Supreme Court of India
Anil Behari Ghosh vs Smt. Latika Bala Dassi And Others on 15 April, 1955
Equivalent citations: 1955 AIR 566, 1955 SCR (2) 270
Author: B P Sinha
Bench: Sinha, Bhuvneshwar P.

PETITIONER:
ANIL BEHARI GHOSH

Vs.

RESPONDENT:
SMT. LATIKA BALA DASSI AND OTHERS.

DATE OF JUDGMENT:
15/04/1955

BENCH:
SINHA, BHUVNESHWAR P.
BENCH:
SINHA, BHUVNESHWAR P.
BOSE, VIVIAN
JAGANNADHADAS, B.

CITATION:
1955 AIR 566 1955 SCR (2) 270

ACT:

Indian Succession Act, 1925 (Act XXXIX of 1925), s. 263-Explanation cl. (a)-Expression "defective in substance "-Meaning of-Probate proceedings-Omission to issue citation to persons who should have been apprised-Legal effect thereof-Revocation of grant -Whether, an absolute right irrespective of other considerations arising in the case-Judicial discretion vested in Courts.

HEADNOTE:

The expression "defective in substance" in Explanation el. (a) to s. 263 of the Indian Succession Act, 1925 means that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings.

The omission to issue citations to persons who should have been apprised of the probate proceedings may well be in a normal case a ground by itself for revocation of the grant. But this is not an absolute right irrespective of other considerations arising from the proved facts of a case. The law has vested a judicial discretion in the court to revoke a grant where the court may have prima facie reasons to believe that it was necessary to have the will proved afresh

in the presence of interested parties.
The Supreme Court was not satisfied that in all the circumstances of the present case just cause for the annulment of the grant of probate within the meaning of s. 263 of the Act had been made out.
The annulment of the grant of probate is a matter of substance and not of mere form. The court may refuse to grant annulment in cases where there is no likelihood of proof being offered that the will admitted to probate was either not genuine or had not been validly executed.
Where, as in the present case, the validity or genuineness of the will has not been challenged it would serve no useful purpose to revoke the grant and to make the parties go through the mere formality of proving the will again.
Under the circumstances of the present case the omission of citation has had no effect on the regularity of the proceedings resulting in the grant of 1921.
Mokshadayini Dasi v. Karnadhar Mandal ([1914] 19 C.W.N. 1108), Brindaban v. Sureshwar ([1909] 10 C.L.J. 263), Durgavati v. Sourabini ([1906] I.L.R. 33 Cal. 1001) and Ramanandi Kuer v. Kalawati Kiter ([1927] L.R. 55 I.A. 18), referred to.

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JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 106 of 1953. Appeal from the Judgment and Order dated the 4th September 1951 of the High Court of Judicature at Calcutta in Appeal from Original Order No. 131 of 1950 arising out of the Order dated the 29th day of August 1950 of the High Court of Calcutta in its Testamentary Intestate Jurisdiction made in Application under Section 263 of the Indian Succession Act.

P. N. Sen, (A. K. Dutt and S. Ghose, with him) for the appellant.

M. C. Setalvad, Attorney-General for India (A. N. Sinha, with him) for respondent No. 1.

D. N. Mukherji, for respondent No. 2.

1955. April 15. The Judgment of the Court was delivered by SINHA J.-This is an appeal against the judgment and order dated the 4th September 1951 of the Calcutta High Court in its appellate jurisdiction reversing those dated the 29th August 1950 of a Judge of that Court sitting on the Original Side granting the appellant's prayer for revoking and annulling the probate granted in respect of the last will and testament dated the 29th July 1912 of one Binod Lal Ghosh, deceased, whom we shall call the testator in the course of this judgment.

The testator is said to have executed a will on the 29th July 1912 which was registered on the same date at the Calcutta registry office. By the said will the testator appointed the following five persons

as executors or executrices:-

(1) Anil Nath Basu, Attorney-at-Law (2) Brindaban Chandra Mitter (These two also figure as attesting witnesses to the will) (3) His adopted son Charu Chandra Ghose (whom we shall call Charu for the sake of brevity) a minor on his attaining majority.

(4) His wife Haimabati Dasi, and (5) His brother's widow Muktakesi Dasi.

He also directed that on the death of the said Anil Nath Basu, his son Achintya Nath Basu, and on the death of Brindaban Chandra Mitter, his son Debi Prosad Mitter will take their places respectively as executors; and on the death of his wife Haimabati Dasi, Charu's wife, Latikabala Dasi, and on the death of Muktakesi Dasi, his nephew's wife Sushamabala Dasi, will take her place respectively as executrix. It is not necessary to set out in detail the legacies created by the will except to state that he created annuities in favour of a number of persons including his wife, his brother's widow . Muktakesi Dasi, his daughter-in- law, his niece-in-law aforesaid and Charu. He also made provision in his will for annual payments in respect of the expenses of certain deities and festivals, as also for the funeral expenses of himself and the annuitants aforesaid. He directed his executors to accumulate Rs. 12,000 a year out of the balance left after meeting the annuities and the other annual expenses aforesaid to be paid over to Charu upon the death of the said Latikabala Dasi and Sushama Bala Dasi who were to share the residue, if any, after paying the annuities and other outgoings referred to above. It would thus appear that though the testator intended Charu to be the owner of his entire estate including the accumulations after meeting the annuities and the other annual expenses, he did not trust him to the extent of putting that estate into his hands immediately on his attaining majority. He trusted Charu's wife and the other ladies in his family more than Charu himself, though he specifically stated in the will-

"Provided always that the said adopted son shall be deemed to have a vested interest in the said estate immediately on my death".

He appointed his wife Haimabati Dasi as the guardian of the person and property of Charu and of his wife Latikabala Dasi aforesaid.

On the 5th March 1920 the testator is said to have been murdered by Charu who was placed on his trial, convicted for murder and sentenced to transportation for life. Charu served his term of imprisonment and was released from jail some time in 1933.

On the 30th September 1921 an application for probate of the will aforesaid was made on the Original Side of the Calcutta High Court on behalf of Anil Nath, Muktakesi Dasi and Latikabala Dasi aforesaid. The application stated that the testator died on the 5th March 1920 at Baranagar, leaving him surviving his adopted son Charu and his widow Haimabati Dasi. The will dated the 29th July 1912 was recited and the five persons named above were said to have been appointed executors and executrices of the will. It also stated that Brindaban Chandra Mitter, one of the executors named in the will, had died in July 1913 and his son Debi Prosad Mitter was a minor. It also recited the death of Haimabati Dasi on the 22nd May 1921, thus explaining why out of the five executors and

executrices named in the will the application had been made only on behalf of the surviving three persons. The assets of the testator's estate were stated not to exceed a sum of Rs. 4,75,780/-. The prayer was "that probate of the said will may be granted to your petitioners limited within the Province of Bengal reserving power of making the like grant to the said Charu Chandra Ghose and the said Debi Prosad Mitter (when he comes of age) when they will come and pray for the same". The grant was made the same day (i.e., 30th September 1921) which fell during the long vacation and the Judge in charge passed the order- "Order as prayed" no citations being issued. This is material in view of what has been alleged subsequently about this grant, as will presently appear.

Nothing was heard about these proceedings until the 24th July 1933 when an application was made by Debi Prosad Mitter aforesaid for the grant of probate to him along with Anil Nath Basu and Latikabala Dasi. In that application, the previous grant of probate dated the 30th September, 1921, the death of Muktakesi Dasi some time in October 1932 and the fact of his attaining majority some time in January 1924 are recited. On the 16th September 1933 Debi Prosad Mitter's application was granted.

It appears that Latikabala Dasi and Sushamabala Dasi applied to the Calcutta High Court on the 4th December 1933 for an order for discharging the executors appointed previously and for a direction to hand over the entire estate of the testator to the applicants. In answer to the summons Debi Prosad Mitter made an affidavit on the 7th December 1933 in which he recited the previous grants of the probate made in 1921 and 1933; and stated that the testator Binod Lal Ghosh was murdered on the 5th March 1920 by Charu and that on the death of Haimabati in May 1921, the testator's first cousin Girish Chandra Ghosh became entitled to the residue of the estate of the testator. In that affidavit be set out the genealogical table of the family of the testator showing how Girish Chandra Ghosh was related to the deceased. He also made pointed reference to the fact that the surviving grantees of the probate, Anil Nath Basu and Latikabala Dasi, after the death of Haimabati bad not filed any account of the testator's estate in their capacity as executor and executrix respectively and that on his obtaining probate of the will those persons had not complied with his request of furnishing a statement of accounts about their dealings with the testator's estate. He also set out the text of the letter sent by his solicitor to Anil Nath Basu and Latikabala Dasi. The letter is dated the 4th December 1933. It does not appear from the record as to what attitude had been taken by the executor and the executrix aforesaid in answer to the call made by Debi Prosad Mitter for submission of accounts of their dealings with the testator's estate after the grant of probate in 1921 as aforesaid. Ultimately, on the 16th May, 1934 the High Court dismissed the application for discharging the persons who had been granted the probate. Girish Chandra Ghosh aforesaid died in December, 1940 without having taken any steps in court claiming his rights, whatever they were, in the testator's estate. Anil Nath Basu also died in July, 1948. He does not appear from the record to have rendered any accounts in respect of his dealings as the managing executor of the will of the deceased.

It was not until the 17th September, 1949 that the appellant, who is one of the four sons of the said Girish Chandra Ghosh, made an application to the Calcutta High Court on the Original Side praying that the probates dated the 30th September, 1921, and the 16th September, 1933 in respect of the will dated the 29th July, 1912 be revoked, annulled and/or set aside and that an administrator

pendente lite be appointed. The petition runs into about twenty printed pages setting out the petitioner's relationship with the testator, the will and the grant of the probates as aforesaid, the murder of the testator by Charu, his trial, conviction and sentence for that murder. It was also averred that the testator had "intended to revoke his said will of 29th July, 1912". Then follows a long recital of facts tending to that conclusion. Then follows para 19 which is in these terms:-

"From the said correspondence and papers it is absolutely clear that the said testator revoked his will of 29th July, 1912. Your petitioner submits that arrangements were being made for handing over the estate of the said Binod Lal Ghosh, deceased, in the hands of the Administrator-General of Bengal for the purpose of charity but the said purpose did not mature and under the circumstances your petitioner submits that the said will of 29th July, 1912 has been revoked by the said testator and no further will was executed in its place or stead".

Para. 23 is a statement of the grounds on which the case for revocation of the grants is founded. That paragraph is in these terms:-

"Your petitioner submits that the probates herein should be revoked as a just cause for doing so exists inter alia, on the following grounds:-

(a) That no notice of either application for probate was served on your petitioner's father, although be was the nearest male relative alive at the time when the said Binod Lal Ghosh was murdered;

(b) That the grants were obtained fraudulently;

(c) That the grants were obtained by means of an untrue allegation of a fact essential to justify the grant;

(d)That the grants were obtained by making a false declaration that the property was valued only at Rs. 4,75,780/-, although the High Court in its Criminal Jurisdiction had stated in 1920 that the estate of the said Binod Lal Ghosh was over Rs. 40,00,000/-; (e) That the grants in any event, are useless and inoperative;

(f) That there was no filing of accounts;

(g) That the grants were issued by concealing the facts of the intention of the said testator to revoke the will;

(h) That the deceased never lived within the Ordinary Original Civil Jurisdiction of this Hon'ble Court". The application was opposed by Latikabala Dasi chiefly on the ground that no citation to Girish Chandra Ghosh wag necessary, that in any event, he was cognisant of the probate proceedings and of the estate being administered by the executors and that he stood by. It was denied by her that the said Girish Chandra Ghosh was the nearest male relative of the testator or that Charu had murdered his adoptive father. It was also denied that the testator had revoked his will and that he died intestate as a result of which the petitioner and his three brothers became entitled to succeed to

his estate. Achintya Nath Basu took similar grounds in opposition to the application for revocation. Debi Prosad Mitter by an affidavit -of his own denied that there had been any just cause for revoking the probate but added that he had been discharged on his own application from further acting as one of the executors of the testator's will.

Though no issues were framed, the main grounds for revocation or annulment of the probates were as stated in para. 23 set out above. Mr. Justice P. B. Mukherjee who dealt with the case on the Original Side, after an elaborate consideration of the facts and circumstances of the case, passed orders revoking and annulling the grants aforesaid and directing "that the will be proved in solemn form on notice to the applicant and the other sons of Girish and also after a general citation to all persons interested in the estate". He also appointed the applicant, the appellant before us, as an administrator pendente lite with usual powers to take charge of the estate, with costs to the applicant to be paid out of the estate. He directed the other opponents-respondents to bear their own costs. On the points in controversy he came to the conclusion that Girish was related to the testator as a cousin, that there was no acquiescence on the part of Girish barring the appellant from pursuing his remedy, that the non-citation of Girish was by itself not sufficient to invalidate the grant, but that circumstance in conjunction with other facts, viz., of material concealment of the fact that Charu bad murdered the testator and that the testator had entertained an intention to revoke the will, though it had not actually been revoked, was sufficient ground for revoking the grant. He held further, on the authority of the decision in Mokshadayini v. Karnadhar(1) that the question whether the will bad as a matter of fact been revoked would form the subject matter for final determination after the revocation of the grants when fresh proceedings will be taken after due citation. He also held that in the circumstances of this case, though there was no averment of wilful default in exhibiting an inventory and accounts of the testator's estate the executors were actually guilty of such a default and there was thus just cause for revoking the grant. He did not hold the other grounds of attack against the grant made out by the applicant; that is to say, he did not find it established that the estate was worth over Rs. 40,00,000 and that the declaration of the value of the testator's estate at Rs. 4,75,780 was false or fraudulent or that the grant bad become useless or inoperative otherwise, or that the case could not be heard by the Calcutta High Court, on the Original Side.

On appeal by Latikabala Dasi, the Appellate Beach (1) 19 C.W.N. 1108, consisting of Sir Trevor Harries, C. J. and Banerjee, J., allowed the appeal and dismissed the application for revocation of the probate with costs of both the courts. They held that the will in question was genuine and valid in view of the evidence and of the fact that its genuineness or validity had not been questioned specifically in the pleadings. They also held that there was no revocation of the will or even an intention on the part of the testator to revoke the will. They also held that Girish was entitled to citation but that the non-citation did not materially affect the grant of the probate and that at any rate, Girish being fully aware of the grant stood by, and therefore acquiesced in the grant, and did not take any steps at the right time to question the grant. They therefore did not think it just and expedient to reopen the proceedings when they were satisfied that there was no real and substantial attack against the genuineness and validity of the will itself. In this appeal it has been argued on behalf of the appellant on the authority of the decision in Mokshadayini v. Karnadhar(1) that the Appeal Court should have agreed with the Judge on the Original Side in holding that there was

material concealment of facts which considered along with the admitted position that no citation had been taken against Girish Chandra Ghosh had vitiated the proceedings for the grant of probate and that the question of the genuineness or validity of the will should have been left over for determination at a later stage of the proceedings. It was also argued that the omission to exhibit the accounts was in the circumstances of this case wilful default without reasonable cause within the meaning of the law and was sufficient by itself to entitle the applicant to a revocation. It was also argued that no grounds had been made out in fact to support the legal conclusion drawn by the Appeal Court that there had been an acquiescence on the part of Girish. On behalf of the 1st respondent the conclusion of the Appeal Bench has been supported on all the grounds. On behalf of the respondent Debi Prosad Mitter, it (1) 19 C.W N. 1108.

was contended that he had been unnecessarily impleaded at all the stages and that he should have been granted his costs out of the estate of the deceased.

The grant of probate was made under the provisions of the Probate and Administration Act (V of 1881); but the Indian Succession Act (XXXIX of 1925) consolidated the law relating to intestate and testamentary succession and thus incorporated the other Acts relating to the same subject, including Act V of 1881. In order to be entitled to a revocation or annulment of the grant aforesaid the appellant has to bring his case within the purview of section 263 of the Indian Succession Act (XXXIX of 1925), which will hereinafter be referred to as the Act). Section 263 of the Act is substantially in the same terms as section 50 of Act V of 1881. Section 263 provides that "The grant of probate or letters of administration may be revoked or annulled for just cause". Under the 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 inadvertently, or

(d) the grant has become useless and inoperative through circumstances, or

(e)the person to whom the grant was made has wilfully 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". After the explanation, there are eight illustrations of the grounds on which a grant of probate may be revoked, of which the first three are material. They are as follows:-

" (i) The court by which the grant was made had no jurisdiction.

(ii) The grant was made without citing parties who ought to have been cited.

(iii) The will of which probate was obtained was forged or revoked".

In this case the appellant tried to take advantage of the first illustration also, by suggesting in one of the grounds set out in para. 23 of his petition quoted above that the testator never lived within the Ordinary Original Civil Jurisdiction of the Calcutta High Court in exercise of which the grant in question had been made. But that ground was negatived by the trial Judge and as it was not pressed before us, no more need be said about it.

It was vehemently argued at all stages of the case including the appeal before us that admittedly no citation was issued against Girish Chandra Ghosh aforesaid and as he was the person most interested in the testator's estate besides the legatees named in the will, the case came directly within the purview of clause (a) of the Explanation and Illustration (ii) quoted above. Girish Chandra Ghosh has been found by the Judge in the first instance to have been the person most vitally interested in the estate of the testator, whether he died intestate or leaving a will, in the events which had happened. The learned counsel for the contesting respondent suggested that it had not been found by the lower Appellate Court as a fact upon the evidence adduced in this case, that Girish was the nearest agnate of the testator or that Charu had murdered his adoptive father, though these matters had been assumed as facts. The courts below have referred to good and reliable evidence in support of the finding that Girish was the nearest reversioner to the estate of the testator. If the will is a valid and genuine will, there is intestacy in respect of the interest created in favour of Char;, if he was the murderer of the testator. On this question the courts below have assumed on the basis of the judgment of conviction and sentence passed by the High Court in the sessions trial that Charu was the murderer. Though that judgment is relevant only to show that there was such a trial resulting in the conviction and sentence of Charu to transportation for life, it is not evidence of the fact that Charu was the murderer. That question has to be decided on evidence. However, for purposes of this case we shall assume in favour of the appellant that Charu was the murderer. The result of such an assumption is that Girish being the nearest reversioner to the estate of the testator, in case of intestacy after the death of the testator's widow in 1921; or in case of testamentary succession after the death of the two legatees, the testator's daughter-in-law and the nephew's wife aforesaid, and the failure of the legacy in favour of Charu on account of the murder would, in either event, have sufficient interest in the estate of the testator to entitle him to challenge the grant and to obtain revocation. But it is noteworthy that Girish who died in 1940, lived for about 19 years after the grant and took no steps in that direction. There may be some doubt as to Girish's knowledge of the probate proceedings and of the grant until 1933; but, in our opinion, there is ample evidence in support of the finding arrived at by the Court of Appeal below that Girish was aware of the grant at the latest in 1933 when Debi Prosad Mitter took -proceedings to obtain a grant in his own favour also. In his application, as indicated above, he clearly stated that Charu was the murderer of his adoptive father and that Girish would succeed to his estate, which otherwise would have gone to Charu. If Girish had initiated proceedings for revocation of the grant and had insisted on the will being proved in his presence, the courts would have had no difficulty in having all the necessary evidence before it because the chief person who had played the most leading part in the execution of the will, in its registration and in its being admitted to probate, viz., Anil Nath Basu,

was then alive and could have been examined. But for reasons not made clear in these proceedings Girish did not think it worth his while to take any steps in court to challenge the will or the grant. The estate was worth anything between five to forty lakhs, perhaps nearer five lakhs than forty lakhs. Girish was a mere pensioner belonging to a middle class family. Either he did not think it worth his while to embark on a litigation with all its uncertainties or he had not the wherewithal to do so. The record as it stands does not satisfactorily explain the reasons why Girish refrained from making any attempts to get this large estate. If the will was not genuine or valid, Girish would take the reversionary estate at once because the testator's widow died in 1921 and there was no other impediment in his way, except to get rid of the will. If, on the other hand, the will was genuine- and valid, even then he would stand to gain all the interest which had been bequeathed in favour of Charu. The fact that Girish did not take advantage of his position as the nearest reversioner as on partial intestacy goes a long way to support the great probability of the will being valid and genuine, especially as it had been probated and because the appellant in his long petition for revoking the grant has not made the least suggestion casting any doubt on the genuineness and validity of the will. But it was argued on behalf of the appellant that that stage had not yet arrived and that it would be open to the appellant after obtaining an order of revocation of the grant to show that the will was either not genuine or had not been validly executed. Great reliance was placed in this connection on the judgment of a Division Bench of the Calcutta High Court in Mokshadayini Dasi v. Karnadhar Mandal (1) where the following observations have been made:- "No question of the genuineness of the will arises for consideration till the court has decided that the probate must be revoked on one or more of the grounds specified in section 50 of the Probate and Administration Act. The only matter for consideration at this stage is, whether the appellants have made out a just cause for revocation of the probate which was granted without notice to them: Brindaban v. Suresh-

(1) 19 C.W.N 1108.

war(1). The question of genuineness cannot be considered till a case for revocation is made out: Durgavati v. Sourabini(2)".

The observations relied upon by the appellant were made with reference to the facts of that case and were not intended to be of universal application. As pointed out above, section 263 of the Act also contemplates a case for revocation based on the single ground that the will in respect of which the grant- in question was obtained was a forged one. In such a case, whether or not the will was a forged one would be the only question to be canvassed before the court before the order of revocation could be made.

It was further argued on behalf of the appellant that the appeal should be allowed and the grant revoked on the simple ground, apart from any other considerations, that there had been no citation issued to Girish. In our opinion, this proposition also is ,much too widely stated. Section 263 of the Act vests a judicial discretion in the court to revoke or annul a grant for just cause. The explanation has indicated the circumstances in which the court can come to the conclusion that "just cause" had been made out. In this connection the appellant relied upon clause (a) quoted above which requires that the proceedings resulting in the grant sought to be revoked should have been "defective in substance". We are not inclined to hold that they were "defective in substance". "Defective in

substance" must mean that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings. If there were any suggestions in the present proceedings or any circumstances were pointed out to show that if Girish had been cited he would have been able to enter a caveat, the absence of citation would have rendered those proceedings "defective in substance". It may be that Girish having been found to have been the next reversioner to the testator's estate in case of intestacy and on the assumption that Charu had murdered the testator, Girish might have been entitled to a revocation of the grant if he (1) 10 C.L.J. 263 at p. 273. (2) I.L.R. 33 Cal. 1001, had moved shortly after the grant of the probate on the simple ground that no citation had been issued to him. The omission to issue citations to persons who should have been apprised of the probate proceedings may well be in a normal case a ground by itself for revocation of the grant. But this is not an absolute right irrespective of other considerations arising from the proved facts of a case. The law has vested a judicial discretion in the Court to revoke a grant where the court may have prima facie reasons to believe that it was necessary to have the will proved afresh in the presence of interested parties. But in the present case we are not satisfied in all the circumstances of the case that just cause within the meaning of section 263 had been made out. We cannot ignore the facts that about 27 years had elapsed after the grant of probate in 1921, that Girish in spite of the knowledge of the grant at the latest in 1933 did not take any steps in his lifetime to have the grant revoked, that there was no suggestion that the will was a forgery or was otherwise invalid and that the will was a registered one and had been executed eight years before the testator's unnatural death. Hence the omission of citations to Girish which ordinarily may have been sufficient for a revocation of the grant was not in the special circumstances of this case sufficient to justify the court to revoke the grant.

Learned Counsel for the appellant made pointed reference to the decision of their Lordships of the Judicial Committee of the Privy Council in Ramanandi Kuer v. Kalawati Kuer(1). But that case is an authority for the proposition that where two grounds are taken for revocation of a grant, viz., (1) that persons who ought to have been cited were not cited, and (2) that the will was a forgery, if the first ground is established, the onus is upon the opponents to prove that the will is genuine. That case is no authority for the proposition that in every case where there is a defect in citation, the court must order a revocation or annulment of the grant. The annulment is a matter of substance and not of mere form. The court (1) L.R. 55 I.A. 18, may refuse to grant annulment in cases where there is no likelihood of proof being offered that the will admitted to probate was either not genuine or had not been validly executed. But, as rightly pointed out by the lower Appellate Court, in the present case where the validity or genuineness of the will has not been challenged, it would serve no useful purpose to revoke the grant and to make the parties go through the mere formality of proving the will over again. In our opinion, therefore, the omission of citation has had no effect on the regularity of the proceedings resulting in the grant of 1921. It was next contended that there had been fraudulent concealment of material facts from the court in the proceedings of 1921, and that therefore the case came within the purview of clause (b) of the Explanation quoted above. It was said in this connection that the petition for the grant of probate made in 1921 did not disclose the following material facts:

1. That Charu was the murderer of the testator;

2. That the testator had revoked the will or had at least intended to revoke the will; and

3. That a false declaration as regards the value of the property constituting the estate of the deceased testator had been made, that is to say, the applicants for probate had concealed from the court the true value of the property which was forty lakhs of rupees and not only Rs. 4,75,780/- as stated by them.

It is true that in para. 4 of the petition for probate it was only stated that Charu had been found guilty of murder by the High Court and was sentenced to transportation for life and had not till then been released from jail. Our attention was also called to the prayer portion of the petition in which the right of Charu to make an application for probate had been reserved. We can easily dispose of the last suggestion by observing that it was a mere formal reservation. It has no such sinister significance as is attributed to it. It is also true that there is no statement in the application that Charu had murdered the testator. While agreeing with the Judge in the first court that this was rather disingenuous, we must also hold that that concealment, if it was deliberate, was not material to the case. Even if that statement had been made in the petition, that would have had no effect on the grant of probate to the petitioners who were before the court. The fact of the murder is relevant only to this extent, that it would affect the legacies in favour of Charu, but the other legacies would stand and the will would still be open to probate.

The last allegation relating to concealment is on the question of the value of the property left by the testator by his will. It is not necessary to consider whether if such a concealment had been made out it would have been sufficient to revoke the grant. It is enough to point out that neither of the courts below has found that the property was really worth anything like forty lakhs of rupees. This ground has not been pressed before us either. It must therefore be held that the appellant has failed to bring his case within the rule of material concealment. The most serious allegation which could have a determining effect on the grant, if made out, is that the testator had revoked the will. Such an allegation would directly come within the third illustration quoted above. But unfortunately for the appellant he made no attempt to prove his allegation that there was any such revocation. Apart from showing that in or about the year 1917 the testator had entertained the intention either of materially altering his will or of altogether revoking it, there is absolutely no evidence in support of the allegation that the testator actually revoked the registered will in question. For proving that the will had been revoked, it had to be shown that the testator had made another will or codicil or by some writing declared his intention to revoke the will. Such a document is required by section 70 of the Act to be executed in the same manner as a will. Such a revocation could also have been proved, as the section lays down, by burning, tearing or otherwise destroying the will by the testator himself or by some other person in his presence and by his direction, thus clearly indicating his intention of revoking the will. No such proof has been offered in this case. But it was argued that the appellant would have offered such proof after the order of revocation was made by the court. That would be to put the cart before the horse. If an applicant for revocation of a grant alleges as a ground for such revocation that the testator had revoked the will, he has got to prove that alleged fact at least prima facie before he can be entitled to an order of revocation. There may be cases where such a proof may be offered at a later stage where the revocation is founded upon other grounds, for example, where the court is satisfied that there was substantial defect in the previous proceedings resulting in the

grant, or that the grantee had wilfully and without reasonable cause omitted to exhibit an inventory or account; or some such other ground recognized by section 263 as just cause for annulling the grant has been established. It was also argued on behalf of the appellant that even though he may not have proved that the testator had as a matter of fact revoked the will, he is still entitled to an order of revocation on the ground that he bad entertained the intention of revoking the will. No authority had been cited before us in support of this contention. It is open to a person who has made a will at any time to alter or to revoke it; but if he has died leaving a registered will and has not taken any tangible steps to revoke such a will, it is not enough to allege that the testator had at one time entertained the intention of doing so, because such an intention without being translated into action has no effect on the will actually left by him which must be treated as the last will and testament.

It remains to consider the last point, viz., whether the case is within clause (e) of the explanation to section 263. In this connection ground (f) in paragraph 23 of the petition quoted above is the only allegation. The omission to submit accounts is not always synonymous with "wilfully and without reasonable cause" omitting to exhibit accounts. In certain circumstances omission to submit accounts may bring the case within the purview of clause (e) aforesaid because the circumstances may tend to show that the omission was wilful and without reasonable cause. We have therefore to consider whether in the circumstances of this case the omission to file accounts has the effect of entitling the appellant to an order of revocation. Under the will the testator intended that Anil Nath Basu should function as the managing executor during his lifetime, as will appear from the relevant portion of paragraph 17 of the will which is as follows:

"I direct that my executor Babu Anil Nath Basu shall act alone without interference of my other executors in drawing money from or depositing money to any bank, courts or any other place or places and also in drawing interest of Government Promissory Note, debentures, etc. and in collecting rents of the houses and also in defending and instituting all suits relating to my estate and for the purpose above to sign cheques, rent bills and all papers relating to any suit in connection with my estate". It would thus appear that Anil Nath Basu was not only the most competent man being a trained lawyer to administer the estate but had also been in terms vested with the power to handle the cash and the accounts by himself without interference by the other executors. He must therefore have handled the incomings and the outgoings and been responsible for keeping true and proper accounts. Whether or not he did so we do not know, because Girish, as already indicated, never made any attempt to question the will or the grant or to call him to account. We have already made reference to Debi Prosad Mitter's correspondence with Anil Nath Basu, the managing executor, bearing on the question of accounts. There is nothing on the record to show what happened on that demand for accounts by Debi Prosad Mitter. The managing executor was alive up till July 1948 and unfortunately for the appellant, he initiated the revocation proceedings more than a year after his death. If these proceedings had been started in Anil Nath Basu's lifetime, he would have been the best person to inform the court as to how matters stood with reference to the accounts. The fact remains that no accounts appear from the record of this case to have been submitted by the executors. An application was made before us to take notice of the fact that accounts had been submitted up to date by the 1st respondent who is in charge of the testator's estate. But whether or not the respondent has filed accounts during the pendency of this appeal is wholly irrelevant. We have to determine whether the omission to submit accounts in the

circumstances of this case entitles the appellant to have an order of revocation. In the first place, no proper pleading had been made on this part of the case. It has not been alleged that there has been a wilful default without any reason, able cause. Hence no proper foundation was laid in the pleadings for reception of evidence either way. On that ground alone, in our opinion, the appellant must fail on this part of the case. It may also be pointed out that in all the circumstances of this case referred to above, particularly in view of the fact that it was never suggested that the will in question was not genuine or had not been validly executed, it must be held that the proceedings leading up to this appeal have been misconceived. If the appellant has any locus standi, his remedy lay not against the will or against the grant of probate, but under the will. But it is not for this court to advise what the appellant should have done. As, in our opinion, all the grounds raised on behalf of the appellant for revoking the grant have failed, it is not necessary to go into the question whether Girish had acquiesced in the grant in question and had therefore barred the door against the appellant from raising any further questions about it.

For the reasons aforesaid we uphold the decision of the court below and dismiss the appeal with costs to the contesting respondent No. 1. There will be no order as to costs in respect of the other respondent.