

MADHYA PRADESH HIGH COURT

Banwarilal Shrinivas

Vs.

Kumari Kusum Bai

Misc. First Appeal No. 96 of 1967, decided on 27.7.1972, from judgment of M.M. Dube, 4th Addl. Dist. J., Jabalpur
(P.K. Tare and A.P. Sen, JJ.)

27.07.1972

JUDGMENT

A.P. Sen, J.

1. This appeal is directed against an order of dismissal of an application for revocation of a letters of administration with a copy of the will annexed.
2. The appellant acquired an interest in the testatrix's estate, though after her death, by reason of a transfer by the heirs at law. The questions for consideration are (1) whether he was entitled to a special citation in the proceedings for grant of letters of administration in view of Section 263, Illustration (ii) of the Succession Act, 1925; (2) if so, whether by reason of the absence of citation there was defect of substance within the meaning of Section 263, Explanation, Clause (a) of the Act, which vitiated the grant and (3) whether he has a locus standi to apply for revocation.
3. The respondent No. 1, Ku. Kusumbai, daughter of Deoraj hereinafter referred to as the "propounder", on 16-10-1958 applied for letters of administration of a will alleged to have been executed by her grand-mother, Mst. Kuntidevi, on 4-6-1943, i.e., nearly 15 years after her death. The will purports to bequeath the property to the propounder, in the first instance, charging the executer named therein to preserve the estate for her benefit during her minority, and if there be necessity to alienate the same to meet the expenses of her marriage. That was a contingent bequest. In the event of her father, Deoraj, performing her marriage, the estate shall then go to her brothers and sisters born afterwards, and in their absence to her mother for maintenance. The effect of the will was to dis-inherit the heirs at law.

4. Mst. Kuntidevi - the alleged testatrix, owned a plot of land at Stationganj, Katni. She had three sons - Deoraj, Jugraj and Jaichand. Of them, Jugraj pre-deceased Mst. Kuntidevi while Jaichand died after her death leaving behind his widow, Mst. Vidyawati.

5. Meanwhile, during the long period of 15 years, the estate was dealt with by Deoraj and Mst. Vidyawati, the heirs at law, as on intestacy. The property was attached in their hands in execution of a money decree by one Ajudhya Prasad, in execution of his decree in Civil Suit No. 46-B of 1950 on 12-4-1951 and again on 24-2-1954. On 3-4-1954, the appellant purchased the property by a registered sale-deed executed by Deoraj and Mst. Vidyawati for Rupees 2,000/-. From out of the consideration, they deposited Rs. 1,569.94 P. in satisfaction of the full decretal claim of Ajudhya Prasad. After the sale, the property which, in the meanwhile, had been mutated in his name, was leased back by the appellant to Deoraj and Mst. Vidyawati. In Revenue case No. 64/55-56, the appellant applied under CI. 13 (3) of the C. P. and Berar Letting of Houses and Rent Control Order, 1949 for permission to determine the tenancy. Meanwhile, Deoraj and Vidyawati filed Civil Suit No. 21-A/ 56-later re-numbered as 4-A/57, for a declaration of title notwithstanding the sale. That suit was dismissed in default of their appearance on 10-4-1958. While this suit was pending, the appellant brought Civil Suit No. 27-B/57 for recovery of arrears of rent. In this suit, the propounder applied for being impleaded as a party-defendant alleging that the property had been bequeathed to her by the testatrix, and that she had been granted letters of administration with a copy of the will annexed.

6. In the application for revocation, the appellant challenged the grant on two grounds, namely, (1) that there was substantial defect in the proceedings to obtain the grant and (2) that the alleged will was a forgery. In the alternative, the appellant also pleaded that the testatrix was a mere benamidar of Deoraj and, therefore, the will bequeathed no interest on the propounder. That was a foolish plea and has not rightly been pressed before us. The appellant has applied under Order 6, Rule 17, read with Sections 141 and 151 of the Code of Civil Procedure, for permission to delete paragraph 4 (h) of the application. We allow the application and permit the appellant to delete that plea, as the question whether the testatrix had no bequeathable interest being only a benamidar, is wholly outside the purview of these proceedings.

7. It is well established that any interest, however, slight, and even the bare possibility of an interest, is sufficient to entitle a party to oppose a testamentary document. So, a transferee from heirs-at-law, acquiring an interest in the testator's estate, by reason of a mortgage or sale, can, when a will is set up in opposition of his interest, apply for revocation of the probate of the will. See *Komallochun Dutt v. Nilruttun Mundle*,¹ *Muddun Mohun Sircar v. Kali Churn Dey*² *Lalit Mohan v. Navadip Chandra*,³ *Mokashadayini Dassi v. Karnadhar Mandal*,⁴ and *Promode Kumar Roy v. Sephalika Dutta*,⁵ The underlying principle was stated by Mookerjee, J., in AIR 1915 Calcutta 421 (supra) in these words:

"This is in accord with the principle adopted in the case of *Lindsay v. Lindsay*,⁶ where it was ruled that the person entitled to intervene in a proceeding for revocation of Letters of Administration or Probate need not show that he had an interest in the estate of the deceased at the time of his death; an interest acquired subsequently by purchase of a part of the estate is sufficient. Consequently, if it is established that the appellants have acquired by purchase an interest in the properties left by the deceased, they were entitled to be heard in the proceedings for grant of Probate. There is thus 'just cause' for revocation of the probate within the meaning of Section 50, Probate and Administration Act."

8. A purchaser who acquires an interest in the estate of the testator, by reason of a transfer by the heirs-at-law after his death, is, therefore, entitled to citation, because he is a person "who ought to have been cited" as contemplated in Illustration (ii) to Section 263 of the Act, which reads as follows:

"The grant was made without citing parties who ought to have been cited."

The Illustration refers not merely to compulsory cases, i.e., where it is imperative on the Court to issue a special citation, as on the executors under Section 229 of the Act, but refers also to cases where the grant is made without citing the person who ought, in the opinion of the Court, to have been cited. Section 283 (1) (c) contemplates issue of citation calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration. There are three decisions of the Privy Council on the point In *Rajah Nilmoni Singh Deo Bahadoor v. Umanath Mookerjee*,⁷ their Lordships stated that if a

person is complaining that he has, in fact, been defrauded, he is one of the persons who is injured by the fraud alleged and he is entitled to have his redress by applying to revoke the probate and thereby cause the fraud to become inoperative. Following that decision, their Lordships in *Sarala Sundari Dassya v. Firm Dinabandhu Roy Brajaraj Saha*,⁸ reiterated.

"If he had not such a right as that, it is very difficult to know what right a creditor in those circumstances, or a person injured by the fraud, could have, otherwise the probate would stand and he would be affected by the probate which had been obtained ex hypothesi fraudulently".

In *Ramanandi Kuer v. Mt. Kalawati Kuer*,⁹ the minor daughter of the testator applied for revocation and their Lordships found that the service of notice on her mother was defective. There, before the grant of probate some kind of formality was gone through on the occasion when service of notice was said to have been effected, but it was not such as would give to the person alleged to have been served, an opportunity either to oppose the grant of probate or to require the will to be proved in her presence. Their Lordships held that the service, if any, was of no greater effect in law than personal service on an infant of tender years, and the proceedings were, therefore, defective in substance. S.K. Das, J., (speaking on behalf of a Division Bench) in *Mt. Sheopati Kuer v. Ramakant Dikshit*,¹⁰ has stated that absence of citation on a person who ought to have been cited would, no doubt, be a defect of substance which will be deemed to be "just cause" as contemplated by illustration (ii) to Section 263 of the Act. We have also the weighty observations of P.N. Mukherjee, J., speaking for a Division Bench in AIR 1957 Calcutta 631 to the same effect. We are in respectful agreement with the views expressed in all these cases.

9. We are satisfied that the grant was procured by fraud. The record of probate case No. 5 of 1958 is before us. The propounder in her application had only impleaded Deoraj and Mst. Vidyawati, i.e. the heirs at-law. At the time when the application was made, she was aware that the heirs-at-law of the testatrix had sold the property dealt with in the will to the appellant on the footing that the testatrix had died intestate, and she fraudulently suppressed this fact. There was thus substantial defect to the procedure when the grant was made, and the grant is, therefore, liable to be set aside. The fact of the will by the heirs-at-law was something "material" to the case within the meaning of Section 263 of the Act, for that fact, if disclosed, would have been

material for the probate Court to consideration of the question as to whether a special citation was to be issued upon the appellant in view of Section 283 (1) (c) of the Act. [See: *Mahammad Ibrahim Midda v. Bhola Nath Lahiri*, (1946) 50 Cal WN 423 and AIR 1957 Calcutta 631 (supra)].

10. In the circumstances of the case, knowledge on the part of the propounder must clearly be inferred. She has chosen not to examine herself in support of denial. The evidence of her maternal uncle, Harchand Narayansingh (N.A.W. 2) shows that all along she was living with her father at Katni. She must, therefore, be presumed to have knowledge of the sale. If the case is not covered by the first clause of the definition of "just cause" to Section 263, namely, that the proceedings to obtain the grant were defective to substance, it is undoubtedly covered by the second clause, namely, that the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case. Notices were served on both Deoraj and Mst Vidyawati. There was no opposition to the grant. It was nevertheless their duty to apprise the Court that they had no subsisting interest in the estate so as to justify an opposition on their part. They should have intimated to the Court that they had already transferred the estate left by the testatrix to the present appellant. If this had been done, the Court would undoubtedly have issued a notice upon the appellant.

11. In view of this, it is not necessary for us to consider the question of genuineness of the will. When a just cause under Section 263 of the Act is made out, the onus is not on the applicant for revocation to prove that the will is a forgery but is on the grantee to prove that the will is a valid one. The law is clear on the subject. In AIR 1928 PC 2, then Lordships of the Privy Council have observed as follows:

"It is apparent that the plaintiff to this case set up both these grounds for revocation (that is, that the grant was made without citing parties who ought to have been cited and the will of which probate was obtained was a forgery)..... If these issues were tried separately and the plaintiff succeeded on the first issue, that to itself would be sufficient for revoking the probate; but it would still be open to the defendant to prove the will and, if she succeeded, the probate would stand. If on the other hand the plaintiff failed on the first issue that would not preclude her from proceeding to prove her second ground, viz., that the will

was forged, and the probate would stand or fall, according to the result"

The decisions in *Bal Govind v. Shri Ram*¹¹ and *Anil Behari Ghosh v. Smt. Latika Bala Dassi*,¹² are clearly distinguishable on facts. In AIR 1947 Allahabad 372 (supra), the Court recognised the principle that when there was a just cause for revocation, the propounder has to prove the will to the solemn form. In that case, the parties themselves led evidence on the question of the genuineness of the will. In the present case, there is no such evidence. In AIR 1955 Supreme Court 566 (supra), the execution of the will was practically admitted.

12. The procedure to be adopted is clearly indicated by P.N. Mukerjee, J. in AIR 1957 Calcutta 631 (supra) to these words:

"In our view the law is this: (1) Where the attack on the will forms the only ground or just cause for revocation, that must be considered by the revocation court, the onus being on the applicant for revocation to prove his case, (ii) Where the attack on the will forms only one of the several grounds or just causes for revocation under Clauses (a) to (c) of the section, the other grounds should be considered first and if they or any of them be established and the Court finds no reason to refuse revocation in the exercise of its discretion, the propounder should be called upon to prove the will, the onus of proof being cast upon him, and if he succeeds, the grant would stand; otherwise it would be revoked. If the other grounds fail, the Court should consider the ground of attack on the will, placing the onus on the revocator. (iii) Where the just causes, pleaded in a particular case, under Clauses (a) to (c) do not comprise any attack on the will - and this is quite possible as we have already seen, - the court may, in a proper case, consider the question of genuineness or the validity of the will or its existence for proper exercise of its discretion under the section but it is not obliged to do so in every case. Such consideration may be appropriate where the parties have adduced evidence on the point or where there are before the Court all relevant details of the necessary averments or where the question admits of decision on proved or admitted facts; otherwise, ordinarily, at least the grant should be revoked in the absence of circumstances compelling refusal of revocation in the exercise of the court's judicial discretion, and the original proceeding for the grant should be revived and reopened or a fresh proceeding for the grant should be initiated and the will proved over again and the question

of grant considered afresh in that proceeding."

13. In the result, this appeal is allowed with costs, the order of the learned Additional District Judge is set aside and the grant of a letter of administration with a copy of the will annexed to the respondent No. 1 in probate case No. 5/58 is hereby revoked with a direction that the proceedings for such grant be revived, and she be called upon to prove the will in solemn form in the presence of the appellant. Hearing fee Rs. 100/-, if certified.

Appeal allowed.

Cases Referred.

1. (1879) ILR 4 Cal 360
2. (1893) ILR 20 Cal 37
3. (1901) ILR 28 Cal 587
4. AIR 1915 Cal 631
5. AIR 1957 Cal 631
6. (1872) 42 LJ P and M 32
7. (1907) 10 Ind App 80 (PC)
8. AIR 1944 PC 11
9. AIR 1928 PC 2
10. AIR 1947 Pat 434
11. AIR 1947 All 372
12. AIR 1955 SC 566