Privy Council Appeal No. 24 of 1946

Battan Singh and others - - - - - - - *Appellants*

v.

Amirchand and others - - - - - - - *Respondents*

FROM

THE SUPREME COURT OF FIJI

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH JULY AND THE 8TH DECEMBER, 1947

Present at the Hearing:

LORD ROCHE
LORD NORMAND
MR. JAMES STRATFORD

[*Delivered by* LORD NORMAND]

This is an appeal from a judgment and decree of the Supreme Court of Fiji in its Probate Jurisdiction which decreed probate of a will dated 3rd April, 1944, of an Indian named Jaimal, who died on the day after the execution of the will. The issue to be decided is whether that will which was in favour of the respondents Amirchand and Mehar as the sole beneficiaries is valid or whether a will dated 25th February, 1944, in favour of the testator's nephews ought to be admitted to probate.

The testator was a Sikh who had come to Fiji about thirty-eight years before his death. He had made a considerable fortune as a money-lender and his estate amounts to more than £20,000. He was illiterate and ill-educated but he could write his name in English. Amirchand and Mehar were in no way related to him but they were both indebted to him at his death, Amirchand for about £400 and Mehar for £6,500. The testator had no wife or child, but he had had a brother who lived in India and who died about 1940 or 1941. This brother had four sons, the beneficiaries under a will of 26th November, 1941, which was confirmed by a codicil of 1st July, 1942, and they and their father had been the beneficiaries under a still earlier will of 21st January, 1938. It is proved that the testator had been on affectionate terms with his brother to whom he paid a prolonged visit in India in 1938 to 1940, and that he was also on good terms with his nephews to two of whom he had at one time given a power of attorney to enable them to deal on his behalf with certain property belonging to him in India. He employed a firm of solicitors in Fiji, Messrs. Ellis Munro Warren & Leys, to attend to his affairs and this firm had been instructed by him to draw up the testamentary writings above referred to except the final and disputed writing of 3rd April, 1944. Jaimal became gravely ill with pulmonary tuberculosis, and in the early part of 1944 he was in the Suva Government hospital. He left that hospital in February and went to the Sikh temple at Samabula. It was while he was at this temple that he executed the will of 25th February 1944 appointing the President, Secretary and Treasurer of the Sikh Gurdwara Committee at Samabula, Suva, to be his executors and trustees and leaving all his property to his four nephews equally. Amirchand was present at the making of this will. Shortly afterwards, as Jaimal wanted to enter the Lautoka hospital at Ba, Amirchand brought him to a stable near Mehar's house at Ba in which he stayed for a few days before entering the hospital. He removed from there to the

Sikh Gurdwara at Lautoka, and was next taken to a house hired by Mehar at Yalaleva, where he arrived about two or three weeks before his death. On Friday, 31st March, he received a visit from a young man named Hari Charan, who as a boy about twelve years earlier had had some acquaintanceship with him. Hari Charan gave evidence that this was the third visit that he had paid to Jaimal in as many weeks and that it was a casual visit. Jaimal, however, on this occasion is said to have lost no time in taking Hari Charan into his confidence about his testamentary intentions. According to Hari Charan, whose evidence the learned Chief Justice appears to have accepted only because it was uncontradicted, Jaimal told him that he wished to make a will in favour of Mehar and Amirchand because they had looked after him so well and he asked Hari Charan to get a lawyer to draw up a will for him. Hari Charan asked whether he had ever made a will before and Jaimal said he had made two, but that he was not worrying about them and that he wished to make his last will in favour of these men. He also said that he had neither wife nor children but that he had relatives " regarded as brothers " in India to whom he had given sufficient property in the way of money and assets. It does not appear from Hari Charan's examination in chief that Jaimal asked him to do more than to get a lawyer for him, but in his cross-examination he says that Jaimal asked him to get a will drawn up in favour of Amirchand and Mehar. Hari Charan went on the same day to Mr. Davidson, a lawyer in Fiji, and gave him instructions which enabled Mr. Davidson to draw up the will. Amirchand accompanied Hari Charan to Mr. Davidson's office but remained outside and Mr. Davidson is said to have had no direct communication with him that day. The will is in the following terms:

> " This is the last will and testament of me Jaimal (Father's name Nehala) formerly of Suva but now of Yala Levu in the District of Ba in the Colony of Fiji ' Financier ' I revoke all former Wills and Testamentary Dispositions made by me and declare this to be my last and only will after payment of all my just debts funeral testamentary and medical expenses I give devise and bequeath unto my dear friends Amirchand (Father's name Utham) and Mehar (Father's name Saudi) both of Yala Levu aforesaid Farmers as Tenants in Common in equal shares absolutely all my estate and property whatsoever and wheresoever situate and whether in possession reversion or remainder and I appoint them the said Amirchand and Mehar to be the Trustees and Executors of this my said Will. I declare that I have no next of kin nor blood relations in Fiji or elsewhere who are known to me I desire to express by this my said Will my deep gratitude to the said Amirchand and Mehar for their devotion to me during my present illness."

Mr. Davidson deponed that the expressions of affection for and gratitude to Amirchand and Mehar were inserted by him of his own volition and without instructions from Hari Charan, and that for the statement that the testator had no next of kin nor blood relations in Fiji or elsewhere his only warrant was Hari Charan's statement that Jaimal had no wife or children and that he inferred the rest. Mr. Davidson typed out this draft will either on the afternoon of Friday, 31st March, or the next morning. According to their evidence Amirchand and Hari Charan had expected Mr. Davidson to deal with the will as a matter of urgency, and as no progress had been made by Monday morning they went in a taxi cab to his office and fetched him to see Jaimal. Mr. Davidson said that he put questions to Jaimal and read over the will in Hindu and then in English which was again translated into Hindu by his clerk: that Jaimal listened carefully and at the end gave his assent to the will and said he wanted nothing in it changed: that among other questions put to Jaimal before he gave his final assent, Mr. Davidson asked who Amirchand and Mehar were and Jaimal put a hand on each of these two men and spoke with affection of them and said he wanted to give them all his property. In answer to other questions he said they were the only persons who had

helped him in his illness, that he had no relations in Fiji and that he did not know if he had any relations elsewhere than in Fiji. Mr. Davidson also said he was told by Jaimal that he had made a previous will but Mr. Davidson asked no questions about its contents. Jaimal tried to sign the will, but his hand was too shaky. He then tried to affix his thumb mark but he was too weak to do so unaided and Mr. Davidson had to help him. Mr. Davidson considered that Jaimal was a very sick man though his mind was perfectly logical. He also formed the opinion that Jaimal was not receiving adequate medical treatment and he said so to Amirchand. Amirchand and Mehar were present in the room with Mr. Davidson and Jaimal during the whole interview between them and it is significant that Amirchand, who must have heard the questions and answers about Jaimal's relations and who must also have known from being present when the earlier will was made that Jaimal had nephews in India, did not intervene to correct Jaimal's memory. Amirchand, in his own evidence, which was disbelieved by the learned Chief Justice, falsely depones that he did intervene to say that Jaimal had nephews in India. It was no doubt in consequence of Mr. Davidson's advice that Amirchand took Jaimal to a hospital in the afternoon. Jaimal was by that time unable to speak. The doctor found that he was in a very weak condition, but gave him some medicine and told Amirchand to take him home. Jaimal died next day.

The objections to the validity of the will of 3rd April, 1944, urged in the court below were:—(1) that it was not duly executed according to the provisions of the Wills Act, 1837; (2) that Jaimal was not, when he executed it, of sound mind, memory or understanding; (3) that the execution was obtained by the undue influence of Amirchand and Mehar; and (4) that Jaimal did not know or approve the contents. The learned Chief Justice summarily rejected the first, third and fourth of these objections. In the appeal to their Lordships' Board nothing was said in support of the first objection, which was merely a technical objection to the authentication of the will. Nor was it maintained that Jaimal did not know the contents of the will in the sense that he did not understand the meaning and effect of the words read to him. It was no longer denied that he gave his assent. The charge of undue influence was not abandoned at the hearing of this appeal but it was not pressed because, as counsel for the appellant explained, the evidence on which he relied for proof of undue influence was in part the evidence relied on for proof that Jaimal was not of sound mind, memory or understanding, and if it was not sufficient to establish that ground of objection it would not suffice to prove the undue influence. The issue of undue influence is in this case purely one of fact and as the learned Chief Justice has found in favour of the respondents, their Lordships would not be disposed to reverse his finding though the evidence gives reason for the gravest suspicion.

The issue whether Jaimal was of sound mind, memory and understanding was decided by the learned Chief Justice on what seems to their Lordships a misunderstanding of *Parker* v. *Felgate* (1883) 8 Probate Division 171. That case decided that if a testator has given instructions to a solicitor at a time when he was able to appreciate what he was doing in all its relevant bearings and if the solicitor prepares the will in accordance with these instructions, the will will stand good, though at the time of execution the testator is capable only of understanding that he is executing the will which he has instructed, but is no longer capable of understanding the instructions themselves or the clauses in the will which give effect to them. The learned Chief Justice applied this case by holding that Jaimal gave instructions to Hari Charan at a time when his memory was not proved to be defective; that these instructions were properly embodied in the draft will by Mr. Davidson; that Jaimal was able to understand the will and to give his assent to it on the day of execution, and therefore that Jaimal was of sound disposing mind at that date.

The principle illustrated in *Parker* v. *Felgate* and in the similar case of *Perera* v. *Perera* (1901) A.C. 354 has, in their Lordships' opinion, no application to the present case. Apart from the single answer already noticed in cross-examination the tenor of Hari Charan's evidence is that Jaimal merely asked him to obtain a lawyer to draw his will. The words spoken to by Hari Charan in the examination in chief are " will you procure a lawyer for me to draw up the will ", and in another place he was asked " and he asked you to get a lawyer for him and you promised to do so? ", and answered " That's right ". Their Lordships would be reluctant on this evidence to take it as proved that Jaimal asked Hari Charan to give specific instructions to a solicitor on his behalf. Nor is it apparent from Hari Charan's account of the conversation that Jaimal intended to leave the whole of his property, wherever situated, to Amirchand and Mehar to the exclusion of his relations, and Hari Charan does not speak of any express direction that the previous will should be destroyed or cancelled. The learned Chief Justice has made no specific finding but has tacitly assumed that Hari Charan received specific instructions which he was to transmit to a solicitor to draw a will cancelling all previous wills and leaving all that Jaimal possessed to Amirchand and Mehar equally between them. Their Lordships are further of opinion that the principle enunciated in *Parker* v. *Felgate* should be applied with the greatest caution and reserve when the testator does not himself give instructions to the solicitor who draws the will, but to a lay intermediary who repeats them to the solicitor. The opportunities for error in transmission and of misunderstanding and of deception in such a situation are obvious, and the court ought to be strictly satisfied that there is no ground for suspicion, and that the instructions given to the intermediary were unambiguous and clearly understood, faithfully reported by him and rightly apprehended by the solicitor, before making any presumption in favour of validity.

The learned Chief Justice was accordingly not entitled to conclude as he did that it was unnecessary to determine what was the condition of Jaimal's memory on the day when the will was executed. That was indeed the only day on which Jaimal was seen by Mr. Davidson and it is plain from Mr. Davidson's evidence that though he had drafted a will on information supplied to him by Hari Charan with, as he supposed, the authority of Jaimal, he was not satisfied until he had obtained instructions from Jaimal himself. There were, moreover, in the draft will, as has been seen, statements which Mr. Davidson had inserted of his own volition and he said he was at pains to put these statements to Jaimal. One of these was the statement that Jaimal had no next of kin nor blood relations in Fiji or elsewhere. It was on this statement that the appellants chiefly founded the argument that the testator was not of sound mind, memory and understanding when he executed the will. The respondents' counsel maintained that the finding that Jaimal knew and understood the contents of the will was a conclusive answer to this argument. But that is a misunderstanding of the judgment of the learned Chief Justice who expressly says that he found it unnecessary to enquire into the state of Jaimal's memory on the day when the will was executed. A testator may have a clear apprehension of the meaning of a draft will submitted to him and may approve of it, and yet if he was at the time through infirmity or disease so deficient in memory that he was oblivious of the claims of his relations and if that forgetfulness was an inducing cause of his choosing strangers to be his legatees, the will is invalid. In *Banks* v. *Goodfellow* (1870) Law Reports 5 Queen's Bench 549, Chief Justice Cockburn, delivering the judgment of the court said, at page 565, " it is essential to the exercise of such a power " (scilicet, testamentary power) " that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, and prevent the exercise of his natural faculties—that no insane delusion shall

influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made." In *Harwood* v. *Barker* (1840) 3 Moore Privy Council 282, the same principle had been stated and it was observed that when a testator suffering from a debilitating disease had made a will excluding from his bounty his near relations in favour of his wife, it was necessary to determine whether he was at the time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property. In *Sivewright* v. *Sivewright's Trustees* (1920) Session Cases (H.L.) 63, Lord Haldane, with whom Lord Dunedin and Lord Buckmaster concurred, said, " The question whether there is such unsoundness of mind as renders it impossible in law to make a testamentary disposition is one of degree. A testator must be able to exercise a rational appreciation of what he is doing. He must understand the nature of his act. . . . If his act is the outcome of a delusion so irrational that it is not to be taken as that of one having appreciated what he was doing sufficiently to make his action in the particular case that of a mind sane upon the question, the will cannot stand. But, in that case, if the testator is not generally insane, the will must be shown to be the outcome of the special delusion." There is, of course, in the present case no question of insanity in the general or in the popular sense. But here the testator, who is proved to have been in the last stages of consumption and to have been reduced by disease to extreme weakness, has declared in his will that he had no relations anywhere, though if he had been of sound mind in the sense of the cases cited he must have known that the statement was untrue.

The testator immediately before giving assent to the terms of the will had said that he did not know whether he had relations elsewhere than in Fiji. This, however, does not better the case, but merely provides additional evidence of his weakness and vacillation of memory about his relations. There is evidence that at an earlier stage of his illness the testator had at one time remembered these nephews, in whose favour he had made a will as recently as in February, 1944, and had been under the mistaken belief that he had made by gift adequate provision for them. At other times he appears, according to some of the evidence, to have remembered that they took benefits under the wills he had made. The evidence as a whole shows that, though the Chief Justice may or may not have been warranted in saying that there was no good ground for inferring that Jaimal's memory was defective on the 31st March, there was a rapid degradation of his memory of his nephews till at last he reached the stage when he executed his will of denying their existence. It is relevant to note that he failed to employ the solicitor who had acted for him on previous occasions or even to ask him to send the previous wills or copies of them, for these are precautions which a testator of sound mind who deliberately intended to alter his will and to disinherit his near relations would naturally take. The result was that he obtained the services of a solicitor unacquainted with his family affairs and unable to judge whether he had the capacity to make a will with due regard for the claims of his nephews for whom he had till the closing days of his life always felt a warm affection. The opinion of Mr. Davidson and some other witnesses that Jaimal's mind was clear and logical and sound, though it might have had some value if the question had been one of his general sanity, is of no value in the present case where the question is whether there was a particular defect of memory caused by the weakness of disease. Witnesses were adduced to prove that the testator had a week or so before his death expressed to them his intention of leaving his property to Amirchand and Mehar. The evidence is of little relevance to the issue on which the appeal must turn. The learned Chief Justice does not mention this evidence, and their Lordships do not doubt that he had the fullest justification for ignoring it, and since it was pressed upon their attention their Lordships think it proper to say that after considering it they deem it unworthy of credit and that its only effect is to deepen the suspicion which surrounds the will.

Their Lordships are satisfied that the proper conclusion, disregarding all questions of *onus*, is that the will is the product of a man so enfeebled by disease as to be without sound mind or memory at the time of execution and that the disposition of his property under it was the outcome of the delusion touching his nephews' existence. The will is therefore invalid.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and that judgment should be entered against the will of 3rd April, and that probate of the will of 25th February, 1944, should be decreed in solemn form, and that the order for costs in the Court below should be set aside, except so far as it applies to the executors of the will dated 25th February, 1944. The respondents will pay the appellants' costs in the appeal.

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In the Privy Council

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v.

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DELIVERED BY LORD NORMAND

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