kuala Lumpur. He was taken there by Balasingam. He (DW4) said that the instructions to prepare the will was given to him personally by the deceased when he met the deceased at the hospital. Asked about the nature of his conversation with the deceased, he said.

> The deceased told me that he wanted to make a will. He told me that he was married and had one child. He wanted to leave his house to his mother, EPF and Insurance on trust for his daughter and the balance of his estate to his wife. I recall that I had specifically asked him why he wanted to leave his house to his mother. He said that he had bought a house with a government loan and that the deposit was paid by his mother. The house was still not completed and if anything were to happen to him he wanted his mother to get the house in view of the deposit paid by her.

Asked to identify the will, he said: "This is the will which was prepared by me on the instructions of the deceased."

Unfortunately the learned judge, from his judgment, does not appear to consider DW4's evidence. Had he done so and had he given sufficient weight to it, he might have come to a different conclusion.

In conclusion, on the issue of suspicious circumstance surrounding the making of the will, while we do not make a definite finding, we find that the learned judge had failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial and,

in reaching his conclusion, had not properly analysed the entirety of the evidence which was given before him - see *Lee Ing Chin & Ors v. Gan Yook Chin & Anor (supra).*

We now come to the testamentary capacity. On this issue, the learned judge relied mainly on the medical report given by Dr. Ahmad Kamal, prepared one year after the death of the deceased. The doctor was not called to give evidence. It is not known where he obtained the information from, considering that, as stated by Dr. Joel Gabriel Nonis, the only information available from the medical records written by Dr. Ahmad Kamal on the day in question consists of only two lines, reproduced earlier. Dr. Ahmad Kamal's earlier report dated 17 August 1989, about two weeks after the death of the deceased was nothing more than a history of the treatment. The subsequent report made about one year later, accepted as "accurate" by the learned judge talks about the deceased having difficulty in breathing and that the deceased was "afebrile", which simply means "having no fever". Nothing was mentioned about his mental condition.

What the learned judge did was, having accepted the medical report, having made a finding that the secondaries in the lungs "must be associated with cancer in the bone" when the medical report only said "These were **suggestive** of lungs secondaries;" having made a finding that the deceased was under oxygen mask based on the evidence of the respondent and her brother and the statement in the medical report that the deceased had difficulty in breathing (even though the report says nothing about oxygen mask) and rejecting the evidence of the deceased brothers; having made a finding that the deceased was under a drip, again based on the respondent's evidence and the medical report which actually says nothing about it, the learned judge concluded that "with the severity of the deceased's physical condition... the suspicion on the testamentary capacity of the deceased at the material time is exceedingly high" and has not been established.

Coming back to the law. Again our task is made easy by this court's decisions in the two cases referred earlier. Again we adopt the statement of the law stated therein. The passage from *Tho Yow Pew & Anor v. Chua Kooi Hean (supra)* reproduced earlier clearly states that very slight testamentary capacity is required for making the will. A passage from the judgment of Macleod CJ in *Gordhandas v. Bai Suraj* AIR [1921] Bom. 193 reproduced in the judgment of this court in *Lee Ing Chin & Ors v. Gan Yook Chin & Ors v. Gan Yook Chin & Anor (supra)* is worth repeating:

> It is well settled law now that it need not be proved that a testator, in order that his will may be found good by a Court, was in a perfect state of health, or that his mind was so clear as to enable him to give complicated instructions. It is sufficient if it is proved that he was able to give the outlines of the manner in which his estate was to be disposed of, and was able, when the result of the lawyer's efforts was read out to him, to understand that his instructions in the main had been complied with.

It is to be remembered that in the instant appeal the estate of the deceased consists only the house, his EPF and insurance policy, the house was given to his mother and the EPF and insurance policy to his only child. There is nothing complicated about it.

We find that in the instant appeal, as in *Tho Yow Pew & Anor v. Chua KooiHean (supra)* there was a failure to consider certain evidence adduced by the appellants which was highly relevant to the issues before the court.

We also find ourselves in the same situation as this court was in *Tho Yow Pew v. Chua Kooi Hean (supra).* We find that case of great assistance to us regarding the decision we should make and for similar reasons given by this court in that case as stated in the courts judgment delivered by Gopal Sri Ram JCA.

> In the present case, the learned Judge addressed his mind to what he termed as suspicious circumstances relating to the testamentary capacity of the testator. That approach falls well outside both principle and authority. It is a misdirection of law. Whether the learned judge would have come to the same conclusion had he applied the correct test is something we are unable to say. Whether indeed the testator in the present case had testamentary capacity upon a proper consideration of the evidence and upon a proper direction of the law by the trial judge unto himself is a question we do not think is within our realm. It will be wholly inappropriate in our judgment, for us to enter upon this issue because we have neither seen nor heard the witnesses. Indeed if we do attempt to resolve this issue we would be arrogating to ourselves powers we really do not have or if we had we ought not to exercise on the peculiar facts and circumstances of the instant case.

In the circumstances, as was done by this court in *Tho Yow Pew & Anor v. Chua Kooi Hean (supra)* in the interest of justice we direct a re-trial of the action before another judge on the issues of suspicious circumstances surrounding the making of the will and the testamentary capacity of the deceased. Nothing that we have said in this judgment is to be considered as conclusive upon the facts or evidence led before the learned judge. Those matters are to be considered afresh by the judge re-trying the case. It may be said that this would cause further delay in the disposal of the action and that the respondent is given a second bite of the cherry. However, in our view, truth and justice is more important than quick disposal and interest of either party to the action.

We therefore allow the appeal and order the matter to be re-tried before another judge. The deposit in this court is to be refunded to the appellants. On costs, we would also follow the order made by this court in *Tho Yow Pew & Anor v. Chua Kooi Hean (supra)* and that is that the costs should follow the event of the re-trial. We leave it to the learned judge upon re-trial to determine whether the costs are to be borne by the successful party or by the estate.