Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bama Soondari Debi v. *Tara Soondari Debi and another, from the High Court of Judicature at Fort William in Bengal; delivered* 18*th July* 1891.

Present:

LORD HANNEN.
SIR RICHARD COUCH.
MR. SHAND (LORD SHAND).

[*Delivered by Mr. Shand.*]

The question to be decided in this appeal is whether a will alleged to have been executed by the deceased Dwarka Nath Chuckerbutty, bearing date the 3rd January 1886, two days before the death of the alleged testator, is genuine or a forgery. The District Judge of Mymensing, who tried the case, pronounced in favour of the will, but on appeal his decision was reversed by the High Court at Fort William in Bengal, who rejected the application for probate of the will.

The alleged will was registered five days after the date it bears. The petition for probate was presented by the father of the alleged testator, who was appointed executor. The document is in all respects formal, and purports to have been signed, not only by the deceased, but by the witnesses said to have been present when it was executed; and the application for probate was accompanied by a declaration by

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two of these persons in the ordinary form, testifying that they were present, and saw the testator sign the will. The defence stated was that the deceased never executed any will, and that the will propounded was fictitious and false and fraudulently got up, and in the course of the inquiry much evidence was given as to the state of the deceased, who, at the time when the deed is said to have been executed, was admittedly suffering from the serious illness of which he died—the defenders having under their general defence maintained and endeavoured to prove that the deceased was in such a state of mental and physical incapacity as to be unfit to make a will on the date when he is alleged to have done so.

The will is one which not only complies with all requisites of formality, but which seems to be in all respects reasonable in its provisions, and such as might naturally be expected to be made, having regard to the deceased's circumstances and family relations. The deceased had three wives. By the eldest he had a daughter, and by the youngest a son, and both of these children were only six months old. There is no evidence in the case which would lead to the inference that he had any decided predilection or affection for one of his wives in preference to the others. His estate, which he seems to have acquired from his adoptive father, was of considerable value and required management, and in point of fact it had been managed for some time by his natural father, either as manager only, or in virtue of an ijara which was in force at the time of his illness. If he died intestate the right to this estate would devolve on his infant son, and on his decease (which in point of fact occurred before the appeal was heard in the High Court) would go to his mother, as his heir, and during the son's long minority, if he survived,

the management would fall into the hands of strangers. His mother was herself in minority and incapable of taking the management. In these circumstances the alleged will, while it gives the deceased's estate to his son, should he survive minority, provides for its administration in the first instance by continuing the management in the hands of the deceased's father, failing whom other two persons,—first a grand-uncle, and failing him the deceased's usual man of business is named. In the event of the son's death while still in minority, the will provides that each of the wives of the deceased, beginning with the eldest, should have the power of adopting a son who should, provided he survived the period of minority, succeed to the estates in their order; and the will further provides for the marriage expenses of his daughter "in suitable "proportion to the income and disbursements" of the estate.

The genuineness of the will having been challenged, the petitioner, the father of the deceased, and six other witnesses were examined in support of it. Five of these had signed as testamentary witnesses to the document, and all of them deposed that they were present and saw it executed. It is common ground that, unless the deceased desired to die intestate, it was obviously necessary that he should make a will, for he had been suffering from serious illness, and was in a dangerous condition. The facts affirmed by the petitioner's witnesses were that, some days before the will was executed, the deceased requested his father to send for his ordinary man of business, Goluck Buttacharji, who lived at some distance away, who came on the Thursday; that Goluck Buttacharji had interviews with the deceased after his arrival at the deceased's house, and at a time when there is no doubt the deceased was quite capable of

giving instructions for the preparation of his will, as well as with the father of the deceased, to whom his son had explained the provisions he desired to be made; that thereafter Goluck Buttacharji dictated the draft to Rojoni Kant Das, the person living in the house, who usually wrote such papers as the deceased required to be written; that on the Saturday this draft was read over to the deceased in his bed, when he approved of it; and that on the following day, Sunday, between 1 and 2 o'clock in the day, the will was signed in the presence of the testamentary witnesses, after it had been read over, when at the same time the deceased executed an *anumati patra* to enable his wives to adopt sons who should succeed to the estates in their order, in the event of his infant son dying in minority. The writer of the will, who declared that he saw it signed by the deceased, and the other witnesses, some of whom were, according to the evidence, expressly called in to see it executed, agree in the material facts to which they speak, and there is really nothing in their evidence which could justify or support the inference that there was any want of capacity on the part of the deceased, mental or physical, to understand and execute the will. They concur in their account of the serious nature of the illness of the deceased, and in describing him as being in a weak condition, but they do not support the defence that the deceased was not able fully to understand the act he was performing; and they concur in saying that he sat up in his bed, which was on the floor, leaning against the pillows which were propped up, and so signed the document. It is clear that with this testimony, and keeping in view the fact that nothing can be said against the reasonable nature of the provisions of the will (which is always a material element in such questions, from its bearing on the probabilities

of the case), it would require a strong case in defence to lead to the result of holding that the will had been forged. The Judge who saw and heard the witnesses seems to have remarked nothing in their demeanour to induce him to think they were not speaking the truth, or to lead him to the conclusion that they were combined in a conspiracy fraudulently to set up a false deed. Taking the view now presented of the evidence adduced by the Petitioner, the District Judge properly observes that "the burden is on the Defendants to prove "that the Court ought to refuse probate either "on account of the incapacity of the testator at "the time of alleged execution, or on any other "ground," and on careful examination of the evidence for the defence he came to the conclusion that this onus had not been discharged.

In the High Court this decision was reversed, substantially on the ground that it had been shown, in the opinion of the two learned Judges by whom the case was determined, that, on the day when the will was alleged to have been executed, the deceased was incapable mentally and physically of performing such an act. The Chief Justice put the issue in this way,—"The question upon which the truth "of this will turns is really, had the testator "become so weakened by the fever that he was "incapable of signing the will in the way it is "signed." In the judgment of the Court he observed that there was a fact of which the Judge of First Instance had taken no notice whatever, "and that is the character of the signatures." The Chief Justice goes on to observe that the will is signed in six or seven places, and the other document is also signed in several places, and having examined these signatures he expresses the opinion of himself and Mr. Justice Tottenham that they are to

all appearances those of a vigorous man, being perfectly clear and even and all alike, and this circumstance, it is explained, has greatly influenced the judgment. The opinion is, however, also expressed that the evidence of the medical men called for the defence has shown that, during the whole of the Sunday on which the will is said to have been executed, "the testator was "not in a condition to make a will at all, that "he was not in a condition to know what he was "doing;" while in a subsequent passage the Chief Justice observes,—"It is clear to our minds "that this man was not in a condition to make "the will on the Sunday at all, and certainly "not in a condition to sign it with the degree of "vigour shown by these signatures."

It is scarcely necessary to observe that if their Lordships, after the consideration of the evidence and of the argument submitted to them on the present appeal, had come to the conclusion that the proof adduced by the Defendants or the proof as a whole led to the inference that the deceased was incapable mentally or physically of executing the will "in the way it is signed," they would agree with the Appellate Court in their judgment, reversing that of the District Judge and refusing probate. But their Lordships are unable to adopt that view.

Neither the will in dispute, nor the *anumati patra* which is alleged to have been executed at the same time, have been transmitted with the documents in the appeal to this country. Neither of the parties seem to have applied to have this done, or to have photographs of the signatures taken and transmitted. In these circumstances, in dealing with the appeal, their Lordships will assume—subject to the observation, which they think of much importance, that there is an entire absence of any question or answer in the evidence bearing on the nature of

the handwriting of the signatures, a circumstance which clearly explains why the learned District Judge did not refer to the subject—that as these signatures are written on the will they present an appearance of uniformity and of firmness, and their Lordships will immediately deal with the question whether this should affect the judgment to be given in the case. But in the first instance it seems to be desirable to ascertain how far it has been shown that the deceased was incapable mentally of performing with intelligence the act of making a will, for if the deceased wanted the requisite mental capacity this would form a clear ground against granting probate as prayed for.

The important witness on this point is unquestionably Tara Nath Bal the doctor, who was called in during the latter part of Dwarka Nath Chuckerbutty's illness, and who was examined for the defence. He has been treated by the District Judge and the Court of Appeal as a witness entitled to credit, though the former makes the observation that his intimate connection with Prosunno Babu, who appears not to have been on very good terms with the deceased, and who has a pecuniary interest in the case, favours the presumption of a certain amount of bias on his part. Prosunno Babu appears to have had such interviews with most of the witnesses for the defence, immediately before their examination, as lead to the suspicion that they were being schooled as to the evidence they should give, and his connection with Tara Nath Bal certainly seems to warrant the inference that this witness would not give a more favourable account of the condition, mental and physical, of the deceased than the facts warranted. He went to attend the deceased five days before his death. Speaking of the first two of these days he states that his patient did not seem to be unconscious.

On the second day he says, he "could not par-
"ticularly perceive unconsciousness," although at intervals his patient may have spoken one or two incoherent words. He subsequently says that the serious illness began on Sunday morning, but that "on Sunday up to evening he did not talk incoherently," while in a subsequent passage of his evidence, in a conversation on the Sunday with Raj Chundar, or Gour Mohun, or Goluck Bhuttacharji, when he says the making of a will was spoken of, he states, "I may have said
"that instead of doing this to-day it may be done
"to-morrow as well."

Their Lordships cannot regard the evidence of this witness as warranting the conclusion on which, to a great extent, the judgment of the High Court is founded, that on the Sunday when the will is said to have been executed the deceased was incapable, either mentally or physically, of executing the will. The witness Lalit Chunder Biswas, who was for a time, during the earlier part of the deceased's illness, present as medical attendant, but who says he visited the deceased, apparently as a friend, till he died, gives somewhat stronger evidence, but his statements seem to be exaggerated in material respects when tested by the other evidence in the case. The evidence of Tara Nath Bal is in its terms qualified throughout, and in their Lordships' opinion results in this, that although the deceased was in a weak condition, and his "condition commenced to be worse" on the Sunday, he was nevertheless capable throughout that day of understanding and executing the will in dispute.

Again, in regard to the ability of the deceased to write the signatures firmly, it does not appear to their Lordships that there is evidence to lead to the conclusion that he was unable to do so. The witness Tara Nath Bal states that on

Sunday the patient could sit resting against a pillow, and the witnesses for the petitioner all say that it was in this attitude that the will was signed, while more than one of them states that the deceased rested his left hand on the pillow, holding the document in that hand and signing with his right hand. According to the evidence he had himself suggested that he would delay signing it till after taking food, and he did so; and, in the performance of so deliberate and solemn an act as signing his will, he would naturally make an effort such as might enable him, although in a weak state, to write his signatures with firmness. In the High Court it was observed that the District Judge had taken no notice of the characters of the signatures. But to their Lordships this circumstance seems to be fully accounted for by the fact that the point does not seem to have been made the subject of examination in the evidence, or of observation in the argument, so far as appears. The petitioner himself gives the strongest evidence, perhaps almost the only evidence, which indirectly gives some support to the view that the deceased might be unable to write with a firm hand, when he says the deceased was latterly unable to feed himself; but neither this evidence, nor that of the witnesses generally, would in the opinion of their Lordships warrant the conclusion that on the Sunday in question the deceased was unable, on so important an occasion, to write his signatures, and, by an effort, to do so firmly.

It would no doubt have been more satisfactory in the determination of the case if the testamentary witness, the doctor, Kali Chunder Acharji, and indeed also the mokhtar Goluck Buttacharji, who, though not present at the signing of the will, had prepared the draft, had been examined as witnesses. There is some evidence that the

petitioner did endeavour to secure the attendance of Kali Chunder Acharji, and if it be the case that his evidence could have been obtained, and it would have been unfavourable to the will, the Defendants might have examined him. As the case on the proof stands the petitioner, in the opinion of their Lordships, adduced sufficient evidence to establish the genuineness of the will, and the capacity of the testator to make it, and the evidence for the defence was not sufficient to destroy the petitioner's case on either of these points.

On the whole, their Lordships will humbly advise Her Majesty to reverse the judgment of the High Court, and to affirm the judgment of the District Judge, with costs in the High Court. The Respondents must bear the costs of this appeal.