

**Pradeep Kumar Chatterjee Vs. Shibarata Chatterjee and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/522999](http://sooperkanoon.com/522999)

**Court :** Jharkhand

**Decided On :** Dec-23-2003

**Reported in :** [2004(1)JCR484(Jhr)]

**Judge :** Vishnudeo Narayan, J.

**Acts :** [Indian Succession Act, 1925](#) - Sections 222, 263 and 273

**Appeal No. :** AFOD No. 624 of 1993

**Appellant :** Pradeep Kumar Chatterjee

**Respondent :** Shibarata Chatterjee and ors.

**Advocate for Def. :** N.N. Tiwary, Sr. Adv. and; K.P. Deo, Adv.

**Advocate for Pet/Ap. :** S.N. Das,; N.K. Chatterjee and; S.K. Deo, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

**Vishnudeo Narayan, J.**

1. This appeal at the instance of the appellant has been directed against the impugned judgment and decree dated 3.6.1993 and 5.7.1993 respectively passed in Miscellaneous Judicial Case No. 1 of 1987 'arising out of Title Suit No. 3 of 1985 in connection with Probate Case No. 2 of 1985' passed by Shri A.C. Das, District

and Sessions Judge, Deoghar whereby and whereunder the Probate granted vide order dated 9.1.1987 of the Will dated 15.3.1976 executed by Sudhir Chandra Chatterjee deceased (hereinafter referred to as the testator) in favour of appellant in Title Suit No. 3 of 1985 was revoked.

2. The said Miscellaneous Judicial Case No. 1 of 1987 was filed on 24.1.1987 by the petitioner-respondent Shib Brat Chatterjee for the revocation of the Probate granted on 9.1.1987 by the District Judge, Deoghar in favour of the appellant on the basis of the alleged Will dated 15.3.1976 purported to have been executed by the testator in his favour.

3. The case of the petitioner-respondent First Party, in brief, is that the testator who was a Hindu governed by Dayabhag School of Hindu Law died on 22.6.1977 at Chitranjan Hospital, Park Circus, Calcutta and he had executed his last Will in the Bengali language on 23.4.1977 in favour of his nephew the petitioner-respondent Shib Brat Chatterjee and duly attested by Dr. Malay Kumar Dutta, resident of 225/A, Vivekanand Road, Calcutta and Dilip Kumar Dey, resident of 22, Narikel Danga, North Road, Calcutta whereby the testator had bequeathed his entire moveable and immoveable property in favour of the petitioner-respondent aforesaid and he also appointed him the executor of the said Will. The said testator was issueless and he had reared a female child named, Roma Chatterjee and earlier he had executed a registered Will dated 30.12.1972 in favour of Roma Chatterjee aforesaid in respect of his estate but in his last Will dated 23.4.1977 in favour of the petitioner-respondent aforesaid he had cancelled his earlier registered Will dated 30.12.1972 in favour of Roam Chatterjee. The Will executed by the testator in favour of the petitioner-respondent aforesaid includes the land bearing holding No. 291 New/126 Old, Ward No. 15, Jamabandi No. 1080 known as Drakshakunj situate in Kalirak-ha, Joshagiri in the town of Deoghar, District Deoghar. It is further alleged that the testator was in service at Calcutta and his permanent abode was 356/3, now 307 Rabindra Sorini, P.S. Jora Bagan, Calcutta - 6 and he had died at Calcutta. The further case of the petitioner-respondent is that respondent-appellant Pradeep Kumar Chatterjee (hereinafter referred to as the appellant) was a tenant of the testator in the said house at Deoghar. It is alleged that the petitioner-respondent filed Probate case No. 71 of 1978 before the

Hon'ble High Court at Calcutta under its testamentary Jurisdiction, Probate to the executor for the Probate regarding the Will dated 23.4.1977 in his favour duly executed by the testator and Probate was granted in his favour by the Hon'ble High Court, Calcutta on 12.12.1986 on contest by Roma Chatterjee. It is alleged that after the grant of the Probate of the last Will and testament of the testator in his favour by the Hon'ble High Court, Calcutta he came to Deoghar on 12.1.1987 for realization of the rent of the said Deoghar house and also for taking steps for mutation of his name in respect thereof where he learnt that the appellant had obtained a Probate of a Will of the said Deoghar property in his favour on the basis of a forged and fabricated Will dated 15.3.1976 purported to have been executed by the testator in his favour and, thereafter, he inspected the record of the said case on 13.1.1987 and came to know about the said forged and fabricated Will dated 15.3-1976 and the order of the Probate has been obtained by suppressing the material facts and not citing and making the relatives of the testator as a party in the said Probate proceeding. It is also alleged that the Will dated 15.3.1976 alleged to have been executed by the testator in favour of the appellant regarding Deoghar house is a forged, fabricated and illegal document earlier in time to that of the last testament and Will dated 23.4.1977 executed by testator in favour of this petitioner-respondent and the said Will dated 15.3.1976 in favour ,of the appellant is a void and illegal document and besides that the appellant had suppressed the material facts regarding the name and address of the kith and kin as well as the relatives of the testator in his Probate petition whereas the death certificate of the testator filed by the appellant clearly mentions therein the name of this petitioner-respondent as a kith and kin and relative of the testator and no notice was ever served upon him and it was deliberately suppressed to avoid objection, if any, on his behalf and the Will in favour of the appellant is not the last Will and the testament of the testator and the appellant has fraudulently obtained the Probate in his favour making false allegations and suggestions and also by concealing the true facts and the Probate granted by the Deoghar Court is Inoperative in view of the Probate granted by the Hon'ble High Court, Calcutta. It has also been alleged that the testator had no daughter named Gita Chatterjee who is said to have executed a sale deed in respect of the Deoghar house in favour of Ashok Kumar Singh, respondent 2nd party and the said sale deed

executed by Gita Chatterjee in favour of Ashok Kumar Singh is a fraudulent and illegal sale deed and only with a view to avoid technical objection said Ashok Kumar Singh has been im-pleaded as respondent 2nd party/Lastly it has been alleged that the appellant was also not named as an executor and beneficiary in the said fraudulent Will and the proceeding granting the Probate to the appellant is defective in substance and the Probate was obtained fraudulently by making false allegations/suggestions and by concealing the true and material facts from the Court below.

4. The appellant has filed his show cause 'stating, inter alia, therein that the case of revocation filed by the petitioner-respondent is not maintainable either in law or on facts and the facts averred by the petitioner-respondent is false and incorrect. It is alleged that the Will dated 23.4.1977 purported to have been executed by the testator in favour of the petitioner-respondent is forged and fabricated. It is alleged that the testator has executed his last Will on 15.3.1976 in favour of the appellant and the permanent abode of the testator was at Deoghar within the jurisdiction of the Deoghar Court and the Will in favour of Roma Chatterjee is also forged and fabricated. It is alleged that though the testator had died at Calcutta but it is false to say that his permanent abode was at Calcutta. The further case of the appellant is that the testator has love and affection for this appellant as his son and the appellant was living in the said Deoghar house since long without paying any rent either in cash or in kind and the Will dated 15.3.1976 executed by the testator in his favour is genuine and valid and has been duly executed and the learned Court below on the basis of the evidence on the record found the Will genuine and valid and granted the Probate in respect thereof in his favour. It is also alleged that this appellant had no knowledge of the Probate proceeding pending before the Hon'ble High Court, Calcutta and the order of Probate of the Hon'ble High Court, Calcutta is not binding on him and the petitioner-respondent had knowledge of the Probate proceeding pending at the Deoghar Court and there is no ground available to the petitioner-respondent under Section 263 of the Indian Succession Act (hereinafter referred to as the said Act) for the revocation of the grant of Probate in favour of this appellant.

5. In view of the pleadings of the parties the learned Court below has formulated the following issues for adjudication in this case :--

(i) Is the suit as framed, maintainable?

(ii) Whether plaintiff has got valid cause of action under Section 263 of the Indian Succession Act and right to sue?

(iii) Has the defendant 1st party knowingly suppressed the name, address and avoided notice on the nearest relation of late Sudhir Chandra Ghattejee, namely, his nephew Shiba Brata Chatterjee, plaintiff herein in Title Probate Suit No. 3 of 1985?

(iv) Whether grant of Probate in favour of the defendant 1st party in Title Suit No. 3 of 1985 of this Court was obtained fraudulently by making false suggestion or by concealing something material to the case?

(v) Whether the proceedings of Title Suit No. 3 of 1985 were defective in substance?

(vi) Whether the grant of Probate by Hon'ble Calcutta High Court in the name of the plaintiff in Suit No. 71 of 1978 dated 14.5.1986 is a collusive one?

(vii) Whether Title Suit No. 3 of 1985 is hit under Section 222 of the Indian Succession Act to the extent that though the defendant is not named as an executor in the alleged Will dated 15.3.1976, still the Probate had been granted to him by this Court?

(viii) To what, relief and reliefs, the plaintiff is entitled?

6. While deciding issue No. VII the learned Court below has held that a Probate of a Will cannot be granted to a person who is not an executor appointed by the Will or an executor by necessary implication and in the other words the grant of Probate can be made only to a person appointed as an executor by the Will or an executor by necessary implication from the recital of the Will in question. While deciding issue Nos. III, IV and VI it has been held that there was suppression of material facts in the Probate petition of the appellant and the appellant has

knowingly suppressed the name and address and has avoided special citation (notice) on the nearest relation, namely, Shiba Brat Chatterjee (the petitioner-respondent here) of the testator in his Title Suit No. 3 of 1985 and the grant of Probate in favour of Pradeep Kumar Chatterjee (the appellant here) in Title Suit No. 3 of 1985 was obtained fraudulently by making false suggestion or by concealing something material to the case and the Title Suit No. 3 of 1985 is hit under Section 222 of the said Act to the extent that Pradeep Kumar Chatterjee (the appellant here) is not named as an executor in the alleged Will dated 15.3.1976 and the Probate of the said Will was wrongly granted in his favour. It has also been held that the proceeding of Title Suit No. 3 of 1985 were defective in substance. In view of the findings aforesaid the said Miscellaneous Judicial Case No. 1 of 1987 was allowed and the grant of the Probate of the Will dated 15.3.1976 vide order dated 9.1.1987 was revoked under Section 363 of the said Act.

7. Assailing the impugned judgment it has been submitted by the learned counsel for the appellant that the learned Court, below did not consider the evidence on the record in proper perspective and has erred in revoking the grant of Probate in favour of the appellant and the appellant has never deliberately suppressed the name and address of the respondent as the kith and kin of the testator and has not deliberately avoided citation on him whereas the appellant made all endeavours to locate the respondent at his address given in the death certificate of the testator but in spite of all his efforts the respondent was not found on that address and he has categorically deposed in respect thereof in his evidence on oath. It has further been submitted that the appellant is the only legatee and beneficiary under the Will dated 15.3.1976 executed by the testator in his favour which was duly executed by him and its due execution was proved in accordance with law before the Court below by the attesting witnesses in whose presence the Will dated 15.3.1976 was executed by the testator and finding the Will genuine and duly executed the learned Court below had granted Probate to the said Will in favour of the appellant and, therefore, there is no question of any fraud upon the Court and it cannot be said that the Will dated 15.3.1976 in favour of the appellant is a fraudulent document and furthermore since he was the sole legatee and beneficiary under the said Will and as such the Will does not suffer due to the absence of any recital

in respect of the executor of the said Will therein and the learned Court below has committed an error in holding that the Will has been wrongly Probated being in violation of Section 222 of the said Act. It has further been contended that the Will dated 15.3.1976 executed by the testator in his favour is his last Will whereas the Will dated 23.4.1977 executed in favour of the respondent is a fraudulent Will in which there is no reference regarding the Will dated 15.3.1976 and no explanation is forthcoming on the record as to why the testator has not disclosed regarding the existence of his Will dated 15.3.1976 therein and the Probate by the Hon'ble High Court, Calcutta in favour of the respondent probating the Will dated 23.4.1977 is of no consequence in this case. Relying upon the ratio of the case of Sashi Kumar Banerjee and Ors. v. Sub-odh Kumar Banerjee (since dead), AIR 1964 SC 529, it has been contended that the onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus but onus is on the propounder to explain the suspicious circumstances to the satisfaction of the Court before the Court accepts the Will as genuine and the suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the Will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that the testator's mind was not free and these suspicious circumstances has to be completely removed before the document is accepted as the last Will of the testator and when the propounder succeeds in removing the suspicious circumstances the Court would grant Probate even if the Will might be unnatural and might cut off wholly or in part near relations and in the present case the appellant was living in the bequeathed house with the testator serving him to his utmost satisfaction and being pleased he had executed the Will dated 15.3.1976 in favour of the appellant which was duly executed in presence of PW Muni Lal Verrna and PW 3 Gopal Prasad Narone besides one Ram Khelawan Mistri and the aforesaid attesting witnesses in their evidence on oath have proved the due execution of the said Will by the testator in favour of the appellant and the Court having been satisfied had probated the said Will. It has been submitted placing reliance upon the ratio of the case of Bibhuti Bhusan Mayur v. Bhabesh Bhusan

Mayur and others, AIR 1982 Cal 374, that Probate could not be revoked when the Will is held to be a genuine document not surrounded by any suspicious circumstance and not obtained by practicing fraud or undue influence and the ratio of this case squarely covers the case of the appellant. Relying upon the ratio of the case of R. Sivagnanam v. P.K. Sadananda Mudaliar, AIR 1978 Mad 265, it has been submitted that revocation of a grant of Probate implies the effacement of the earlier valid judicial order of a Court and the Court should be cautious in acceding to the request of revocation which can only be done in case of strict proof of the existence of one or the other circumstances enumerated in the explanation under Section 263 of the said Act and failure to cite all interested parties is not invariably fatal to the validity of the Probate proceeding. In this connection reliance has also been placed on the ratio of the case of Asber Reuben Samson and Ors. v. Eillah Solomon and others, AIR 1991 Bom 148. Viewed thus the impugned Judgment revoking the grant of Probate in favour of the appellant by the learned Court below is unsustainable.

8. Refuting the contention aforesaid made on behalf of the appellant it has been submitted by the learned counsel for the respondent that Probate of the Will dated 15.3.1976 allegedly executed by the testator in favour of the appellant has been fraudulently obtained by making false suggestion and also concealing material facts in respect thereof from the Court. Elucidating further it has been submitted that the Will dated 15.3.1976 is not the last Will and testament of the testator and there is no averment in the Probate Petition of the appellant regarding any kith and kin or close relatives of the said testator and there has been false recital in the said petition that the fixed place of abode of the testator is Deoghar and it has further been wrongly and falsely averred that the appellant is the executor of the Will duly appointed by the testator. It has also been submitted that Section 276 of the said Act specifically mandates that the propounder i.e. the appellant here has to specifically aver that the Will annexed with the Probate petition is the last Will and testament of the testator and the propounder is the executor named by the Will. It has further been contended that the appellant had full knowledge regarding this respondent being the nephew i.e. the son of the full brother of the testator prior to the institution of Probate Case No. 2 of 1985 which was filed on 2.5.1985 as he had obtained the certified copy of the death certificate of the testator on

12.1.1985 from the Registrar of Birth and Death, Calcutta which describes this respondent therein as the nephew of the testator having his residence at 356/3, Upper Chitpur Road, Calcutta-6 and the said death certificate has been filed by the appellant in the Probate Case No. 2 of 1985 on 6.12.1985 which was used by the respondent in the revocation proceeding before the Court below and marked as Ext. 6 on his behalf and having full knowledge regarding the respondent being the kith and kin of the testator and a close relative, the appellant has deliberately and fraudulently suppressed citation, on him only with a view to avoid contest and to obtain the Probate of the Will surreptitiously and the grant of the Probate was obtained without citing the respondent as a party in the said Probate proceeding' who according to the mandate contained under Section 263 ought to have been cited as such. In support of his contention reliance has been placed upon the ratio of the case of *Mt. Ramanandi Kuer v. Mt. Kalawati Kuer*, AIR 1928 Privy Council 2; *Priya Nath Bhattacharji v. Saila Bala Debi*, AIR 1929 Pat 385 and *Satrughan Mishra v. Smt. Sulochana Devi*, AIR 1983 Pat 74. It has further been submitted that the grant of Probate of the Will dated 15.3.1976 suffers with infirmity in view of the fact that the appellant was not named as an executor by the Will and he has false'ly made an averment to that effect in his Probate petition and further Section 222 of the said Act specifically mandates that a Probate shall be granted only to an executor appointed expressly or by necessary implication by the Will. In support of his contention reliance has been placed upon the ratio of the case of *Rajkishore Panda and Anr. v. Haribandhu Mahala and others*, AIR 1973 Ori 81; *Inder Chand Nayyar v. Sar-vadeshik Arya Pratinidhi Sabha and another*, AIR 1977 Del 34 and *Lallubhai Chhotabhai and Ors. v. Vithalbhai Par-shottambhai*. AIR 1982 Guj 222. It has also been contended that the Will dated 15.3.1976 is not the last Will and the testament of the testator rather the Will dated 23.4.1977 in favour of the respondent is the last Will and testament of the testator and the appellant has deliberately suppressed this fact and the last Will dated 23.4.1977 of the testator executed in favour of the respondent stands Probated by the Hon'ble High Court, Calcutta vide order dated 14.5.1986 i.e. much prior to the order of Probate dated 9.1.1987 in favour of the appellant by the Court below at Deoghar and thereby the grant of the Probate in favour of the appellant has become useless invalid and inoperative in view of the fact aforesaid i.e.the existence of the last Will

and testament dated 23.4.1977 of the testator having been probated on 14.5.1986 by the Hon'ble High Court, Calcutta. It has further been contended that the Will dated 15.3.1976 alleged to have been executed by the testator is forged and fabricated one and had the said Will been executed by the testator there ought to have been reference in respect of the Will dated 30.12.1972 In favour of Roma Chatterjee rather a false recital has been made in the Will dated 15.3.1976 that the testator had not at all executed any Will earlier. It has also been submitted that the appellant was a tenant in the Deoghar house and he had never served him as the testator had his permanent abode at Calcutta where he was in service and where he finally died and it is palpably false that the appellant has ever served him and according to him his dead body was unclaimed one and his funeral was performed by the funeral Samiti. Lastly it has been contended that the learned Court below after considering the evidence oral and documentary on the record has rightly revoked the grant of the Probate in favour of the appellant of the Will dated 15.3.1976 and there is no illegality in the impugned judgment and it has been observed in the case of madhusudan Das v. Smt. Narayani Bai and others, 1983 BBCJ SC 33, that the general rule is that the appellate Court should permit the findings of fact rendered by the trial Court to prevail unless it clearly appears that the said finding is based on inadmissible evidence or misreading of the evidence or non consideration of the evidence on the record.

9. In view of the pleadings of the parties and the evidence and material on the record it appears that Sudhir Chandra Chatterjee, the testator had executed three Wills, firstly on 30.12.1972 in favour of his foster daughter Roma Chatterjee in respect of his entire properties situate in the district of 24 Parganas, West Bengal and his house Drakshakunj at Kalirakha, Deoghar in the district of Deoghar, Bihar (now Jharkhand) and, thereafter, it is said that he has executed the alleged Will dated 15.3.1976 in favour of Pradeep Kumar Chatterjee, the appellant in this case in respect of the aforesaid house, namely, Drakshakunj at Kalirakha, Deoghar only and, lastly he had executed a Will in respect of all of his properties aforesaid including the house at Deoghar in favour of Shib Brat Chatterjee on 23.4.1977 cancelling his earlier Will dated 30.12.1972 in favour of Roma Chatterjee, Sushil Chandra, Ranesh Chandra, Ramesh Chandra and Rajesh Chandra are his brothers and his eldest brother sushil Chandra and his youngest brother Rajesh

Chandra have predeceased him and his brothers, namely, Sushil Chandra, Ramesh Chandra and Rajesh Chandra were separate from him. Shib Brat Chatterjee, the respondent is the son of his full brother Ranesh Kumar Chatterjee. The entire properties bequeath in the Wills aforesaid are the self acquired property of the testator who had died on 22.6.1977 at Chitranjan Hospital. Calcutta. The testator was in service in the automobile company at Calcutta and his permanent abode appears to be at Calcutta though on occasions he used to visit the town of Deoghar and during that period he used to reside in his house Drakshakunj at Kalirakha, Deoghar. Ram Chandra Chatterjee, the father of the appellant was admittedly a tenant in the said Drakshkunj at Deoghar and Ext. 1 series and Ext. 2 establish the said fact. It is an admitted fact that the said testator had died issueless but there is divergence in the recitals of the Will dated 30.12.1972 and 23.4.1977 regarding his marital status. As per the recital in the Will dated 30.12.1972 he had a wife named Angoor Lata who had predeceased him and he had acquired the Deoghar property in her name but according to the recitals made in the Will dated 23.4.1977 the testator is said to be unmarried. However, this aspect of the matter has no relevancy in this case. The Will dated 15.3.1976 allegedly executed in favour of the appellant is conspicuously silent regarding the marital status of the testator and also as to whether he has any child and at the same time it also does not refer regarding the existence, of the earlier Will dated 30.12.1972 executed by the testator in favour of Roma Chatterjee. The Will dated 23.4.1977 stands probated by the Hon'ble High Court of Calcutta on 14.5.1986 in favour of the respondent and when he came to Deoghar for mutation of his name in pursuance to the grant of Probate dated 14.5.1986 he came to know that the appellant has obtained a grant of Probate in his favour by virtue of the alleged Will dated 15.3.1976 purported to have been executed by the testator in his favour and on enquiry it transpired to him that the said Will is forged and fabricated Will and after suppressing the material facts and without citation the grant of the Probate has been obtained by the appellant and, thereafter, he filed the revocation case for the grant of Probate dated 9.1.1987 in favour of the appellant. The appellant filed Probate petition annexed with the original Will dated 15.3.1976 on 2.5.1985 before the Court of District Judge, Deoghar for the grant of Probate which gave rise to Probate Case No. 2 of 1985. During the pendency of this case one Ashok Kumar

Singh who is respondent 2nd party in this appeal objected to the grant of Probate in favour of the appellant claiming himself to be, the purchaser of the Deoghar property covered under the said Will by virtue of the sale deed purported to have been executed by one Gita Chatterjee said to be the daughter of the testator and, thereafter, the Probate proceeding being contentious it was registered as Title Suit No. 3 of 1985 and in view of the evidence on the record in the said Title Suit No, 3 of 1985 the then District Judge, Deoghar negatived the claim of the 2nd party respondent and Probate of the Will dated 15.3.1976 was granted in favour of the appellant. For proper' appreciation it is pertinent to quote the Will dated 15.3.1976 which runs thus ;

'I, Sudhir Chatterjee s/o Late Khirod Nath Chatterjee, on this the 15th day of March, 1976 executed the deed of Will in favour of Pradeep Kumar Chatterjee s/o Ram Chandra Chatterjee of Mohalla Karirakha, Deoghar Town, PS & Sub-Division. Deoghar, District Santhal Paragana. I declare that after my death P.K. Chatterjee who lived with me and always took care of me would inherit the entire land in Jhaunsagarhi Thana No. 582 under J.B. No. 1080 measuring 6 (six) Kathas yearly rental Re. 1.80 with house standing thereon bearing Holding No. 126, Ward No. 15 within Deoghar Municipality. The said P.K. Chatterjee shall be the absolute owner of the aforesaid land and house after my death. I have not executed any Will earlier. No other person shall lay any claim. If any claim would be made that would be rejected in the eye of law.'

In witness whereof I put my signature on

the day, month and year aforesaid

Executant

Sd/- Sudhir Chatterjee

Witnesses

Sd/- Ram Khelawan Mistri

Sd/- Muni Lal Verma

Sd/- Gopal Prasad Narone

It appears from the perusal of the Will dated 15.3.1976 aforesaid that legatee named in the said Will has not been appointed executor by the Will though he has been made absolute owner of the land and house of Deoghar after the death of the testator. The legatee is not a universal donor in view of the fact that the testator had several other moveable and immoveable properties which transpires from the Will dated 30.12.1972 read with the Will dated 23.4.1977. There is no reference therein regarding the permanent abode of the testator. There is no endorsement with signature of the person who had typed the said Will dated 15.3.1976. The name of the testator is Sudhir Chandra Chatterjee which is evident from the Will dated 30.12.1972 and 23.4.1977 as well as from Ext. 6 the death certificate whereas in the Will dated 15.3.1976 the name of the testator appears as 'Sudhir Chatterjee'. There is recital in this Will that the testator has not executed any Will earlier but the fact is otherwise which is evident from the Will dated 23.4.1977 read with 23.12.1972 that the testator had earlier executed a Will in favour of Roma Chatterjee, his foster daughter on 30.12.1972 in respect of his entire properties including the Deoghar house and there is no reference in respect thereof in the Will quoted above. It is also pertinent in this connection to look into the averments made in the petition of Probate filed by the appellant on 2.5.1985. The averments in the Probate petition of the appellant runs thus :

- (1) The Sudhir Chatterjee died at Calcutta on 22.6.1977 and that the writing annexed in his last Will is tes-tacy which was duly executed by him.
- (2) that the value of asset is about Rs. 10,000/- which has come at the hands of the applicant as set forth in the Schedule A hereto.
- (3) That the applicant is the execute in the Will dated 15.3.1976.
- (4) That the testator Sudhir Chatterjee left behind the non-applicant as his near relation.
- (5) That the said Sudhir Chatterjee had his fixed place at Deoghar and the property for which the Probate is sought situates at Deoghar within the jurisdiction

of this Court.

(6) That to the best of the belief of the applicant, no application for grant of Probate has been made in the said Will (which is annexed with this applicant) of the deceased Sudhir Chatterjee.

It appears from the averments aforesaid that there are material suppression of the fact of the kith and kin and near relatives of the testator and there is false assertion therein that the appellant has been appointed the executor by the said Will and the Will dated 15.3.1976 is the last Will and testament of the testator. There is also false assertion regarding the fixed place of abode of the testator. Furthermore the prayer has been made for the grant of Probate of the said Will and not for letters of administration in respect thereof.

10. Section 276 of the said Act mandates as to what has to be averred in the petition of Probate for its grant and Sub-clause (e) of Sub-section (1) of Section 276 prescribes that the propounder i.e. the appellant has to state that he is the executor named in the Will and Sub-clause (a) of Sub-section (2) of the said Section further prescribes that the propounder has to aver the place where the deceased at the time of his death had a fixed place of abode. The principle governing the revocation of the grant are specifically enumerated in Section 263 of the said Act which reads thus :--

'263. Revocation or annulment for Just cause.--The grant of Probate or letters of administration may be revoked or annulled for just cause.

Explanation.--Just cause shall be deemed to exist where--

(a) the proceedings to obtain the grant were defective in substance; or

(b) the grant was obtained fraudulently by making a false suggestion, or suggestion, or by concealing from the Court something material to the case; or

(c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or

(d) the grant has become useless and inoperative through circumstances; or

(e) the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

Illustrations.

(i) The Court by which the grant was made had no jurisdiction.

(ii) The grant was made without citing parties who ought to have been cited.

(iii) The Will of which Probate was obtained was forged or revoked.

(iv) A obtained letters of administration to the estate of B, as his widow, but it has since transpired that she was never married to him.

(v) A has been taken administration to the estate of B as if he had died intestate, but a Will has since been discovered.

(vi) Since Probate was granted, a latter will has been discovered.

(vii) Since Probate was granted, a codicil has been discovered which revokes or adds to the appointment of executors under the Will.

(viii) The person to whom Probate was, or letters of administration were, granted has subsequently become of unsound mind.

The grant of a Probate may be revoked for a just cause. 'Just cause' is explained in the body of the section itself. The various clauses which explained the expression 'just cause' provide guidelines for the Court, whose assistance is sought for revocation of an improper grant under the said Act. As revocation of a grant implies the effacement of the earlier valid judicial order of a Court, not only there should be caution in acceding to such a request but strict proof of the existence of one or other of the circumstances enumerated in the explanation to Section 263 of the Indian Succession Act is necessary before the Court could

accede to such request. The revocation should be for a just cause. The illustrations to the Section 263 quoted above also provides some material to the Court as to when it could exercise its discretion to reverse a grant. Illustrations (ii) and (vi) read with clauses (a), (b) and (c) are very much material in this case which have an impact on the facts and circumstances of this case. 'The grant was made without citing parties who ought to have been cited' as per illustration (ii) is a just cause which would enable the Court to revoke the grant. No doubt it is fundamental that the judgment of a Court of Probate being a judgment in rem, should be pronounced in the presence of all parties interested, however, slight such interest may be but this is not axiomatic. Each case has to be decided on its own merit. Absence of just cause cannot be presumed on a priori consideration.

11. Let us now advert to the evidence on the record. There is no denying the fact that there was no citation on the respondent Shib Brat Chatterjee besides any other kith and kin of the testator in the said Probate proceeding regarding the grant of Probate of the Will dated 15.3.1976. The appellant in the Probate petition has not mentioned any kith or kin or relative of the testator. No citation was ever issued on any kith and kin or relative of the testator. The appellant who has examined himself as AW 1 in the Probate proceeding has deposed in para 8 of his testimony that he has no knowledge as to whether the testator has his brother or nephew or not but in course of enquiry at Calcutta he came to know that Shib Brat Chatterjee (the respondent No. 1 here) is his nephew but he could not ascertain his address. He has further deposed that the testator died at Calcutta and his funeral was performed by the funeral committee. He has also taken oath as OW 1 in the revocation proceeding in which he has stated that he has not sent any notice of the Probate proceeding to Shib Brat Chatterjee the nephew of the testator. He has further deposed that he had disclosed in the petition of Probate regarding Shib Brat Chatterjee. The evidence of the appellant referred to above is totally false. The appellant had obtained the certified copy of the death certificate of the testator on 12.1.1985, and, thereafter, he had filed the petition for Probate on 2.5.1985 for the grant of Probate. He has filed the said death certificate in the Probate proceeding on 6.12.1985. The said death certificate though filed by the appellant in the Probate proceeding has been used by the respondent Shib Brat Chatterjee in the revocation case and the said death certificate has been marked as Ext. 6 on

his behalf. The death certificate describes the address of the testator c/o the respondent Shib Brat Chatterjee, 356/3, Upper Chitpur Road, Calcutta-6. That very address is the present address of the said respondent as disclosed in his revocation petition. It, therefore, appears that the appellant had full knowledge of the existence of the said respondent on the said address but he deliberately did not cite him as party in the said Probate proceeding whereas he was the most interested party in the said proceeding and it further appears that the grant of Probate of the Will dated 15.3.1976 was made without citing the said respondent as party who ought to have been cited. The reason is not very far to see for not citing the said respondent as party in the said proceeding. He was deliberately not cited as party by the appellant only with a view to obtain Probate of the Will dated 15.3.1976 without any objection by the kith and kin of the testator due to ulterior mala fide motive and intention, so that the truth of the due execution of the Will dated 15.3.1976 may not come to light. In the case of Priya Nath Bhat-tacharji. (supra) it has been observed that when just cause is made out it is not left to the discretion of the Court to revoke or not to revoke the letters of administration under Section 263 and even universal legatee is not relieved of issuing citation on the reversioners. It has further been observed that a person having reversionary interest although such interest be Inalienable and dependant upon remote contingencies is nevertheless substantially Interested in the protection of devolution of the estate and as such he is entitled to appear and be heard in Probate proceeding. Want of necessary citation make the proceeding defective and the letters of administration can be revoked. In the case of Satrugan Mishra, (supra) the Probate was granted in his favour being a distant relative of the testator whose daughter filed the instant proceeding for revocation of the grant of Probate and she alleged that the Probate was obtained by the defendant ex parte without notice to her by practicing fraud and the Will was forged and the trial Court revoked the grant of the Probate on the ground of want of notice to the plaintiff in the Probate proceeding. In view of the facts aforesaid it was observed that the findings of the Court below that citation was not issued to the plaintiff cannot be disturbed on the facts of the case and, therefore, there was no merit in the appeal which has to be dismissed. In the case of Mt. Ramanadi Kuer, (supra) the Privy Council has observed that the service, if any, was of no greater effect in law than

personal service of an infant of tender years and the proceeding were defective in substance. The ratio of the case of Asber Reuben Samson and others, (supra) relied upon by the appellant in this case has no application in the facts and circumstances of this case for the reason that there was citation published in Free Press Journal and in view of the facts aforesaid it was observed therein that one cannot impute fraud against the propounder of the Will and order of grant of Probate without citation is not bad in all cases and so also citation by publication are not improper in all cases. Furthermore the said ratio is also of no help to the appellant in this case in view of the fact that there was no citation at all on the respondent Shib Brat Chatter-Jee. The ratio of the case of R. Sivagnanam, (supra) is also of no help to the appellant in view of the fact that though there was no citation in the Probate proceeding but the interested persons appeared in the said case and had filed their caveat and, thereafter, they have withdrawn the said caveat. Therefore, the facts of the said case is quite distinguishable from the facts of the present case. Therefore, the finding of the learned Court below that appellant has knowingly suppressed the name and address and has avoided special citation (notice) on the nearest relation, namely, Shib Brat Chat-terjee, the nephew of the testator in the Probate proceeding is legal and valid and I see no reason to disagree with the said finding. Therefore, the Probate proceeding was defective in substance on this score in violation of Illustration (ii) read with explanation (a) of Section 263 of the said Act.

12. The second aspect of the matter as to whether the Will dated 15.3.1976 in favour of the appellant is the last Will and testament of the testator. Illustration (vij) of Section 263 is relevant in this connection which runs thus :

'(vi) Since Probate was granted, a later Will has been discovered.'

The appellant In the petition of Probate has averred that the Will dated 15.3.1976 in his favour executed by the testator is his last Will and testament. The materials on the record show that the testator has executed a Will on 23.4.1977 in favour of respondent Shib Brat Chatterjee, the Probate of which was granted by the High Court of Calcutta on 14.5.1986. The Will dated 23.4.1977 is in respect of his all moveable and immovable properties including the house Drak-shakunj at

Deoghar. The Will dated 15.3.1976 in favour of the appellant was probated on 9.1.1987 i.e. after the grant of Probate of the Will in favour of respondent Shib Brat Chatterjee. It, therefore, appears that the Will dated 23.4.1977 is the last Will and testament executed by the testator in favour of respondent Shib Brat Chatterjee. The fact of the existence of the Will dated 23.4.1977 was suppressed by the appellant in his petition of Probate which was very much material to the grant of the Probate of the Will dated 15.3.1976 in his favour. Therefore, in this view of the matter the learned Court below has rightly revoked the grant of Probate of the Will dated 15.3.1976 in favour of the appellant and I also see no reason to disagree with his finding in respect thereof. The existence of a latter Will in favour of respondent Shib Brat Chatterjee executed by the testator amounts to cancellation of the earlier Will of the testator in respect of the same property and the existence of the last Will and testament is a just ground for revocation of the grant of Probate in respect of an earlier Will.

13. It is apparent from the contents of the Will dated 15.3.1976 that the appellant has neither been appointed as an executor by the said Will nor by necessary implication though in the petition of Probate he has falsely averred that he has been appointed as an executor in respect of the Will dated 15.3.1976. The testator had several properties and only Deoghar property is the subject matter of the Will dated 15.3.1976 whereas the entire move-able and immoveable properties including Deoghar property has been bequeath in favour of respondent Shib Brat Chatterjee by the Will dated 23.4.1977 which was probated by the High Court of Calcutta on 12.12.1986 on contest by Roma Chatterjee. In this view of the matter the appellant cannot be termed as an universal legatee. The appellant had filed the Probate petition giving rise to Probate Case No. 2 of 1985 which was subsequently converted as Title Suit No. 3 of 1985 for the grant of Probate of the Will dated 15.3.1976. He has not filed the petition for the grant of letters' of administration. Section 222 of the said Act is relevant which runs thus :

'222. Probate only to appointed ex-ecutor.-(I) Probate shall be granted only to an executor appointed by the Will.

(2) The appointment may be expressed or by necessary implication.

Section 263 of the said Act provides for revocation of grant of Probate for any just cause. An explanation has been appended indicating the circumstances where a just cause can be said to exist and the first one is whether it is found that the proceeding to obtain the grant was defecting in substance. The learned counsel for the respondent has submitted that though there was no executor appointed under the Will or by necessary implication yet the application at the instance of the appellant was entertained and Probate of the Will was granted and it brings the matter within the purview of the first clause in the explanation of Section 263 and the petition for Probate filed by the appellant was defective in substance and so is the grant of Probate of the Will dated 15.3.1976. It appears that the proceeding to obtain the grant is defective in substance as the mandatory provision of the Statute was overlooked and petition of Probate filed by the appellant is, therefore, incompetent and the learned Court below had no jurisdiction to grant Probate of the Will. It has been observed in the case of *Rajkishore Panda and another*, (supra) that the grant of a Probate though no executor was appointed under the Will is a material defect for which a revocation of the grant can be claimed. It has been observed in the case of *Inder Chand Nayyar*, (supra) that where the propounder is not appointed executor in the Will either expressly or by necessary implication, Probate cannot be granted to him. It has been thus observed in the case of *Lallubhai Chhotabhai and others*, (supra) ;

'Held, on a fair, proper and comprehensive reading of the material provisions of the Will, there was no manner of doubt that the respondent was constituted the sole universal legatee under the Will, in whom the properties of the testator vested, both in interest as well as in possession, immediately upon the death of the testator and that the respondent was not appointed as an executor by the Will either expressly or by necessary implication, nor was he constituted residuary legatee. The directions contained in the Will that regard to payment of debts etc, did not constitute respondent as executor or residuary legatee. The respondent was not entitled to Probate but only to letters of administration.'

In view of the ratio of the cases aforesaid read with Section 222 of the said Act it is crystal clear that grant of Probate in respect of the Will dated 15.3.1976 in favour of the appellant is illegal, invalid and in violation of the mandatory provisions of the

statute and the Probate proceeding at the instance of the appellant is defective in substance and the grant of the Probate of the Will dated 15.3.1976 in his favour has rightly been revoked by the learned Court below.

14. And last but not the least there is concealment of material facts as well as false suggestion fraudulently made besides untrue allegation of a fact essential in point of law to Justify the grant in the petition of Probate of the appellant. There is evidence on the record that the testator was in service at Calcutta and he has his fixed abode at Calcutta and he was a visitor at his Deoghar house on occasions. Therefore, his house Drakshakunj at Deoghar can never be termed as his fixed place of abode in the facts and circumstances of this case. The appellant claims to have served him at Deoghar but the evidence on the record shows that the testator was a casual visitor to his house at Deoghar on occasions. The appellant has deposed in para 7 of his evidence that he got the news of the death of the testator after one month of his death, as AW 1 in the Probate proceeding he has deposed that the testator died in Chitranjan Hospital, Calcutta and his funeral was performed by Funeral Samiti. This evidence of the appellant casts a cloud of suspicion to the very genuineness of the Will dated 15.3.1976 allegedly executed in his favour by the testator due to his love and affection for him. Furthermore the scribe of the Will is his father but the said Will does not contain any endorsement or his signature thereon. Even there is apparent error in describing the proper name of the testator in the Will dated 15.3.1976. The petition of Probate was filed by the appellant after nine years of the death of the testator and for that no explanation is forthcoming on the record. The aforesaid facts are the suspicious circumstances surrounding the due execution of the Will in question in favour of the appellant and it can be safely held that the said Will is not genuine and valid and duly executed by the testator 'in favour of the appellant. The learned Court below has considered the entire aspect of the matter in proper perspective and has rightly revoked the grant of the Probate of the Will dated 15.3.1976 and the finding of the learned Court below does not appear to have been based on inadmissible evidence or misreading of the evidence or non-consideration of the evidence on the record and thus there is no reason to disagree with the finding of the fact rendered by the Court below and thus there is no illegality in the impugned judgment,

15. There is no merit in the appeal and it fails. The impugned judgment is hereby affirmed. The appeal is dismissed with costs.

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