

**(1957) 03 CAL CK 0028**  
**In the Calcutta High Court**  
**Case No : A.F.O.O. No. 48 of 1955**

Southern Bank Ltd.

APPELLANT

Vs

Kesardeo Ganeriwalla and Others

RESPONDENT

**Date of Decision :** 01-03-1957

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2  
Evidence Act, 1872 — Section 101, 102, 103, 104  
High Court Original Side Rules — Rule 29, 33  
Succession Act, 1925 — Section 263, 272, 283

**Citation :** AIR 1958 Cal 377 : (1958) 1 CALLT 286 : (1955) 1 CALLT 138 : 62  
CWN 444 : (1958) 2 ILR (Cal) 29

**Hon'ble Judges :** P. Chakravartti, C.J.;Sarkar, J

**Bench :** Division Bench

**Advocate :** Asoke Kumar Sen and Salil Roy Chowdhury, for the Appellant;  
Janendra Coomar Datt and Ramendra Lal Sinha, for Respondents Nos. 3 to 6, for  
the Respondent

**Final Decision :** Dismissed

## Judgement

Sarkar, J.—On 17-7-1946, probate of a Will, alleged to have been executed by Rami Bibi, a Hindu widow, was granted by this Court. It appears from the probate that the will was executed by her on 11-4-1946. She died on 6-6-1946, leaving as her sole heir, her adopted son, the respondent Purushottamlal. By the will Rami Bibi devised and bequeathed premises No. 166, Muktaram Sabu Street, Calcutta, which stood in her name, to Parameswari, the wife of Purushottamlal for life and after her death to the sons of Purushottamlal absolutely. She also bequeathed all her movables to Parameswari, absolutely. She does not appear to have had any other property. The result of the will was that Purushottamlal was completely disinherited.

2. The appellant, the Southern Bank Ltd. which is a creditor of Purushottamlal made the application out of which this appeal arises, for an order revoking the probate and directing the executor to prove the will in solemn form. The

application was heard by P. B. Mukharji, J. and dismissed.

3. It appears that in May, 1940, Purushottamlal, who is a merchant, opened an overdraft account with the appellant. The appellant says that at that time, Furushottamlal represented to it that he was the real owner of the premises No. 166, Muktaram Babu Street and it was being held in the benami name of his mother, Rami Bibi. The appellant suggests that it was on the strength of this representation that it agreed to advance moneys by way of overdraft to Purushottamlal. On 13-12-1945, the appellant called upon Purushottamlal to pay up the amount due on the overdraft but no payment was made. Eventually on 10-7-1946 the appellant brought a suit against Purushottamlal for the recovery of its dues. On 16-6-1952 the suit was decreed for Rs. 1,06,551-1-2. In execution of the decree the appellant, on 8-9-1953 attached the Property. Its case is that, upto then, it was not aware of the will and levied the attachment on the basis that the property was really Purushottamlal's Rami Bibi being only a benamidar for him, and that in any event, on Rami Bibi's death intestate, Purushottamlal had inherited the property as her sole heir and became the owner thereof. Upon the attachment being levied, the sons of Purushottamlal preferred an objection under Order 21, Rule 58 of the Code of Civil Procedure, claiming the property as their own under the will of Rami Bibi, probate of which had been duly obtained as aforesaid, as Parameswari had died earlier, namely, sometime in 1950. The appellant states that it was from this objection that it came to know of the will and the probate for the first time. The claim preferred by Purushottamlal's sons was allowed and the property was released from attachment. Thereafter on 7-5-1954 the appellant filed a suit against Purushottamlal and his sons for a declaration that Purushottamlal was the real owner of the property and Rami Bibi was merely a benamidar for him and that it was liable to attachment in execution of the decree against Purushottamlal. That suit is still pending.

4. Later on, on 28-6-1954 the appellant made the present application. The respondents to it are the executor Keshardeo, Purushottamlal and the latter's sons. The executor never appeared. This application claims, as I have earlier stated, that the probate be revoked and the executor be directed to prove the will in solemn form. I will have to consider the right, to the two reliefs separately for they are based on different grounds.

5. First then, as to the right to the revocation of the probate. The grounds for revocation of probate are set out in Section 283 of the Succession Act of 1925 and it is well settled that that section is exhaustive: See *Annoda Prosad v. Kalikrishna* ILR Cal 95 (A). I have therefore to see whether the appellant has made out any ground which justifies an order for revocation of the probate under that section. The grounds for revocation of the probate stated in the petition and on which alone therefore, the appellant can rely, may be summarised in the following manner:

(1) The will was brought into existence only to defraud the appellant.

- (2) The probate was obtained by fraud on the creditors.
- (3) The circumstances connected with the execution of the will are suspicious.
- (4) Probate was obtained by defective procedure.
- (5) The will is not genuine.

Those grounds will naturally have to be considered one by one, for any one of them may justify an order for revocation of the probate.

6. The first ground is that the will was brought into existence only to defraud the appellant. It is not quite clear to me what this means. It may mean that the will was executed so as to prevent the property from descending by inheritance on intestacy to Purushottamlal and thereby taking it out of the reach of the latter's creditors. If this is what was intended, then the due execution of the will is conceded or at least such execution is not challenged. In either of these cases the probate must have been duly granted and it cannot be revoked. If a will is genuine, the executor named in the will is entitled to a probate of it and this irrespective of what the effect of the dispositions contained in the will may be or of the intention with which these dispositions had been made. If the will was genuine probate of it had to be granted. It is not the law that a genuine will has to be refused probate, because it would deprive the creditors of an heir of the testator of the means of realising their dues. And if probate could not be refused, neither can it be revoked. Rami Bibi had full power to dispose of her properties in any way she liked and the creditors of her son and heir on intestacy, cannot complain if she took it away by her will from the son with the result that they were thereby deprived of the means of realising their dues. This is so, even, though she bequeathed the property to some one else, deliberately intending thereby to prevent it being availed of by her son's creditors in satisfaction of their claims. These creditors had no right against Rami Bibi. If they had no such right there can be no question of their and therefore of the appellant, having been defrauded by the will. If again the appellant intended by this objection to the will to convey that Rami Bibi, being only a benamidar for Purushottamlal, she executed the will only as a camouflage, only to throw a cloak over the latter's ownership of the property, then also this is not a ground for revocation of the probate. The will being duly executed, the probate was properly granted. In such a case the appellant, if he proves the benami, is not at all affected by either the will or the probate. It is well known that a probate does not decide any question of title to property purported to be disposed of by the will. If the property was not Rami Bibi's, she could not dispose it of by her will. In spite of her will and its probate, the property remains Purushottamlal's if such was the fact and has not been taken away from him. The appellant in such a case would be claiming independently of the will and is therefore not entitled to have any probate granted of it, revoked; *Srigobind v. Laljhari* 14 CWN 119 (B). Obviously no person is entitled to revocation of the probate unless his rights are affected by it, and one who says that the property did not belong to him who disposed it of by

his will of which probate has been granted, is not such a person. The only other thing that could have been intended by the allegation that the will had been brought into existence to defraud the appellant is that the will had been forged with intent to deprive the appellant of the means of realisation of its dues. So understood, it becomes the same thing as the ground for revocation expressly taken in the petition that the will is not genuine and will be dealt with by me when that ground is considered.

7. The second ground on which the claim for revocation is based is that the probate had been obtained by fraud on creditors. It has to be distinguished from the first ground which was that the will itself had been brought into existence to defraud the creditors. These creditors are admittedly all creditors of Purushottamlal and not of the testatrix. Of course no creditor of a testator is affected by his will for no legacy mentioned in the will can be paid till all the testator's debts have been paid. If the present ground means only this that the will itself having been brought into existence to defraud creditors, the probate also must necessarily be deemed to have been obtained by fraud on creditors, then I think it must fail, for I have already held that, apart from the case that the will was forged which I have to discuss later, the will did not defraud the creditors. There can obviously be no question of the probate being necessarily in fraud of creditors because the will was intended to defraud creditors, where the will was not made with that intention. On the other hand, if the second ground means that the probate alone had been obtained by fraud on creditors, then I find myself unable to decide the point, as no particulars of any such fraud have been given. Neither from the facts concerning the issue of the probate that appear in this case, am I able to detect any fraud. We have not had the petition for the probate before us and we do not know what statements were made there. It may be that it was not mentioned there that the appellant was a creditor of the testatrix's son. But such was not required to be made by any rule or law. It is however admitted that no citation was issued to the appellant to appear at the probate proceedings. Can that be relied on as a fraud perpetrated in obtaining the probate?

8. Now on this part of the case the real question is whether the appellant was entitled to be served with a citation. If it was, then u/s 263 of the Succession Act the probate may be revoked, whether the omission to serve the citation was due to fraud or honest mistake. In fact illustration (ii) in the section shows that a probate may be revoked where "the grant was made without citing parties who ought to have been cited." This is how Mr. Sen, appearing for the appellant, put the case. So considered, this ground becomes the same as the fourth ground earlier enumerated, namely, that the probate was obtained by defective procedure. It will be convenient to consider the two grounds together, for no other defect in the procedure has been pointed out

9. Then, was the appellant entitled to a citation? That depends on Section 283 of the Succession Act. That section provides that the Court before which the

probate proceedings are pending may issue citations, calling upon all persons claiming to have an interest in the estate of the deceased to come and see the proceedings before the grant of the probate. It is said that that appellant is a person who should have been served with citations under this section. The appellant's claim to a citation is based on no other provision and in fact there is no other provision on which it could have been based. The question therefore is whether the appellant was a person claiming to have an interest in the estate of Rami Bibi? I do not think it was. Now, what is the appellant's position? At the date of the will and also at the date of the grant, it was a creditor of Rami Bibi's only heir, Purushottamlal. In fact, before the latter date it had filed a suit against Purushottamlal for the realisation of its dues. The suit was decreed six years after the probate and a year later the appellant attached the property in execution of the decree, which attachment was subsequently removed at the instance of Purushottamlal's sons as I have earlier stated. The appellant then was at the death of the testatrix and when the probate was granted a simple creditor of her sole heir and subsequently to the probate, became his attaching creditor. The most that could be said therefore is that the appellant was a person who claimed to be entitled to be paid out of the estate left by Rami Bibi on the basis that it was inherited by her son. In actual fact, however, it never at any prior stage made any such claim, for, its case was all along that the property never belonged to Rami Bibi but that she held it as benamidar for Purushottamlal. Even now, it has not abandoned that case but is relying on it, may be as an alternative case in a suit.

10. But I will leave this out of consideration and assume that the appellant had always claimed to be paid out of the estate left by Rami Bibi. I do not think it would thereby have become a person claiming an interest in that estate. In my view, a person claiming to be paid out of the assets of an estate claims no interest in it and has no interest in it. A right to have an estate applied in payment of a claim does not confer on the claimant an interest in the estate. The owner of the estate may alienate it and if he does so honestly and not intending to defeat his creditors, the claimant can not complain though he may be prevented by the alienation from realising his dues from the estate and in case such an alienation is made the alienee will hold the estate transferred to him free from the demands of the claimant. This could not have happened if the claimant had an interest in the estate. Again if a propounder of a will had to see that citations were served on all the creditors of all the heirs of the testator then he would in most cases have an impossible task before him for he would rarely know what creditors which heirs had.

11. A contrary view however appears to receive some support from certain observations made in the case, *Kishen Dai v. Satyendra Nath Dutt* ILR Cal 441 (C), by Rampini and Gupta JJ. but it seems to me that there are some decisions of the Privy Council to which I shall presently refer which show this view to be incorrect. In *Kishen Dai's* case (C), the testator had died, leaving his two brothers, his heirs on intestacy. One of the brothers, Gopichand, was indebted to

a company called the Bankipur or Patna Loan Office Company Ltd. and in respect of this debt the company had obtained a decree against Gopichand. After the death of the testator, the wife of one of the brothers applied for the probate of a will alleged to have been left by the testator whereby he gave all his properties to that brother's son. The company through its secretary, Satyendra Nath Dutt, opposed the grant of the probate on the ground that the will was a forgery and had been set up at the instance of the brothers of the deceased so as to take the property away from them and thereby put it beyond the reach of the company as the creditor of one of the brothers. This was not the case of an application to revoke a probate but that does not make any difference. It was contended on behalf of the applicant for probate that the company had no locus standi in opposing the grant of the probate inasmuch as it had no interest in the estate of the deceased as contemplated by Section 69 of the Probate and Administration Act (Act V of 1881). That section has been reenacted in Section 283 of the present Succession Act which repealed Act V of 1881. With regard to this contention the learned Judges observed as follows (p. 444) :

"Every person who comes in to oppose the grant of probate must be a person claiming to have an interest in the estate left by the deceased. Now in this case the Patna Loan Office would seem to us to have a clear claim to an interest in the property left by the deceased, because if it were not for this will, it would have a right to seize the property, or that share of the property, which should descend to Gopichand, in execution of the decree which it had obtained against him."

12. I am unable to agree that a person who has a right to seize a property in execution of a decree for money which he holds, has therefore an interest in it. I have already given my reason for this view. I am also unable to agree that every person who comes in to oppose the grant of probate must be a person claiming to have an interest in the estate of the deceased. I shall presently show that both those views are against the authorities. Before I do that, it is important that I should point out that with the actual decision in *Kishen Dai's* case (C) I fully agree. The party opposing the probate there was challenging the genuineness of the will and he was certainly interested in having the will put out of his way though he was not interested in any estate. This is what gave him the right to oppose the probate and not any interest in any estate, as has now been made clear by the Judicial Committee in AIR 1944 11 (Privy Council) , a case to which I will have occasion later to refer. It seems to me therefore, that it was not necessary in *Kishen Dai's* case (C) to make the observations which I have earlier quoted. Those observations however bear directly on the question which I am now considering namely, whether the creditor of an heir of a deceased person has an interest in the estate so as to entitle him to be served with citation to see the proceedings for grant of probate of the will of that deceased person. It is important to remember that I am not now considering whether such a creditor can oppose the grant of a probate or apply for its revocation if granted, if he alleges that the will is a forgery or had been revoked or was for any other reason incompetent. Such a question, as I have earlier stated, I would answer in the

affirmative.

13. I have said that Kishen Dai's case (C) is against the authorities. I will now refer to these authorities. The first is *Rajah Nilmoni Singh Deo v. Umanath Mukeherjee* 10 Ind App 80 (E). In that case the Judicial Committee had to deal with the question whether the attaching creditor of an heir of a deceased testator had the right to apply for revocation of the probate of his will. Their Lordships having found on the facts that the will was genuine, expressly refused to decide the question whether apart from forgery, a creditor of an heir of the testator can oppose the probate or apply for its revocation. There are however observations in their judgment which shew that the view expressed in Kishen Dai's case (C) was wrong. First I will read what their Lordships said about the case of *Bajinath Sahai v. Desputty Singh*, ILR Cal 208 (F). They said at p. 86 of the report,

"The case of *Eaijnath Sahai v. Desputty Singh* (F) was this: A Hindu testator died, leaving B, alleged to be his adopted son, and C, who would be his heir in default of adoption, and made a will of which B applied for probate, and it was held ..... that creditors of C were not parties having any interest in the estate of the deceased, and were therefore not entitled to oppose the grant of probate. Their Lordships think this was a right decision."

It would show that the Judicial Committee were of the view that the creditors of an heir of the testator had no interest in the estate of the testator. It is true that *Bajinath Sahai's* case (F) was concerned with the creditors of one who would be the heir but for the adoption, but that makes no difference for these creditors had obviously contended that the adoption was bad and they were the creditors of one who in fact was the heir. The question of their locus standi to oppose the probate depended on their claim and not on the actual facts which would be decided in the proceedings to follow if they had a locus standi.

14. In the second place I find that the Judicial Committee seem to approve of what a Bench of this Court in *Komollochun v. Nilruttan*, ILR Cal 360 (G). What was said there was this,

"The ground of the decision in *Bajinath Sahai v. Desputty Singh* (F) was that the party there, a creditor of one of the next of kin, had no interest in the estate of the deceased."

I say they approved of this view because the Judicial Committee quoted it without criticism but they criticised two other sentences, following what I have quoted and which they also quoted, The sentences were as follows;

"A purchaser from a next of Kin is in a very different position from a creditor. If we thought that the decision went so far as to hold that a purchaser, or an attaching creditor, could not apply for revocation of a probate,..... we should disagree from such a ruling."

Referring to these sentences the Judicial Committee said at p. 87 :

"The case in which this judgment was given was that of a purchaser from the heir, but no distinction is made between a purchaser and an attaching creditor. Assuming that a purchaser can oppose the grant of a probate, or apply to have it revoked (which their Lordships do not decide), they entertain grave doubts whether an attaching creditor can do so, at least in a case which is not founded on the ground that the probate has been obtained in fraud of the creditors."

Their Lordships were therefore not prepared to hold that an attaching creditor of an heir of the testator unless he came with a case of fraud was entitled to oppose a grant of probate or apply for its revocation. Since an attaching creditor would have under the statute such a right if he had an interest in the estate, it follows that in their Lordships' opinion, it is doubtful if he had such interest. If an attaching creditor had no such interest, much less would a simple creditor have.

15. Now it seems to me that the learned Judges deciding Kishen Dai's case (C) were alive to this aspect of the matter, for, referring: to the observations of the Judicial Committee as last quoted by me, they said (at p. 445) that their Lordships

"seem to imply that. In case which is founded on the ground that the grant of probate has been obtained in fraud of the creditor, such attaching creditor would have a right to come in and oppose the grant of probate. That seems to us to be authority for holding that the Patna Loan Office has a right to come in and oppose the grant of probate, because in the present case it is expressly alleged by the Patna Loan Office that the will has been set up by two brothers of the deceased Gopichand and Puran Chand, so as to defraud it and put the property of the deceased beyond its reach. We, therefore, must find that the Patna Loan Office has a locus standi in this case and is entitled to come in and oppose the grant of probate."

Here therefore the learned Judges seem to be relying on the fact that the creditor came with a case of fraud as giving it the locus standi and not on the ground that as creditor, it had an interest in the estate of the deceased. Their observation in an earlier part of their judgment which I have quoted that the creditor has an interest in the estate of the deceased was unnecessary and, I say this with respect, in conflict with the later part of their judgment where they seek to derive support for their decision from Rajah Nilmoni Singh's case (E).

16. Kishen Dai's case (C), Rajah Nilmoni Singh's case (E) and the cases referred to in the latter case were decided under the Hindu Wills Act of 1870, the Probate and Administration Act of 1881 & the Succession Act of 1865. All these Acts have however been repealed and the sections in them with which I am concerned in the present context, have all been re-enacted in the Succession Act of 1925 by which the case before us is governed. These cases are admittedly good authority even now. In what I have been saying so long I have mentioned a right to oppose probate and also a right to apply for its revocation. These two rights spring mostly from the same facts. If there is a right to the one, there is also

generally a right to the ether. In the present judgment I shall treat both as the same.

17. The other case which shows that a creditor of an heir of a testator has no interest in his estate is AIR 1944 11 (Privy Council) . That case was concerned with an application by such creditors for revocation of the probate of the will of the testator on the ground that it was a forged document. There also the question arose whether the creditor had the locus standi to make the application. It appears to have been argued there that only those persons who could be cited before the grant of probate u/s 283, that is only those who had an interest in the estate of the deceased, were the persons who could apply for revocation of the probate and that the creditors of the heir were not such persons. In regard to that contention, Lord Atkin, in delivering the judgment of the Board, observed as follows; pp. 4-5 (of I. A.) : (p. 13 of AIR):

"In their Lordships view that is putting the matter on much too narrow a footing. One of the grounds for revoking probate is that the grant was obtained fraudulently by making a false suggestion, which, obviously covers the case of putting forward a forged will, just as (c) would cover the case of a person putting forward a forged will even if when he or she propounded it, he or she did not know it was a forged will.

In dealing with the first point, that the grant was obtained fraudulently, it appears to their Lordships to follow as a matter of course that if a person is complaining that he has in fact been defrauded, he is one of the persons who is injured by the fraud alleged, and that that person is entitled to have his redress by applying to revoke the probate and thereby to cause the fraud to become inoperative. If he had not such a right as that, it is very difficult to know what right a creditor in those circumstances, or a person injured by the fraud, could have, otherwise the probate would stand and he would be affected by the probate which had been obtained ex hypothesi fraudulently. That is the view which has been taken by their Lordships in *Rajah Nilmoni Singh Deo Bahadoor v. Umanath Mokerjee (E)*."

18. "c" referred to in this quotation is explanation (c) in Section 263 of the Succession Act which is one of the causes for which a probate may be revoked. That explanation states that a probate may be revoked where

"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."

19. Having made these observations, their Lordships held that the applicants before them had the locus standi as they had alleged that the will was a forgery. It follows from what their Lordships said that in the opinion of the Judicial Committee a creditor of an heir of a testator had no interest in his estate and was not entitled to be served with a citation. It also follows that none the less such a creditor had a right to apply for revocation of the probate if he alleged

that the will was a forgery and that this right sprang from Section 263, explanation (c), illustration (iii). Illustration (iii) shows that a probate may be revoked where the will was forged or revoked. All that I am concerned with at the present moment is that it was held in this case that a creditor of a testator's heir had no interest in his estate and that it is not necessary that such an interest must exist before a person can apply for revocation of the probate. The other thing that I wish to note is that Sarala Sundari's case (D) held that this is what had been decided in Rajah Nilmoni Singh Deo's case (E). The observations to the contrary in Kishen Dai's case (C) are hence not justified. The conclusion that I came to therefore is that the appellant had no interest in the estate of Rami Bibi and was not entitled to be served with citation to see the proceeding relating to the will of Rami Bibi. The probate therefore can not be revoked on the ground of omission to serve the appellant with the citation. This also disposes of the claim to have the probate revoked on the ground that the probate was obtained by defective procedure, for no other defect in the procedure was relied upon except the omission to serve a citation. Furthermore it appears that the ground of defective procedure was given up in the court below.

20. The next ground on which revocation of probate is claimed is that the circumstances connected with the execution of the will are suspicious. Learned Counsel for the appellant said that the principle of *Tyrrel v. Painton* (1894) P. 151 (H) applied. That case confirmed the well-known rule of testamentary courts that where a will is prepared and executed in circumstances which raise the suspicion of the Court, it ought not to be pronounced, till all traces of suspicion are removed. As I have already stated, a revocation of probate can be granted only u/s 263 of the Succession Act and it is not one of the reasons for revocation, there expressly mentioned, that the will was executed in suspicious circumstances. It may therefore be argued that a revocation cannot be ordered merely on proof of suspicious circumstances. But it seems to me that it would be wrong to accede to such an argument. A creditor attacking the genuineness of the will as the appellant in our case does, would, if he had notice of the probate proceedings, have been entitled to appear and oppose the grant. This right was recognised in Kishen Dai's case (C) and I have already said that to this extent I have no difficulty in accepting that case as a correct decision. It would, in my view, be strange reasoning to say that a person has a right to apply for revocation of probate, but has no right to oppose the grant of it for his rights in both cases arise upon the same facts. It would be illogical if he were compelled to wait till what he objected to was done and then only permitted to come in and apply for the undoing of it. Now then, if the creditor opposed the grant and showed that the circumstances in which the will was said to have been executed were suspicious, the Court would have acted on the principle of *Tyrrel v. Painton* (H) and refused probate. It seems to me to follow that when the creditor comes not to oppose the grant but to ask for the revocation of a probate already granted, the position should be the same and if the circumstances be such that the Court would not have granted probate initially, it would in the same

circumstances proceed to revoke the grant. It seems to me that a case like this can be brought under explanation (b) in Section 263 which provides that a grant can be revoked where it was "obtained fraudulently by making a false suggestion or by concealing from the Court something material to the case." The circumstances throwing suspicion on the due execution of the will are of course material and if they have been kept back from the Court, that would be good ground for revoking the probate.

21. I therefore proceed to examine if any such circumstances exist in this case which create suspicion as to the due execution of the will. For this purpose the appellant must be confined to its petition and cannot travel outside it. The first thing that is relied upon is that the effect of the will is to deprive the creditors of the sole heir of the testatrix. Now, that is hardly a suspicious circumstance. It would be most natural for the testatrix to save the property for the family and prevent it from being lost to it by being seized upon by the creditors of the heir. This is not a circumstance which will lead the court to suspect that the will was not duly executed. Then it is said that the fact that Purushottamlal, the person benefited by the will, is an attesting witness to it, shows that the will was not genuine. This contention is obviously based on *Barry v. Butlin* (1838) 2 Moo P C C 480 (I) referred to in *Tyrrel v. Painton* (H). But there the will gave a legacy to a person who was connected with the preparation of the will. I will assume that an attesting witness is a person connected with the preparation of the will. Purushottamlal, however, as the attesting witness of the will before us got nothing under it and in fact was thereby completely deprived. It is difficult to imagine that the rule in *Barry v. Butlin* (I) which lays down that the court should suspect a will which is prepared by a person who is given a benefit by it, can be extended to the case of a person attesting a will by which the property which he would have got, if the testator had died interstate is taken away from him. But then it is said this deprivation was really to the benefit of Purushottamlal, because it deprived his creditors of their means of realising their debts. I am unable to see that this is a benefit to Purushottamlal, for the result of it is to continue his liability for his debts, which for a businessman as Purushottamlal is, is really a burden and not a benefit. But assume it was a thing that Purushottamlal desired, because the will saved the property for his family and that would for practical purposes, if not in law, have preserved the property for his benefit safe from the attacks of his creditors. Is that, however, a circumstance creating a suspicion about the due execution of the will? I do not think so. As I have already said, if the mother of Purushottamlal found that he was in hopelessly involved circumstances, it would have been quite natural for her to give the property to Purushottamlal's family and deprive him so as to prevent his creditors from getting at it. The circumstance that the will deprived Purushottamlal's creditors is quite consistent with it having been genuinely executed. That does not make the will in the least an unnatural will. That being so, the fact that it was attested by Purushottamlal can give rise to no legitimate suspicion about its due execution. The last circumstance alleged to create

suspicion is that Keshardeo Ganeriwalla, an employee of Purushottamal, was made the executor of the will. But the will itself shows that Keshardeo was Rami Bibi's husband's brother. It was therefore not unnatural to appoint him the executor. It is true that Keshardeo has not appeared to oppose the application. But Purushottamal and his sons say that Keshardeo completed administration of the estate long ago and made over possession of the property thereafter to Purushottamlal's wife, Parameswari and she having died in 1950, the sons of Purushottamlal are in possession of the property. It is also said that in these circumstances it was not necessary for Keshardeo to appear, for Purushottamlal's sons would take all the necessary steps to support the will. With these contentions I agree.

22. Now I come to the last ground on which the application is based, namely, that the will is not genuine. This, if established, would be a good ground for revoking the probate. It is furthermore a ground on which a creditor of Purushottamlal may apply for revocation : see AIR 1944 11 (Privy Council) . This charge appears to have been given up in the court below. If it was given up then of course the appellant, as creditor of Purushottamlal, would have no locus standi to apply for revocation. That follows from what I have earlier said. There is some difference between Counsel as to whether it was given up. This much however is clear that no attempt was made to prove it before P. B. Mukharji, J. Neither was such attempt made before us, except in what was involved in the allegation that there were suspicious circumstances in connection with the execution of the will. With such circumstances I have already dealt. In Sarala Sundari's case (D) the Judicial Committee did not think it necessary to deal with the question of onus of proof of forgery. That was because full evidence had been led on both sides and the conclusion to be drawn from the evidence was perfectly clear to their Lordships. As is well known, in such a case the question on whom the onus of proof lies is irrelevant : see *Robins v. National Trust Co. Ltd.* (1971 A. C. 515 at p. 520 (J)). Sarala Sundari's case (D) therefore does not cast any doubt as to the person on whom the onus of proving the facts which would justify the probate being revoked should be put. That person must be he who alleges facts on which he bases his claim for revocation. The rule is clear that he who alleges facts must prove, them. The onus of proving that the will is not genuine therefore lies on the appellant. This view, it may be said, would appear to be supported by the cases of *Ramanandi v. Kalawati* 55 Ind. App. 18: (AIR 1928 P C 2) (K) and *Durgagati v. Saurabini*. ILR Cal 1001 (L). Now in the case before us, the appellant made no attempt to prove that the will was other than genuine. Nor do I find on the facts that are before us that the will was not genuine. The allegation that the will was a forgery therefore fails.

23. I have now dealt with all the grounds contained in the petition on which the claim for the revocation of the probate is based and have come to the conclusion that none of them justifies an order for revocation. I shall now turn to the other claim of the appellant namely, an order directing that the will be proved in solemn form. If such an order is made, the appellant will of course have the right

to cross-examine the witnesses produced in proving the will in solemn form. Such right is also expressly claimed in the petition but for the reason just stated, it was perhaps not necessary to do so.

24. If the order for revocation had been made, there would have been no need for the appellant to have also pressed for an order that the will be proved in solemn form, for it is not interested in the proof of the will at all. Indeed, according to it, there is no genuine will. The claim for an order for proof of the will in solemn form has therefore to be justified on its own. Now there is no provision in the Succession Act for such an order at all. It cannot therefore be made under the powers contained in that Act. I do not think this was disputed by Mr. Sen. The question remains, can it be made otherwise? The Rules of this Court on its Original Side contain a provision that a person opposing a will may give notice that he merely insists upon the will being proved in solemn form and only intends to cross-examine the witnesses produced in support of the will: Ch. XXXV, Rule 29. If he gives this notice he does not call any witness of his own and the rule also provides that he will not, when he gives such a notice, be liable for costs in any event of the other side, unless the Court thinks that there was no reasonable grounds for opposing the will. This rule was obviously meant to save a party from liability for costs when, for example, he had no knowledge of the circumstances in which the will was executed and only wanted to be satisfied about its due execution. It provides for no order being made to prove a will in what is called the solemn form. This rule cannot in any event justify an order being made in this case for proof of the will in solemn form, for it applies when the will has not yet been probated and not where, as here, the probate has already been granted.

25. There is therefore no provision in Indian law, enabling an order being made for proving a will in solemn form at least in circumstances like those prevailing in this case. As I understood the learned counsel for the appellant, he does not dispute this. He however said that there is a rule of English law which applies to the Original side of our Court and which permits such an order being made. The learned counsel for the appellant based his case for this order only on the English rule and on nothing else. This contention, at least in the form presented to us, does not seem to have been advanced before P. B. Mukharji J. And this is the point which was not stressed (sic), before us by learned counsel for the appellant.

26. Mr. Sen put the matter in this way. He said that as the probate in this case was granted in common form, his client was entitled as a matter of right to an order caning in the probate and putting the will to proof in, solemn form. This he said was" the law in England and applied at least to probate proceedings on the Original Side of this Court. This was so, because the Supreme Court established in Calcutta by the Charter of 1774 was given all the powers of English Courts in testamentary matters and all such powers were preserved to the High Court by its establishing Act of 1861.

27. Mr. Sen read the principle of English law upon which he relied for this part of

his arguments, from Tristram & Coote's Probate Practice (20th Ed) p. 545. The rule is there stated in these terms:

"Any person whose interest is adversely affected by a probate granted in common form may call it in by citation, and put the person who obtained it or his representative to proof of the will in solemn form."

28. This rule is also stated in Williams on Executors (13th Ed) at p. 80. There is no question that this is the rule in England and well established there. There is also no doubt that the appellant is a person whose interest is adversely affected by the probate granted in this case. The question however remains whether the rule applies to our country. It is unnecessary for a decision of that question to consider how much of the powers of the English Courts, if at all, are possessed by this Court. It will be enough to decide whether the power given by this rule is possessed. I will therefore not go into the bigger question whether the powers of the English Courts have come down to this Court.

29. Now the rule only applies when a probate in common form has been granted. It is said that in the case in hand, the probate had been granted in common form. We have no particulars as to what was done. The following passage however occurs in the judgment of P. B. Mukharji, J:

"The Probate in this case was granted by Mr. Justice J. N. Majumdar in the common form on the sole executor's petition affirming that the due execution of the will was proved by the declaration of Mr. S. N. Chunder, Attorney-at-Law, who was one of the attesting witnesses to the Will. The declaration of the attesting witness appeared at the foot of that petition."

It is not disputed that the facts are correctly stated in this quotation. The argument before us proceeded on this basis and also on the fact that no citation had been issued to any one. P. B. Mukharji, J. no doubt says that the probate was granted in common form. I believe that is how such probates are commonly called by the members of the profession attached to this Court. But there does not seem to be any legal justification for this, for, neither the Rules of this Court, nor the Succession Act of 1925 which is now the only statute governing probates, uses this term. However that may be, we have to see whether the probate granted in this case would be in England called a probate granted in common form, for otherwise there would be no justification whatever in applying the English rule to the probate granted in this case. As will be apparent from what I shall say later, the English rule springs necessarily from the procedure obtaining in England regarding grants in common form. It would therefore follow that in the absence of that procedure, there would be no occasion for the existence of that rule.

30. I shall therefore now discuss the English procedure for grants of probate in common form. In England, the expression "common form business" is a statutory term which it is not in India. The "common form business" in England is regulated by Statutes and statutory rules: See Tristram and Cootes Probate

Practice (20th Ed.) p. 6. The procedure for obtaining grants in common form is as hereinafter stated.

31. The necessary papers which are called "the papers to lead the grant" are left at the Principal Probate Registry which is an office attached to the Probate Division of the High Court in England. These papers are the will, the oath, the Inland Revenue Affidavit and such affidavits, renunciations and certificate as may be necessary (ibid p. 18). The oath is the oath of the executor (ibid p. 109) and it has to state that in his belief the paper writing produced (i.e. the will) contains the time and last original will of the deceased and that the deponent is the executor named in the last will (ibid p. 1186 form No. 112). It would therefore appear that the executor need not say on oath that he has personal knowledge of the due execution of the will and he need not have such knowledge so long as he is able to say that in his belief the paper attached is the will of the deceased. The Inland Reserve Affidavit sets out the assets of the deceased and is for collection of Government's dues on the will (ibid pp. 233-4). Renunciations are renunciations of probate by some executors and are necessary when all do not join in the application for probate (ibid p. 386). Certificates are statutory certificates proving death e.g. as issued under the Merchant Shipping Act, 1894 (ibid p. 115). Such certificates may be necessary where the testator was in a ship which was lost and the executor cannot say whether he is dead or alive. Lastly there are the other affidavits which may be necessary to be included in the papers leading to the grant. Thus, where the attestation clause is absent from the will, or the testator's signature has been placed below those of the witnesses the Registrar may require an affidavit of the due execution of the will from one of the attesting witnesses (ibid pp. 39-40) or he may at his discretion require proof by affidavit of the identity of the person applying for the probate, with the executor named in the will (ibid p. 109).

32. The papers to lead the grant may also be lodged in District Registries or with customs and excise officers (ibid pp. 20-28). The subsequent procedure is however the same as when they are lodged in the Principal Probate Registry.

33. After the papers to lead the grant as aforesaid have been lodged, the "records" are searched to ascertain that no other grant has been made in respect of the same estate, the papers are examined at the "seats" department, and if approved, a form of grant is prepared, and attached to a photographic copy of the will and codicils (if any). The grant is signed by the Registrar and sealed with the seal of the Probate Division (ibid pp. 18-19). Now the grant is ready for issue. There an entry is made in the Calendar of the Principal Probate Registry kept for the purpose of recording all grants made. The grant is despatched to the party applying for the probate so as to reach him in the morning of the day before it appears in the Calendar. The grant is regarded as issuing on the morning of the day when the entry in the written calendar is available for public search, which, if the papers are in order, is normally one week after they are lodged (ibid pp. 19 and 879).

34. This is the entire procedure for the issue of a probate in common form. But there are one or two other things which I should mention. When the papers lodged are defective, the party is notified and no grant will be issued until the papers have been put in order to the satisfaction of the Registrar (ibid p. 19). This only refers to technical and clerical defects in the papers, for in the common form business there is no power to ask for any other paper or to impose any other condition whatsoever before making the grant. Again, neither can a grant in common form issue when a caveat has been entered, unless the caveator fails to appear on being notified of the application or until withdrawal of the caveat or again without an order or lastly until six months have expired since the filing of the caveat (ibid pp. 463-4, 466). On appearance being entered by the caveator, contentious proceedings begin and no grant can then be made in common form: (ibid p. 468).

35. The common form procedure described above has been defined in the following way, (ibid p. 542),

"A will is proved in "common form" when its validity is not contested or questioned. The executor ..... brings the will into the principal registry or district registry and obtains the grant notwithstanding the absence of other parties interested, upon his own oath and any further affidavit that may be required."

A proof in solemn form is, on the other hand defined in these terms, (ibid p. 542):

"A will is proved in "solemn form" by the executor ..... propounding it in an action to which the person prejudiced by it have been made parties, and by the Court, upon hearing evidence, pronouncing for the validity of the will."

36. The substance of the common form procedure then is this :

(a) The probate is granted as a matter of right upon the ex parte application of the propounder and in the absence of all other parties interested in the probate : It is granted "notwithstanding the absence of other parties interested."

(b) The validity of the will cannot be contested in this procedure, because it must be granted on the ex parte application of the propounder.

(c) The will is accepted as proved by the oath of the executor who need not say that he has personal knowledge of the due execution of the will and who therefore need not have such knowledge, such oath being on affidavit and not by viva voce evidence. It is only when a defect appears on the face of the will as to its due execution that the executor may be required to get the oath of one of the attesting witnesses, again on an affidavit as to the due execution of the will. Likewise, the executor applying may at the discretion of the Registrar be required to establish his identity with the executor named in the will by a satisfactory affidavit.

(d) The grant is made by the Registrar and the matter never comes before a Court or Judge.

On the other hand, a will is proved in solemn form only in an action to which interested persons have been made parties and in which witnesses have been called by the propounder to prove the due execution of the will and by the persons opposing the will if they so choose, to prove the contrary and such witnesses have been cross-examined and upon the Court holding upon the entire evidence that the will had been duly executed.

37. It is an executor's choice to apply for probate in common form and if he has done so, it is his right to proceed in the absence of all other parties interested. It is only fair in such a case that any person interested in opposing the grant should not be prejudiced by the executor at his option choosing the common form procedure. He should be placed in the same position as if the probate had not been granted. Such, I believe, is the reason for the English rule on which Mr. Sen relies. The procedure to be followed by a person who objects to a probate granted in common form is to have a citation issued, calling in the grant and to start an action by a writ for revocation of the probate or for its proof in solemn form: (ibid pp. 484, 545. 550 and 557). By calling in the probate, he makes the probate for the time being ineffectual and its revivor or final revocation depends on the result of his action. If probate had not been granted, he could only have instituted an action for the proof of the will in solemn form : (Ibid p. 552). An action for the revocation of probate on the ground of the invalidity of the will is really an action for proof of it in solemn form : (ibid p. 555). Therefore, the two forms of action which the person calling in the grant in common form has to start are really one. It follows that the rule puts the person opposing the will in the same position as if the grant obtained without notice to him had not been made. I have already said that it is only fair that it should be so.

38. In order therefore that the English rule may be applied in our country it must be shown that we have here the same system of granting probates as the common form procedure in England, or at least a system which would show that the reason which, as I have said, has led to the existence of the English rule, also obtains in our country. It has more particularly to be shown that we have a system in which a person is entitled as a matter of right to probate in the absence of all parties interested in the will and such was the procedure followed in the present case.

39. Now what is done in our country in, making a grant is done in terms of the procedure laid down by the Succession Act, 1925, and when a grant is made by this Court, the rules on the matter on the Original Side have furthermore to be followed. These Rules however do not depart from the Act. Neither in the Act, nor in the Rules do the words common form" occur. The procedure laid down in the Act and the Rules is this. A petition for the grant of probate has to be made to the Court by the executor verified in the prescribed manner. The petition has to state the time of the testator's death, that the writing annexed to the petition

is his last will, that it was duly executed, that the petitioner is the executor named in the will and also the amount of the assets that are likely to come into the petitioner's hands: Sections 276 and 280. The petition shall also be verified in the prescribed manner by at least one of the attesting witnesses to the will when procurable : Section 281, Upon the petition being presented, the Court may, if it thinks proper, (a) examine the petitioner in person, upon oath, (b) require (further evidence of the will, and (c) issue citations, calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate: Section 283. In any case in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit according to the provisions of the Code of Civil Procedure: Section 295. When it appears to the Court that probate should be granted, it will grant the same under its seal: Section 289. The Rules of this Court do not make any provision regarding the procedure which is relevant for the present purpose except Rules 5A and 29 of Ch. XXXV. I have previously dealt with Rule 29. Rule 5A has no application in this case, because it came into force on March 1, 1948 that is after the present probate had been granted. That rule provides that, in all applications for probate, the petitioner shall state the names of the members of the family or other relations upon whom the estate would have devolved in case of intestacy, together with their present places of residence. The idea obviously is that before granting the probate, the Court might at its discretion, being apprised of the existence of these people, serve them with the notice of the proceedings. I do not think Rule 5A made any substantial departure from the previous existing procedure, for in most cases the petitioner would have set out these particulars, for if he did not do so, the Court would not have been aware of their existence and would not therefore have given them any notice of the proceedings and these persons would then have been entitled as a matter of right to have the probate revoked u/s 263 on the ground that they were not served, provided of course they challenged the genuineness of the will, for, there would be no sense in revoking the probate at the instance of a person who accepted the will.

40. It has been seen that if the application for probate is opposed, the proceedings become a suit. The question of opposition arises when a person, on notice being given to him, either because he had entered a caveat or because the Court from the materials before it finds that he is a person entitled to an interest in the estate of the deceased. It seems a person may also appear, of course with the permission of the Court on his own initiative without a notice if he has an interest in the estate or the probate. This is perhaps what happened in ILR 28 Cal 441 (C).

41. The important distinctions between the English Common form procedure and the Indian Procedure are therefore as follows:

(a) In England the matter never comes before the Court; in India the Court does everything.

(b) In England the oath of an attesting witness is not necessary unless doubts

arise from the will itself about its due execution; in India there has to be declaration by one attesting witness when procurable about the due execution of the will.

(c) In England there is no right to examine the petitioner in person while in India such a right exists.

(d) Lastly, and this is most important for the present purpose, a Court here may in all cases issue citation calling upon persons interested in the estate to appear and persons may of their own also appear, but in England, unless there is a caveat, no citation can be issued on any one nor can any one appear on his own.

42. In my view, therefore, there is nothing like the English Common Form procedure in India. In the English procedure there is really no judicial determination of the right to the probate, but the probate is issued as a matter of course on certain formalities being complied with. The English Common Form grant is as a matter of right in the absence of all other parties interested but there is no such right in any applicant for probate anywhere in India. I have earlier stated that the reason behind the English rule is that a common form grant is made in the absence of other parties interested who were entitled to be heard at the time of the grant and the rule puts them in the same position as if they had appeared. This reason does not exist in India. The Court may, if it so desires, call upon any party interested to appear in the proceedings of the grant and the applicant for probate has no right to object to it. Whether the Court in any particular case does so or not, can make no difference, for the rule must be of general application and the reasons for its existence cannot be the facts of the case but have to be in the procedure itself. In England the rule is, there, because of the procedure and not because a certain state of things existed in a, certain case.

43. I therefore come to the conclusion that we have no system in our country like the English Common Form procedure. The system of grant that we have here does not contain the reason which fortifies the existence of the English rule. The result is that the English rule is not available in our country.

44. It will have been seen that the distinction between the procedure in England and the procedure in India, which I have made depends on Section 283 of the Succession Act which gives the Court power to "issue citations calling upon all persons claiming to have any interest in the estate of the deceased" to appear: Sub-section (2) of Section 283 provides that the citation shall be fixed up in the Court house, and, the office of the Collector of the District and also otherwise published as the Court may direct. It was suggested at one stage of the arguments that the citation contemplated in Section 283 was a general citation, not addressed to any particular individual, but to all persons claiming interest in the estate of the deceased and that such a citation made no difference between the English and the Indian procedures. I am unable to see that the power to issue a general citation makes no difference. Particular persons are entitled to

appear under a general citation just as well as under a special citation issued severally to them. So particular persons are also cited under a general citation. In any event, there is because of Section 283 in our country no right to obtain probate in the absence of others and that is the difference between the two systems which I have been stressing. Again, I am unable to agree that Section 283 contemplates a general citation only. The word used is the plural "citations" which would be inappropriate if only one citation, namely, a general citation was intended. Furthermore Section 283 has obviously to be read, keeping in mind illustration (ii) of Section 263. That shows that a grant can be revoked when it was made without citing parties who ought to have been cited. This of course contemplates a citation on a particular person. Since there is no section other than Section 283 which provides for citations being issued, that section must also contemplate issue of a citation to a particular individual. I have here left out of consideration Section 285 which provides for the issue of a citation to a person who has entered a caveat, for that is a special case, a case of a compulsory citation. I do not think Sub-section (2) of Section 283 indicates that the section contemplates only general citations, for that sub-section deals only with the mode of service of the citation and not with persons to be cited. Then I find that the reported cases show that discretionary citations directed to individuals are and should be issued in appropriate cases and if they are not, that by itself is a sufficient ground for revoking a probate. *Dwijendra Nath v. Golak Nath* 19 CWN 747: (AIR 1915 Cal 393) (M) and 55 Ind App 18: (AIR 1928 PC 2) (K). This is the practice on the Original Side of this Court also, though the Rules do not provide for an individual citation being issued. See *In the Goods of Gopi Mohan Bysack* 5 Cal LJ 560 (N). The new rule 5A of Ch. XXXV of the Rules of this Court to which I have earlier referred, would also indicate that individual citations should be served. I do not therefore think that there is anything in Section 283(2) which shows that in India citations to individuals cannot be issued and that therefore the Indian procedure and the English Common Form Procedure are the same.

45. There is one other reason for holding that the English rule cannot be applied in India. That rule gives a right to have the probate called in and an action for revocation or proof in solemn form commenced. Now in India there is no provision for the calling in of a probate. All that can be done about a probate once issued is to revoke it and a probate can be revoked only on the grounds mentioned in Section 263 of the Succession Act. Now the calling in of a probate does not by itself amount to a revocation of it. That is clear from the procedure stated in *Tristram and Coote* (20th Ed.) H. 484, 549, 550 and 555. The English rule which I have been so far discussing also shows this, for it contemplates an action for proof of the will in solemn form or for revocations of the probate, being started after the probate has been called in. It appeared that if the person at whose instance the probate was called in takes no further steps, the party to whom the probate had been granted can obtain an order from the Registrar "for the delivery out of the grant to himself", (*ibid* p. 484). This could not happen if

the calling in of the probate amounted to its revocation.

46. As I have said, I find no procedure in India whereby a probate issued can be called in. So far as the subordinate Courts are concerned, the matter is beyond doubt and it has not even been argued before us that they can call in probates. In 19 Cal WN 447: (AIR .1915 Cal 393) (M) probate of a will had been granted to a brother of the testator without, proper notice to his son. On the son applying for revocation of the probate, the District Judge made an order calling upon the brother to whom probate had been granted to prove the will in the presence of the son without revoking the probate. On appeal, this Court held that the District Judge should have revoked the probate as the son had not been cited and then called upon the brother to prove the will in the presence of the son. In ILR 33 Cal 1001 (L) it was definitely held that in the subordinate courts in India at least, a probate, once granted, can only be revoked on the grounds mentioned in the Statute and that the English rule has no application there. Coming now to the Original Side of this Court, we were referred to 5 Cal LJ 560 (N) as showing that on that side of this Court, the English rule applied. I do not think that the case does so. That was a case of an application for revocation of probate and Mr. B. C. Mitter, appearing to support the application said it was made u/s 50 of the Probate and Administration Act which is now reproduced in Section 263 of the present Succession Act. This Court revoked the probate. It was not therefore a case where the English Rule was applied or the probate was called in. There, a reversionary heir had not been cited at the time of the grant and on his application for revocation of the grant it was held that he ought to have been cited and that the probate should for the omission to cite him be revoked and an opportunity given to the person interested to do so to prove the will in the presence of the heirs and as that person refused to prove the will the revocation must stand. Woodroffe, J. said (at pp. 562-3),

"It is true that according to the practice which prevails in this Court, probate is granted in common form without citation. But applicants follow this procedure at their own risk", viz., the risk of having the proceedings set aside at the instance of parties who were entitled to be heard but have not in fact been heard".

Now, a person entitled to be heard is a person claiming an interest in the estate of deceased. This I have already said. The heir in Gopi Mohan Bysack's case (N) was of course such a person. The observations of Woodroffe, J. cannot cover the case of an applicant who has no such interest, as the appellant before us is. u/s 263, if a person entitled to be served was not served, he was entitled to the revocation without any assistance drawn from any English rule. This is clear from what the learned Judge appears to have said at p. 562 of the report:

"Under Section 50, probate may be revoked for just cause and in the illustration to that section, one ground of just cause is given as the granting of probate without citing parties who ought to be cited. In this case it appears first that the applicant as a reversioner ought to have been cited, and secondly, that he was not so cited, and therefore there is just cause for the revocation of the probate u/

s 50. It appears to be therefore, that the applicant is entitled to apply to have this grant revoked and to claim that the will should be proved in solemn form in the presence of the applicant."

Prima facie it seems to be somewhat inaccurate to say that a person entitled to revocation u/s 50 for Section 263 of the Present Act) is entitled to claim that the will should be proved in solemn form, for that person is entitled to the destruction of the will and not interested in its being upheld. It is for the party supporting the will to ask for an opportunity to prove the will again and this will naturally be granted to him provided of course the revocation had not been ordered on the ground that the will was not genuine. What Woodroffe, J. meant was that the person who is entitled to the revocation can say that if the will is to be proved again it should be on notice to him in solemn form. Where probate is revoked on the ground of non-citation the will may be proved again but then the right to prove the will again is in the person wishing to uphold the will and not in the person wanting the revocation of the probate. The claim to prove the will again will therefore be made by the former and not the latter.

47. The case of *Elokeshi Dassi v. Hari Prosad Soor* ILR Cal 528 (O) however directly lays down that a probate of the will can be called in. There, probate of the will of the testator was granted to his brother, without citing his sole heir and widow Elokeshi. Elokeshi then applied on the ground of omission to cite her, to have the probate recalled and revoked and the will proved in her presence. Ameer Ali, J. who heard the application went into the question of the genuineness of the will on the affidavits filed in the application and dismissed it. On appeal the order of Ameer Ali, J. was set aside, MacLean C. J. observing (at p. 531),

"She was not cited, and she substantiated a case for having the probate of the will recalled, and of having an opportunity given her of showing that the will is not a genuine one.

If I may say so, with respect, the error into which the learned Judge in the Court below seems to me to have fallen is that on this application, he has decided the question as to the genuineness of the will. This was premature.

The application was in effect only that the will be proved in the applicant's presence, and this ought to be done, or evidence given in the way usual in probate cases, and not on this application.

On these grounds, the appeal must succeed with costs, and the probate granted must be recalled and kept in the record of this Court until the case is decided."

With the actual decision I respectfully agree. Ameer Ali, J. should have decided the question of the genuineness of the will on proper pleadings and proper evidence and not, as he did, on the affidavits in the application. I do not however see that there was any justification for saying that the application "was one asking in effect only that the will be proved in the applicant's presence." The

statement of the facts given in the report shows it to have been one for revocation also. Mr. Sinha appearing for the appellant, the widow, based his case on *Walter Rebbels and another Vs. Maria Rebbels and others*. That case turned on what are now Ss. 263 and 283 of the present Succession Act. Now it appears to me that when a just cause for revocation is made out u/s 263, the applicant is entitled to a revocation as a matter of right and no question of calling in a grant arises. But I quite see that instead of revoking the grant in the first instance and then deciding on the evidence adduced whether a fresh probate should be issued or not, the court may make one order upon hearing the whole matter on proper evidence and as in a suit, whether the probate should be revoked or not. That in substance was what was done in *Elokeshi's case* (O). This however would be entirely different from calling in a grant.

48. It only remains for me to refer to 55 Ind App 18: (AIR 1928 PC 2) (K) where what I have said seems to have been laid down as the correct procedure. There an application for revocation of the probate granted to the testator's brother Gyan Prakash, was made by his widow and infant daughter on the allegation that they had not been cited and that the will was not genuine. Lord Sinha in delivering the judgment of the Board observed at p. 23 (of I. A.) : (at p. 4 of AIR) :

"There has been some divergence of opinion in the Courts in India as regards the law and procedure governing cases for revocation of probate, due in part to the introduction into Indian practice of the difference in English law between the grant of probate in common form and probate in solemn form. It is worse than unprofitable to consider how far, if at all, that distinction has been incorporated into Indian law. It has often been pointed out by this Board that where there is a positive enactment of the Indian Legislature, the proper course is to examine the language of that statute and to ascertain its proper meaning, uninfluenced by any consideration of the previous state of the law -- or of the English law upon which it may be founded.

These observations apply with peculiar force to testamentary cases which are governed by the Indian Succession Act of 1865 or the Probate and Administration Act of 1881 (both now repealed by the Succession Act of 1925). As Sir A. Wilson observed, in delivering the judgment of this Board in the case of *Kurrutulain Bahadur v. Nuzbal-Ud-Dowla Abbas Khan* ILR Cal 116 (Q) these Acts, while to a large extent embodying the rules of English law on the subject yet departed in many particulars from these rules; and in the progress in the development of the law and practice in test-amentary cases the ecclesiastical origin of this jurisdiction of the Courts in England has been completely discarded; and the Indian Legislature has gradually evolved in independent system of its own, largely suggested, no doubt, by English law, but also differing much from that law and purporting to be a self-contained system."

49. Stopping here for a moment, it would appear that these observations would strongly support the view that there is no scope in India of applying any rule of

English law and certainly not where the Indian Statute makes an express provision on the subject. Obviously these observations would lead to the same conclusion in considering a matter on the Original Side of this Court also, for the statute applies with as much force to the subordinate Courts as to this Court in its Original Side. Hence if the case is one which falls within Section 263 of the present Succession Act, the probate granted has to be revoked and cannot simply be called in and allowed to lie dormant. There it would appear that the procedure recommended by McLean C. J. in *Elokeshi's* case (O) is not the correct one to follow.

50. Lord Sinha then proceeded to say that u/s 50 of the Probate and Administration Act (which is Section 263 of the present Succession Act) a probate was revocable on proof that the grant had been made without citing parties who ought to have been cited or that the will was forged, being illustrations (b) and (c) of the section. Lord Sinha then said,

"It is apparent that the plaintiff in this case set up both these grounds for revocation. The [first issue as framed comes under illustration (b) and the second under illustration (c.).

If these issues were tried separately and the plaintiff succeeded on the first issue, that in itself would be sufficient for revoking the probate; but it would still be open to the defendant to prove the will and, if she succeeded the probate would stand.'"

Here as both issues were involved they were tried together and a final judgment was given revoking the probate as the defendant failed to prove the genuineness of the will, the onus of which was on her.

51. There can be little doubt that in our country there is a right u/s 263 to apply for revocation alone only on the ground that the person applying ought to have been served but was not served. That seems to follow from the section itself and also from what I have read from the judgment in *Ramanandi's* case (K). He need not also ask that the will be proved in his presence. That is the concern of the other side. If he wants to prove the will in the presence of the party wanting revocation the whole thing will be heard together and one judgment pronounced revoking the probate or refusing to do so. The English rule however contemplates the calling in of the grant only for the purpose of enabling the person calling in the grant to take further steps for the revocation of the probate which, as I have earlier said, if he does not do, the probate will be delivered back to the original grantee. In our country the only thing permitted after a grant has been made is to revoke it.

52. In the case in hand the English rule has been relied upon by the appellant as an alternative basis to be availed of if it fails to substantiate its grounds of revocation mentioned in the petition including the ground that it ought to have cited but was not. I have held that these grounds have not been substantiated and that the appellant is not a person who ought to have been cited. In these

circumstances the appellant has invoked the assistance of the English rule, for that is available to any person affected by the probate, and therefore also to a person who claims no interest in the estate of the deceased. By this rule, the appellant wants to throw the burden of proving the will in its presence on the respondents. This it should not be allowed to do. As was said in Ramanandi's case (K), a person who fails to prove that he ought to have been cited and therefore cannot rely on the omission to cite him as a ground for revocation of probate may yet ask for revocation on the ground that the will is not genuine, provided of course he is affected by the probate as happened in AIR 1944 11 (Privy Council) , but in such a case the onus of proving that the will is not genuine is on him. If this is the result of our statute, the appellant cannot be allowed to evade it by a resort to an English rule. It appears to me also that it is not thereby put to any real hardship. It was free to lead any evidence it had, to show that the will is not genuine and unless the evidence led was wholly worthless, in which case there would be no reason for the law to favour the appellant, the respondents would be compelled to call witnesses to prove the will unless they abandoned the will, and then the appellant might have cross-examined such witnesses in the same manner it would have done if an order had been made on the respondents to prove the will in solemn form.

53. I also wish to add if the English rule obtained here, then on the refusal of the party who obtained the grant to prove the will in the presence of the person at whose instance the probate had been called in and the former had been put to the proof of the will, the probate would have to be revoked. Now this is not a ground for revocation mentioned in Section 263. If the English rule applied the section would therefore be added to. Now it is well settled that the section is exhaustive and a revocation cannot be ordered except on one or other of the grounds mentioned in it and this is so whether the application for revocation is made to this Court on its Original Side or elsewhere. Therefore, again, the English rule can not be applied here.

54. I think I ought also to refer to a rule in Ch. 35 of the Rules of this Court in its Original Side, dealing with the procedure in testamentary matters. That is Rule 33 and it lays down that, in cases not provided for by this Chapter, or by the rules of procedure laid down in the Indian Succession Act or the Administrator General's Act, or the Code, the practice and procedure of the Probate Division of the High Court of Justice in England shall be followed so far as they are applicable and not inconsistent with this chapter and the said Acts. I do not think that the application of the English rule in this Court can be justified by Ch. 35, Rule 33. Rule 33 makes English rules of procedure applicable here but the English rule which we are asked to apply in this case deals with a party's right to have a grant called and the will proved afresh in solemn form and is not a matter of procedure. Again, Rule 33 cannot justify the application of any English rule which is inconsistent with the Succession Act and for the reasons already stated this English rule is, in my view, inconsistent with that Act.

55. I have now dealt with all the points necessary for the decision of this appeal. There is however one point dealt with by P. B. Mukharji, J. about which it is right that I should express my views. That point is this. It will be remembered that the appellants riled a suit, claiming a declaration that the property really belonged to Purushottamlal and that Rami Bibi was merely a benamidar for him. It was after that suit was filed that the appellant made the present application for revocation of the probate. P. B. Mukharji, J. observed.

"Here, as I have said, no right was reserved under Order 2, Rule 2 of the CPC to apply for revocation in the Probate Court. The creditor chose his remedy and that was to stand or fall by his exclusive case that the property did not belong to the testatrix who was a mere benamidar. In such a case the creditor cannot come within the rule laid down by the Privy Council in *Sarala Sundari's* case (D) for his entire claim is de hors the Will. In my judgment, a creditor who claims entirely de hors the Will and does not make the case that the Will is in fraud of the creditors cannot be allowed to revoke the grant of probate of the Will". It is true and this I have also earlier said that no one is entitled to revocation of the probate granted of a Will, if his case is that the property did not belong to the testator, for in such a case his claim to the property can never be affected by the Will or the probate granted of it. As the learned Judge said, the "Probate Court does not deal with title at all", the question is, has the appellant in this case made that case in his petition for revocation? I have earlier shown that this is not so. P. B. Mukharji J., has referred to Order 2, Rule 2 of the Code of Civil Procedure. I do not think the fact that leave under that rule was not reserved in the plaint in the appellant's suit for a declaration that the property really belonged to Purushottamlal -- and I do not see where else such leave could have been reserved -- prevents it from making another case in its petition for revocation or makes that petition one based on the ground of benami alone. Mr. Sinha appearing for the sons of Purushottamlal stated that he did not say that the omission to ask for the leave had this result. Order 2, Rule 2 says that the entire claim in respect of a cause of action shall be included in the same suit and if any portion of the claim is left out it cannot be sued upon later. It also says that if a person entitled to more than one relief in respect of the same cause of action omits to sue for some of such reliefs without the leave of the Court, he shall not afterwards sue for the relief left out. If this rule applied to the case in hand, then the petition would not have been maintainable at all. It would have been barred in limine. This is not however what was held by P. B. Mukharji, J. It could not have the result of confining the appellant to the case that the property was benami. It therefore could not be said that that was the exclusive case that the appellant was making. But it does not seem to me that the rule applies. It bars a sub-sequent suit and the petition for revocation can hardly be said to be a suit. Again, the claim or the relief barred must be in respect of the same cause of action, and I do not think that a claim for revocation and a claim for a declaration that the property was held by Rami Bibi as benamidar for Purushottamlal are parts of the same cause of action. The causes of action on

which the two claims are based seem to me to be entirely different. It is enough to say that that is so appears from the fact that the claim that the property is benami, is one which disentitles the claimant to a revocation of the probate. In fact, it would have been impossible to combine a claim for a declaration that a property is held benami and a claim for revocation of the probate of a Will by the benamidar, which purported to dispose of the property, in one legal proceeding and Order 2, Rule 2 applies only where such combination is possible. Therefore, I do not think that Order 2, Rule 2 at all affects the appellant's rights in the matter of the revocation of the probate. It is true that in both the petition and in its affidavit in reply, the appellant purported to say that it was true to its knowledge that Rami Bibi held the property benami for Purushottamlal. Obviously however this was not correct and the appellant had no personal knowledge of the matter. But however that may be, if it had such knowledge, the only effect of the statements in the petition and the affidavit would be at the highest to throw doubts on its other statements about the genuineness of the will and otherwise concerning the probate of the Will. Since however I hold that the probate cannot be revoked it is not necessary to discuss the question of doubt further.

56. On the grounds aforesaid I think this appeal fails and it is dismissed with costs.

P. Chakravarti, C.J.

57. I have had the advantage of reading in advance the judgment prepared by my learned brother which he is about to deliver. I agree with him that this appeal should be dismissed with costs.

58. In my opinion, the practice prevailing on the original Side of this Court of granting probate without citations is not exactly the practice prevailing in England of obtaining probate after the Will in common form. That is the view taken by my learned brother with which I agree. I also agree that the appellant Bank, as one of the creditors of the heir of the testatrix, was not entitled to be cited and cannot make its non-citation as a ground of the revocation of the probate. I also agree that the appellant Bank has not been able to establish its case of forgery or the other grounds on which it might be entitled to intervene in law.

59. As regards the observations made by my learned brother on the decisions he has cited, I desire to say that I should not like to be regarded as being a party to each and every one of them.