

(1922) 06 CAL CK 0046
In the Calcutta High Court

Saradindunath Rai Chaudhuri and Others	APPELLANT
Vs	
Sudhir Chandra Das and Others	RESPONDENT

Date of Decision : 01-06-1922

Acts Referred:

Succession Act, 1925 — Section 45

Citation : AIR 1923 Cal 116 : 69 Ind. Cas. 48

Hon'ble Judges : Chofzner, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This appeal is directed against the grant of Letters of Administration with copy annexed of a Will alleged to have been executed by Sris Chandra Das, a wealthy banker and land-owner of Dacca. The Will is said to have been executed and registered between 9 and 10 A. M. on the 11th December 1904; the testator died between 3 and 4 p. m. on the following day. The names of the members of his family are set out in the following pedigree:

PROTAP CHANDRA DAS, married Preomoyi | | Sris Chandra Das, widow
 Rasheswari | | _____
 _____ | | | | Sarojini, Indumati, Promila, Sukumari,
 married married, married married Bankim Bipin Chanda Nath Sudhidendra | | |
 Nath | | Daughter, | | | born _____ | | after 1904. | | | |
 | | | Saradindu, Khoka, | | born born | | after 1904. after 1904. | | | |
 _____ | | | _____ | | | |
 Daughter. Bibhuti, born Biraja, born | after 1904. after 1904 |
 _____ |
 _____ | | | | Nirmal Bimal. Amal.
 Manmotho, Sudhansu, alias born born Sudhir. after 1904. after 1904.

2. The testator left him surviving his mother Preomoyi, his widow Rasheswari, and his four daughters, Sarojini, Indumati, Promila and Sukumari. Sarojini had been married to Bankim and had three sons Nirmal, Bimal and Amal. Indumati had been married to Bipin, a Pleader at Dacca and had one daughter. Promila

bad been married to Ghanda Nath and Sukumari to Shdhidendra Nath. These two sons-in-law belonged to well-to-do families, while Bankim and Bipin had very little property of their own. The testator appointed his widow Rasheswari and his cousin Rajani Mohan to be executrix and executor of the estate left by him, and empowered them to take Probate without security. The directions contained in the Will were two fold, namely, first, that his widow would adopt Nirmal, his grandson by his daughter, and, in default, any other boy,--the adopted son to be the proprietor of the estate; and, secondly, that his first two daughters would receive two houses and a monthly allowance of Rs. 100 each. The Will purported, on the face of it, to have been written out by Ananda Charan Chakrabarti, a Pleader of Dacea, and attested by seven witnesses, all of them persons of position and respectability. On the 19th February 1905 Indumati, the second daughter of the deceased, presented a petition to the Collector of Dacea, stating that a false Will had been propounded in respect of the estate left by her father. On the 22nd February 1905, Rasheswari and Rajani applied for Probate in the Court of the District Judge and on the same date, Indumati filed her caveat. On the 29th March 1905, Indumati filed her petition of objection, challenging the Will as spurious. On the 22nd May, 1905, Indumati withdrew her objection, stating that she had ascertained on enquiry that the Will was genuine and her objection could not be maintained. This was, as might be easily surmised, a mere euphemistic statement; for it has since transpired that Indumati exacted a substantial price for this concession; she was given, over and above what she would get under the Will, two houses and a sum of Rs, 30,000, and thereupon she destroyed a letter, which she had in her possession, from Col. Campbell, one of the medical attendants of her father during his last illness, expressing the opinion that he was at the time of the execution of the alleged Will unable to execute a document. But in whatever manner Indumati might have been persuaded to withdraw her op. position, the fact remains that the Will was thereupon proved formally and Probate was granted in common form. On the 26th April 1906, Rasheswari took in adoption her daughter's son, Nirmal, who assumed the name of Sudhir. Rasheswari and Rajani administered the estate as executrix and executor for many years, and matters proceeded smoothly till 1912 when differences unhappily arose between Rasheswari and her son-in-law Bankim, which culminated in a suit instituted, at the instance of Bankim, by Promila as the next friend of Sudhir against the executors, for accounts of the estate on charges of waste and mismanagement. This was followed by an application in 1913 by Sarojini to the District Judge for removal of Rasheswari from the guardianship of Sudhir; the result was an order by the District Judge for the appointment of Sarojini as a joint guardian with Rasheswari, The breath between the parties steadily widened, and on the 11th April 1917, Trailokhya, brother of Rajani, the executor, applied to the District Judge to revoke the Probate on the ground that citations were not properly served on Bimal and Amal, the infant brothers of Nirmal alias Sudhir. Sudhir contested the application, but on the 28th August 1917 the District Judge revoked the Probate and recalled the grant. On appeal to this Court, the order of the District Judge was

substantially affirmed on the 15th August 1918 by Woodroffe and Hude, JJ. On the 20th September 1918 Rasheswari was tailed upon by the District Judge to prove the Will in solemn form as directed by this Court. On the 20th November 1918, Rasheswari intimated to the court that she would not prove the Will and prayed that the Probate case might be dismissed. Thereupon, on the 25th January 1919 Sarojini, on behalf of Sudhir, filed a petition for Letters of Administration to the estate of Sris with copy of the Will annexed. Such in brief outline is the history of this belated application for enquiry into the question of the genuineness of a Will alleged to have been executed and registered so far back as the 11th December 1904.

3. The case has been elaborately investigated in the Court below, and in a careful judgment which accurately analyses the evidence on the record, the District Judge has pronounced in favour of the Will. In his opinion it is abundantly proved that the Will was in fact executed by the testator between 9 and 10 a. m. on the 11th December 1904 and was duly signed by the attesting witnesses. The only question seriously in controversy is whether at that time Sris had testamentary capacity. Upon this point, the District Judge has held that he was in no condition to settle the terms then, but that the Will was drawn up in accordance with instructions given by him two months previously to his legal adviser Mahendra Kumar Ghosh. The District Judge has also found that, at the time of execution, the testator was conscious, that he understood the provisions of the Will when put to him, that he was able to express his assent by monosyllables, and that he affixed his initials to the document. In this view, the District Judge has applied the principle of the decisions in *Parker v. Felgate* (1883) 8 P.D. 171 : 52 L.J.P. 95 : 32 W.R. 186 : 47 J.P. 808 and *Perera v. Perera* (901) A.C. 354 : 70 L.J.P.C. 46 : 84 L.T. 371 : 17 T.L.R. 889 and has upheld the Will as a valid and operative testamentary instrument. This conclusion has been vigorously attacked in this Court, and the evidence has been minutely scrutinised on behalf of the appellants; but on a careful review of the evidence, we have arrived at the conclusion that the view taken by the District Judge cannot be successfully assailed.

4. The Will was attested by seven persons besides the scribe. Four of these witnesses are dead, namely, Prasanna Chandra Vidyaratna a well-known Pandit of Dacea, Raghunath Das, a rich banker of Dacea, Gobinda Chandra Das, a Pleader of Dacca, and Amrila Lal Mitra, Librarian of the North brook Hall Library at Dacea. The surviving four attesting witnesses, who have been examined, are, Trailokhya Nath Bose, Ananda Chandra Chakrabarti, Mahendra Kumar Ghose, and Debendra Nath Das, all leading members of the legal profession in Dacea. Their testimony, which has been accepted by the District Judge, leaves to room for doubt that the document was in fact executed by the testator and attested by the witnesses in his presence. The real question for solution is, whether he had testamentary capacity at the time of the execution of the document. The proffounder has not endeavoured to maintain the position that the testator was at the time competent to settle the terms of the Will. He had been taken ill in November with

fever, rheumatism and other complications due to habits of drink and Col, Campbell was in attendance on him regularly from the 18th November. From the 1st December it was realised that his illness was serious, and the evidence shows that on the 10th December he gave directions for execution of the Will on the next morning. That he had sometime previously given instructions to his legal adviser Mahendra Kumar Ghose to draft a Will, has been satisfactorily established. Mahendra has been believed by the District Judge, who was favourably impressed with his demeanour. We see no reason to question the opinion of the District Judge as to the credibility of Mahendra. Mahendra asserts that he received three instructions, namely, first, that the testator's wife Rasheswari and cousin Rajani should be executors; secondly, that his wife would have permission to adopt the son of his eldest daughter; and, thirdly, that each of the two elder daughters would get Rs. 100 a month besides a house. Mahendra adds that the testator asked him to write what else he might think proper. Mahendra prepared the draft within two or three days and made it over to his brother Sasi, who was an officer of the estate, to make a fair copy. This fair copy and not the original draft was produced when the Will was executed. Much emphasis has been laid on the fact that neither the draft nor the fair copy is now forthcoming, but we agree with the District Judge that the omission to produce these papers is not calculated to cast suspicion on the genuineness of the Will, for there is oral evidence of an unimpeachable character as to what took place when the Will was executed. Mahendra told Trailokhya Nath the instructions received by him from Sris, Trailokhya Nath then asked Sris whether he wished to make a Will, Sris answered in the affirmative. Trailokhya next put the instructions one by one to Sris, who expressed his assent by nods or by monosyllables. Ananda Chandra thereupon wrote out the Will in accordance with the instructions and read it over to Sris who expressed his assent and initialed the pages. These initials bear a remarkable resemblance to the genuine specimens of the signature of the deceased who used to sign his name in a very peculiar style. At the same time, the initials furnish abundant evidence of extreme feebleness of the writer. The document was registered immediately afterwards by the Sab-Registrar, Aulad Hossain, who was in attendance. He has been examined and confirmed the note recorded by him at the time of registration, that though execution was admitted by the testator, he was too weak to sign his name and accordingly made his mark. His strength was manifestly ebbing away fast. Notwithstanding this, it is plain that the testator was, at the time of execution, capable of understanding and expressing his assent to the Will, as is indicated by a remarkable incident related by all the witnesses present. The testator had a mistress named Charubala, who lived in another part of his house. She was anxious to secure a gift from her paramour and a deed had been drawn up for that purpose. During the execution of the Will the woman came into the room and presented her document to Sris for signature. Sris exhibited anger and disgust, pushed the deed away and asked her to leave. At the time of registration of the Will, she came again into the room. Sris got angry with her, threw the document away and asked her to leave. The vivid description of this

incident by the witnesses has the ring of truth; their versions differ only in detail but agree in substance. The incident shows unquestionably that the testator could discriminate between the Will in favour of the members of his family and the deed of gift which his mistress was anxious to secure from him. Upon the testimony of the witnesses present on the occasion, there is consequently no escape from the conclusion that Sris had testamentary capacity at the time of the execution of the Will which was duly executed and attested.

5. But the objectors lay great stress on the medical evidence which, they contend shows beyond reasonable doubt that the testator was unconscious and speechless at the time when the Will is said to have been executed by him. It must be stated at the outset, however, that none of the attendant physicians was present when the Will was executed. Col. Campbell (now Sir Robert Campbell) is able to speak of the condition of the patient shortly before 8 a. m. and again shortly after 2 p. m. on the 11th December; on both occasions the doctor found Sris semi-conscious in a state of stupor passing into coma though he could be roused and appeared to understand what was said to him. Dr. Hem Chandra Sarkar, who was in attendance from 11 A. M. to 3 p. m. on the same date, confirms this version. Dr. Sib Chandra Bose, another medical attendant, is now dead. There is thus no direct medical evidence as to the actual condition of the patient between 9 and 10 a. m. when the Will is said to have been executed. The objectors-appellants, however, have invoked the aid of the principle of continuity to supplement the statement of Sir Robert Campbell and they have urged the Court to hold that the condition of the patient between 9 and 10 a. M. must have been what was found by the physicians before 8 i. m., and after 11 a, m. It may be a matter for argument whether the hypothesis of continuity can be reasonably applied in cases of this description, without a detailed knowledge of the constitution of the patient and the nature of his ailment. But, in this case, there is positive evidence forthcoming, which shows that powerful nervous, cardiac, and general stimulants were administered by Dr. Sib Chandra Bose shortly after Col. Campbell had left in the morning. Col. Newman, who has been examined as an expert, is of opinion that the normal result of the drugs injected hypodermically would have been to stimulate the cardiac and nervous system and to rouse the patient from this condition of exhaustion. This effect would be produced in five or ten minutes and would last for two or three hours. Col, Campbell expressed substantially the same opinion regarding the possible effect of the injection of the nervous and cardiac stimulants used. There is thus on the medical evidence itself a reasonable and probable explanation of the existence of testamentary capacity between 9 and 10 A. m. on the day of the execution of the Will, and we are consequently not driven to hold that the diagnosis of the physicians, who were not present when the Will was executed, should outweigh and prevail over the testimony of eye-witnesses based upon the evidence of their own senses. Such a course was condemned by Lord Macnaghten in delivering the judgment of the Judicial Committee in *Perera v. Perera* (901) A.C. 354 : 70 L.J.P.C. 46 : 84 L.T. 371 : 17 T.L.R. 889 and should certainly be avoided in a case

where, we have the testimony of considerable body of trustworthy witnesses of good position and undoubted respectability, who were able to observe facts and draw inferences therefrom, who acted not in secrecy but with the utmost publicity in the midst of a large assembly, and who had no intelligible motive to engage in a conspiracy for setting up a false testamentary instrument. The District Judge, in our opinion, took a correct view of the effect of the medical evidence in the case when he held that the injection temporarily rallied the testator in a sufficient degree to enable him to understand the terms of the Will put to him by Trailokhya and to express his assent to the execution and registration.

6. As a last resort, the appellants have urged that the evidence in favour of the Will does not disclose that standard of testamentary capacity which is recognised as essential in Section 45 of the Indian Succession Act and in the illustrations thereto. Reference has been made in this connection to the decisions of the Judicial Committee in *Barry v. Rutlin* (1838) 2 Moo. 480 at p. 482 : 1 Curt. 614 : 46 R.R. 123 : 12 E.R. 1089; *Dufaur v. Croft* (1840) 3 Moo. 136 : 13 E.R. 59 and *Harwood v. Baker* (1840) 3 Moo. 282 : 3 E.R. 117 : 50 R.R. 37. As *Erskine, J.*, said in the case last mentioned, "in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard; but he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his Will, he is excluding from all participation in that property; and that the protection of the law is in no cases more needed, than...in those where the mind has been too much, enfeebled to comprehend more objects than one." To the same effect is the decision of *Cockburn, C.J.* in *Banks v. Goodfellow* (1870) 5 Q.B. 549 at p. 566 : 39 L.J.Q.B. 237 : 22 L.T. 813; where he cites with approval the statement in *Den v. Vancleve* (1819) 2 Sou N.J. Law 660; see also *Harrison v. Rowan* (1820) 3 Was 685; *Stevens v. Vancleve* (1822) 4 Was 267; *Guardhouse v. Blackburne* (1866) 1 P. & D. 109 : 35 L.J.P. 116 : 12 Jur. 278 : 14 L.T. 69 : 14 W.R. 463; *Goodacre v. Smith* (1867) 1 P. & D. 359 : 36 L.J.P. 43 : 15 L.T. 611 : 15 W.R. 561; *Susil Kumar Banerjee v. Apsari Debi* 27 Ind. Cas. 276 : 20 C.L.J. 501 : 19 C.W.N. 826; *Surendra Krishna Mondal v. Ranee Dasii* 59 Ind. Cas. 814 : 47 C. 1043 : 33 C.L.J. 34 : 24 C.W.N. 860 The proponent does not controvert this view and does not dispute that the testator should be of sound mind, memory and understanding, words which have been held to mean sound disposing mind and to import sufficient capacity to deal with and appreciate the various dispositions of property to which the testator is about to affix his signature: *Hastilow v. Stobie* (1865) 1 P. & D. 64 : 35 L. J.P. 18 : 11 Jur. 1039 : 13 L.T. 473 : 14 W.R. 211. But he argues that if a testator has given instructions to a Solicitor to make a Will and the Solicitor prepares it in accordance with those instructions, all that is necessary to make it a good Will, if executed by the testator, is that he should be able to think thus far: "I gave my Solicitor instructions to prepare a Will, making a certain disposition of my property. I have no doubt that he has given effect to my intention and I accept the document

which is put before me as carrying it cut," This position is supported by decisions of the highest authority. In *Parker v. Felgate* (1883) 8 P.D. 171 : 52 LJP 95 : 32 W.R. 186 : 47 J.P. 808 a testatrix, lying in a state approaching insensibility, executed a Will drawn up in accordance with her previous instructions. Sir James Hannen held that though she might not remember the instructions, though she could not have understood the Will, even if read to her clause by clause, yet since she was capable of understanding and did understand that she was engaged in executing the Will for which she had given instructions, she must be taken to have known and approved of its contents. The distinction thus brought out between the two classes of cases, was applied by the Judicial Committee in the case of *Perera v. Perera* (901) A.C. 354 : 70 L.J.P.C. 46 : 84 L.T. 371 : 17 T.L.R. 889 and had been recognised in earlier decisions. Thus, in *Bash Mohini Dasi v. Umesh Chunder Biswas* 25 C. 824 : 25 I.A. 109 : 2 C.W.N. 321 : 7 Sar.P.C.J. 298 : 13 Ind. Dec. 537 (21:7 Sar.P.C.J. 298 : 13 Ind. Dec. (P.C.) where the Judicial Committee affirmed the decision of this Court in *Woomesh Chunder Biswas v. Rashmohini Dasi* 21 C. 279 : 10 Ind Dec. 818 Lord Macnaghten, in pronouncing against the Will, emphasised the circumstance that the testator did not seem to have had any intention of making a Will before his last illness and added that the case was consequently not like one in which a testator executes a disposition of his property for which instructions have been given or preparations made while the mind was in sound state. To the same effect are the observations of Lord Chelmsford in *Tayammaul v. Sashathalla Naiker* 10 M.I.A. 429 at p. 435 : 2 Sar.P.C.J. 139 : 19 E.R. 1034 and of Lord Hobhouse in *Sala Mahomed v. Dame Janbai* 22 B. 17 : 24 I.A. 148 : 1 C.W.N. 481: 7 Sar. P.C.J. 173 : 11 Ind. Dec. 593 . The distinction will be found recognised also in *Kusum Kumari v. Saiishendra Nath Boss* 3 Ind. Cas 787 : 13 C.W.N. 1128; *Susil Kumar Banerjee v. Apsari Debi* 27 Ind. Cas. 276 : 20 C.L.J. 501 : 19 C.W.N. 826; *Venkata Ragavulu v. Baggiammal* 14 Ind. Cas. 550 : 23 M.L.J. 54; *Numberumal Chetty v. Pasumarty Kannia Chetty* 28 Ind. Cas. 959 and *Gordhandas v. Rai Suraj* 64 Ind Cas. 257 : 23 Bom.L.R. 1068. The doctrine has also been frequently recognised and applied in the Courts of the United States; *Bess's Appeal* (1862) 43 Penn. St 73 : 82 Am. Dec. 551; *Day v. Day* (1831) 2 N.J. 549; *Boyd v. Boyd* (1837) 3 Hill S.C. 341; *Black v. Ellis* (1836) 3 Hill 68. The essence of the matter is that testamentary capacity cannot but be looked upon as a relative thing; it is to be considered with reference to the particular Will--the question being, not whether the testator had capacity for Will-making, but whether he had capacity to make the disputed will. He may have had capacity to make that Will in the circumstances and yet not have had capacity to make a more complex one, or he may not have had capacity to make the Will in suit, and yet have had capacity to make a less complex or different one; whether he understood the particular things he was doing, is the vital question. We hold accordingly that the District Judge has correctly applied to this case the standard of testamentary capacity formulated in *Parker v. Felgate* (1883) 8 P.D. 171 : 52 L.J.P. 95 : 32 W.R. 186 : 47 J.P. 808 namely, that where a testator has given instructions for the Will while in health and executes the document prepared in accordance therewith while in

illness, slight proof of knowledge and approval will suffice, and the Will will be valid, though at the time of execution the testator merely recollects that he has given those instructions, but believes that the will which he is executing is in accordance with them.

7. The result is that the decree made by the District Judge including his direction for costs, which we see no reason to disturb, must be affirmed and this appeal dismissed with costs payable by the appellants to the respondent Sudhir Chandra Das.