

The position is clearly distinct from that in which a person makes a statement to a police constable, who translates it to some other person, who writes it down in a different language. In that case only the constable who makes the translation can verify the statement. Here, as I have said, the position is quite distinct.

The objection is over-ruled.

---

*in re* THE WILL OF JAIMAL DECEASED. BATTAN SINGH AND OR *v.* AMIRCHAND AND OR.

[Probate Jurisdiction (Corrie, C.J.) June 1, 1945.]

*Testamentary capacity—testator alleged to be of unsound mind, memory or understanding at time of execution—evidence that testator was of sound mind at time of giving instructions for preparation of the will—how far proof of unsound mind at time of execution is relevant.*

The deceased Jaimal gave instructions to a solicitor's clerk for the preparation of a will on 31st March 1944. He executed this will on 3rd April 1944 and died on 4th April, 1944. There was then in existence an earlier will dated 25th February, 1944 and the plaintiffs as executors of the earlier will claimed that the Court should pronounce against the will dated 3rd April, 1944, and decree probate of the will dated 25th February, 1944. The solicitor's clerk who received instructions from the deceased on 31st March 1944 gave evidence suggesting that on that occasion the deceased's memory was not defective. The solicitor and others present on 3rd April 1944 when the will was executed gave evidence as to his condition at that time.

**HELD.**—Following *Parker v. Felgate*, it being found that at the time of giving instructions for preparation of his will deceased was of sound mind, memory and understanding it is unnecessary to decide the precise condition of his memory at the time of execution of the will if he clearly understood the provisions of the will he was executing and made it clear that they were in accordance with his wishes.

[**EDITORIAL NOTE.**—This judgment is the subject of an appeal (pending) to the Privy Council.]

Cases referred to : —

(1) *Parker v. Felgate* [1883] 8 P.D. 171 ; 52 L.J.P. 95 ; 47 J.P. 808 ; 44 Dig. 251.

(2) *Perera and ors v. Perera and ors* [1901] A.C. 354 ; 70 L.J.P.C. 46 ; 84 L.T. 371 ; 17 T.L.R. 389 ; Dig. Supp. Vol. 33 case 264a.

**ACTION** for probate. The facts appear from the judgment.

*D. M. N. McFarlane* and *N. S. Chalmers*, for Battan Singh, Walaiti Ram and Khazan Singh executors of the will of 25th February 1944, plaintiffs.

*R. L. Munro, P. Rice, and A. D. Patel*, for Amirchand and Mehar, executors of the will of 3rd April, 1944, defendants.

*A. C. Morley*, for Waryama, Banta, Sondhi and Munshi beneficiaries under the will of 25th February, 1944 defendants.

CORRIE, C.J.—The plaintiffs, Battan Singh, Walaiti Ram and Khazan Singh, were the President, Secretary and Treasurer of the Sikh Gurudwara Committee at Samabula, Suva, holding office on the 4th April, 1944, and as such they are the executors appointed under the will dated the 25th February, 1944, of Jaimal (the son of Nihalla) of Samabula, Suva.

On the 3rd April, 1944, Jaimal made another will under which the defendants Amirchand and Mehar are the executors and the sole beneficiaries as tenants in common in equal shares.

Jaimal died on the 4th April, 1944.

The defendants Waryama, Banta, Sondhi and Munshi (all the sons of Nagina) are the sole next of kin of Jaimal. They are also the sole beneficiaries under the will dated the 25th February, 1944.

The plaintiff's claim is that the Court shall pronounce against the will dated 3rd April, 1944, and shall decree probate of the will dated 25th February, 1944.

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
- (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 claim (c), I find no evidence of undue influence having been exercised by either of the defendants Amirchand or Mehar.

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.

The will executed on the 3rd April, 1944, was prepared by Mr. Leslie Davidson, it was executed in his presence and he was one of the attesting witnesses ; and the case for the plaintiffs rests upon the answers that Jaimal gave to questions put to him by Mr. Davidson before the execution of the will.

According to Mr. Davidson's own evidence, he asked Jaimal to whom he wished to leave his property and whom he wished to appoint as executors. The conversation ran as follows : Mr. Davidson said : " Do you wish to give all your property to these men, each half ? " Jaimal said : " Yes " Mr. Davidson then said : " They would be your heirs ; " and Jaimal said " Yes ". The evidence continues : " I

then continued : I asked : "What persons do you want for executors?" He touched the same two men, Amirchand and Mehar. I said: "Have you any blood relations in Fiji". He answered: "No, sir." I said: "Have you any blood relations anywhere else?" He answered: "I do not know". That confirmed what I had of my own accord put in the will. Hari Charan had told me that Jaimal had no family in Fiji. I then said: "Why are you giving all your property to these people? They are not your relations." He said: "These are the only people who helped me in my sickness."

It is clear that Mr. Davidson took the answer which has been translated "I don't know" as meaning "I don't know of any", as he says that corroborates the statement that he had inserted in the will "of his own volition", namely: "I declare that I have no next of kin nor blood relations in Fiji nor elsewhere who are known to me."

Of the other persons who were present at the time, Mr. Davidson's clerk, Mohammed Rasul, who was the other attesting witness to the will, said: "Jaimal's answer was 'Apart from me there is no-one else: I have no-one left.' Mr. Davidson asked: 'Have you anyone else, blood relations?' Jaimal said: 'The ones that I have now are these two, Mehar and Amirchand. Whatever property I have after my death left over I desire that it should be given equally to these two, Mehar and Amirchand.'"

The defendant Amirchand, giving evidence in chief, said: "Mr. Davidson then read the will. He asked if Jaimal had any close relations. Jaimal said he had no-one at the time: the only ones at this particular time were those who were looking after him." In cross-examination he said that when Mr. Davidson asked "Have you any next of kin or blood relations?" Jaimal said "No". It is to be noted that Amirchand then said: "I said immediately, 'He has nephews in India.' Mr. Davidson then asked Jaimal, 'Is that true?' and Jaimal answered, 'Yes, it is true: I have nephews in India, but at this hour of need they are of no use to me, so I say I have no-one.' Mr. Davidson said 'All right, if you say there is no-one' and then he went on reading the will."

It is to be doubted, however, whether any reliance is to be placed upon this evidence, in view of the fact that Mr. Davidson states that nephews were never mentioned.

The defendant Mehar gives the following account of the same conversation: "When Mr. Davidson read the will he asked Jaimal if he had any wife, children or 'anyone belonging to you'. Jaimal answered: I have no-one'. Mr. Davidson did ask: 'Have you any blood relations?'. Jaimal said: 'I have no-one.'"

The defendant added: I understood that to mean that because these two people had helped him in his time of need his affection was for them. I did not see any reason to interrupt."

The only other evidence of what was said is that of Khurshed Khan. According to him, Mr. Davidson's question was whether Jaimal had any blood relations "here": and the reply was: "No, there is no-one here: whatever I have here belonging to me are these two". In cross-examination, he said that Mr. Davidson did not ask about blood relations "elsewhere", only "here".

In reliance upon that evidence, and upon the evidence of the Native Medical Practitioner, Viliame Boko Tavai, to the effect that, when he saw Jaimal after 1 o'clock on the day on which he signed his will of the 3rd April and asked him "Have you any pain? Jaimal did not speak but pointed to the region of his heart and neck, the plaintiff's argue that it is to be inferred that on the 3rd April Jaimal's health was rapidly getting worse; and that at the time when he signed his will he was suffering from such a loss of memory that he had forgotten the existence of nephews in India, in whom he, when in full health, took sufficient interest to have made, a few weeks before, a will in their favour.

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. This is clear on the authority of *Parker v. Felgate*, 8 P.D., p. 171. In that case Sir J. Hannen, President, said:—

" . . . the law applicable to the case in this: If a person 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 out.'"

This judgment was cited with approval in the case of *Perera v. Perera* [1901] A.C., p. 354, at p. 361. After quoting the passage from Sir James Hannen's judgment which has just been cited, the Court observed, "Their Lordships think that the ruling of Sir James Hannen is good law and good sense."

The instructions for the preparation of Jaimal's will were given by him to the witness Hari Charan on Friday, March 31st, 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.'"

I hold that at the time when he gave instructions for his will, Jaimal was of sound mind, memory and understanding. So far as his condition at the time of execution of his will is concerned, it is clear that he was in a far better state of health than the testatrix whose will give rise to the judgment in *Parker v. Felgate* which has been cited. At the time of execution, Jaimal clearly understood the provisions of the will he was executing, and made it clear that they were in accordance with his wishes.

It follows that the plaintiffs' claim fails. The Court decrees probate of the will dated the 3rd day of April, 1944.