

(2015) 11 PAT CK 0049
In the Patna High Court
Case No : Test Case No. 7 of 1993

Sudhendu Kumar Basu and Others	Vs	APPELLANT
Amar Krishna Basu and Others		RESPONDENT

Date of Decision : 09-11-2015

Acts Referred:

Court Fees Act, 1870 — Section 19-H, 19-I
Criminal Procedure Code, 1973 (CrPC) — Section 144
Succession Act, 1925 — Section 15, 229, 235, 263, 283

Citation : (2016) AIR (Patna) 15

Hon'ble Judges : Shivaji Pandey, J.

Bench : Single Bench

Advocate : Ramakant Sharma, Shailesh Kumar, Rajendra Pd. and Lakshmi Kant Sharma, Advocates, for the Appellant; Ray Shivaji Nath and Indrajeet Singh, Advocates, for the Respondent

Judgement

Shivaji Pandey, J.—Heard counsel for the applicant and the respondents.

2. Sudhendu Kumar Basu was a retired Professor having movable and immovable property. He had one son, namely, Subir Kumar Basu (for short, "S.K. Basu"), Sudhendu Kumar Basu died on 15th May 1987 leaving behind his only son, namely, Subir Kumar Basu, who is permanent citizen of United Kingdom has disclaimed his right, title and interest in the property of his father S.K. Basu and he refused to return India whereupon Late S.K. Basu executed his Will with regard to his estate on 20th December 1985 in favour of Board of executor, namely, (1) Amar Krishna Basu, Retired Chief Engineer, his own brother Resident of Ashok Nagar, Ranchi, (2) Sanjay Chandra Sannigrahi C/o. M/s. Romson & Company, Dak Bungalow Road, Patna and (3) Bishwajit Sen Gupta, Architect, resident of South Gandhi Maidan, Patna. In the Will the testator has desired that after his death the aforesaid Board of Executor shall take charge of his property and assets and to dispose of the same in favour of person and institution in India carrying humanitarian work. Wife of Late S.K. Basu predeceased him in the year 1981. Late S.K. Basu died on 15th May 1987 at Patna. Last rites were performed

by the above named Board of Executors who had come in physical possession of the property and assets of Late S.K. Basu. As per petitioner, Late S.K. Basu has executed last Will on 25th April 1987, appointed the petitioner as executor of his estate in respect of immovable property i.e. 13 decimals of land having house and Sahan at New Dak Bungalow Road, Yunus Park, holding No. 391, Circle No. 6.

3. As per claim of petitioner, they were tenants of the house, they were looking after and serving S.K. Basu to his full satisfaction and because of sincere services, Late S.K. Basu was pleased with them and ultimately he by revoking all the earlier Will executed the last will in their favour as aforesaid. In the Will dated 25th April 1987, subject matter is the house. As it also appears that another Will for the same property was executed by Late S.K. Basu on 30th April 1989 in favour of Prabhat Ranjan Kumar who filed a Test case, vide Testamentary Case No. 5 of 1992 which was later on dismissed vide order dated 7th February 1995. After death of S.K. Basu, petitioners filed Probate Case No. 111 of 1987 before the District Judge, Patna Judge as Letters of Administration Case No. 37 of 1988.

4. In the mean time, the Board of Executor filed Testamentary Case being Testamentary Case No. 1 of 1988 on 4th January 1988 with respect to the Will dated 20th December 1984 when they could know about the pendency of Probate Case No. 111 of 1987 filed an application vide MJC No. 372 of 1988 before this Court, notices were issued to the opposite parties, present applicant joined the proceeding vide order dated 6th February 1989 transferred Probate Case No. 111 of 1987 from the court of District Judge, Patna and the same was numbered Testamentary Case No. 2 of 1989 by this Court, directed to hear that case along with Testamentary Case No. 1 of 1988. After transfer, it was registered as Testamentary Case No. 2 of 1989, vide order dated 16th May 1989 to hear along with Testamentary Case No. 1 of 1988. With respect to Testamentary Case No. 1 of 1988, probate duty was deposited on 16th May 1989 from the account of Testator but Testamentary Case No. 2 of 1989 was dismissed for default for non-compliance of order dated 17th August 1989 whereby direction was given to deposit the probate duty. After dismissal of Testamentary Case No. 2 of 1989, the petitioners filed Restoration Application No. 788 of 1991 which was allowed vide order dated 8th January 1993. But before the order of restoration this Court, vide order dated 24th April 1992, granted probate with respect to Will dated 20th December 1987 in favour of Amar Krishna Basu, S.C. Sannigrahi and Bishwa Sen Gupta as executor. It appears from the record that this Court with respect to Testamentary Case No. 1 of 1988 issued special citation through registered notice to the sole heir and thereafter his son Subir Kumar Basu sent affidavit of "No Objection" from United Kingdom which was ordered to be kept on record vide order dated 10th April 1990. General Citation was published in Hindi and English Daily News-paper i.e. Aaj & Times of India giving information to all of the dates regarding hearing of the case on 11th January 1990 and 12th January 1990.

5. No caveat or objection was filed by anyone the case was taken up for hearing. Testamentary Case No. 1 of 1988 was duly fixed for hearing vide order of this Court dated 29th November 1991. After completion of all necessary formalities, the case was listed for hearing on three date s, namely 14th February 1992, 6th March 1992 and 30th March 1992 in which two Bank employees were examined to prove the signature of the testator on the Will and vide judgment and order dated 24th April 1992 granted probate, as per provisions of the Indian Succession Act, the opposite parties u/s. 317 of the Succession Act have filed affidavit with inventory of movable and immovable property of testator submitted account of estate along with affidavit dated 22nd April 1993. The probate of will was granted uncontested as there was none to raise objection from any corner.

6. After restoration of Testamentary Case No. 2 of 1989, the same was renumbered as Testamentary Suit No. 1 of 1999. As per the claimant of the present case, they had no knowledge of Testamentary Case No. 1 of 1988, though the applicant of Testamentary Case No. 1 of 1988 were fully aware about the interest of these petitioners they were not made as party nor special citation was issued to them.

7. In the present revocation application, point has been taken that Testamentary Case No. 2 of 1989 was to be heard along with Testamentary Case No. 1 of 1988 but neither the Office pointed out nor the opposite parties have served special citation with respect to Testamentary Case No. 1 of 1988, suppressing the fact from this Court, obtained grant of probate with regard to Will dated 20th December 1985. They have also suppressed the fact from this Court that the said Testator after revoking his earlier Will has executed his another last Will dated 25th April 1987 in favour of present applicant.

8. In the present state of affairs, Testamentary Case No. 2 of 1989 has been converted into Testamentary Suit No. 1 of 1999. This Court vide order dated 16th July 2006 held that in the event Testamentary Case No. 7 of 1993 is allowed, then application filed for grant of probate vide Testamentary Suit No. 1 of 1999 shall proceed in accordance with law.

9. Again I.A. No. 6981 of 2012 was filed where prayer was made that the present Testamentary Case No. 7 of 1993 be kept in abeyance till disposal of Testamentary Case No. 1 of 1999.

10. This Court has taken note of the order dated 6th July 2006 and the Court vide order dated 14th March 2013 rejected I.A. No. 6981 of 2012 for giving preference Testamentary Suit No. 1 of 1999. The opposite party appeared and filed show cause where it has been stated that the opposite parties are trustees appointed by the testator of the property of Late S.K. Basu, after his demise on 15th May 1987, filed an application for probate of will dated 20th December 1985 on 4th January 1988 which was registered as Testamentary Case No. 1 of 1988. In the show cause, claim has been made that by the testator by the said Will bequeathed his entire property, both movable and immovable for different

purposes appointing the opposite parties as executer to carry out his philanthropic desire. In the Testamentary Case No. 1 of 1988 his nearest heir, his only son Subir Kumar Basu, who resides at present in United Kingdom, was arrayed in the category of nearest heir. A registered notice was issued to the said sole heir and subsequently he sent his affidavit of "No objection" from the United Kingdom which was ordered to be kept on the record by order dated 10th April 1990. General citation was published in Hindi Daily Aaj and English daily Times of India. Even after publication of notice, no objection was filed by any one. The case was taken up for hearing which proceeded almost two years the petitioners of this Revocation case were fully aware of pendency of Testamentary Case No. 1 of 1988 and they did not file any caveat or objection in the Testamentary Case No. 1 of 1988, was fixed for hearing vide order dated 29th November 1999, following the requirement of the procedure, the case was listed for hearing on 10th January 1992 and accordingly, hearing was conducted on three subsequent dates, namely, 14th February 1992, 6th March 1992 and 30th March 1992. On 24th April 1992 judgment was delivered allowing the probate of the will. In compliance of law the opposite parties have filed inventory of movable and immovable property. The probate was granted as there was no objection from any quarter, even from his own son Subir Kumar Basu who had sent his affidavit of "No objection" from the United Kingdom which has been kept on record. In the objection, the opposite parties have taken a plea that they were knowing the pendency of Testamentary Case No. 1 of 1988 but purposely they did not participate. Now on frivolous ground this application has been filed for revocation of grant of probate.

11. In support of his case, the applicant has examined four witnesses, namely, P.W. 1 Jagdish Prasad (applicant No. 2), P.W. 2 Arjun Prasad (one of the tenants in the house of testator), P.W. 3 Pramod Kumar (one of the applicant) and P.W. 4 Jag Mohan (an independent witness). The O.P. has also examined one witness, namely OPW 1 Sanjay Chandra Sannigrahi.

12. P.W. 1 Jagdish Prasad stated that he was a renter in the house of Late S.K. Basu, testator. Late Basu was also living in the said house but was suffering from old age ailments. Pramod Kumar, Vijay Kumar, Alok Kumar and Dinesh Singh were also tenants of the said house. He developed close intimacy with him, served him with his best capacity. Late S.K. Basu disclosed to him, his son (Subir Kumar Basu) left him permanently and settled in England. Being pleased with the services rendered by them, witness Pramod Kumar and Vijay Kumar, Late S.K. Basu executed his last will in favour of all the three. Late S.K. Basu had fallen ill, was hospitalized in Tara Nursing Home, Patna where he breathed his last on 15th July 1997. His last rites was performed at his residence by him with the help of Pramod Kumar and Vijay Kumar. Later on a probate case vide Case No. 111 of 1987 was instituted in the court of District Judge, Patna for grant of probate of the last will of testator dated 25th April 1987 in favour of him and two others. He has stated that he had no knowledge about Testamentary Case No. 1 of 1988 filed before this Court. Petitioners of Testamentary Case No. 1 of 1988 filed an

application of transfer being MJC No. 372 of 1988 before this Court and in pursuance of order dated 26th April 1989 Probate Case No. 111 of 1987 was transferred which was renumbered as Testamentary Case No. 2 of 1989 to be heard along with Testamentary Case No. 1 of 1988. Due to non-compliance of order dated 17th August 1989, Testamentary Case No. 2 of 1989 was dismissed for default and MJC No. 788 of 1991 was filed for restoration of Testamentary Case No. 2 of 1989 and the same was restored. He further deposed that he was under bona fide impression that both cases would be heard together as per the order passed by this Court but during the pendency of restoration application, the opposite party got his will probated. A proceeding under Section 144 of Code of Criminal Procedure was initiated in which party has not disclosed about the progress of Probate Case No. 1 of 1988. He further submitted that he was under bona fide impression that Probate Case No. 1 of 1988 was pending before the Court. He further said that the opposite party had not disclosed before this Court that his will was revoked so far the same was related to house at New Dak Bunglow Road, Patna and not disclosed about the progress of probate case in the proceeding under Section 144 of the Code of Criminal Procedure, claimed that last will of S.K. Basu was dated 25th April 1987. The opposite party suppressed the material facts which is relevant for deciding the controversy in the present case. In his cross-examination, he has said that there is some mistake in the affidavit, so far 1983, "1993" has been typed and he had no knowledge of Testamentary Case No. 1 of 1988 filed by Amar Krishna Basu and others. He claimed that he had no knowledge about Testamentary Case so caveat was not filed in the said case. He has further stated that one MJC petition was filed in the High Court for transfer of probate case pending in the court of District Judge, Patna, in that he was not given notice and he did not know the result of that probate case.

13. A.W. 2 Arjun Singh was examined and in his deposition he has stated that he was also a tenant in the house of Late S.K. Basu. He had knowledge that the Will was executed in favour of Jagdish Prasad, Vijay Kumar and Pramod Kumar with respect to the house standing at Dak Bunglow Road, Patna and he further stated that after that he started paying rent to the present petitioner, specially Jagdish Prasad. In the year 1988, some criminals had entered into the house and started throwing articles outside the room which were kept in his room. A case was instituted as Gandhi Maidan P.S. Case No. 473 of 1988, in course of investigation, Jagdish Prasad produced the last Will before the Police. It also transpired during investigation that all the miscreants entered into the house at the instance of Bishwajit Sen Gupta. In a proceeding under Section 144 Cr.P.C. Amar Krishna Basu and others were the 1st party and Jagdish Prasad and others were the 2nd party. In that proceeding he has filed written statement disclosing about execution of the will in favour of Jagdish Prasad and others and later on he vacated the said house in compliance of order of the Sub-divisional Officer, Patna. Nothing substantial has come in his cross-examination.

14. A.W. 3 Pramod Kumar stated in his examination in-chief being pleased with

the services rendered by him, Jagdish Prasad and Vijay Kumar, Late S.K. Basu executed the last will dated 25th April 1986 with respect to house-hold property standing over plot No. 391 in presence of two independent witnesses, namely, Ashok Kumar and Dinesh Kumar Singh. Late S.K. Basu was hospitalized in Tara Nursing Home where he died on 15th May 1987. His last right was performed at Bansghat, Patna arranged the feast of 25 Brahmins and some poor people at his residence. Probate case was filed. As per the order passed in a proceeding under Section 144 Cr.P.C., they have vacated the house. He said that he had no knowledge about Testamentary Case No. 1 of 1988 and MJC No. 373 of 1988 was filed before this Court for transfer of the case to this Court and in pursuance of order dated 26th April 1989 Probate Case No. 111 of 1987 was transferred to this Court. The same was numbered as Testamentary Case No. 2 of 1989 and it was ordered that both the Testamentary cases will be heard together but due to non-compliance of order dated 17th August 1989 Testamentary Case No. 2 of 1989 was dismissed for default. MJC No. 788 of 1991 was filed for restoration and the same was allowed.

15. He has further stated that he was under the impression that both the cases would be heard together as per the order of the Court but during the pendency of restoration application, the opposite party got the Will probated and also instituted a 144 Cr.P.C. proceeding where the opposite party has not disclosed the progress of Testamentary Case No. 1 of 1988. He has further deposed that he was under the impression that Testamentary Case No. 1 of 1988 is pending before this Court and the opposite party in testamentary case also did not disclose before this Court that his will was revoked with respect to house at New Dak Bunglow, Patna by another Will dated 25th April 1987. In his cross-examination, he has stated that they learnt about transfer of their probate case from Civil Court, Patna to Patna High Court, they filed MJC application without disclosing number and had learnt about transfer of the probate case from the Patna Civil Court to Patna High Court, Patna. He filed MJC application for restoration without impleading Amar Krishna Basu or any of the persons as party.

16. A.W. 4 is Jag Mohan Prasad Singh. It appears that he is a formal witness, engaged in the business of selling and purchasing food items, supplying the same door to door in Kadam Kuan. He used to supply grain and pulse to Late S.K. Basu since very beginning of his business. He has only said that Jagdish Prasad, Pramod Kumar and Vijay Kumar were residing in the house of Late S.K. Basu. After his death, he stopped going to his house as some dispute arose between Jagdish Prasad and Vijay Kumar on the one hand and some others on the other side. He has reiterated the same in his cross-examination.

17. O.P.W. 1 S.C. Shanigrahi is sole witness on behalf of opposite party. He has stated in his examination in-chief that he was/is one of the executors of the last Will dated 20th December 1985 by S.K. Basu who died on 15th May 1987. He has stated that after filing of Probate Case No. 1 of 1988 he could know that one letters of administration case was pending before the District Judge, Patna. He

filed an application of transfer of those two cases before this Court to avoid conflict in the decision. The applicants of the two cases never filed any caveat of objection in Testamentary Case No. 1 of 1988. He has stated that he has not filed any citation even after receipt of such information regarding claim of Vijay, Jagdish and Pramod in the probate case Volunteers that he filed MJC for transfer of the case together on 19th May 1988. He did not bring to the notice of the court regarding the claim of some of the properties of Will by Vijay, Jagdish and Pramod. He volunteered he was informed of two Testamentary cases one which were transferred to this Court, stood dismissed for default. He further said that he did not file any petition or had given information in Testamentary Case No. 1 of 1988 to this effect that Vijay, Jagdish and Pramod were also claiming he some property of the Will. He volunteered that he did not bring this fact to the notice of the Court believing that the Will that was executed in his favour was genuine and will executed in favour of others is not genuine.

18. Counsel for the applicant has taken a plea that before filing Testamentary Case No. 1 of 1988 with respect to the will dated 20th December 1985 they were aware of the execution of the Will dated 25th April 1987 and they intentionally and knowingly did not make them party nor got the special citation issued to them. This is one of the basic vital ground for revocation of the Will. In the Will dated 25th April 1987 there is specific statement of revocation of earlier will to the extent of property mentioned in the will dated 20th December 1985 which will be deemed to have been revoked as per Section 15 of the Indian Succession Act. He has further submitted that his case falls squarely within four corners of the ingredients provided under Section 263 of the Indian Succession Act which provides the ground in what circumstances, the grant of probate of Will can be revoked. It has further been submitted that they purposely not impleaded them as party, nor issued special citation to them and obtained the probate of the Will behind their back.

19. In support of their submission, he has relied on

Sima Rani Mohanti Vs. Puspa Rani Pal,

Dinabandhu Roy Brajaraj Saha, Firm Vs. Sarala Sundari Dassya,

AIR 1991 Pat. 391 (Para-6) and

Reena Sadh Vs. Anjana Enterprises,

20. He has further submitted that the affidavit which was sent by Dr. Subir Kumar Basu son of Late S.K. Basu was without any authoritative seal showing that he had made the affidavit before proper authority and that cannot be treated to have given his "No Objection" for grant of probate to the executor.

21. He has further submitted that D.W. Sanjay Chandra Panigrihi stated that no citation was issued to them. He has further submitted that they had no knowledge about Testamentary Case No. 1 of 1988, as such, they could not take proper steps in the aforesaid case.

22. Counsel for the respondents in reply has submitted that there was no requirement to implead the applicant as party in Testamentary Case No. 1 of 1988 as it was required to only implead those who are near relative of the testator whom they have made. His son was the next of kin so he was shown as near relative, in terms of Section 235 of the Indian Succession Act, special citation was issued to him. There was no question of issuance of special citation to these applicants as they were not next-of-kin. He has submitted that the applicant of Probate Case No. 1 of 1988 had knowledge about the pending case before the District Judge, Patna and, accordingly, took steps by filing MJC No. 372 of 1988 to transfer Testamentary case No. 1 of 1987. Testamentary Case No. 1 of 1988 was heard on different dates but the applicant did not file any caveat or objection. He submitted that the applicant nowhere stated that they did not have knowledge of the general citation published in the two daily news-papers and further submitted that when the case was transferred on account of transfer application, they were fully knowing the pendency of Testamentary Case No. 111 of 1988 before this Court. He has further submitted that general citation was published on 11th January 1990 in Hindi and in English on 12th January 1990 in Aaj & Times of India respectively. He further stated that Special Citation not issued to them cannot be ground for revocation of the already granted Will and the present application does not satisfy any of the criteria mentioned in Section 263 of the Indian Succession Act. The grant of Probate has been acted upon, properties the issue in question has been sold, returned amount has already been given to the different organizations. He has further submitted that power of revocation is a discretionary power of the court, placed reliance on Smt. Yuvrani Tank Rajeshwari Devi Vs. Harilal and Others, . He has further submitted that an application was filed on 6th July 2006 for giving precedence to Testamentary Case No. 1 of 1999 but the court has refused to do so vide order dated 14th March 2003 where order has been passed in Testamentary Case No. 1 of 1999 will be subject to Testamentary Case No. 7 of 1993 i.e. the present case.

23. The order dated 14th March 2003 was challenged upto the Hon"ble Apex Court in SLP (Civil) No. 3108 of 2013 which has been dismissed vide order dated 14th March 2013.

24. From the narration of fact, as stated above, the applicant of this case has take a plea that:

- i) the applicant of Probate Case No. 1 of 1988 has suppressed the fact from this Court about the execution of Will in favour of applicant
- ii) They were not added as party to that proceeding;
- iii) No special citation was issued to them, which makes the order of probate vulnerable;
- iv) Last but not the least, they had no knowledge about the pendency of the Testamentary Case No. 1 of 1988.

25. For deciding the case, it will be appropriate to consider the provisions of Section 263 of the Indian Succession Act which deals with in what circumstances the probate already granted can be revoked:

Section 263 : Revocation or annulment for just cause.-The grant of probate or letters of administration may be revoked or annulled for just cause.

Explanation-just cause shall be deemed to exist where-

- (a) the proceedings to obtain the grant were defective in substance; or
- (b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or
- (c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or advertently; or
- (d) the grant has become useless and inoperative through circumstances; or
- (e) the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

26. Counsel for the applicant has submitted that his case will fall in the category of obtaining the grant in a proceeding which was defective in substance as well as in the category of obtained the grant by making false suggestion or by concealing from the Court some material facts. In order to bring this case under that category, he assigned two reasons, one the special citation was not issued even though they were having knowledge of filing application for letters of administration in the court below on account of having interest in the said property. In such circumstance, they were neither made a party nor special citation has been issued, as such, it will be one of the just grounds for revocation of the will granted to the respondents in as much as, second ground that pending of testamentary case No. 2 of 1989 was not brought to the notice of the Court when both cases were to be heard together and pass order.

27. The issue for revocation of the grant of probate on just cause is to be considered in the light of the facts involved in the present case. Section 235 of the Indian Succession Act provides to whom the special citation is to be issued where it has been provided that letters of administration shall not be granted to any legatee unless a citation has been issued and published in the manner provided calling on next of kin to accept or refuse the letter of administration and Section 283(2) provides the manner citation has to be issued which is called general citation. The basic theme is that who ever has interest over the property in question of the will, he must have knowledge with a view to granting opportunity to make objection in the matter of grant of probate or letters of administration in view of fact this grant of probate is in rem.

28. What would just ground, the Court will exercise his power under Section 263 of the Indian Succession Act for revocation of grant of will came for consideration in *Dinabandhu Roy Brajaraj Saha, Firm Vs. Sarala Sundari Dassya*, where His Lordship Hon^{ble} R.C. Mitter, J. has dealt with the issue and also laid down examples of just cause for the purpose of revocation of the Will. In that case the Court has said that if the special citation is not served on the party, the proceedings are defective and the grant must be revoked at his instance. Absence of non-service of special citation on a person who ought to be cited is itself a good ground for revocation of grant of probate even in absence of issuance of special citation on the person concerned, the Court may refuse revocation in view of discretion vested to the Court in view of Section 263 . But the defect would no longer be defect in substance, if non-cited party had knowledge of the probate proceeding. The relevant portion is as follows:

"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, S. 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 Patna and in the office of the Collector of that District. The question is whether the non-compliance with S. 283(3) , which was a defect in procedure, was a defect in substance within the meaning of cl. (a) of the Explanation contained in S. 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 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 Ss. 229 , 235 or 285 . It extends at least to special citations that may be issued by the Court in its discretion under S. 283(1)(c) . In 55 IA 18 the non-service, a service which was taken as non-service for all practical purses, of a special citation issued under S. 283 , was held to come within the said illustration by the Judicial Committee. In my view the force of the judgment is 13 Bom. LR 38 where a distinction is made between compulsory and discretionary citations, has been weakened by reason of the decision in 55 IA 18. This last mentioned cause 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.

In my judgment, there is no difference in principle between a special and a

general citation issued under S. 283(1) , cl. (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-ss. 2 and 3 of S. 283 . As I understand the decisions, a special citation issued in the Court's discretion under S. 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 S. 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: *Aswini Kumar Chakravarty and Another Vs. Sukhaharan Chakravarty and Others*, . I think that Courtney-Terrell C.J. has laid down the law correctly in *Priya Nath Bhattacharji Vs. Saila Bala Debi*, when he said that S. 50 , Probate and Administration Act (S. 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."

29. In the case of *Sima Rani Mohanti Vs. Puspa Rani Pal*, the Hon"ble Supreme Court has said that the person having even slight interest is sufficient to create locus to make an application for revocation but grant would be revoked is a different matter which would be dependent on facts and circumstances of the case and grounds made out in terms of Section 263 of Succession Act. This judgment does not deal with regard to what would be just ground for revocation but only deals with locus standi of person to file application for revocation.

30. The Madhya Pradesh High Court in the case of *Smt. Yuvrani Tank Rajeshwari Devi Vs. Harilal and Others*, has considered the just cause for revocation of grant of probate where the Court has said that only on the ground of absence of citation to the person concerned will not be a just cause for revocation as all the interested parties who were before the Court had knowledge about the proceeding, therefore, no prejudice has been caused to persons having interest in the property in Will. The Court further said that even if the cause for revocation is established, even then revocation may still be refused by the Court in exercise of discretion if the facts and circumstances of the particular case would warrant just refusal.

31. According to this judgment even though the applicant shows a just cause but the Court may refuse to exercise its discretion in his favour on the ground if it is found that the person who is making prayer for revocation had knowledge of the proceeding as it did not cause any prejudice as the earlier proceeding has already been completed and applicant failed to make out just ground for revocation of grant of Will. It is relevant to quote Para-25 and 31 of the judgment:

Para-25. On behalf of the petitioner, two contentions were pressed with considerable force- (i) that citations were not issued to the respective Collectors and (ii) that there was non-compliance of the provisions of Sections 19-H and 19-I of the Court-fees Act. On behalf of the parties, a number of rulings were cited and some of which are: Moonga Devi and Others Vs. Radha Ballabh, ; Smt. Kamla

Kamla Devi and Others Vs. Kishori Lal Labhu Ram and Others, ; Banwarilal Shrinivas Vs. Kumari Kusum Bai and Others, ; Swatantranandji Vs. Lunidaram Jangaldas, . In the matter of the will of R. Santhana Mudaly; AIR 1955 Mad 576 ; Mundrika Prasad Singh Vs. Mst. Kachnar Kuer and Others, O.V. Forbes Vs. V.G. Peterson, and Mainabai v. Motidas Misc. Appeal No. 83 of 1958 (Indore Bench) D/- 15-12-1960 : 1962 Jab LJ (SN) 125. We have gone through these rulings. We find that the probate proceedings are not invalid on the ground of absence of citations to the persons concerned because all the interested parties were before the Court, had knowledge of the probate proceedings and had put in contest therein. Thus, there was no prejudice either to the respondents 3 and 4 or to the petitioner because they were cognizant of the probate proceedings and had an opportunity to contest them.

Para-31. In Promode Kumar Roy Vs. Sephalika Dutta, it is held that the enumeration of circumstances, in the explanation to S. 263 , which would make out a just cause under the Section is exhaustive and not merely illustrative. An applicant for revocation must, in order to succeed, establish just cause within the meaning of S. 263 , that is, as laid down in cls. (a) to (e) thereof, but even if just cause be established, revocation may still be refused by the Court in the exercise of its discretion under that Section if the facts and circumstances of the particular case would warrant such refusal. In our case, the petitioner has failed to establish any just cause and the special circumstances of this case are such which will make the Court to refuse to exercise its discretion in favour of the petitioner. The probate proceedings were started on 17-1-1964. The petitioner and respondents 3 and 4 had put in appearance through Shri S.M. Mendhekar advocate and filed their written statement. The witnesses were examined on commission and thereafter, respondent No. 3, through his advocate, withdrew from the contest accepting that the will was genuine. The petitioner thus had full opportunity to contest and raise pleas in those proceedings which she is now raising. She did not do so. There is no reasonable explanation for this conduct of the petitioner and in the facts and circumstances of this particular case, we

would be justified in refusing to exercise our discretion in favour of the petitioner.

32. Counsel for the applicant has relied on *Reena Sadh Vs. Anjana Enterprises*, where the Court has dealt with notice and in absence of the same, it was found that it would be proper to interfere in the ex party order. There is no quarrel on this preposition it is dependent on facts, that party to application must show having no information of the proceeding at all. So in view of the aforesaid judgment, it is clear that if the defect is there showing that the citation was not served properly in that circumstance it will be just cause for revocation of the Will but the Court may refuse to exercise discretion to revoke the same when the attending facts and circumstances shows that the person who has filed application for revocation had knowledge of the earlier proceeding.

33. In view of the aforesaid facts, this Court has to see whether the petitioner has been able to prove just cause in terms of Section 263 of the Indian Succession Act compelling this Court to revoke the grant of probate given in the earlier proceeding.

34. From the facts in the present case it is apparently clear that the transfer application was filed for transfer of Probate Case No. 111 of 1987 from the court of District Judge, Patna, ground has been shown of pendency of Testamentary Case No. 1 of 1988. After due notice, order of transfer was passed. Thereafter Probate Case No. 111 of 1987 was converted to Testamentary Case No. 2 of 1989 before this Court and both were moving together as per the order of this Court and Testamentary Case No. 2 of 1989 was dismissed on account of non-compliance of the order. When both the cases were moving together they cannot say that they had no knowledge about Testamentary Case No. 1 of 1988 so much so the evidence of P.W. 1 Jagdish Prasad and P.W. 3 Pramod Kumar in their examination in-chief in a categorical term has said that they had knowledge of Testamentary Case No. 1 of 1988 and they were of the view that both cases will be decided together, but their case was dismissed and Testamentary Case No. 1 of 1988 was proceeded and decided ex parte. It is also to be noticed that on the order of this Court, general citation was issued in two news papers which was meant to disseminate the information about the pendency of probate case and whoever had any interest in the property were called upon to file caveat and file objection whatever objector deems it fit, even the proceeding of probate continued for a substantial period, applicant had not taken any step, to participate in the proceeding by raising any objection, now they cannot turn round and claim prejudice on account of grant of probate.

35. As it appears the Will dated 20th December 1985 carries laudable object that returns amount arising from properties will be paid to the Charitable Institutions. After the grant, the executor in terms of the intention of the testator, have acted upon as per stipulation of will sold property, the entire consideration amount which was recovered, has been given to the Charitable Institution. As on to-day house is no longer in existence as another building has been raised by the purchaser.

36. In such view of the matter, this Court does not feel inclined to exercise discretion in favour of applicant to revoke the grant of probate. Accordingly, the same is dismissed.