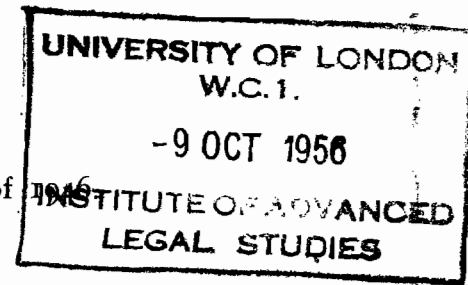


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77, 1947



Appeal No. 24 of 1946

In the Privy Council.

44431

ON APPEAL

FROM THE SUPREME COURT OF FIJI.

BETWEEN

- 1. BATTAN SINGH,
- 2. WALAITI RAM, and
- 3. KHAZAN SINGH

AND

*Plaintiffs-
Appellants,*

- 10 1. AMIRCHAND,
- 2. MEHAR,
- 3. WARYAMA,
- 4. BANTA,
- 5. SONDHI, and
- 6. MUNSHI

*Defendants-
Respondents.*

CASE FOR THE APPELLANTS

AND THE RESPONDENTS Nos. 3 to 6.

1. This is an appeal from a judgment and decree of the Supreme Court of Fiji in its Probate Jurisdiction dated the 1st June, 1945, which decreed probate of a will dated the 3rd April, 1944, of one Jaimal an Indian moneylender, who died on the following day. RECORD.
p. 210.
p. 19.

2. The question at issue in this appeal is whether the said will dated the 3rd April, 1944, in favour of the Respondents Amirchand and Mehar, was a valid will or whether a will dated the 25th February, 1944, in favour of Jaimal's nephews ought to be admitted to probate, on the grounds that the former will was not duly executed and that the Testator was at the time he executed it not of testamentary capacity and for other reasons. p. 8.

30 3. Jaimal was a Sikh from the village of Bahadwa in the Jullunder district of the Punjab and belonged to a family of Bolai Jats. He had come to Fiji at least thirty-eight years before his death. He was a moneylender and had a large business and died a rich man, worth over £20,000. His largest debtor was the Respondent Mehar who was indebted to him to the extent of over £6,500. Jaimal was illiterate and uneducated but could write his name in English. p. 186, l. 40.
p. 97, l. 9.
p. 91, l. 1.
p. 142.
p. 94, l. 44.
p. 75.

- p. 175. 4. Jaimal had for many years before his death lived at Suva in Fiji which is some ten or twelve miles from the township of Ba. He kept his accounts in Ba with a firm of lawyers called Ellis Munro Warner and Leys.
- p. 21, l. 22. 5. Jaimal had no wife or child. His brother Nagina lived in village Barhwal (which appears to be the same as Bahadua) in the Jullunder district of the Punjab and had four sons who are the last four Respondents. In 1938 Jaimal visited his brother at his home in India and bought land there and had a well dug. He returned to Fiji in about 1940.
- p. 91, l. 58.
p. 92, l. 4. 6. In 1936 the Testator gave instructions to Mr. Ellis to make a will in favour of his brother and his nephews the last four Respondents and he executed a will to that effect on the 21st January, 1938. This will was revoked by a will dated the 26th November, 1941, whereby he left his property to his said four nephews (his brother having died). He made a codicil to this will dated the 1st July, 1942, in which he directed that the Committee of the Sikh Gurdwara should be given details of his estate, if they so desired. The attesting witnesses to both will and codicil included Sahu Khan a clerk of Messrs. Ellis & Co. 10
- p. 21.
p. 22.
p. 23.
p. 27. 7. In February, 1944, Jaimal was ill in the Suva Government Hospital suffering from tuberculosis, from which he died on the 4th April, 1944. 20
- p. 26,
pp. 26, 27.
p. 175, l. 27. 8. While he was there the Respondent Amirchand and one Dalel Singh, a man from Jaimal's village in India, went from Ba and saw Jaimal at the hospital. Jaimal remained three or four days longer in the hospital and then went to the Sikh Temple at Samabula, which is near Suva.
- p. 122, l. 29.
p. 9, l. 15 9. While at the Sikh Temple, Samabula, Jaimal sent on the 24th February, 1944, a message to solicitors at Suva that he wanted to make his last will: and on the 26th February he executed a will 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 nephews (the last four Respondents) in equal shares. 30 This will was witnessed by Mr. Noel McFarlane, solicitor of Suva, and C. M. Gopalan, medical practitioner.
- p. 9.
p. 122, l. 30.
p. 131, l. 33. The Respondent Amirchand was present at the making of this will.
- p. 131, l. 48. 10. After Jaimal had been at the Sikh Gurdwara about four days Amirchand and Dalel took him with them to Ba, as he wanted to go to the Lautoka Hospital there and Jaimal gave Amirchand £80 for expenses. Jaimal was then taken by Amirchand to a stable near the house of the Respondent Mehar where he stayed for three or four days. After that he went to the Lautoka Hospital and then to the Sikh Gurdwara at Lautoka and was then taken to the house of one Indar Singh at Yalalevu 40 about two miles from Ba, where he arrived two or three weeks before his death. The house of Indar Singh was a house with iron roof and iron walls and was vacant and was hired by the Respondent Mehar for Jaimal to stay in. The reason that the house was taken was given by Amirchand as follows:—
- p. 107.
p. 123. "The reason why we had him in Indar Singh's house was that

during that time it was raining very much and the road to Mehar's was very slushy and was unapproachable by car, and this house being close to the road was handy in that we were able to take him to the hospital or get medical attention, food supplies and milk, and it was easier for these people to attend him." RECORD.

11. Jaimal stayed in this house until his death on the 4th April, 1944. It is said by the Respondents Amirchand and Mehar that during this time he conceived a desire to leave all his property to them.

12. This desire he is said to have first mentioned in a conversation with Amirchand two weeks before his death. Amirchand says he said: "My nephews are well provided for and I need not worry about them: I am concerned about you two because you have looked after me so well during my last days of illness." p. 124, l. 10.
p. 124, l. 16.

13. The Respondent Mehar says that about two weeks before his death Jaimal said that money is not everything; money is nothing. Whatever there is it is the person himself. The life of a neighbour or the life of a man was everything. To him man was more than money. And he further said, "you have looked after me so well that I wish to make my will in your favour." p. 101, l. 32.

14. The Respondents say that they were not interested or did not desire to take advantage of these intentions and did not get him a lawyer to draw his will, although he asked them to do so. p. 111, l. 36.

15. On Friday the 31st March one Hari Charan was visiting Jaimal and he says that Jaimal asked him to get a lawyer to make a will in favour of the Respondents Amirchand and Mehar and he agreed to do so.

16. Hari Charan says he first went to a Mr. Rice (who appeared at the trial for the Respondents Amirchand and Mehar) and finding him out went to a Mr. Davidson and asked him to make a will for Jaimal in favour of the Respondents Amirchand and Mehar.

17. Mr. Davidson typed on his typewriter a document 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 last 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

p. 19.

RECORD. my said Will my deep gratitude to the said Amirchand and Mehar
for their devotion to me during my present illness."

pp. 45, 59. 18. Mr. Davidson said in his evidence that the only information
p. 61. given to him to draft this document was that Jaimal was ill: desired
to make a will in favour of Amirchand and Mehar and had no wife and
family in Fiji. From these statements he concluded (he says) that
Amirchand and Mehar were his very dear friends that they were looking
after him: and that Jaimal had no relations anywhere who were known
to him.

p. 46, l. 40. 19. On the following Monday Amirchand brought a taxi to fetch 10
Davidson and Davidson and his clerk Mohammad Rasul was taken
in the taxi to the house of Indar Singh and after the will had been read
over to Jaimal in the presence of Mehar, Amirchand, Muhammad Rasul
and one Khursaid Khan, it was said to have been executed.

p. 49, l. 40. 21. Jaimal was unable to write his name though he attempted to
do so. He was too feeble to make a proper thumb mark and Davidson
held his thumb against the document to make the mark.

p. 120, l. 41. 22. The same afternoon, Monday the 3rd April, 1944, at about
1 o'clock Jaimal was taken by Amirchand to the Nailaga Hospital at Ba.
Taval a native medical practitioner examined him and knew he was 20
going to die very soon. Jaimal could not speak but Taval believed he
understood what Taval asked him. Jaimal died the next day Tuesday
the 4th April, 1944.

23. On the 9th August, 1944.

THE PRESENT SUIT

was instituted in the Supreme Court of Fiji in its Probate jurisdiction
by the Appellants who are the President Secretary and Treasurer of the
Sikh Gurdwara Committee at Samabula as executors of the will dated
the 25th February, 1944. The Defendants were the present Respondents.

24. The relief claimed was that the Court should pronounce against 30
the alleged will of the 3rd April, 1944, and decree probate of the will
of the 25th February, 1944.

25. On the 4th September, 1944, the Respondents Amirchand and
Mehar delivered a defence and counterclaim that the Court should
pronounce against the will of the 25th February, 1944, and decree probate
of the will of the 3rd April, 1944.

26. The action was heard before Mr. Justice Corrie, Chief Justice.
Witnesses were heard on behalf of the Defendants Amirchand and Mehar
and the Plaintiffs for ten days.

27. By this judgment dated the 1st June, 1945, the learned Chief 40
Justice found that the Plaintiffs claim failed and decreed probate of the
will dated the 3rd April, 1944.

The learned Chief Judge said in his judgment:—

“ The grounds upon which the Plaintiffs base their claim are as follows:—

“(A) That the will dated 3rd April 1944, was not duly executed according to the provisions of the Wills Act, 1837;

“(B) That at the time the will purported to have been executed, Jaimal was not of sound mind memory or understanding;

“(C) That execution of the will was obtained by the undue influence of the Defendants Amirchand and Mehar; and

10 “(D) That Jaimal, at the time the will purported to have been executed, did not know or approve of the contents thereof.

“ With regard to claims (A) and (D), I am satisfied on the evidence that the will was duly executed, and that Jaimal did know and did approve of its contents.

“ With regard to (C), I find no evidence of undue influence having been exercised by either of the Defendants Amirchand or Mehar.

20 “ There only remains, therefore, the allegation under paragraph (B). On the evidence, this reduces itself to an allegation that, at the time of executing this will on the 3rd April, 1944 Jaimal was suffering from a partial loss of memory, in that he did not at that time recollect that he had in fact nephews residing in India.”

28. The learned Judge then discussed the evidence of Davidson, Amirchand, Mehar, Mohammad Rasul and Khurshed Khan as to the answers Jaimal gave when questioned by Davidson as to whether he had any relations. He doubted whether any reliance was to be placed on Amirchand's evidence on this question.

The learned Judge then proceeded:—

30 “ In view of the authorities however, that have been cited to me, it is unnecessary that I should decide precisely what was the condition of Jaimal's memory on Monday the 3rd April 1944. This is clear on the authority of *Parker v. Felgate*, 8 P. D. p. 171,”

and after quoting from Sir J. Hannen's judgment he said:—

40 “ The instructions for the preparation of Jaimal's will were given by him to the witness Hari Charan on Friday 31st March 1944; that is to say three days before the execution of the will. I see nothing in the evidence from which I am prepared to infer that Jaimal's memory was defective upon that day. If Hari Charan's evidence is to be relied upon—and it is uncontradicted—he then asked Jaimal if he had made a will already. Jaimal said: ‘ Yes, I have made two wills already, but I am not worrying about them: I wish to make my last will in favour of these people.’ He did not say in whose favour the earlier wills had been. He mentioned that he had relations in India: he did not say what the relationship was. I asked if he had wife or children: he said, ‘ No.’ He then said: ‘ I have given sufficient property to these people in India.’

RECORD.

“ I hold that at the time when he gave instructions for his will Jaimal was of sound mind memory and understanding.”

29. It is submitted that the Respondents, Amirchand and Mehar, failed to discharge the burden laid upon them of proving that Jaimal was of testamentary capacity on the 3rd April, the day before his death or on the 31st March; and the learned Judge erred in law in finding that the alleged conversation with Hari Charan was equivalent to instructions to a solicitor of the nature considered in *Parker v. Felgate* and *Perara v. Perara*, (1901) A. C. 354.

30. It is submitted the story told on behalf of the Respondents, Amirchand and Mehar, is quite unworthy of belief. There could be no reason why Jaimal should have, in the last fortnight of his life, changed his testamentary intentions in favour of his close relations, shown over a number of years and finally on the 25th February, 1944; and the only possible explanations of such change are that either when he made the will of the 3rd April, 1944, his mind was so clouded by illness that he was under delusions as to his relations, or that he was under the undue influence of Amirchand and Mehar. 10

31. Jaimal had known Mehar for thirty-eight years, though for most of that time Mehar had lived on the other side of the island. Mehar was his largest debtor and Jaimal had made to Mehar a further loan of £500 on the 15th January, 1944. Jaimal had known Amirchand for eighteen years. He was a man from Jaimal's own village. He had borrowed money from Jaimal. If Jaimal had, when in his right mind, desired to benefit these men, he would have done so by his will of the 25th February, 1944. 20

p. 7, l. 22.
p. 96, l. 22.
p. 121.

32. The evidence of Hari Charan is not credible. This young man, aged twenty-six, was born in Ba and was then living at Suva, twelve miles from Indar Singh's house and ten miles from Ba. Until the events in question he had not seen Jaimal for twelve years. He says Amirchand told him in Suva of Jaimal's illness. He made up his mind to visit Jaimal whenever he went to Ba—though he had never in his life visited Jaimal, who lived in Suva. He visited Jaimal three times in March, 1944. He was very well known to Davidson, who looked to him for his fees for the will. 30

p. 36, l. 20.
p. 35, l. 50.
p. 33, l. 11.

33. The learned Judge appears to have considered that, in spite of this story, he ought to believe Hari Charan because his evidence was uncontradicted.

It was clearly impossible for the Plaintiffs to bring any evidence to contradict Hari Charan and it ought not to be inferred from Hari Charan's evidence that Jaimal was, on the 2nd April, 1944, aware of the existence of his nephews; especially having regard to the statement entered by Davidson in the draft will. 40

34. The following passage appears in Davidson's cross-examination by Macfarlane (Counsel for the Plaintiffs):— RECORD.

Q. Is it your usual form of draftsmanship to say: "I give devise . . . my dear friends . . ." Is "my dear friends" your usual form of draftsmanship?—*A.* Well, I could say nothing else, seeing they were not related. I concluded they were friends.

Q. That was purely a conclusion in your own mind, not based on fact or information given to you?—*A.* It was.

10 *Q.* This was also a conclusion of your own: "I desire to express in this my will my deep gratitude to the said Amirchand and Mehar for their devotion to me during my present illness." That was put in of your own accord; that wasn't based on any information given to you prior to the typing of the will? That was put in by you yourself?—*A.* Entirely.

Q. To Court: Without instruction?—*A.* Without instruction.

Q. Why did you put it in?—*A.* For the reason that, seeing they not were in any way related, I could see no other reason whatsoever for making this sort of people beneficiaries.

20 *Q.* Now Mr. Davidson, you have had considerable experience, you have told learned counsel in the Court—thirty-nine years; do you think that it is right and proper to put such a carefully drawn phrase and such a statement of fact in a will without instructions and without seeing the testator beforehand?—*A.* Certainly, under the circumstances.

Q. Under the circumstances? Now that is to say that there are circumstances under which it is proper to put such words in but there are times when it is not proper to put such words in a will, is that what you mean?—*A.* If it were wife or children or next of kin, I wouldn't put it in. Because they were not, to my knowledge, in
30 any way related to him, the one conclusion I came to was that they were his very dear friends, and accordingly I inserted that particular phrase into the will.

Q. That was a guess on your part?—*A.* It was not a guess. I put it in deliberately for the reason that I could see nothing else but that they were his friends and they were to receive the benefit of his dispositions.

Q. So you assumed that they were his dear friends?—*A.* Yes—an assumption confirmed by the testator himself before he signed the will.

40 *Q.* At that stage you assumed it. On what facts did you assume it on the 31st March?—*A.* That as far as I knew they were not in any way related.

Q. That, *ipso facto*, they were his friends?—*A.* Yes.

Q. On what facts did you base the statement that they were devoted during his present illness?—*A.* I heard casually somewhere

RECORD.

that Jaimal was being nursed and subsequently it was confirmed by Hari Charan that these people were looking after him, when he gave me the instructions and told me who they were.

35. It is submitted that it is impossible to resist the conclusion that the expressions in the will had been suggested to Davidson by Hari Charan (acting in the interests of Amirchand) and that Davidson, who was seventy-five, had forgotten that circumstance.

36. The Respondents Amirchand and Mehar called Abdul Rahman Sahu Khan, a law clerk who had been with Ellis Munro Warren and Leys, their solicitors in this matter. Jaimal kept his documents in their office and this witness had seen him three or four times a week during the last ten years. He had witnessed a former will and codicil of Jaimal's. His evidence did not show that Jaimal had ever given any property to his nephews, though he had executed a power of attorney in favour of his nephews in respect of a sum of Rs. 20,000. This witness said further that Jaimal liked his nephews very much, and when asked whether it would surprise him to hear that on the 3rd April, 1944, Jaimal was saying that Amirchand was like his own child and if he got well he wished to take him to his own country, replied, "I would be surprised, knowing Jaimal." 10 20

37. Further, it is submitted that had Amirchand and Mehar been acting honestly, they would have told Davidson the facts about Jaimal. That he was a very sick man and that he had four nephews and that he had recently made wills in their favour, and would not have kept silent when Jaimal agreed with the statement that he had no blood relations in Fiji or elsewhere who were known to him.

38. There are accordingly in this case the following combination of circumstances:—

- (a) A testator in the last stages of tuberculosis, illiterate and uneducated and so feeble that he could not write his name or unaided make a thumb impression. 30
- (b) A will made the day before his death.
- (c) A disposition in the highest degree improbable and unnatural and contrary to all former wills benefiting the persons whom he would naturally wish to benefit, the last of such dispositions made only five weeks before his death.
- (d) The making of the will procured by a friend of one of the beneficiaries who can give no credible account of the reasons for his employment.
- (e) The will prepared by a solicitor who had never seen the testator or heard of him and did not know or ask about the amount of his property, the nature of previous wills or particulars of his relations. 40
- (f) The will containing very definite expression of the testator's reasons, which were either inserted by the draftsman without

instructions or suggested to him directly or indirectly by the beneficiaries. RECORD.

- 10 (g) The beneficiaries debtors of the testator—one of them his largest debtor.
- (h) Evidence and a statement in the will that at the date of the will the testator had no knowledge of his relations.
- (i) Evidence that the beneficiaries made no disclosure of previous dispositions known to them, and kept silent when the testator appeared to admit having no relations and failed to disclose to the solicitor facts which he ought to have been told.
- (j) Evidence which is, it is submitted, in many respects inconsistent and in many other respects bears marks of fabrication.

39. By an Order dated the 7th June, 1945, of the Supreme Court of Fiji the Appellants obtained leave to appeal to His Majesty in Council and it is humbly submitted that his appeal ought to be allowed with costs for, among other, the following

REASONS:—

- 20 1. The burden of proving that Jaimal had understanding of the nature of the business in which he was engaged, a recollection of the property he meant to dispose of, of the persons who had a claim to be the objects of his bounty and the manner in which it was to be distributed was on the Respondents Amirchand and Mehar, and they did not discharge that burden.
2. The will itself shows that the testator had no knowledge at all of his close relations, the natural objects of his bounty in whose favour he had made a will only five weeks earlier.
- 30 3. Having regard to the state of health of the testator and the fact that he was so near his death, the burden upon the Respondents Amirchand and Mehar could only have been discharged by the clearest independent evidence, which evidence was wholly lacking in this case.
4. It is impossible to believe that the testator would have made the disposition which he did make unless he had become subject to delusions or was under undue influence.
- 40 5. The learned Judge heard evidence for ten days but made no critical examination of such evidence and on the question which he decided against the Appellants appears to have accepted the evidence of Hari Charan, merely because it was uncontradicted.
6. The learned Judge paid no regard to the combination of circumstances mentioned at paragraph 38 hereof.

RECORD.

7. Having regard to Davidson's admissions as to the manner in which he drafted the will his memory ought not to have been relied upon.
8. Having regard to the interests of Amirchand and Mehar and the improbability of or discrepancies in their evidence they ought not to have been believed.
9. Hari Charan was clearly a friend of Amirchand and Mehar and the reasons he gave for visiting Jaimal are not credible and his evidence ought not to have been accepted.
10. The finding of the learned Chief Justice was wrong in law and was not supported by any credible evidence.

LINDSAY M. JOPLING.

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