Dinabandhu Roy Brajaraj Saha, Firm Vs. Sarala Sundari Dassya W/O Haralal Saha

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Court : Kolkata

Decided On : Aug-09-1939

Reported in : AIR1940Cal296

Appellant : Dinabandhu Roy Brajaraj Saha, Firm

Respondent : Sarala Sundari Dassya W/O Haralal Saha

Judgement :

R.C. Mitter, J.

1. This appeal is in proceedings started by the appellant on 5th August 1935 for the revocation of the probate granted to the respondent, Sarala Sundary Dassya, by the District Judge of Pabna on 14th September 1933. The will of which probate had been granted is an unregistered one said to have been executed by the respondent's husband, Haralal Saha, on 24th July 1925. Haralal died on 5th January 1927. The application for probate was made on 27th March 1933, more than six years after the death of Haralal, and it is the admitted case of the propounder, that during this long period of six years nobody knew that Haralal had died testate except the propounder, the alleged writer and the three attesting witnesses. Haralal left three married and grown up sons, Hemendra, Jitendra and Nripendra, a married daughter Sunitibala, and his widow, Sarala Sundary. Nripendra was at America at the time of his death, prosecuting his studies there. He-qualified himself as a mechanical engineer and came back to India some time after Haralal's death. Haralal was a successful businessman. He had four business centres, one at Calcutta, at 34 Sovabazar Street, another at his native village Amta, in the District of Dacca, the third at Serajgunj in the District of Pabna, and the fourth in the District of Rungpore. At the time of his death his business was in a solvent condition. He left considerable immovable properties in the Districts of Dacca, Pabna 24-Parganas, Rungpore and Calcutta. He had also a house at Giridih in the District; of Hazaribagh in the Province of Bihar and Oriasa.

2. The will is in the Bengalee language and is written on two sheets of cartridge paper, such papers as are required to be used for Court purposes, for vakalatnamas, plaints, written statements and petitions. There are three signatures purporting to be of Haralal's. The first signature is at the top at the right hand corner of the first sheet. The second signature is at a similar place on the second sheet and the third signature is at the extreme bottom of the second sheet. It almost touches the edge of the paper. The writer is Surendra Kumar Saha. Three persons appear as attesting witnesses - Pramatha Nath Basu Barman, Chand Mohan Saha and Kedarnath Sarkar. The last paragraph, i.e. Para. 6, ends at about the middle of the second sheet. After it, there is a blank space about 2 1/2 inches wide. Then appear the three signatures of the

writer, Surendra Kumar Saha, and of the witnesses, Chand Mohan Saha and Promatha Nath Bose Barman, in a line. Immediately below the signature of Promatha Nath Bose Barman at the right hand side appear in half margin what has been called the kafiat in the evidence, which runs thus: 'Sitting in my dwelling house at Amta and being acquainted with all the conditions of the will, etc.' This kafiat occupies the space between Promathanath's signature and the signature of Haralal which is, as we have pointed out' before, right at the foot of the sheet. The signature of Kedarnath Sarkar appears under the signature of Surendra Kumar at the left hand side in the space opposite the kafiat. The will has not been printed as it is in the original. I have pointed out its characteristics in some detail, because they have an important bearing on the case. The learned District Judge has overlooked those characteristics.

3. The will gives the greater and the more valuable part of the testator's immovable properties to his widow and leaves to the sons very little. The widow and the three sons are appointed executrix and executors. The evidence discloses that the three sons took prominent part in starting and financing an Electric Company at Giridih called the Giridih Electric Supply Company Ltd. Its branch office was at 34 Sovabazar Street, the guddee house of Haralal's sons. Nriperidra was employed in the said concern. Materials were bought on credit from the International General Electric Company of Bombay on the guarantee of the three brothers Hemendra, Jitendra and Nripendra. That company obtained a decree in the Original Side of this Court against the Giridih Electric Supply Co., Ltd., and also against the said three brothers on 22nd February 1933. The Sheriff of Calcutta attached their immovable properties on 18th April 1933. Thereafter the Bombay Company applied in the Original Side of this Court on 29th May 1934 for adjudicating the three brothers insolvents. They were adjudicated insolvents on 17th July 1934 (Ex. B; II 98) After the Bombay Company had obtained the decree and a few days before the attachment, the respondent applied for probate of the said will. Her application was filed on 27th March 1933 before the District Judge at Pabna. It is printed at p. 21, part I. In the application she states that the testator had properties at Giridih in the District of Hazaribagh within the Province of Bihar and Orissa and in the accompanying affidavit that property was valued at Rs. 2500. The Collector, however, valued it at Rs. 5000. In the affidavit the assets were valued at Rupees 45,260. It is stated therein that the testator owed her Rs. 38,487 which was entered in his account books. (This portion has not been printed.) Citations were issued, but it is admitted, and the record also bears it out, that a copy of the general citation was not sent to the Court of the District Judge of Hazaribagh and published there. In the application no explanation for the delay in applying for probate was given. None appeared to oppose the grant which was made ex parte on 14th September 1933.

4. The appellant firm advanced a loan of Rs. 5000 to Hemendra and his brothers on 8th July 1932 in their firm name of Lalji Mohan Haralal Saha Roy. It obtained a decree on 24th November 1933. On 5th August 1935 it applied for revocation of the probate. The grounds are three in number : (a) that the proceedings in which probate was granted were defective in substance, (b) that the grant was obtained fraudulently by concealing from the Court material facts and (c) that the will propounded was a forgery.

5. These allegations have been denied by the respondent. She has also challenged the right of the appellant to apply for revocation. This last mentioned objection has been put forward on three grounds : (a) that the appellant being an unsecured creditor of the heirs at law of the testator had no right to take part in the probate proceedings

and so has no right to apply for revocation, as it has no 'interest in the estate of the deceased' within the meaning of Section 283 (1), Clause (c), Succession Act of 1925, (b) that assuming that such a creditor of the heir-at law has the right to present and prosecute such an application, the appellant has no such right; it is in the Official Assignee (c) That many event the application cannot be proceeded with at the instance of the appellant after the discharge of Hemendra and his brothers, that is after 2nd February 1939 when the order for discharge was passed.

6. This preliminary objection taken by the respondent was overruled by the learned District Judge by his order dated 6th February 1936 (I. 9). The respondent's advocate challenges the correctness of the said order. The points for decision in this appeal are accordingly : (1) Has the appellant locus standi to maintain the application for revocation? (2)(a) Were the proceedings in which the grant was made to the respondent defective in substance? (b) Was the grant obtained fraudulently by suppression of material facts? (3) Is the will propounded a forgery?

7. The first point has to be decided under two heads, (a) Has a creditor of the heir-at-law, who is substantially deprived of his inheritance, right to appear in probate proceedings and oppose the grant or apply for revocation when his case is that the propounded will has been set up in fraud of creditors of the heir-at-law? (b) If so, has the appellant still the right after the adjudication of the heirs-at-law as insolvents?

8. The first question which actually arises in this case is a somewhat narrow one, for the case of the appellant is that the probate had been obtained in fraud of the creditors of the heirs-at-law of Haralal. The point however has been argued on broader lines by Mr. Gupta appearing for the appellant. His argument is that the word 'interest' used in Section 283(1), Clause (c), Succession Act, must be given a wide meaning. It means, says he, not only proprietary interest but also pecuniary interest. The heir-at-law and those claiming under transfer from him after the testator's death, e.g. his assignee, mortgagee, lessee, have proprietary interest in the estate left by the deceased, but the creditor of the heir-at-law has a pecuniary interest, for, if the will which deprives the heir-at-law or curtails the right which the law of inheritance gives him be not established he, the heir-at-law, would then get the property which in that event would be available for the satisfaction of the dues of his creditors. A creditor of the heir-at-law, says he, thus stands on a different footing from a creditor of the testator, for to the latter the will is immaterial. It does not matter to him whether he gets his money from the executor or administrator or heir-at-law. In support of his argument Mr. Gupta relies on a passage in Williams on Executors to the effect that any interest however slight and even the bare possibility of an interest is sufficient to entitle a party to oppose a testamentary paper, a passage quoted with approval by Mookerjee J. in Brindaban Chandra Shaha v. Sureswar Shaha (1909) 10 C.L.J. 263 at p. 272. If the matter had been res integra I would have felt the force of Mr. Gupta's argument. The wide form in which the law is thus stated had however not the approval of Sanderson Satindra Mohun v. Sarala Sundari (1918) 5 A.I.R. Cal 183 at p. 324, and in my judgment is inconsistent with the opinion expressed by the Eight Hon'ble Sir Richard Couch in Nilmony Singh Deo v. Umanath Mookerjee (1884) 10 Cal 19.

9. In the last mentioned case the Rajah was a creditor of Taranath, one of the sons and heirs-at-law of the testator, Bamandass. By the will that son had been disinherited. The Rajah applied for revocation of the probate granted to Umanath and others. The District Judge held that the Rajah had the right to present the application

for revocation of the probate and on the evidence held that the will was not genuine. On appeal the High Court upheld the District Judge on the preliminary point, but found the will to be genuine. The Judicial Committee agreed with the last finding, but expressed the opinion that a creditor of the heir-at-law has no right to oppose a testamentary grant on the bare ground that he is a creditor. The decision in Baijnath Shahai v. Desputty Singh (1876) 2 Cal 208 was approved, but the question whether a creditor of the heir-at-law whose case was that the grant had been obtained in fraud of creditors, can present an application for revocation or not was left open. In view of the observations made in Nilmony Singh Deo v. Umanath Mookerjee (1884) 10 Cal 19, I cannot accordingly accept the broad contention of Mr. Gupta. The point reserved in that case however has since then been answered in the creditor's favour in Kishen Dei v. Satyendra Nath Dutt (1901) 28 Cal 441, Arakal Bastian v. Narayana Aiyar (1911) 34 Mad. 405 and Lakhi Narain v. Multan Chand Daga (1912) 16 C.W.N. 1099. In the last mentioned case Multan Chand Daga, the creditor of the heir-at-law, Sakhilal, had obtained his decree but had not attached any property as belonging to Sakhilal Still it was held that he could apply for revocation as his case was that the probate had been obtained in fraud of the creditors of Sakhilal.

10. The approval of the decision of this Court in Baijnath Shahai v. Desputty Singh (1876) 2 Cal 208by the Judicial Committee in Nilmony Singh Deo v. Umanath Mookerjee (1884) 10 Cal 19 does not, in my judgment, militate against the soundness of the view taken in these cases. The creditor who opposed the grant in Baijnath Shahai v. Desputty Singh (1876) 2 Cal 208 was not a creditor of the heir-at-law. He had no interest in the estate left by the deceased and would have had none till the adoption made by the latter had been set aside. His claim rested on mere possibility. It was not a real interest; at most he had the possibility of an interest. Only a real interest, however, small, but the interest must be a real one, in my judgment entitles the man to oppose a grant or to apply for revocation of a grant for just cause Nabin Chandra v. Nibaran Chandra : AIR1932Cal734 . Further, it is not necessary that the person applying for revocation should have an interest in the estate of the deceased at the time of his death. It is sufficient if he acquires an interest subsequently, but before the application, for probate is made or may be even while the proceedings for probate are pending Mokshadayini Dassi v. Karnadhar Mondal (1915) 2 A.I.R. Cal. 421 at p. 1109. I accordingly hold that the appellant whose case is that the probate was obtained in fraud of the creditors of the heirs-at-law of Haralal, had the right to intervene in the probate proceedings which were started after it has advanced money to Haralal's sons, and has therefore the right to apply for revocation of the grant, unless that right has been taken away from it by reason of the adjudication of Haralal's sons as insolvents.

11. I do not think that their adjudication as insolvents took away the right of the appellant to apply for revocation. On the adjudication of a debtor his estate vests in the Official Assignee, who alone has the right to realize the assets of the debtor by suit, execution or otherwise. After the adjudication no creditor whose debt is provable in the insolvency proceedings has the right without leave of the insolvency Court to take or continue proceedings against the insolvent for the purpose of realizing his dues. An application for revocation of a probate of a person whose heir-at-law is an adjudicated insolvent does not, in my judgment, come within those classes of proceedings. Section 17, Presidency Towns Insolvency Act, contemplates direct proceedings against the insolvent. The suit or other legal proceeding mentioned in that Section means a suit or other legal proceeding against the insolvent and not a suit or other legal proceeding against a third person, to which the insolvent or the

receiver in insolvency is not a necessary party. That Section bars the commencement of a suit or other legal proceedings and the next Section provides for the stay of a suit or other legal proceeding commenced before but pending at the time of adjudication. One is a complement of the other. In Section 18 it is expressly stated that the suit or other legal proceeding must be against the insolvent. The judgment of the Madras High Court in Subramanyam v. Narasinham (1929) 16 A.I.R. Mad. 323 supports the view I am taking. The discharge of the insolvents has no effect on the appellant's right to proceed on with its application for revocation. By the discharge the debts of the insolvent incurred before adjudication are not extinguished or discharged. He is only absolved from personal liability for these debts and; retains in the absence of express directions to the contrary for his benefit what he acquires after his discharge.

12. I now proceed to deal with the merits of the appeal. In Mt. Ramanandi Kuer v. Mt. Kalawati Kuer (1928) 15 A.I.R. P.C. 2 the manner of approaching the question has been clearly indicated. If a substantial defect in the proceedings be established by the applicant for revocation, the grant must be revoked and the person to whom probate had been granted must prove the will in the presence of the former. He, the propounder, must establish the will. If suspicions are raised in the mind of the Court he must remove those suspicions and satisfy the conscience; of the Court that the will propounded by him was the will of the deceased. If how ever the applicant for revocation fails to prove substantial defects in the proceedings s he would be entitled to an order for revocation only if he proves affirmatively that the will is a forgery. In the case before us the parties have led evidence, bearing upon the question of the genuineness of the will and on that evidence I am satisfied that the-will propounded is a forgery. On that view it is not necessary to consider whether the-appellant has established 'substantial defect in the proceedings' but as the point has been fully argued I pronounce my decision on that point also.

13. It is admitted, and the record also supports the position, that a copy of the general citation was not sent to and published by the District Judge of Hazaribagh, where a part of the deceased's property was. Section 283(3) was overlooked. The learned Judge however in his discretion ordered the issue of special and general citations. It is admitted that a copy of the general citation was affixed in the Court house of the District Judge of Pabna and in the office of the Collector of that District. The question is whether the non-compliance with Section 283(3), which was a defect in procedure, was a defect in substance within the meaning of Clause (a) of the Explanation contained in Section 263, Succession Act. For revoking a. grant, 'just cause' as defined in that Section must be established. That is sine qua non. If just cause as defined there be established, the Court has a discretion, not an arbitrary one but one to be exercised judicially, to revoke the grant. This is implied by the use of the word 'may.' The illustrations afford examples fitting in with the different clauses of the Section, They are not, as the sub-heads of 'just cause' are, exhaustive. The second illustration sets out what is a case of the proceedings being defective in substance. Omission to cite a party who ought to be cited is a substantial defect according to that illustration. That illustration is not confined to compulsory citations, which have to be issued under Sections 229, 235 or 285. It extends at least to special citations that may be issued by the Court in its discretion under Section 283(1)(c). In Mt. Ramanandi Kuer v. Mt. Kalawati Kuer (1928) 15 A.I.R. P.C. 2 the non-service, a service which was taken as non-service for all practical purposes, of a special citation issued under Section 283, was held to come within the said illustration by the Judicial Committee. In my view, the force of the judgment in Digambar Keshav v. Narayan Vithal : (1911)13BOMLR38 where a distinction is made between compulsory and

discretionary citations, has been weakened by reason of the decision in Brindaban Chandra Shaha v. Sureswar Shaha (1909) 10 C.L.J. 263. This last mentioned case establishes the proposition that if the Court in its discretion issues a special citation its non-service renders the proceedings defective in substance, and that probate has to be revoked at the instance of the non cited party. That case establishes the further proposition that whether a defect is substantial or not must be judged on the facts of each case.

14. In my judgment there is no difference in principle between a special and a general citation issued under Section 283(1), Clause (c). The object of both is to give notice to persons interested in the estate of the deceased of the proceedings for grant. As a testamentary grant works in rem, it is of the utmost importance to give a wide publication to the proceedings. When the discretion is exercised and a general citation is issued, it is necessary that it should be published as required by Sub-sections 2 and 3 of Section 283. As I understand the decisions, a special citation issued in the Court's discretion under Section 283 must be served. If it is not served on the party the proceedings are defective and the grant must be revoked at his instance. Absence or non-service of special citation on a person who ought to be cited is itself a good ground for revocation at his instance in the absence of other circumstances on which the Court may refuse revocation on account of the discretion vested in it by Section 263. It would be a defect, but the defect would not be of substance, if the non-cited party had knowledge of the probate proceedings. If those special circumstances do not exist the grant must be revoked. It is not possible or desirable to enumerate exhaustively what those special circumstances may be. Delay in applying for revocation, which amounts to waiver or acquiescence, would be one. In the cases where such special circumstances exist, and specially if the will had been proved in solemn form before, revocation would not be made Sadafal Kanu v. Gadari Hajam (1931) 18 A.I.R. Cal 497; Aswini Kumar v. Sukhaharan Chakravarty : AIR1931Cal717 ; Nalini Sundary v. Bejoy Kumar (1915) 2 A.I.R. Cal 706. I think that Courtney-Terrell Order J. has laid down the law correctly in Priyanath Bhattacharjee v. Sailabala Debi (1929) 16 A.I.R. Pat 385, when he said that Section 50, Probate and Administration Act, (Section 263, Succession Act) does not mean that the Court is entitled in its discretion to refuse revocation even when 'just cause 'is established. His statement regarded generally is what the Legislature means but that statement requires only the qualification which I have noted above.

15. In the case before us the application for probate was made six years after the death of the testator. The sons of the testator at that time had no interest in opposing the grant, although the will had deprived them substantially. They were rather interested, in view of their large indebtedness, to see that the will was probated, so that the bulk of the property may be retained in the family. Their creditors only on the facts of this case, were interested in opposing the grant on the ground that a false will had been set up to defraud them. In these circumstances wide publication of the probate proceedings, no doubt ought to have been given, but I do not see how the commission to publish a copy of the general citation in the Court of the District Judge of Hazaribagh has affected the appellant. There is no evidence to the effect that the partners would have known of the probate proceedings if a copy of the general citation had been published at Hazaribagh. The omission, though a defect, is not, in my judgment, a substantial one. This does not however dispose of the point. There is overwhelming evidence that the deceased had his permanent residence at Amta in the District of Dacca, where he used to live with his family. He also lived with his family at Calcutta, which also could be said to be his place of residence. The evidence

of the respondent leads to the conclusion that her husband never lived with her at Serajgunj in the District of Pabna. The deceased may have at times gone to Pabna for supervising his business, but even on this point there is very little evidence.

16. In para. 1 of the application for probate the respondent made a statement that the deceased had left a Bashabari (place of residence) at Serajgunj. That is a false statement. Sarat Babu's Bashabari at Serajgunj was a branch office of the deceased where his officers resided. In no sense was it the place of residence of Haralal. In para. 2 it is stated that Haralal'a ancestral dwelling house was at Amta in the District of Dacca, but the statement is qualified by saying that in connexion with his business he used to stay at Serajgunj and at different places in different districts. It is stated that he had died in the town of Dacca where he had gone on business. These statements taken together, in my judgment, had a misleading effect, and were made to keep Amta and Calcutta in the background. The evidence discloses that he mostly resided either at Amta or at Calcutta. If the real facts had been disclosed, I have no doubt, that the probate Court would have, in accordance with the usual practice, directed general citations to be issued at the places where he lived mostly. The partners of the appellant firm lived in the District of Dacca. Mohini Mohan Roy, a person intimate with the partners of the appellant firm, lived in the town of Dacca and was a practising pleader of Dacca. The principal place of business of the appellant firm was at 22 Bonomali Sarkar Street, Calcutta (Ex. 1, 11-91). None of the partners of the appellant firm had knowledge of the probate proceedings They were prevented, so to say, by a contrivance from knowing of the probate proceedings at Pabna. I cannot believe the evidence of Profulla Kumar Bardhan (D.W. 5, I-178) to the effect that in Jaistha 1340 B.S. (May-June 1933) Srish Chandra Roy, a son of Dinobandhu Roy, came to know from him of the probate proceedings then pending at Pabna.

17. The facts lead me to the conclusion that the Court of the District Judge at Dacca or the Original Side of the High Court was intentionally avoided and the application for probate was made at Pabna, to avoid publication of the general citation at Dacca or Calcutta and to prevent due publicity of the proceedings. The partners of the appellant firm would have had, or mostly likely to have had, knowledge of the proceedings in that case. In March 1933 when the application for probate was made at Pabna the business at Serajgunj was gone. Only the Bashabari of Sarat Babu and some adjoining land were there. The application for probate was made at Pabna on the calculation, which has proved correct, that no creditor of the heirs-at law would be on the alert at that place. The proceedings at Pabna in my judgment were fraudulent proceedings. The appellant is accordingly entitled to have the grant revoked under Clauses (a) and (b) of the Explanation to Section 263S Succession Act. (After discussing evidence his Lordship proceeded.) In any event the evidence is not sufficient to justify the Court in upholding the will, and if the onus is on the respondent, on the view I have taken that the appellant has brought their case within Clauses (a) and (b) of the Explanation to Section 263, that onus has not been discharged. It seems that frantic efforts were made by Haralal's sons to save from their creditors as much as they could. It is quite evident that they caused a suit to be brought in the name of their mother against the Giridih Electric Co. Ltd. on a heavy loan said to have been advanced by her and had a decree passed (Ex. 28, II 101). The evident object was to retain in the family as much of the assets of that company as was possible. The respondent in her evidence has given up the whole show by admitting that she had never advanced any money to the said company. I accordingly allow this appeal and revoke the probate. I hold that the will set up is not the will of

Haralal. The appellants must have the costs of this Court and of the lower Court from the respondent. Hearing-fee is assessed at 15 gold mohurs.

Mohamad Akram, J.

18. This appeal arises out of an application for revoking the probate of an unregistered will dated 24th July 1925 (Ex. E-3) said to have been executed by one Haralal Saha in favour of his wife Sarala Sundari Dasya. Under the terms of the -will, the bulk of the properties is given to Sarala Sundari, and she and her three sons (Hemendra, Jitendra and Nripendra) are appointed executrix and executors respectively. Haralal died on 5th January 1927 and the sons not having agreed to take out probate, Sarala applied for it on 27th March 1933 and obtained the same unopposed from the District Judge of Pabna on 14th September 1933. An application for the revocation of the said probate wag then filed on 5th August 1935 before the District Judge of Pabna, by the firm of Dinabandhu Roy, Brajaraj Saha (Part I, p. 27) alleging that in order to avoid payment of the loan of about Us. 5000 advanced on 8th July 1932 by the said firm to the firm of Lalji Mohan Haralal Saha, of which the three sons of Haralal were the partners, the will had been fabricated in fraud of the creditors and the probate had been obtained without issuing proper citations. The learned District Judge dismissed this application on 22nd June 1936 and thereupon the petitioner firm filed the present appeal. The main points for decision in this appeal are : (1) Whether the will is a forged document. (2) Whether the probate proceeding was materially defective. (3) Whether the petitioner has any locus standi to make the application for revocation.

19. As to the first point, looking at the original will (Ex. E-3) I find that it consists of two sheets of paper and in each of these sheets the signature of Haralal appears at the top corner, but in the second sheet it appears also at the bottom of the page, below the signatures of the scribe, the attesting witnesses and an endorsement to the effect that Haralal was signing the document at his dwelling house at Amta with full knowledge and consent. Between the last paragraph of the will (para. 6) and the signatures of the scribe and the attesting witnesses, there is a blank space left which is over 2 inches wide; the testator instead of signing his name in this space has chosen to put his signature at the foot of the page as stated above. This I consider as somewhat unusual and suspicious, specially in view of the evidence of the appellant's witnesses Prannath Saha and Basanta Kumar Banik. Prannath Saha who had served in the estate of Haralal for about 20 years stated:

In connexion with the writing of plaints and written statements Haralal Babu sometimes signed written cartridge papers and sometimes blank cartridge papers (Part I, 114), while Basanta Kamar Banik, a pleader of Dacca, who appeared in some cases for Haralal, deposed : 'Haralal's officers sometimes produced before me blank demy papers bearing signatures of Haralal Saha': (Part I, 130). It is suggested by the appellant that blank papers signed by Haralal for writing out plaints and written statements had been utilized for the purpose of fabricating the will, and the signature at the foot of the page indicated that it was there for verification which was necessary for every pleading. It seems to me that there is a good deal of force in this suggestion.

20. Prom the conduct also, of Sarala Sundari Dasya (respondent) 1 am induced to draw the inference that the will set up by her has been fabricated after the death of Haralal. Sarala Sundari allowed her sons to take out succession certificate for

collecting the dues of Haralal upon their statement in the application Ex. 4 (Part II, 31) that the deceased had left n6 will, despite the fact, that notice of this application was served upon her. Ex. 9 (1) (Part II, 38), furthermore she raised no objection to the sons acting as owners and realizing rents and getting their names substituted in pending suits and appeals as heirs and legal representatives of Haralal deceased regarding the properties covered by the Will (Exs. 14, 14 (4) Part II, 76), (Ex. 15 Part II, 43), (Exs. 17, 17 (2) Part II, 41), (Ex. 26 (3) Part II, 77) and (Ex. 6 Part II, 8), (Ex 10 Part II, 29), (Ex. 22 Part II, 6), (Ex. 26 Part II, 50) and (Ex. 31 Part II, 27). The application for the substitution of her own name in S.A. No. 1971/32 was made only on 15th December 1933 (Ex. J-2 Part II, 91) after the decree for Rs. 5371-1.6 was obtained by the appellant against the sons (Ex. 2, Part II, 89).

21. One cannot fail to notice that the application for probate is made more than six years after the death of Haralal, that the scribe and the attesting witnesses of the will are all in the pay and service of the respondent and that in the schedule to the mortgage bonds, Ex. 19 executed by the scribe, and Ex. 20 (4) executed by one of the attesting witnesses some properties covered by the will are described as the properties of the sons of Haralal. I am reluctant to place any reliance upon the evidence which seeks to establish that the will was the outcome of domestic disputes and ill-feeling and that the sons not being apprised of the execution of the will, had acted honestly in Ignorance of it. Haralal by the will had appointed his sons as executors and he also by a power of attorney executed in favour of two of them had given them wide powers in the management of his affairs during his lifetime (Ex. 32); the story therefore of ill-feeling and of secrecy regarding the will, told by the respondent and her witnesses, does not seem to me to be worthy of credit. I prefer, in this respect, to accept the evidence adduced on behalf of the appellant as more reliable. Considering these and other facts and circumstances I am of opinion that the appellant has succeeded in proving that the will propounded as of Haralal dated 24th July 1925 is a forged document created after his death.

22. Having regard to my finding on the first point, it does not seem necessary to give any decision on points Nos. 2 and 3 but as they have been argued before us at some length, I shall just indicate my views upon those points also. As to point No. 2, it was urged that in contravention of Section 283 of Act 39 of 1925 the general citation was not published in the district of Hazaribagh (in the province of Bihar and Orissa) where some of the properties of the testator existed (Part I, p. 21) and special citation was not issued upon the appellant firm which was fraudulently sought to be deprived of its dues by means of the probate proceeding cutting off the debtors from their inheritance.

23. It appears that the learned District Judge of Pabna had passed the order to issue general and special citations (order dated 27th March 1933, Part I, p. 1) but the order is merely a discretionary one and it is not obligatory upon the District Judge to issue citations under Section 283 of Act 39 of 1925. One may be interested in disputing a will without any right to issue of citation upon himself. The discretion which a Court has in respect of issuing citations cannot be exercised unless more than mere absence of citation is proved Nistariny Debya v. Brahmomoyi Debya (1891) 18 Cal 45. There is nothing before us to show that anyone is prejudicially affected by the non-publication of citation at Hazaribag or that the appellant has any direct interest in the estate of the deceased. I cannot therefore say that omission to publish citation at Hazaribagh or failure to issue citation upon the appellant has rendered the probate proceeding 'defective in substance' and constituted 'just cause' for revocation under

Section 263 of Act 39 of 1925. See Digambar Keshav v. Narayan Vithal : (1911)13BOMLR38 ; Sadafal Kanu v. Gadari Hajam (1931) 18 A.I.R. Cal 497. The case in Mt. Ramanandi Kuer v. Mt. Kalawati Kuer (1928) 15 A.I.R. P.C. 2 cited by the appellant, shows how the onus of proof, regarding the genuineness or otherwise of a will, is affected by the citation not being properly served upon the person on whom it had been issued under Section 283 of Act 39 of 1925, but in the case before us the question whether the plaintiff (appellant) should have proved that the will was a forged document or the defendant (respondent) should have proved that it was a genuine one, is not of much importance as both the parties have adduced evidenoe relating to their respective cases in the Court below.

24. As to point No. 3 : upon the authority of the decisions in Lakhi Narain v. Multan Chand Daga (1912) 16 C.W.N. 1099 and Kishen Dei v. Satyendra Nath Dutt (1901) 28 Cal 441 I am of opinion that the appellant has the locus standi to make the application for revocation. It is a matter of utmost concern for the creditors to see that the assets of their debtors are not kept out of their reach by fraud and sham transactions; it is to the benefit of creditors if the estate left by the deceased comes to the hands of their debtors. The cases in Baijnath Shahai v. Desputty Singh (1876) 2 Cal 208 and Nilmony Singh Deo v. Umanath Mookerjee (1884) 10 Cal 19 do not seem to me to be of much assistance to the respondent regarding the question of locus standi. The case in Baijnath Shahai v. Desputty Singh (1876) 2 Cal 208 not being based upon the ground of fraud is istinguishable : in 10 Cal 19s the point, whether the attaching creditor of the heir-at-law of a deceased testator could apply for revocation of probate on the ground that it was obtained in fraud of the creditors, was kept open, and their Lordships of the Judicial Committee of the Privy Council, expressed no final opinion upon it. The trend of the decision in the latter case, however, indicates that such a creditor can apply for revocation in case he alleges fraud on the part of his debtor. In the case before us the petition for revocation contains the following allegations, (part 1, p. 27)

* * * * *

25. Paragraph 3:

That subsequently your honour's petitioner on 31st July 1933 brought a suit against the above debtor firm and its partners...and got a decree for Rs. 5745-1-6 the decree of the Hon'ble High Court being dated 24th November 1933.

26. Paragraph 4:

That when the above suit was pending in the High Court, the opposite party Sarala Sundari Dashya, at the instance and instigation of her sons set up an unregistered fictitious will in which by far a large and a most valuable part of the properties was purported to be made over by the alleged testator to her, in fraud of the creditors of her sons and started a proceeding for obtaining probate of the alleged will...and obtained without citation to the proper persons and to your petitioner and with material irregularities in the proceedings, the probate of the will...&c.;

27. In my opinion the circumstance that in the present case an ordinary creditor is seeking for revocation on the ground of fraud and not an attaching creditor, cannot make any difference in the principle which is to be applied. The further objection by the respondent that as the debtors were adjudicated insolvents on 17th July 1934 Ex.

B (II 98), the only person competent to apply for revocation was the Official Assignee under Section 17 of Act 3 of 1909 is also untenable. The relevant portion of Section 17 runs as follows:

* * * * *

No creditor to whom the insolvent is indebted In respect of any debt provable in insolvency...shall commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose....

28. The expression 'commence any suit or other legal proceeding' is no doubt very wide, but in my opinion it relates to a suit or a proceeding by the creditor against the person or the property of the insolvent debtor; the meaning becomes clear on referring to the next Section (Section 18) which provides for staying 'any suit or other proceeding pending against the insolvent' after making the adjudication order. Section 17 of Act 3 of 1909 therefore has no application to a proceeding of the present nature Subramanyam v. Narasinham (1929) 16 A.I.R. Mad. 323. I agree that this appeal should be decreed with costs.