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SANDERSON C.J.

sentences, which, having regard to the nature of the case, are not unreasonable.

The result is that this Rule is made absolute to this extent, namely, that the convictions under section 149 read with sections 325 and 323 of the Indian Penal Code, and the convictions under section 353 of the Indian Penal Code, are set aside. The convictions under section 147 of the Indian Penal Code and the sentences imposed thereunder must stand.

PANTON J. I agree.

E. H. M.

APPELLATE CIVIL.

Before Mookerjee and Chotzner JJ.

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June 1.

SARADINDUNATH RAY CHOWDHURY

v.

SUDHIR CHANDRA DAS.*

Will—Sound disposing mind—Testamentary capacity—Testator in health instructed for will and in illness executed it—Slight proof of knowledge and approval sufficient—Principle of continuity, whether applicable—Succession Act (X of 1865), s. 48.

Where a testator instructed his lawyer to draw up a will two months prior to its execution and at the time of execution he fell very ill, but was conscious, understood the provisions of the will when put to him, expressed his assent by monosyllables and affixed his initials to the will :—

Held, that the District Judge had correctly applied to this case the standard of testamentary capacity formulated in *Parker* v. *Felgate* (1), namely, that where a testator had given instructions for the will while in

* Appeal from Original Decree, No. 22 of 1920, against the decree of S. E. Stinton, District Judge of Dacca, dated Jan. 17 and 19, 1920.

(1) (1883) 8 P. D. 171.

health and executed the document prepared in accordance therewith while in illness, slight proof of knowledge and approval would suffice, and the will would be valid, though at the time of execution the testator merely recollected that he had given those instructions, but believed that the will which he was executing was in accordance with them.

Held, further, that although the testator was found semi-conscious by his medical attendants one hour before and one hour after the execution of the will, yet having regard to the nature of the medical evidence and other most reliable and highly respectable evidence, it was not inconsistent with the fact that the testator was conscious enough to assent to the terms of the will when they were read over to him and therefore the principle of continuity of being semi-conscious throughout did not apply.

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.

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 thing he was doing, is the vital question.

Harwood v. *Baker* (1), *Parker* v. *Felgate* (2), *Perera* v. *Perera* (3), *Rash Mohini Dasi* v. *Umesh Chunder Biswas* (4) and other cases referred to and discussed.

APPEAL by Saradindunath Ray Chowdhury and others, the objectors.

This appeal arose out of an application for grant of letters of administration with a copy of the will annexed. One Srish Chandra Das gave instructions to his lawyer to prepare a will some time ago and then he fell very ill. On December 11, 1904, between 9 and 10 A.M. he executed and registered the will. On

(1) (1840) 3 Moo. P. C. 282.
(2) (1883) 8 P. D. 171.
(3) [1901] App. Cas. 354.
(4) (1898) I. L. R. 25 Calc. 824 L. R. 25 I. A. 109.

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the following day he died leaving a widow Rasheswari and numerous descendants. By the will Srish appointed Rasheswari an executrix and his cousin Rajani an executor and directed that Rasheswari would adopt Nirmal, a grandson by the first daughter of Srish. Rasheswari and Rajani were granted letters of administration. On April 26, 1906, Rasheswari adopted Nirmal who assumed the name of Sudhir. Then various proceedings intervened. Ultimately Sarojini, the mother of Sudhir, applied for letters of administration to the estate of Srish on the 25th January, 1919, and challenged the genuineness of the will. The District Judge found that the will was genuine and was properly executed. In the High Court the appellants contended that the testator was too ill to execute any will with sound mind and free will and therefore the will was invalid.

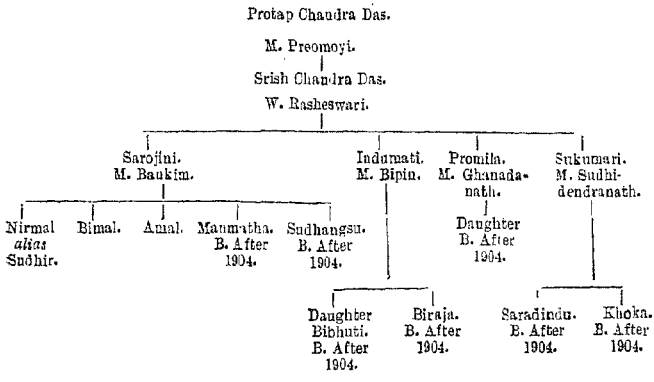
Babu Sarat Chandra Ray Chowdhury, *Babu Ramani Mohan Chatterjee* and *Babu Charu Chandra Bhattacharjee*, for the appellants (objectors).

Sir Asutosh Chaudhuri, *Babu Gopal Chandra Das* and *Babu Rajendra Chandra Guha*, for the respondents (petitioners).

Babu Mahesh Chandra Banerjee (for Babu Rama Prosad Mukherjee,) for the respondent (objector).

MOOKERJEE AND CHOTZNER JJ. This appeal is directed against the grant of letters of administration with copy annexed of a will alleged to have been executed by Srish 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.



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 had been married to Ghanadanath and Sukumari to Sudhidendranath. 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 twofold, 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 Dacca, and attested by seven witnesses, all of them persons

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of position and respectability. On the 19th February, 1905, Indumati, the second daughter of the deceased, presented a petition to the Collector of Dacca, 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 Colonel 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 opposition, 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 joint guardian with Rasheswari. The breach between the parties steadily widened, and on the 11th April, 1917, Trailakhya, 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 Huda, JJ. On the 20th September, 1918, Rasheswari was called 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 Srish 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.

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

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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 Srish 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 Ghose. 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* (1) and *Perera* v. *Perera* (2) 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 scrutinized 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.

The will was attested by seven persons besides the scribe. Four of these witnesses are dead, namely, Prasanna Chandra Vidyaratna, a well-known pundit of Dacca, Raghu Nath Das, a rich banker of Dacca, Govinda Chandra Das, a pleader of Dacca, and Amrita Lal Mitra, Librarian of the Northbrook Hall Library at Dacca. The surviving four attesting witnesses, who have been examined, are Trailakhya Nath Bose, Ananda Chandra Chakrabarti, Mahendra Kumar Ghose and Debendra Nath Das, all leading members of the legal profession in Dacca. Their testimony, which has been accepted by the District Judge, leaves

(1) (1883) 8 P. D. 171. (2) [1901] App. Cas. 354.

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no 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 propounder 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 Colonel 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 some time 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 que[illegible] the opinion of the District Judge as to the cr[illegible] of Mahendra. Mahendra asserts that [illegible] three instructions, namely, first, that [illegible]ived Rasheswari and cousin Rajani [illegible]ctor's wife secondly, that his wife w[illegible]e executors; adopt the son of his e[illegible]ve permission to that each of the two [illegible]ughter; and, thirdly, a month besid[illegible]ghters would get Rs. 100 testator as[illegible]se. Mahendra adds that the proper[illegible]ed [illegible]o write what else he might think th[illegible]ee days and made it over to his brother Soshi, 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

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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 Trailakhyanath the instructions received by him from Srish. Trailakhyanath then asked Srish whether he wished to make a will. Srish answered in the affirmative. Trailakhyanath next put the instructions one by one to Srish, 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 Srish who expressed his assent and initialled 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 [illegible] the Sub-Registrar, Aulad Hossain, who was in [illegible]ce. He has been examined and confirms the [illegible] by him at the time of registration, that note[illegible] was admitted by the testator, he though [illegible] his name and accordingly made was too weak [illegible] was manifestly ebbing away his mark. His [illegible]t is plain that the testa- fast. Notwithstandi[illegible]on, capable of under- tor was, at the time o[illegible] the will, as is standing and expressing his a[illegible]d by all the indicated by a remarkable incid[illegible]ate[illegible]istress witnesses present. The testator [illegible]d a m[illegible] his named Charubala, who lived in anothe[illegible]part of [illegible] house. She was anxious to secure a gift fr[illegible]m her paramour, and a deed had been drawn up for [illegible] that purpose. During the execution of the will, the woman came into the room and presented her document to Srish for signature. Srish exhibited anger

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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. Srish 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 Srish had testamentary capacity at the time of the execution of the will which was duly executed and attested.

But the objectors lay great stress on the medical evidence which, they contend, shows beyond reasonable doubt that the testator was unconscious speechless at the time when the will is said been executed by him. It must be stated set, however, that none of the attes was present when the will was exec Campbell (now Sir Robert Campbell of the condition of the patien and again shortly after 2 P.M. on both occasions the scious, in a state he could be ro was said to attend

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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 A.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. Shib Chandra Bose shortly after Colonel Campbell had left in the morning. Colonel Newman, who has been examined as an expert, is of opinion that the normal result of the drugs injected hypodermically would ...ve been to stimulate the cardiac and nervous ...ms and to rouse the patient from his condition ...tion. This effect should be produced in five ...tes and would last for three hours or ... expressed substantially the same Colonel ... ...ng the possible effect of the injection opinion regar... cardiac stimulants used. There is of the nervine an... ...dence itself, a reasonable and thus, on the medical e... existence of testamentary probable explanation of t... capacity between 9 and 10 M. on the day of the execution of the will, and we are consequently not driven to hold that the diagnosis of 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* (1) and should certainly be avoided in a case where we have the

(1) [1901] App. Cas. 354.

testimony of a 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 Trailakhya and to express his assent to the execution and registration.

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 48 of the Indian Succession Act and in the illustrations thereto. Reference has been made in this connexion to the decisions of the Judicial Committee in *Barry* v. *Butlin* (1), *Dufaur* v. *Croft* (2) and *Harwood* v. *Baker* (3). 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 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 object than one". To the same effect is the decision of Cockburn, C. J., in *Banks* v.

(1) (1838) 2 Moo. P. C. 480. (2) (1840) 3 Moo. P. C. 136.
(3) (1840) 3 Moo. P. C. 282.

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Goodfellow (1), where he cites with approval the statement in *Den* v. *Vancleve* (2); see also *Harrison* v. *Rowan* (3), *Stevens* v. *Vancleve* (4), *Guardhouse* v. *Blackburn* (5), *Goodacre* v. *Smith* (6), *Susil Kumar* v. *Apsari* (7), *Surendra Krishna* v. *Rani Dassi* (8). The propounder 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* (9). But he argues that if a testator has given instructions to solicitor to make a will and the solicitor prepared 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 out." This position is supported by decisions of the highest authority. In *Parker* v. *Felgate* (10), 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

(1) (1870) L. R. 5 Q. B. 549, 566.
(2) (1819) 2 Southard, N. J. Law 660.
(3) (1820) 3 Washington 585.
(4) (1822) 4 Washington 267.
(5) (1866) L. R. 1 P. & D. 109.
(6) (1867) L. R. 1 P. & D. 359.
(7) (1914) 19 C. W. N. 826; 20 C. L. J. 501.
(8) (1924) I. L. R. 47 Calc. 1043.
(9) (1865) L. R. 1. P. & D. 64.
(10) (1883) 8 P. D. 171.

and did understand that she was engaged in executing the will for which she had given instructions, she must be taken to have known 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* (1) and had been recognised in earlier decisions. Thus, in *Rash Mohini* v. *Umesh Chunder* (2), where the Judicial Committee affirmed the decision of this Court in *Woomesh* v. *Rashmohini* (3), 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 vigour. To the same effect are the observations of Lord Chelmsford in *Tayammaul* v. *Sashachalla* (4) and of Lord Hobhouse in *Sala Mahommed* v. *Dame Janbai* (5). The distinction will be found recognised also in *Kusum Kumari* v. *Satishendra Nath* (6). *Susil* v. *Apsari* (7), *Venkata* v. *Baggiammal* (8), *Namberumal* v. *Pasumanty* (9), and *Gordhandas* v. *Bai Suraj* (10). The doctrine has also been frequently recognised and applied in the Courts of the United States: *Hess' Appeal* (11), *Day* v. *Day* (12), *Boyd* v. *Boyd* (13), *Black* v. *Ellis* (14). The essence of the matter is that

(1) [1901] App. Cas. 354.
(2) (1898) I. L. R. 25 Calc. 824; L. R. 25 I. A. 109.
(3) (1893) I. L. R. 21 Calc. 279.
(4) (1865) 10 Moo. I. A. 429, 435.
(5) (1897) I. L. R. 22 Bom. 17; L. R. 24 I. A. 148.
(6) (1909) 13 C. W. N. 1128
(7) (1914) 19 C. W. N. 826; 20 C. L. J. 501.
(8) (1912) 23 M. L. J. 54.
(9) (1915) 28 I. C. 959.
(10) (1921) 23 Bom. L. R. 1088.
(11) (1862) 43 Pa. St. 73; 82 Am. Dec. 551.
(12) (1831) 3 N. J. Eq. 549.
(13) (1837) 3 Hill. S. C. 341.
(14) (1836) 3 Hill 68.

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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 thing 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* (1), 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.

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. Hearing fee Rs. 500.

B. M. S. *Appeal dismissed.*

(1) (1883) 8 P. D. 171.