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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Date of decision:* 07.02.2018**

+ TEST.CAS. 55/2014 & I.A. 10705/2014

SNEHANSU SEN GUPTA Petitioner
Through Ms.Anisha Banerji and
Ms.Madhurima Ghosh, Advs.

versus

SITANGSU SEN GUPTA AND ANR. Respondents
Through Mr.V.P.Yadav, Adv. for R-1 and 2.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. This petition is filed under Section 263 of the Indian Succession Act for revocation of the probate that was granted to the respondent No.1 in Testament Case 46/2000 vide judgment dated 02.09.2003.
2. The facts of this case are that Sh.Himanshu Kumar Sen Gupta (Testator), the paternal uncle of the petitioner and step-brother of respondent No.1 died a bachelor without any Class I legal heir on 06.01.1997 at New Delhi. Late Sh.Himanshu Kumar Sen Gupta was the owner of property B-122, Chitaranjan Park, New Delhi. Sh.Himanshu Kumar Sen Gupta had one real brother namely, Shri Sudhanshu Kumar Sen Gupta who was born from the first marriage of his father Shri Suresh Chandra Sen Gupta. Respondent No.1 is the step-brother of Sh.Himanshu Kumar Sen Gupta being the son of late Shri Suresh Chandra Sen Gupta from his second marriage.
3. Respondent No.1 filed a Testament Case 46/2000 which was filed

under Section 276 of the Indian Succession Act for grant of Letters of Administration with a Will annexed namely, Will dated 26.02.1995. The respondent No.1 pleaded that the deceased Sh.Himanshu Kumar Sen Gupta was a bachelor and that the respondent No.1 and the deceased are the only brothers and there are no other brothers or sisters of the deceased or of respondent No.1.

4. The petitioner who is the nephew of the testator Late Sh.Himanshu Kumar Sen Gupta and the son of his real brother has now filed the present petition stating that he was a necessary and proper party to the probate petition and has been wrongly and mischievously not impleaded as a party. It is pleaded that the petitioner was very close to the said testator Late Sh.Himanshu Kumar Sen Gupta. The petitioner resided with the testator in Delhi for a period of over 13 years since 1976 till the petitioner was posted to Kolkata. Respondent No.1 subsequently moved to Delhi and lived in Delhi when Sh.Himanshu Kumar Sen Gupta passed away. However, the bond between the petitioner and Sh.Himanshu Kumar Sen Gupta continued to be strong and that Sh.Himanshu Kumar Sen Gupta often told the petitioner and respondent No.1 that he intended to divide his assets jointly amongst his legal heirs. Hence, it is pleaded that the petitioner was a necessary and property party and has wrongly been not impleaded in the petition by respondent No.1 by making a false statement. Hence, it is stated that this court may revoke the order granting probate vide judgment dated 02.09.2003.

5. I have heard the learned counsel for the parties.

6. Learned counsel for the petitioner has reiterated that a false statement was deliberately been made in the probate petition by respondent No.1

stating that he is the only brother and real brother of late Sh.Himanshu Kumar Sen Gupta. She also relies upon the judgment of the Supreme Court in *Manibhai Amaidas Patel and anr. V. Dayabhai Amaidas (2005) 12 SCC 154* and judgment of this court in *Umesh Kumar Pushkarna & Anr. V. State (2015) 224 DLT (CN) 4* to contend that the petitioner was a necessary party to the said probate petition that he has been wrongly and deliberately not impleaded. She further pleads that a family settlement existed whereby the petitioner was also to get rights in the said property at Chitranjan Park, New Delhi and hence the petitioner was a necessary party to this petition.

7. Learned counsel appearing for the respondents has pointed out that under the Hindu Succession Act, the respondents fall under Entry II of Class II whereas the petitioner falls in Entry IV of Class II of the Schedule to the Hindu Succession Act. He submits that even if the Will had not been probated by this court, in view of the Hindu Succession Act, he would have been the sole heir of the estate of the testator late Sh.Himanshu Kumar Sen Gupta and would have in any case inherited the property at Chitaranjan Park. He further points out that Sh.Himanshu Kumar Sen Gupta died in 1997. The probate was granted to the petitioner in 2003. The petitioner has now in 2013 woken up and has filed the present petition for revocation of the probate.

8. I may note that the parties have made the submissions on merits of the case and did not seek filing of evidence. In any case, given the nature of the pleadings, in my opinion, no evidence was necessary.

9. Section 263 and 278 of the Indian Succession Act read as follows:

“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 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.

278. Petition for letters of administration.—

(1) Application for letters of administration shall be made by petition distinctly written as aforesaid and stating—

- (a) the time and place of the deceased's death;
- (b) the family or other relatives of the deceased, and their respective residences;
- (c) the right in which the petitioner claims;
- (d) the amount of assets which are likely to come to the petitioner's hands;
- (e) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and
- (f) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(2) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another State, the petition shall further state the amount of such assets in each State and the District Judges

within whose jurisdiction such assets are situate.”

10. Hence, under Section 263 of the above Act, a grant of a probate or Letter of Administration can be revoked only if it has been obtained fraudulently on making a false suggestion or by concealing from the court something material or if the grant has been obtained by means of untrue allegation of essential facts. Under Section 278 of the above Act, a petitioner is bound to implead the family or other relatives of the deceased to the petition for seeking Letters of Administration.

11. I may first look at the judgments relied upon by the learned counsel for the petitioner. The Supreme Court in *Manibhai Amaidas Patel & Anr. v. Dayabhai Amaidas*(supra), in paras 9 and 10 held as follows:

“9. This would clearly show that it is necessary to cite parties who would otherwise have an interest in the succession to the estate of the deceased. That would naturally include all the heirs of the deceased. Besides, Section 283 gives power to the District Judge as regards the issue of citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate. Necessarily therefore the facts on the basis of which the District Judge is required to exercise his discretion must be fairly placed before him. In this case the respondent had done nothing of the sort as we have already noticed.

10. The courts below also overlooked the fact that in their application for revocation the appellants had clearly stated that in other proceedings between the members of the family of Amaidas and the respondent the Will had been successfully disputed. In the circumstances, for the respondent to say that the grant was being opposed by “nobody” was misleading. The grant was obtained by concealing from the court something which was very material to the case. The appellants were entitled to be heard and doubtless the District Judge would have

directed to issue of citations to each of Amaidas's heirs on intestacy under Section 283(1)(c) of the Act had the true facts been revealed by the respondent in his application for grant of probate. The advertisement in this case was wholly insufficient to patch up the gross lacuna.

12. Hence, in terms of the above judgment, it is necessary to cite parties who would otherwise have an interest in the succession to the estate of the deceased. This would include all the heirs of the deceased. The facts of the case show that there existed disputes between the family members where the Will had been disputed. Hence, Will was a disputed document and this fact had been concealed from the court.

13. Reliance of learned counsel for the petitioner on the judgment of this court in the case *Umesh Kumar Pushkarna & Anr. v. State*(supra), is misplaced. A reading of the said judgment does not show as to why or in what manner it helps the case of the petitioner.

14. No doubt, the issue would be whether the petitioner herein would have an interest in the succession to the estate of the deceased. If so, he would be a necessary party. The admitted fact is that in the present case an incorrect and false statement was made by the respondent No.1 claiming himself to be the sole real brother of deceased testator Sh.Himanshu Kumar Sen Gupta. The fact of the matter is that he is the step-brother and not the real brother. The real brother of the deceased testator, namely, Shri Sudhanshu Kumar Sen Gupta had pre-deceased him and was survived by his son namely, the petitioner. This fact has been wrongly stated in the petition.

15. However, would this be a concealment of a material fact which warrants this court to hold that the grant of probate was obtained by fraudulent means and hence to revoke the grant of Letters of Administration

vide judgment dated 02.09.2003. The admitted position herein is that had respondent No.1 not propounded any Will, he would succeed to the property in question under the Hindu Succession Act. This is so as under Class II Entry II a brother including a step-brother has precedence over the brother's son. A brother's son finds mention in List IV of Class II. Under Section 9 of the Hindu Succession Act, those in first entry in Class II shall be preferred to second entry. Those in the second entry shall be preferred to the third entry and so on. This position is not disputed by the learned counsel for the petitioner that if for some reasons the Will is held to be defective or forged, respondent No.1 would succeed to the said property in terms of Hindu Succession Act. It is quite clear that even if I may hold that Will was not validly and legally executed by Late Sh.Himanshu Kumar Sen Gupta, respondent would still succeed to the estate of Late Sh.Himanshu Kumar Sen Gupta unless the petitioner succeeds in proving anything to the contrary like a family settlement as claimed. In my opinion, in these facts, it cannot be said that the petitioner had a right to be impleaded as a party.

16. The Supreme Court in *Anil Behari Ghosh v. Smt.Latika Bala Dassi & Ors.*, *AIR 1955 SC 566*, held as follows:

“21. 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 had moved shortly after the grant of the probate on the simple ground that no citation had been issued to him. This 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 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.

22. 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* L.R. 55 I.A.

18. 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 may refuse to grant annulment in causes where there is not likelihood of proof being offered that the will admitted to probate was either not genuine or had not been validity executed. But, as rightly pointed out by the lower Appellate Court, in the present cases 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.”

17. Clearly, the omission to issue citations to persons who should have been apprised of the probate proceedings would normally result in revocation but this is not an absolute right irrespective of the other considerations arising from the proved facts of a case.

18. As noted above, in my opinion, even if I were to set aside grant of letter of administration with the Will attached as prayed in this petition, respondent No.1 would succeed to the estate of Late Sh.Himanshu Kumar Sen Gupta. Further there is another reason which persuades me not to grant relief in favour of the petitioner. The deceased testator died in 1997 while the present petition has been filed in 2014. Hence, for 17 years, the petitioner did not assert any right to the estate of Late Sh.Himanshu Kumar Sen Gupta. This is despite the fact that he claims to be close to the deceased testator and had been as claimed assured by the testator of an equal share in

the estate as claimed. He has now woken up in 2014 claiming that Late Sh.Himanshu Kumar Sen Gupta had always stated that his estate would devolve equally among the parties and this was a family arrangement. The belated filing of this petition to assert his right and to seek revocation of the probate order inspires no confidence. On account of this delay also I am not inclined to exercise any discretion in favour of the petitioner.

19. In view of the above, in my opinion, no grounds are made out for revocation of the probate order dated 02.09.2003. The present petition is accordingly dismissed. It is for the petitioner to take step to enforce the family settlement if any as per law.

JAYANT NATH, J.

FEBRUARY 07, 2018/rk/v

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