

Promode Kumar Roy Vs. Sephalika Dutta

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Court : Kolkata

Decided On : Aug-13-1956

Reported in : AIR1957Cal631

Judge : P.N. Mukerjee and ;Renupada Mukherjee, JJ.

Acts : [Succession Act, 1925](#) - Sections 2 and 263

Appeal No. : A.F.O.D. No. 210 of 1955 (Probate)

Appellant : Promode Kumar Roy

Respondent : Sephalika Dutta

Advocate for Def. : Pramath Nath Mitter, ;Sourendra Kumar Ghose Choudhury,
;Sushil Kumar Biswas and ;Purnendu Narayan Nath, Adv.

Advocate for Pet/Ap. : H.N. Sanyal and ;Syama Charan Mitter, Adv.

Disposition : Appeal allowed

Judgement :

P.N. Mookerjee, J.

1. The appellant before us was the applicant for revocation of a rant of Letters of Administration. The grant was made to the respondent Shephalika Dutta on 22-12-1952, and it was actually issued to her on 2-1-1953. The grant was obtained in

respect of the alleged Will of the respondent's father-in-law Charu Chandra Dutta who died in or about November 1932. The Will is dated 3-10-1932. It is an unregistered Will which purports to disinherit the testator's only living son Nayan Chand Dutta and to make a debuttar of all his (the testator's) movable and immovable properties and under the Will the testator's widow Sm. Durgabati Devi was to be the first shebait and after her his son's wife, if any, the son not having married till then, and thereafter their sons, grandsons etc., and in default the testator's other heirs in succession. In short, after the testator's daughter-in-law, the shebaitship was to follow the testator's line of succession and devolve upon his living heirs at the time, barring, of course, his only surviving son Nayan Chand Dutta who, as already stated, was expressly disinherited and excluded from his properties and the shebaitship. More detailed reference to the provisions of the Will is not necessary for our present purpose.

2. The respondent's application for Letters of Administration (which is Ext. 12 in the present case and which is dated 26-11-1952) was filed in November 1952 that is, about 20 years after the death of the testator. There was general citation and special citation only on the applicant-respondent's husband Nayan Chand Dutta, the only surviving son of the testator, who was disinherited by the Will. Nayan Chand did not appear and the grant was made ex parte and without opposition and it was issued on plain paper without security as prayed for by the respondent in her two supplementary petitions dated 23-12-1952 and filed in court on 2-1-1953. These two petitions have been marked in this Court by consent as High Court Exts. 2 and 3 by way of additional evidence.

3. Meanwhile, during the long period of about 20 years which had elapsed between the testator's death and the alleged discovery of the Will, which discovery, according to the respondent, was made on 4-11-1952, the testator's disinherited son Nayan Chand Dutta, who was the respondent's husband, had been dealing with the testator's properties as on intestacy and he had during this interval actually alienated by sale Holding No. 110, then Premises No. 149 Kutighat Road of the Baranagore Municipality, on 22-1-1936; portion of Holdings Nos. 72 to 75, village Nainan on Nainan Mussalmanpara Lane (Baranagore) on 15-12-1941; remaining portion of Holdings Nos. 72-75 and Holdings Nos. 66 to 71

on 28-1-1944; No. 17, Kashi Nath Dutta Road on 22-8-1944, and Holdings Nos. 64/65 and 65/110, village Nainan, on 30-1-1946, to several persons, one of whom, namely, Ramjan Ali, the purchaser of the Kutighat Road property, had in his turn sold the same to one Gopi Mohan Daw and his two brothers Sital Chandra Daw and Gour Mohan Daw on 24-1-1945, and the said Nayan Chand Dutta had also during the said interval mortgaged to the present appellant by way of collateral security No. 203, Kashinath Dutta Road and No. 20, Cossipore Road on 12-4-1949, and 17-6-1949, and the said premises No. 20/1, Gunfoundry Road on 19-12-1950 and 2-6-1951, for securing several loans taken by him from the appellant in the meantime. Memorandum of one of these equitable mortgages, namely, that of 12-4-1949, was registered. Meanwhile, the testator's widow Durgabati had also died on 6-12-1944.

4. On 5-9-1951 and 22-2-1952, the appellant filed two Title Suits Nos. 120 of 1951 and 19 of 1952 in the Fifth Court of the Subordinate Judge of Alipore for recovery of his dues under the above mortgages against the respondent's husband Nayan Chand Dutta. Later on, the claim in the second suit was included in the first by amendment of plaint and the present appellant who was the plaintiff got a preliminary decree on 8-3-1954, which was made final on 6-11-1954. In the meantime, as we have already said, that is, during the pendency of the appellant's above mortgage suit and while it was being contested by the respondent's husband Nayan Chand Dutta, who was the defendant therein, the respondent, alleging discovery of the alleged Will of her father-in-law on 4-11-1952, obtained grant of Letters of Administration in respect thereof on 22-12-1952, the Letters being actually issued to her on 2-1-1953. On 23-12-1953, the appellant filed his present application for revoking the said grant upon the allegation inter alia that he came to know of its existence about the end of September 1953 and could obtain the necessary particulars only in the third week of December following.

5. In his application for revocation the appellant imputed fraud to the respondent in the matter of the disputed grant. He alleged inter alia:

(1) that since the death of his father Charu Chandra Dutta, the alleged testator, the defendant Nayan Chand Dutta had been dealing with his estate as his sole heir on

intestacy and as the sole owner and proprietor of all properties left by the said deceased to the knowledge and with the consent of the respondent Sm. shephalika Dutta who was his wife and who always allowed him to deal with the said estate as the owner thereof;

(b) that the respondent had all along been aware of the different transactions (including the appellant's mortgages, referred to above,) made by her husband Nayan Chand Dutta in respect of the above estate, left by Charu Chandra Dutta;

(c) that the disputed grant had been obtained by the respondent fraudulently from court by concealing from it the facts, relating to the appellant's above mortgages, and the facts about the transfer of the other properties of the alleged testator Charu Chandra Dutta by his son Nayan Chand Dutta (who was the respondent's husband) on the footing of intestacy, which facts were all material to the case for obtaining the said grant;

(d) that the said grant had been obtained by the respondent in fraud of the creditors of the said Nayan Chand Dutta including the present appellant and to their utter prejudice; and

(e) that the said grant had been obtained by making a false declaration as to the assets to be administered thereunder.

6. In his said application for revocation the appellant referred to the disputed Will as the alleged Will of the alleged testator Charu Chandra Dutta and to the respondent as the alleged testatrix and in paragraph 20 of the application he also stated inter alia that the said alleged Will was not put forward till twenty years after the death of the testator and the Letters of Administration had been obtained in fraud of the creditors, suggesting thereby that the alleged Will was not a genuine or valid document.

7. The appellant's application was opposed by the respondent who denied the appellant's above allegations and pleaded inter alia:

(a) that the appellant had no locus standi to make the application and that the same was not maintainable in law, there being no just or sufficient cause or valid

reason for revoking the grant and that even the facts stated in the applicant's application did not warrant revocation;

(b) that she was not aware of any transfer by her husband Nayan Chand Dutta, nor had she any knowledge of the appellant's mortgages and that the same, even if they had any real existence in fact, were fraudulent and collusive and vitiated by undue influence and were also otherwise invalid in law; and

(c) that the appellant was fully aware of the Letters of Administration proceedings from the very beginning and he purposely lay by at the time and then came up with the above mala fide and harassing application.

8. In the Court below four issues were framed, namely,

'1. Has the applicant any locus standi to make the application for revocation of Letters of Administration?

2. Is the application maintainable in law?

3. Is there any just cause for revoking grant of Letters of Administration?

4. To what relief, if any, is the applicant entitled?'

9. The trial court answered issue No. 1 in the affirmative that is, in the appellant's favour and held that as a person interested in the estate of the deceased, who was likely to be affected by the grant, he had locus standi to apply for revocation of the grant. Issues Nos. 2 and 3 were dealt with together by the learned trial Judge who found inter alia, that the respondent had no knowledge of her husband's dealings with the testator's properties including the appellant's mortgages and could not, therefore, be held guilty of any concealment or fraud in the matter of the same and that the appellant's plea that the disputed grant was obtained by the respondent by concealing from the court something material to the case, or by making false suggestions had not been established. The learned trial Judge also found that the respondent was not guilty of making any untrue allegation of fact before the Probate Court and, further, that the appellant, in spite of his proved interest in the matter of the disputed properties, was not entitled to any special

citation in the matter of the grant of the Letters of Administration and that, general citation having been duly proved, the proceedings for the grant were not defective in substance. He accordingly, dismissed the application for revocation. Hence this appeal by the applicant-appellant.

10. On behalf of the appellant, the appeal was argued by Senior Counsel Sri H. N. Sanyal. The respondent's case was presented by her learned Advocate Sri Promotha Nath Mitter. The appellant's locus standi to make the application for revocation was not challenged before us and the trial court's decision on the point in the appellant's favour was accepted by the respondent. Indeed, Mr. Mitter, with his usual fairness, could not have taken up any other attitude. It is settled law that transferees from the testator's heir-at-law (including mortgagees), as also the latter's creditors (who allege that the probate or Letters of Administration were obtained in fraud of them) have locus standi to oppose the grant and to apply for revocation of the same, vide *Gopes Chandra Dutta v. Sylhet Loan Co. Ltd.* 41 Cal WN 120 (A) *Dinabandhu Roy Brajaraj Saha, Firm v. Sarala Sundari Dassya* : AIR1940 Cal296 and *Mahammad Ibrahim Midda v. Bholanath* 50 Cal WN 423 (C), and that the fact that their status or interest as aforesaid was acquired after the testator's death would not make any difference in that respect. The appellant, therefore, who has certainly acquired an interest in the testator's estate, though after his death, by reason of the mortgage transfer by the testator's son Nayan Chand Dutta and who is undoubtedly also a creditor of the testator's said son whom the alleged Will purports to disinherit has plainly locus standi to apply for revocation of the grant, particularly when his allegation is that the grant was obtained in fraud of the creditors.

11. The real question is whether there is any Just cause for revocation within the meaning of Section 263 of the Indian Succession Act and whether, such 'just cause' notwithstanding, an order for revocation of the grant should be refused in this case. We shall presently elucidate this statement;

12. Section 263 of the Indian Succession Act deals with revocation or annulment of grants, both probate and Letters of Administration. Under it 'the grant of probate or letters of administration may be revoked or annulled for just cause.' The section

also lays down and explains what would be just cause within its meaning and enumerates the circumstances which would make out a just cause under the section or, in other words, the grounds for revocation admissible in law. It is almost beyond controversy now that such enumeration is exhaustive and not merely illustrative vide *Annoda Prosad Chatterjee v. Kali Krishna Chatterjee* ILR 24 Cal 95 (D); *Bal Gangadhar Tilak v. Sankarbai* ILR 26 Bom 792 at p, 798 (E) and *Subroya Chetty v. Rangammal*, ILR 28 Mad 161 at p. 164 (F). See also *Mahommad Renu Meah v. Sm. Sabida Khatun* 29 Cal LJ 37 at p. 39: 23 Cal WN 658 at p. 659: (AIR 1919 Cal 113 at p. 114) (G); *Srish Chandra Choudhury v. Bhaba Tarini Devi* : AIR1928 Cal695 and *Georga Anthony Harris v. Millicent Spencer* AIR 1933 Bom 370 at P. 373 (I). This is not disputed before us. We, accordingly, proceed upon that view.

13. In the above view the applicant for revocation must, in order to succeed, bring his case within one or other of the different Clauses (a) to (e) of the section. Otherwise his application would fail. It is clear, however, on a reading of the section, that, even if Just cause be established, the applicant would not be entitled to an order for revocation as matter of course. This was overlooked in some of the decided cases, but the Supreme Court in what appears to be its latest decision on the point, namely, *Anil Behari Ghosh v. Latika Bala Dassi* : [1955]2SCR270 , has authoritatively laid down that the section gives a discretion to the court in the matter of revocation of grant and revocation may be refused in a particular case notwithstanding the existence and proof of just cause as explained in the section. Apart from authority also, the matter seems to be pretty clear. The section says that the grant may be revoked which prima facie leaves a discretion to the court and this prima facie position is confirmed when we look a little more closely into the matter. The enumeration of just cause in the section shows that invalidity of the Will, although it may come under Clause (b) or Clause (c) and is, indeed, one of the illustrations or instances of just cause as appended to the section, (vide Illustration (iii)), does not come within any of the other clauses, or, in other words, a just cause under the section may be -1st apart from invalidity of the Will. Clearly, however, if there is a valid subsisting Will, and that is either proved or admitted, it will be useless to revoke the grant in most cases coming under Clauses (a) to(c), even if just cause be established under these clauses. In such cases,

notwithstanding proof of just cause, revocation should ordinarily be refused as a fresh grant would follow almost as a matter of course and the revocation would serve no useful purpose and would be no more than a mere useless formality. Such revocation was certainly not intended by the statute. To take another instance, when the applicant for revocation was guilty of deliberate unconscionable delay in making his application to the irreparable prejudice of the propounder in the shape of loss of evidence or otherwise, it would be unreasonable to hold that revocation cannot be refused. An apt illustration is also to be found in the decision of this Court in the case of *Official Trustee of Bengal v. Kumudini Dasi*, ILR 37 Cal 387 (K) where, as far back as 1910, the learned Judges (Jenkins, C. J., and Woodroffe, J.) pointed out that the court has plainly a judicial discretion in the matter of revocation of probate. In the above context the word 'may' in the section should not be read as 'shall' and, in our opinion, on authority and principle alike the Court must be held to have a discretion in the matter of revocation which of course, must be judicially exercised, having regard to the facts and circumstances of each particular case.

14. The net position then is that an applicant for revocation must, in order to succeed, establish just cause within the meaning of Section 263, that is as laid down in Clauses (a) to (e) thereof, but, even if just cause be established, revocation may still be refused by the Court in the exercise of its discretion under that section, if the facts and circumstances of the particular case would warrant such refusal. In this view we shall consider first whether the appellant has succeeded in proving any just cause for revocation in the present case and if we hold in the affirmative on that question we shall consider next whether, in the circumstances of the present case, an order for revocation should be made in the exercise of our discretion under the section.

15. Now, the appellant's relevant allegations do not travel beyond Clauses (a) to (c) of the section and do not obviously attract the other Clauses (d) and (e). We shall, therefore, confine ourselves to the first three Clauses (a) to (c).

16. The learned trial Judge has rejected the appellant's case under the above three Clauses (a) to (c) of Section 263 of the Indian Succession Act upon the

findings inter alia:

(i) that the appellant was not entitled to special citation and his non-citation, therefore, did not render the proceedings for the grant defective in substance as contemplated by Clause (a);

(ii) that the respondent did not know about the appellant's mortgages or about the other transfers, made by her husband, and was not, therefore, guilty of any fraudulent concealment or false suggestion as required by Clause (b); and

(iii) that the respondent did not make any untrue allegation of fact essential in point of law to justify a grant (vide Clause (c)).

17. We are unable to accept this view of the learned trial Judge. In the appellants application for revocation specific allegations were made that the respondent was all along aware of the appellant's mortgages and the other transactions entered into by her husband in respect of the testator's properties and of his dealings with the same as the testator's heir on intestacy and that the said facts were fraudulently concealed from the Court which granted the Letters of Administration. This was no doubt denied by the respondent in her petition of objection but the circumstances appearing in the case do not leave any room for doubt as to the truth of the appellant's above allegations. It is true that the appellant has not been able to adduce any direct evidence about the respondent's knowledge, but the circumstances are so eloquent on the point that such knowledge may be safely found. The respondent has not taken the oath. She has chosen not to examine herself in support of her denial. The husband and the wife were all along living together; there is no story of any estrangement between them; the properties sold away by the husband were carefully omitted from the list of assets, filed by the respondent; there is no explanation why and how they came to be so omitted; the appellant's mortgage suit was pending and was being contested by the respondent's husband when the application for Letters of Administration was filed by the wife. In these circumstances we have not the least doubt in our mind that the respondent was fully aware of her husband's dealings with the testator's properties and about the sales and mortgages effected by him in respect thereof and that she fraudulently suppressed or concealed the said facts from the Probate

Court in the proceedings started by her for obtaining Letters of Administration. We are also clearly of the view that these facts were material to the case as, without them, the Court was not in a position to exercise its discretion in the matter of special citation and, as, in our opinion, in the facts of this particular case, where an unregistered Will was sought to be proved after a lapse of about twenty years from the death of the testator to the derogation of the rights of the transferees from the disinherited son during this long interval, these transferees (including the mortgagee appellant) were entitled to special citation, the absence of such citation was a substantial defect or irregularity which rendered the proceedings defective in substance (vide in this connection 50 Cal WN 423 (C) supra). Clearly then just cause both under Clause (a) and Clause (b) of the section (Section 263) was established in the present case and the learned trial Judge was in error in holding otherwise. On the materials before the Court, this conclusion is irresistible and we have little hesitation in recording the same.

18. In the above view it is not necessary for us to consider the appellant's case under Clause (c) of the section but the fact that, on the respondent's own case of Will, the affidavit of assets, filed by her, (which we have marked here by consent as High Court Ext. 1 by way of additional evidence) would be materially incomplete as regards the testator's assets might well have brought the present case under that clause.

19. In holding as above we have not overlooked the respondent's status of a pardanashin lady on which too much stress appears to have been laid by the learned trial Judge. That status, however, does not necessarily dbar the Court from holding that the respondent was all along aware of her husband's dealing with the testator's properties and in the circumstances of this case, no other finding seems to be reasonable.

20. Mr. Mitter, appearing for the respondent, saw the force of the above circumstances and he practically conceded that just cause for revocation may be taken to have been made out under the above Clauses of Section 263. He, however, contended that, notwithstanding the existence of just cause for revocation, the appellant's application must fail. Here he relied very strongly upon

the decision of the Supreme Court, to which reference has already been made by us, and he urged that, in the circumstances of this case, revocation should be refused by the court in the exercise of its statutory discretion. That the court has discretion in the matter has already been pointed out by us and the only question that remains is to see whether this is a fit case for the exercise of that discretion in the appellant-applicants favour.

21. Mr. Mitter argued and argued with some force that an applicant for revocation under Clauses (a) to (c) of Section 263 of the Indian Succession Act must, in order to succeed, challenge and challenges specifically in his application for revocation the genuineness or the validity of the Will or its existence (so far, of course, as it is relevant in probate proceedings) and, in the absence of such a specific challenge, the application for revocation must fail in limine. The Court, argued Mr. Mitter, would not, whatever the other circumstances, revoke, in the exercise of its discretion in such cases, a grant in respect of a Will, the genuineness or validity whereof was not specifically challenged before it. For this proposition Mr. Mitter strongly relied upon the Supreme Court decision, referred to above, and he pointed out certain passages from the judgment of their Lordships in support of his extreme contention. He submitted that the case cited was clear authority for the view, put forward by him, and he submitted further that, as annulment or revocation was, in the words of their Lordships, 'a matter of substance and not of mere form' the court would not be justified in revoking a grant in the exercise of its discretion unless it had reason to believe that there was some possibility of refusal of the grant on the merits, for which at least a specific challenge to the validity of the Will was necessary.

22. We are unable to accept Mr. Mitter's extreme contention. His proposition is too wide and the case, cited by him, does not, in our opinion, lend any real support to it. It may be conceded that where the genuineness and validity of the Will is admitted, -- and here we are prepared to include cases where the genuineness or validity of the Will is not disputed either expressly or impliedly, -- the application for revocation under Clauses (a) to (c) should ordinarily be refused, but we are reluctant to go further and hold that the same result should follow even where there is implied--though not express or specific -- challenge to the Will. Ordinarily,

at any rate, -- and here we are leaving out cases where some attack on the Will forms the only 'just cause' pleaded, -- the question of genuineness or validity of the Will does not arise for consideration in a revocation proceeding under Clauses (a) to (c) of Section 263 before at least a prima facie case for revocation has been made out and the Supreme Court in the case cited did not purport to say anything to the contrary. Their Lordships did not overrule Mokshadayini's case 19 Cal WN 1103: (AIR 1915 Cal 421) (L), but merely explained the true limits of that decision. They simply pointed out that the observations, appearing at page 1109 (of Cal WN) : (at p. 422 of AIR) of the above report and quoted by their Lordships, were not intended to be of universal application so as to support the broad argument that the Question of genuineness or validity of the will was altogether irrelevant in a revocation proceeding and that the revocation court was not at all concerned with it and it could not arise until an order of revocation has been made. With this view we respectfully agree and we do not think that this Court ever intended to lay down that, even where revocation was sought for on the only ground of invalidity of the Will vide illustration (iii) to Section 263 which is cited in Anil Behari's case (J), that question could not be considered by the revocation court. In 19 Cal WN 1108 : (AIR 1915 Cal 421) (L), the challenge to the Will was only one of the several grounds on which revocation was prayed for and this Court rightly pointed out that in such cases the question of invalidity of the will should be taken up, if necessary, by the revocation court only after the other grounds of attack to the grant had been disposed of. This was plainly in accord with the view of law, expressed by the Privy Council, years later, in the case of Ramanandi Kuer v. Kalawati Kuer, 55 Ind App 18: (AIR 1928 PC 2) (M), where their Lordships examined and laid down the procedure (including the question of onus on the issue of validity of the Will) in cases of this type. Clearly, therefore, the actual decision of this Court in the case cited is not open to any criticism although the observations quoted from page 1109 (of Cal WN) : (at p. 422 of AIR) of the report to the extent that they were suggestive of the broad argument, noted above, might not be strictly correct and might give rise to misconceptions. This indeed, appears to be implicit in their Lordships' decision in : [1955]2SCR270 where at page 1037 of the report : (at P. 572 of AIR) we find the categorical statement that the said observations in 19 Cal WN 1108 : (AIR 1915 Cal 421) (L) 'were made with

reference to the facts of the case and were not intended, to be of universal application.'

23. Clearly also where the genuineness and validity of the Will is admitted either expressly or by necessary implication, that fact is quite a relevant consideration -- and, indeed, the determining factor -- in deciding the question of revocation under Clauses (a) to (c) of Section 263. This follows from the view which we have already expressed that in matters of revocation the Court has a certain amount of discretion and it is not obliged to revoke the grant where such revocation would be ultimately useless. In Anil Behari's case (J), the Supreme Court did not intend to go further and the observations relied on by the respondent should be read in that light and with reference to the facts of that case. It is perfectly clear from a reading of the report that in Anil Behari's case (J) the Will was practically admitted -- at least that was how the Court took it -- and the plea was that it was revoked. This plea of revocation the applicant failed to establish. It was thus a case where the validity of the Will was not disputed even impliedly but the grant was sought to be revoked on the technical ground of non-citation of a person who ought to have been cited which no doubt was proved. Revocation was refused by the Appeal Bench of this Court (vide *Lati abala Dasi v. Anil Behari Ghose* AIR 1933 Cal 103 (N)) in the exercise of its discretion under the section as it found the Will to be genuine, valid and subsisting so that revocation of the grant would have been an unprofitable and useless formality, bound to be rendered nugatory by a fresh grant almost as a matter of course. The Supreme Court also took the same view and refused annulment upon the same ground, namely, that there was no livelihood of proof being offered that the Will admitted to probate was either not genuine or had not been validly executed 'and that the validity or genuineness of the Will not being challenged (either expressly or even by implication) 'it would serve no useful purpose to revoke the grant and to make the parties go through the mere formality of proving the Will over again' and upon the further ground that the fact that the party, not cited, having had enough opportunity and sufficient time to apply for revocation did not do so, clearly showed that, if cited, he would not have contested the grant and his noncitation was not, therefore, a substantial defect so as to render the proceedings for the grant 'defective in substance' and that, at any rate, that fact, taken along with the other facts mentioned by their Lordships, was

sufficient to disincline the Court to exercise its judicial discretion in the applicant's favour and to justify refusal of his revocation application. There can be no question that, on the facts before the Court, the decision was entirely right and it did not conflict with 55 Ind App. 18 : (AIR 1928 PC 2) (M) which, as their Lordships pointed out, did not exclude the Court's judicial discretion in matters of revocation. We do not think that their Lordships of the Supreme Court ever intended to lay down that all applications for revocation of the grant under Clauses (a) to (c) of the section must contain an express averment of challenge to the Will, failing which, they would fail in limine.

24. In the above view of the matter we are not prepared to hold that the absence of a specific challenge to the genuineness or validity of the Will or its existence would by itself be fatal to the revocator's case and, in our opinion, an implied challenge would be quite sufficient from this point of view. We, accordingly, reject Mr. Mitter's contrary submission. For our present purpose, it is unnecessary to go further and we do not decide what effect the absence of, even an implied challenge; short of admission of the genuineness and validity of the Will, on the revocator's part would have upon his revocation application.

25. In the present case this much at least is clear that there is an implied challenge to the Will in the appellant's application for revocation. This is evident from the guarded language of Paragraphs 1 and 2 of the said application and from the very suggestive words, used in Paragraph 20 thereof, and test but not the least, from the trend throughout on the appellants part to avoid admission of the genuineness and validity of the Will. This, in our opinion, sufficiently meets the point raised by Mr. Mitter, and the revocation application cannot be thrown out in limine as urged by him. On the merits also we have found that there is just cause for revocation of the disputed grant and, as we find nothing in the present record to justify refusal of revocation in the exercise of our, judicial discretion, the learned trial Judges' order of dismissal cannot stand. This appeal must, therefore, succeed but the question still remains as to what order should actually be passed by this Court,

26. Prima facie the appellant is entitled to an order of revocation but the position will entirely change if the respondent succeeds in proving the Will according to

law. This she may be allowed to do in the present proceedings and the revocation order may be deferred until the Court considers the entire matter and decides whether the Will has been proved or not, or an order of revocation may be made forthwith and the Letters of Administration proceeding revived and restored to file or a fresh proceeding started therefor and the question of genuineness or validity of the Will or its existence, so far as it is relevant in the Probate Court, reconsidered in that proceeding in accordance with law. Either course has the sanction and support of precedent and authority and the Court is entitled to adopt the one or the other according to the circumstances before it. The Supreme Court in Anil Behari's case (J), did certainly lay down that the question of genuineness or validity of the Will or its existence is not outside the scope of revocation proceedings and may be considered by the revocation court in deciding whether the grant should be revoked or not in the exercise of its judicial discretion but, at the same time, it cannot be seriously argued -- at any rate, we are not convinced -- that their Lordships ever intended to rule that no order for revocation can be made under, the first three Clauses of Section 263 of the Indian Succession Act unless and until the question of genuineness and validity of the Will or its existence is decided against the grantee of the probate or letters of administration. Such a view would be productive of very serious inconvenience and grave complications and we do not find anything in the statute or in the pronouncement of their Lordships or in any principle, precedent or authority to compel its acceptance. In our view the law is this : (i) 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 of 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.

27. Generally speaking, this will be a very convenient course having the undoubted support of plain commonsense and to the adoption of such a course in such cases law seems to present no obstacle. We do not, however propose to lay down any absolute rule in this matter and the court should be free to decide what course should be followed in a particular case. It should be guided by the facts and circumstances before it and should have power to make necessary adjustments to shorten litigation and avoid unnecessary delays.

28. In the present case, in view of our findings, already made, and the circumstances before us, we would revoke the disputed grant and directs that the Will be proved again after fresh general and special citation, the latter to be issued, in particular to the present appellant and the other transferees of the testator's properties from the testator's son Nayan Chand Dutt, whose names appear on the present record. For that purpose, the matter would now go back to the learned District Judge who will start a fresh proceeding for grant of Letters of Administration on the respondent's application dated 26th November, 1952, which is Ext. 12 in the present case. This will expedite matters and a revival of the Original Letters of Administration proceeding (L. A. Case No. 146 of 1952) which, as an uncontested proceeding, was filed before and dealt with by the District Delegate, would not be necessary, when it is pretty clear that the respondent's application for Letters of Administration will be contested at least by the appellant. In this fresh proceeding the parties should have full opportunity of proving their

respective cases but all dilatory tactics should be checked by the court with a firm hand and the proceeding should be brought to a close as quickly as possible. Pending its disposal, execution of the appellant's final mortgage decree in Title Mortgage Suit No. 120 of 1951, referred to above, should remain stayed.

29. We have dealt with the principal contentions of the parties and practically the appeal has been decided. There were, however, three other contentions, urged by Mr. Sanyal, two of which do not need much discussion and the third also stands to be rejected. The first two raised questions under Section 191 of the Indian Court Fees Act and Section 291 of the Indian Succession Act and were concerned with the effect of non-compliance with these statutory provisions upon the grant of probate or Letters of Administration and its relative bearing on revocation proceedings. In the present case, as we have already said, the disputed grant was made on plain paper, that is, without stamp or court fee and also without security. Mr. Sanyal contended that this was not permissible under the law and these patent contraventions of the two Sections 191 and 291 rendered the proceedings for grant 'defective in substance' within the meaning of Clause (a) of Section 263 of the Indian Succession Act and, on this ground too, the disputed grant should be revoked. Clearly, however the effect of such revocation would be of much lesser moment to Mr. Sanyal's client as, in case of revocation on this ground, the respondent will be entitled to a reissue of the grant simply on payment of proper, court-fee and on such security as the court might choose to direct and as, in the present case, we are revoking the grant on a broader and more fundamental ground (which is of much greater assistance to the appellant) and as we are directing fresh consideration of the respondent's application it is unnecessary for us to consider Mr. Sanyal's above arguments on Sections 191 and 291 and we would only say that, in deciding the fresh proceeding for Letters of Administration, which will now be started by the learned District Judge, the court below will pay particular attention and will have due regard to the provisions of the two said sections, namely, Section 191 of the Indian Court Fees Act and Section 291 of the Indian Succession Act, and will act in due compliance with them. Mr. Sanyal's third argument, referred to above, sought to establish that the document, in respect of which the disputed grant was obtained by the respondent, was not a Will and no Letters of Administration could or should have been issued in respect thereof. If

this was a sound argument, a clear case of revocation would possibly have been made out and the proceeding would have ended here and the respondent's grant would have been revoked and her application for Letters of Administration would have stood rejected without any further consideration. We do not, however, feel persuaded to accent this argument of Mr. Sanyal. It is undoubtedly the that the document in question is not altogether free from ambiguity but, reading it as a whole and having regard particularly to the terms, used therein, we are inclined to hold that it is testamentary in character, laying down rules for devolution of the testator's properties after his death with no present disposition in favour of anybody and carrying with it, by necessary implication, the element of revocability. It is thus a Will within the meaning of the relevant definition section (Section 2(h)) of the Indian Succession Act. We accordingly, reject this third argument of the appellant's learned Counsel.

30. In the result this appeal is allowed, the Judgment and decree of the learned Subordinate Judge is set aside, and the plaintiff's suit is decreed and the disputed grant revoked and the matter is sent down to the learned District Judge to be dealt with in accordance with law in the light of the directions given by us and the observations made in this judgment.

31. Costs of this appeal and of the court below in the present proceeding will abide the final result of the Letters of Administration case which will now be started by the learned District Judge in pursuance of this judgment.

32. Renupada Mukherjee, J.

I agree.