ORIGINAL CIVIL.

Before Mr. Justice R. S. Bachawat

CIVIL.

1953.

January, 12.

IN THE GOODS OF ATUL KRISHNA MAJUMDAR DECEASED.

Probate—Non-citation [illegible] of grant, [illegible] of—Material defects in [illegible] that bar [illegible] for revocation.

Proof in [illegible] form—[illegible] of [illegible] 275-283 of the Indian [illegible] Act 1925 and Section 68 of the Indian [illegible] Act—Non-citation of a person [illegible] to be cited, if a [illegible] ground for [illegible] of grant—Effect of non-citation, [illegible] or further proof in solemn form.

Absence of an [illegible] of an [illegible] witness to [illegible] a [illegible] for grant of Probate does not make the [illegible] defective in [illegible] provided the [illegible] is [illegible] in [illegible] with the [illegible] of Sections 275-283 of the Indian Succession Act 1925.

[illegible] of Section 68 of the Indian [illegible] Act are not [illegible]. Under the [illegible] Act and the Rules of this High Court, [illegible] and [illegible] of the [illegible] and an [illegible] witness is [illegible] proof of the Will, and the Court has the power to grant [illegible] in non-[illegible] proceeding, though there be no [illegible] from the [illegible] or the [illegible] witnesses.

Proof of non-citation of a person who ought to have been cited makes the [illegible] in [illegible] but it is not in itself [illegible] for [illegible] of the [illegible] granted *ex-parte*. The Court ought to give the [illegible] an [illegible] to prove the will in solemn form, and after hearing evidence and [illegible] decide [illegible] the order [illegible] should stand or whether it should be [illegible]. Proof of non-citation thus converts a non-[illegible] into a [illegible] action for proof in solemn form.

Mere delay and [illegible] under [illegible] not [illegible] to waiver or [illegible] does not bar the right of a person [illegible] to apply for [illegible] of grant of [illegible] in non-[illegible], and the onus of [illegible] such [illegible] or waiver is on the [illegible].

Petition by Sm. Subhalata Ghose for [illegible] the grant of probate of will of her father, Atul Krishna Majumdar and if necessary, for an order [illegible] the executors to prove the will in solemn form.

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The [illegible] facts of the case will [illegible] from the judgment.

A. C. Mitra for the [illegible]

Sankar Banerjee and [illegible] *Roy* for the [illegible]

The [illegible] of the Court was as follows:—

[illegible], J.:—This [illegible] raises [illegible] of [illegible] practice. This is a [illegible] by [illegible] Ghose for [illegible] the grant of [illegible] of will of her father Atul Krishna Majumdar and, if [illegible], for an order [illegible] the executors to prove the will in [illegible] form.

Atul Krishna died on the 12th [illegible], 1947. He left behind him surviving his [illegible] Harimati, two [illegible] and [illegible], two grand [illegible] by a pre-[illegible] son and [illegible] grand [illegible] by Santilata and a [illegible] daughter Sudhalata. One Satish Chandra Majumdar, Nirode Chandra Majumdar, Kanai Lal Chaudhury and Charu Chandra Chaudhury as executors presented to this Court a petition for grant of probate of the will on the 22nd [illegible], 1947. The order for grant of [illegible] was made on the 22nd [illegible]/1948 without issuing any special citation. Later Satish and Nirode [illegible] the exec[illegible]. In 1952 Harimati [illegible] a suit for [illegible] of the estate of the [illegible] Kanai and Charu as executors.

I am called upon to decide on [illegible] the [illegible] preliminary points:

(1) Has the petitioner *locus standi* to [illegible] this application?

(2) Is she in the circumstances of this case debarred from making the application?

(3) Was the proceeding for the grant of probate defective in [illegible] because (a) the petition for grant was not supported by an affidavit of an attesting

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witness (b) the petition did not disclose the names of the persons upon whom the estate would have devolved on intestacy and (c) no special citation was issued to the petitioner.

(4) If so, is the petitioner entitled to revocation as a matter of course without further investigation?

The petitioner is a childless married daughter of Atul Krishna. It is said that she is barren and, having regard to her age, is not likely to have a male issue. The evidence establishes that her husband is willing to adopt a son and is not incapable of doing so. She, therefore, has the possibility of getting a son and for purposes of succession to the estate of Atul Krishna under the Dayabhaga law ranks on the same footing as Santilata who is a married daughter having a male issue: *Umakanta Bhattacharjya* v. *Bed Bati Debi* (1). In case of intestacy of of Atul Krishna the petitioner and Santilata are both entitled to succeed to his estate after the death of his widow. She is, therefore, a presumptive heiress and as such is entitled to maintain this application.

It is contended that the petitioner is set up by Harimati who having instituted the suit for administration is now debarred from applying for revocation of the grant. If the petitioner has an independent right of her own to apply to revocation of the grant of probate, that right is not lost because she is acting in concert with some other person or because she has been set up by the other. *Shrooshi-Bala* v. *Anandamoyee* (2).

It is next contended that the petitioner is barred by delay and acquiescence. The onus of establishing such delay and acquiescence as will bar the petitioner is upon the respondent caveator: *Shyama Charan Baisya* v. *Prafulla Sundari Gupta* (3). Where the proceedings for grant of probate are contentious, any person who is cognizant of such proceedings and who chooses to stand by, allowing others to fight the battle is a privy to the proceedings and is not entitled to reagitate the matter: *O. V. Forbes* v. *V. G. Peterson* (4). The proceedings here were non-contentious. The effect of delay and acquiescence in grants

(1) [1942] I.L.R. 1 Calc. 299. (2) (1906) 12 C.W.N. 6.
(3) (1914-15) 19 C.W.N. 882. (4) (1940-41) 45 C.W.N. 739 (745).

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in "Common Form" on the right of the petitioner to put the executors to proof of the will in solemn form under the English practice is thus stated in *Tristram and Coote's Probate Practice* (19th Edition p. 462):—

"Any party whose interest is adversely affected by a probate granted in common form may call it in by citation and put the party who obtained it, or his representative, to prove the will in solemn form, and this right is not affected by mere lapse of time, by acquiescence, or by the receipt of legacies under the will."

Mere delay and acquiescence under circumstances not amounting to waiver or estoppel does not bar the right of a person adversely affected to apply for revocation of grant of probate in non-contentious proceedings. *Aswini K. Chakravarty* v. *Sukhalurum Chakravarty* (1). Estoppel or waiver of the right with full knowledge of material facts must be established. In this case waiver and estoppel are not pleaded. It is not alleged that the petitioner was cognizant of the non-contentious proceedings during the short period while it was in progress. It is alleged that the will was read out by one Bindha Nath Mitra while the applicant was present and that it was then arranged that the papers would be placed in the hands of a certain solicitor for taking out probate. Particulars of the time and place and of the parties to this arrangement are not disclosed. No affidavit from Bindha Nath Mitra has been produced. There is no distinct averment that the petitioner knew of the grant after it was made.

In my view the respondents have not established that the petitioner is debarred from making this application for revocation.

The next point is whether the proceedings were defective in substance because no affidavit from an attesting witness was filed when the grant for probate was made. The petition for grants was in the form prescribed by section 276 of the Indian Succession Act, 1925. It states that the writing signed is the last will and testament of Atul Krishna and that it was duly

(1) (1930) 35 C.W.N. 568.

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executed. It gives all the particulars required by sections 276 and 279 of the Act. It annexes a translation as required by section 277. It is signed and verified by the petitioner as required by section 280 and is verified by one of the attesting witnesses as required by section 281 of the Act. It is still said that the court could not grant probate on these materials, because there was no sufficient proof of the execution of the will. I think that the Court had the power to grant probate on the materials before it. This power is conferred by the Succession Act. Section 275 of the Act says:—

> "The application for probate if made and verified in the manner hereinafter provided, shall be conclusive for the purpose of authorising the grant of probate . . . ."

The petition in this case was in proper form and was made and verified in the manner provided in the Act. By section 275 of the Act a petition so made and verified is sufficient authority for the grant. It is conclusive for authorising the grant. It is not conclusive for other purposes. But certain statement in the petition are given special effect for the Section goes on:—

> "* * * and no such grant shall be impeached by reason only that the testator * * * had no fixed place of abode or no property within the district at the time of his death unless by a proceeding to revoke the grant by a fraud upon the Court."

The Court had the power to call for further proof under section 283 of the Act. But this was a matter of discretion. The Court had jurisdiction to make the grant without calling for further proof. Probate was granted under section 289 as it appeared to the Court that the same should be granted.

The relevant provisions of law are contained in Sections 275, 276, 277, 279, 280, 281, 282, 283 and 289 of the Indian Succession Act, 1925. These sections correspond to sections 243, 244, 245, 246, 247, 248, 249, 250 and 254 of the Indian Succession Act X of 1865 and to sections 61, 62, 63, 65, 66, 67, 68, 69 and 76 of the Probate and Administration Act (V of 1881), with regard to the point in issue, there is no material difference in the provisions of the several Acts.

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Neither the Indian Succession Act 1865 nor the Probate and Administration Act 1882 nor the Indian Succession Act 1925 require an affidavit from executor and an attesting witness before grant of probate in non-contentious proceedings. They do not even require the executor's oath. Due execution of the will is proved under these Acts by simple verification and declaration. Bell's Rules and Orders 1900 page 319: Kinney Probate and Administration Act, 2nd Edition page 110.

Our rules and practice with regard to proof in non-contentious grants have varied from time to time.

The practices of the Diocese of London and ecclesiastical rules were followed in the matter of granting probates by the Supreme Court in its ecclesiastical jurisdiction under clause 22 of the Supreme Court Charter 14 Geo. III of 1774.

These practices and rules ceased to have effect on the passing of the Succession Act X of 1865 and in consequence of rule 65 made by this court under the Letters Patent of 1865. But even thereafter they were to some extent referred to in matters otherwise unprovided for.

Rule 740 of Bell's Rules and Orders passed under the Letters Patent of 1865 required an affidavit from an executor in support of a petition for probate in common form of a written and perfect will written or subscribed by the testator's own hand and such other proof, if any, as the court might require. By rule 756, the application for probate and swearing in the executor was done by the same motion. The executor had to take oath. The corresponding English Practice may be found in Tristram & Coote's Probate Practice, 19th Edition, pages 86 and 1140.

Where there was no proper attestation clause our court used to require an affidavit of due execution of the will from one of the attesting witnesses if alive and available: Henderson's Law of Succession 3rd Edition page 312; Kinney Probate and Administration Act, 2nd Edition pages 116-19, and the unreported cases collected therein. This practice is borrowed from the English Probate Practice, which is embodied in Rule 4 of the

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Principal Registry Rules and Rule 7 of the District Registry Rules. See, *Tristram & Coote's Probate Practice*, 19th Edition *pages* 32 *and* 930.

Under our practice [illegible] the facts not appearing in the defective attestation clause could be supplied by a simple declaration of the attesting witness. *In the Goods of Phul-[illegible] Dassi* decided by [illegible], J. on May 27, 1899 and noted in *Kinney's Probate & Administration Act*, 2nd Edition, *page* 118.

Prima facie proof of the will was sufficient to warrant the grant in common form [*In Re*: [illegible] (1)] for persons interested and adversely affected by the grant had [illegible] the right to put the executor to proof in solemn *form* to have the grant revoked for just cause.

Rules 740 and 755 are no longer in force. The existing rules passed in 1914 do not require an oath or affidavit from the executor. Under rule 33 of Ch. XXXV the English practice may be followed in matters not provided for by the Succession Act, the Rules and the Code, so far as applicable and not inconsistent with the latter.

Under the Succession Act and the existing Rules, the declaration and verification of the executor and an attesting witness is sufficient proof of the Will. Following the English practise and our previous practise this court has called for further proof of due execution of the Will where there is no proper attestation clause.

In the goods of Edwin Carlow Mallick deceased (2), decided in August 1951, my brother Sinha, J. called for an affidavit from an attesting witness. It does not appear that the attestation clause of the Will was defective. Sinha, J. of course had [illegible] the power to call for further proof. It is said, [illegible], that the effect of that decision is that the Court has no power to grant the probate without an affidavit from an attesting witness. Sinha, J. referred to Section 68 of the Indian Evidence Act, by virtue of which a will cannot be used

(1) (1880) 7 C.L.R. 387. (2) (1951) 56 C.W.N. 650.

as evidence until one attesting witness, if available, has been called for the purpose of proving its execution. The Evidence Act, is not exhaustive. The law of evidence is to be found in the Evidence Act and in other Acts which make special provisions on matters of evidence. *In the matter of Rudolph Stallmann* (1). In my view sections 275-83 of the Succession Act 1925 contain special provisions for proof in non-contentious *grants*. The Evidence Act which is a general Statute is to be read as silently excluding from its operation these special provisions. The *prima facie* proof for grant in non-contentious case is furnished by the petition, declaration and verifications required by Sections 276, 280 and 281 of the Act. The making of a false statement in the petition and declaration is, by virtue of section 282 of the Act, punishable as an offence under section 193 of the Indian Penal Code. Strict proof of the will, is required in contentious proceedings which, under section 295 of the Act, takes the form of a regular suit.

In my view, the Court has the power to make the grant in non-contentious proceedings though there is no affidavit from the executor or the attesting witnesses.

The attestation clause of the Will in this case appears to be somewhat defective and the Court might well have called for an affidavit from an attesting witness. But the Court in the exercise of its discretion did not call for further proof. The omission to call for further proof is not in the circumstances of this case such a defect in the proceedings as entitles the petitioner to ask for revocation of the probate.

Under the Act and our Rules in force on the date of the grant, the petitioner was not required to disclose the names of the persons interested in the estate of the deceased and, in my view, the failure to make such disclosure is not a defect in the proceedings. Rule 5(a) of Chapter XXXV, which requires the petitioner to state the names of the relatives upon whom the estate would have devolved in the case of intestacy was not in force on the date of the grant.

(1) (1911) 15 C.W.N. 1053 (1064-65).

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The proceedings for grant [illegible] were defective in substance because the [illegible] ought to have been cited but was not cited. As already stated, she is one of the [illegible] to the estate of Atul Krishna and, as such, she was entitled to special citation: *Abbiseswari* v. *Harikishan* (1).

What, then, is the effect of non-[illegible] of the petitioner? Does it entitle her to immediate revocation of the grant or does it entitle her to revocation only after further investigation?

Under the English practice, if the executor has obtained grant in common form in the absence of persons interested, the person who objects to the grant enters a caveat and cites the executor to bring in the grant and leave it in Court so that the objector may proceed in due course of law for its revocation. Concurrently the objector commences an action for revocation of the probate by issue of a writ of summons and alleging in the [illegible] of claim on the writ and in the statement of claim the grounds for revoking the grant, e.g. invalidity of the Will. The defendant executor brings in and lodges the grant in the registry and appears to the writ. The action thus defended becomes an action for proof in solemn form. The executor is put to proof of the Will in solemn form in the presence of the persons interested. The action is brought by a party whose interest is adversely affected by the probate in common form. I have given a summary of the practice which may be found in *Tristram & Coote's Probate Practice* (19th Edition pages 460, 462, 468, 472-74, 398-406, 1083, 1058-9, 1159, 1163-4).

By rule 33 of Chapter XXXV of our Rules the English practice may be followed only in matters not provided for by the Succession Act. The proper course for ascertaining our probate practice is to examine in the first instance the language of the Succession Act. Section 263 of the Act confers a discretion on the Court to revoke a grant if it was made without citing parties who ought to have been cited. Judicial decisions show how this discretion is to be exercised. In *Msst. Ramanandi Kuer* v. *Kalawati Kuer* (2), where non-citation and genuineness of the Will were separately put in issue Lord Sinha observed:—

(1) (1928) 40 C.L.J. 297.

(2) (1927) L.R. 55 I.A. 18.

"Relevant illustrations to the sections are (b) 'The grant was made without citing parties who ought to have been cited (c) The will of which probate was obtained was forged or revoked:

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

"If these issues were tried separately and the plaintiff succeeded on the first issue, that in itself would have been 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."

Proof of non-citation of a party who ought to have been cited in itself is sufficient ground for revocation. But the enquiry on the petition for revocation ought not to be stopped in limine, for Lord Simha added "but it would still be open to the defendant to prove the Will and if she succeeded the probate would stand." If the executor proves the Will the probate stands. On such proof the petition for revocation is dismissed. The probate stands, not that a new grant is made.

In *Saroja Sundari Dassi* v. *Abhoy Charan Basak* (1), the lower court had revoked the grant on mere proof of non-citation and on appeal this Court set aside that order observing that "we cannot support the order for revocation at this stage; absence of citation or failure to serve the notice is not sufficient for revoking the probate granted *ex parte*. The proper course for the learned Judge was to give to the applicant an opportunity for proving the Will in solemn form.

If the Court is satisfied that the [illegible]y grant should be recalled because of the absence of [illegible], the Court should not revoke the grant [illegible]. In *Premchand Das* v. *Sureshchandra Saha* (2), this Court set aside a [illegible]y order of revocation observing that the Judge ought "to have called upon the applicant for the grant of letters of administration to prove

(1) (1914) I.L.R. 41 Calc. 819. (2) (1904) 9 C.W.N. 190.

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the will in solemn form in the presence of the respondent, the objector, and after hearing the evidence and his objections, he then ought to have decided whether the order granting the letters of administration should stand or whether it should be revoked." If the Will is duly proved on further investigation the petition for revocation is dismissed and the probate stands although the proceedings for grant was defective on account of the absence of special citation. Hardin Kedda v. *Bhola Nath Lohari* (1); and Appeal from Original Order No. 131/50, *In the goods of Bendelal Ghosh, deceased.*

The Court has a discretion under section 263 of the Succession Act not to revoke and it will not revoke the grant on account of technical defects in proceedings where the will is duly proved.

If the grant is revoked the grantee is required by section 296 of the Act to deliver up the probate in Court.

Pending proof of the Will in solemn form on the petition of revocation the Court in *Elokeshi Dassi* v. *Hurry Prosad Soor* (2), made the following order: "The probate granted must be recalled and kept in the record of this court until the case is decided."

The form of the order in *Prem Chand Das* v. *Sarasibala Nath Saha* (3), was:—' the letters of administration granted to the applicants be recalled and the Judge do call upon them to prove the Will in solemn form in the presence of the respondent, the objector.'

In both those cases the grant was recalled pending proceedings for proof of the Will in solemn form and final decision of the petition for probate. Under the English practice this is done upon a motion by the executor to bring in the grant and lodge it in court so that the action for revocation may proceed. *Tristram & Coote's Probate Practice*—19th Edition, pages 406, 474, 1083. The question of recalling the grant pending the enquiry has not been argued and I therefore do not give any direction on this point.

(1) (1945) 50 C.W.N. 423.
(2) (1903) 7 C.W.N. 450.
(3) (1904) 9 C.W.N. 190.

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The grounds of [illegible] of the Will have not been clearly formulated in the pleadings. I have not called for further pleadings with regard to the suggested issues as it was not insisted upon by the [illegible].

In order to [illegible] of [illegible] it is desirable that citation should issue to the other [illegible] namely, Santilata Ghose.

I therefore, pass the following order:

The [illegible] Kanailal Chowdhury and Charu Chandra Chowdhury are called upon to prove the will in [illegible] form in these proceedings.

The matter is set down for trial and will appear in the [illegible] list of [illegible] suits on the 25th February 1953.

(1) Was the Will executed by Atul Krishna [illegible] duly and in accordance with law?

(2) Was the deceased at the time of the execution of the alleged Will of sound mind, [illegible] and [illegible]?

(3) Was execution of the Will obtained by the [illegible] influence of Kanailal Chowdhury and Charu Chandra Chowdhury as alleged?

Citation do issue calling upon Sm. Santilata Ghosh mentioned in the petition to come and see these proceedings.

The respondents Kanailal and Charu Chandra are directed to serve the citation on Sm. Santilata Ghosh by registered post.

The citation issued by this order shall also be fixed up.

D. C. Mitra. Solicitor for the Petitioner.

Bhattacharjee & Sil and L. M. Dutta Chowdhury. Solicitors for the Respondents.

S.G.P.

Will to be proved in solemn form.