

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE MADHURESH PRASAD

FA 74 OF 2019
with
IA No. CAN 2 of 2019 (Old No. CAN 1174 of 2019)
IA No. CAN 3 of 2019 (Old No. CAN 5913 of 2019)
IA No. CAN 4 of 2019 (Old No. CAN 7247 of 2019)
IA No. CAN 5 of 2019 (Old No. CAN 10513 of 2019)

Sri Bojendra Mohan Mazumdar
Vs.
Smt. Durga Chatterjee & Ors.

Appearance:

For the Appellant	: Mr. Saktinath Mukherjee, Adv. Mr. Aniruddha Chatterjee, Adv. Mr. Srijib Chakraborty, Adv. Mr. Surya Prasad Chattopadhyay, Adv. Ms. Gargi Goswami, Adv. Mr. Ankit Chatterjee, Adv.
For the Respondent no. 1 to 3	: Mr. Pratha Pratim Roy, Adv. Mr. Tanmay Mukherjee, Adv. Mr. Arjun Samanta, Adv.
For the Respondent no. 4	: Mr. Kamalesh Bhattacharyya, Adv. Mr. Aninda Bhattacharyya, Adv.
For the Respondent no. 5	: Mr. Aninda Kumar Mitra, Adv. Mr. Ashim Kr. Halder, Adv.
Judgment On	: 22.03.2024

Harish Tandon, J.:

The scope of the instant appeal is sought to be enlarged at the behest of the rival parties to the proceedings taking various routs impinging upon the impugned judgment passed by the Court of Probate below. The instant appeal is filed at the behest of the propounder/executor to the Will challenging the order of the Court of Probate below by which an application for grant of probate is rejected. The notice of appeal in the instant appeal was directed to be effected upon the heirs of the testator who would inherit the assets covered in the said Will in the event the testator dies intestate and after the service have been effected upon them, they have appeared and the instant appeal is contested by the sons of the testator; whereas the daughters by filing an affidavit/application have disclosed their stand in favour of the Will.

The facts germane from the record would reveal that one holograph Will was made, executed and published on 30th January, 2010 by one Nabani Dhar Mazumdar who was an ordinary resident of Radhanagar Road, PO – Burnpur, PS. Hirapur, District- Burdwan. The said testator died on 17th May, 2014 in Calcutta and an application for probate was taken out by the appellant to the said holograph Will before the Court of District Delegate at Asansol which gave rise to registration of Probate Case no. 190 of 2014. The contents of the said probate application were duly verified by the executor appointed in the said Will along with the verification and the affidavit verifying the statement by one of the witness to the said Will. Although the paper book does not contain the order passed by the District Delegate with regard to the citations and the notices to be served upon the

heirs disclosed in the said application but the District Delegate found that one of the son namely Respondent no. 4 filed a vokatnama and, therefore, it was perceived that the said proceeding has become contentious and directed the presentation of the application for probate before the District Judge as the District Delegate lacks jurisdiction to entertain the contentious cause.

The order dated 25.2.2016 passed by the District Judge would reveal that the matter was presented before it and the orders were passed to produce the original Will filed before the District Delegate, Asansol. Order dated 01.08.2016 would indicate that the service was effected upon the heirs except the general notice which was also held to have been effected in the subsequent order dated 28.11.2016. It is recorded in the said order that there is no appearance on behalf of the opposite parties and the appellant herein was directed to file a draft copy of publication in any Bengali newspaper widely circulated in the area where the near relatives lastly resided or carrying on the business. Upon approval of the draft copy for publication, it was approved by the Court and subsequently published in the newspaper "Aajkal Patrika" on 29.03.2017. The District Judge thereafter assigned the said matter for disposal to the Additional District Judge, 5th Court, Burdwan upon recording that despite the service having effected, citation having made therein, one of the sons has entered appearance. The order dated 29.01.2018 is reflective of the fact that despite the said date being fixed for appearance of the heirs in an anticipation of a contest, no one appears and there was further declaration by the Court that the summons upon all the heirs have already been served along with the general notice on

01.07.2016 and 24.11.2016 respectively. The Court made a further observation that in view of a non-appearance of the heirs to contest the said probate proceedings, the matter may be proceeded *ex parte*. Thereafter, the matter was proceeding *ex parte* and the appellant filed the affidavit as to Examination-in-Chief and also deposed in the Court. One of the attesting witnesses who verified the content of application for probate was also cited as a second witness to prove the Will and thereafter the matter was posted for argument. By the impugned order, the Court rejected the application for probate treating the documents received in evidence to be incomplete and inconsistent. The salient observations of the Trial Court is summarised as under:

- i) Record would reveal that after the service of the general notice and publications none of the respondents appears to contest the same with the categorical observation that no notice was served individually upon the heirs of the relatives of the deceased testator.
- ii) The appellant/the executor has not averred in the application for grant of probate nor adduced any evidence that the testator had written and executed the said Will in question in presence of the attesting witnesses.
- iii) Although one of the attesting witnesses being the second witness deposed that the said holograph Will is in the handwriting of the testator and he put his signature thereupon in his presence and in the presence of the other two witnesses

but the other two witnesses were not examined to corroborate the aforesaid facts.

- iv) The testator has signed only 3 pages out of 8 pages which also creates a suspicion in the genuinity of the Will.
- v) The first two pages of the said Will and the remaining six other pages are written in different inks and does not appear to be in the same handwriting and, therefore, it cast a doubt on the contents of the pages of the said Will which does not bear any signature of the testator or the attesting witnesses.

Mr. Saktinath Mukherjee, the learned Senior Advocate appearing for the appellant vehemently submits that on a critical examination of the findings made in the impugned order, there appears inconsistency in marshalling the facts and law and there cannot be any doubt to be raised in this regard to deny the grant of probate. He submits that the holograph Will raises a strong presumption in favour of its genuinity and the probate Court cannot raise any doubt merely on the fact that the testator did not put a signature on all the pages of the Will, if the handwriting of the testator in all such pages have been proved with cogent evidence. In support of the aforesaid contention, Mr. Mukherjee placed reliance upon a Division Bench Judgment of this Court in case of ***Ajit Chandra Majumdar vs. Akhil Chandra Majumdar, reported in (1959-60) 64 CWN 576***. Mr. Mukherjee submits that the special citation was issued upon each of the heirs and the record would reveal that the Respondent no.4 received the same not only on his behalf but on behalf of other heirs including the daughters and therefore, it cannot be said that the service was not effected upon them. He

further submits that the Respondent no. 4, in fact filed a vakalatnama in the said proceeding but later on choose not to contest the same. He thus submits that the service affected upon the heirs was subsequently declared by the Court in the order passed in the probate proceeding and even after the publication was made in a newspaper, there was no appearance on behalf of the respondents and, therefore, the observation of the Court that the citation was not served individually is incorrect.

Mr. Mukherjee thus submits that in absence of any allegation that there has been any fraudulent attempt on the part of the appellant in suppressing the citation, it cannot be a good ground for revocation and equally cannot be a ground to deny the probate and placed reliance upon a judgment of the Supreme Court in ***Lynette Fernandes vs. Gertie Mathias since deceased by legal, reported in (2018) 1 SCC 271***. Mr. Mukherjee is very much vocal in his submission that the probate Court had no material to raise a doubt on the ground that all pages of the Will was not signed by the testator nor the different inks used *ipso facto* raises such doubt in absence of any contest being made by the opposite party. He further submits that there is no presumption which can be raised if all the pages of holograph Will are not signed if the handwriting of the testator has been proved by the attesting witnesses. He vociferously submits that there is no statutory form prescribed for making the Will nor the deprivation of any of the natural heirs shall entail the said Will liable to be treated as in-genuine. He vociferously submits that the testator put the signature after writing the Will and in order to restrict the Will to the properties mentioned therein to eradicate any confusion or a dispute to arise, the testator put his signature

on the pages where the immovable properties were included in the said Will and therefore, the finding of the Probate Court that the absence of the signature in other pages is fatal and raise doubt on the genuinity of the Will. He thus submits that the moment the Court declared that the service have been effected and there is no contest from the respondents, the application for grant of probate should not have been dismissed by the Court if the said Will is otherwise proved in accordance with law.

On the other hand, Mr. Anindya Kumar Mitra, the learned Senior Advocate appearing for the Respondent no. 5 raises various points touching upon the genuinity and the authenticity of the Will. He contends that the Will sought to be probated is not a holograph Will nor the application for grant of probate is in proper form. He further submits that no service was effected upon his client which would appear from the record where the service was accepted by the Respondent no. 4 for and on behalf of his client without any authority having bestowed upon him. Mr. Mitra is very much critical on the verification of the facts appended to an application for grant of probate in relation to one of the attesting witnesses and submitted that it is not in strict compliance with the provisions contained under Section 282 of the Indian Succession Act. According to him, the application for grant of probate lacks due execution of the said Will which is one of the paramount duty of the executor under the law. Mr. Mitra further submits that even the daughters have not stated anywhere in the application filed before this Court that they have authorised or did not authorise the Respondent no. 4 to accept the notice on their behalf which would prove that the service of the notice was not effected upon them as well. Mr. Mitra would further submit

that the application for grant of probate is bereft of any statement that the testator had a testamentary capacity and such defect is fatal in nature.

Mr. Mitra is very much vocal in his submission that there has been a fraudulent suppression of the material facts in the said petition and in such view of the matter, there is no illegality and/or infirmity in the impugned order. Mr. Mitra concededly submits that his client is not foregoing the findings which have been recorded in the impugned order but the aforesaid points can be treated as an additional ground to deny the grant of probate in favour of the appellant. Mr. Mitra submits that the pleading is an important facet of the judicial adjudication and if there is an defect or a lack of requisite statement therein, it may invite the dismissal of the proceeding as held by the Supreme Court in ***Abdul Khader Rowther vs. P.K. Sara Bai & Ors.***, reported in ***AIR 1990 SC 682*** and in ***Ouseph Varghese vs. Joseph Aley & Ors.*** reported in ***(1969) 2 SCC 539***. In support of his contention that non service of the notice or the citation is fatal and the grant can be revoked reliance is placed upon judgment of the Supreme Court in case of ***Manibhai Amaidas Patel & Anr. vs. Dayabhai Amaidas***, reported in ***(2005) 12 SCC 154*** and ***Krishna Kumar Birla vs. Rajendra Singh Lodha & Ors.***, reported in ***(2008) 4 SCC 300***. He further submits that there is an inequal distribution of the assets by the testator which itself is a ground to raise a doubt on the genuineness of the said Will. Mr. Mitra vociferously submits that the finding of the Trial Court that the purported Will does not contain the signature of the testator in all pages have not been challenged in the instant appeal and, therefore, this Court is not obliged to consider the

said finding even though an argument is advanced by the appellant in this regard.

The Respondent no. 4 has also contested the instant appeal and submits that the endorsement of the process server is incorrect. It is further submitted that the notice was received by putting a signature on his behalf as he was not authorised to receive the service of notice on behalf of the other brothers and sisters. It is further submitted that the purported Will raises a sufficient doubts on its genuinity and there is no error committed by the Probate Court in rejecting the same.

On the other hand, the daughters by filing the applications/affidavits conveyed their intention in favour of the genuinity of the Will and the Counsel appearing on their behalf concededly submits that their clients have no objection if the probate is granted to the purported Will.

On the backdrop of the aforesaid facts discerned from the record it is pertinent to record that the scope of the appeal is sought to be enlarged mainly at the behest of the Respondent no. 5, to whom Mr. Mitra, the Senior Advocate is representing, not only on the fundamental defect in the application but also on non-adherence of the various provision of the Act. Several judgments have been cited before us relatable to a situation when the Court can revoke the grant which, in our opinion, does not appear to have any manner of application for the simple reason that the Probate Court rejected the application for grant of probate. The occasion to revoke the grant has not arisen, even if it has arisen in the event the grant is made by the Court, the law suggest that same is required to be adjudicated by the

Probate Court. Admittedly, none of the respondent contested the probate proceeding filed before the District Delegate but we do not see any fetter on the part of the District Delegate to direct the parties to present the application before the District Judge under Section 288 of the Indian Succession Act. The aforesaid provision provides the formation of the opinion by the District Delegate that the probate proceeding appears to be contentious meaning thereby the appearance of any person in person or by his recognised agents with an intent to oppose the proceeding.

Indubitably, the Respondent no. 4 filed a vokalatnama before the District Delegate and in view of the explanations contained under Section 286 of the said Act, it satisfies the condition of the contention and, therefore, the District Delegate relegated the parties to the District Judge who is conferred with the power to dispose of the contentious cause. Precisely, the same has been done and the District Judge or the Additional District Judge as in this case is not denuded of any power to decide the same. There is no obstacle in the law in proceeding to decide the matter *ex parte* in the event, after the due service the person or the persons having a caveatable right did not lodge the caveat and file the affidavit in support thereof. Such being the sub-stratum of the facts discerned from the record, the first and foremost thing which is required to be considered in the instant case is whether the service was affected on all such heirs or the persons having caveatable interest.

It is to be remembered that the Probate Court is a Court of conscience and unless such conscience is cleared and satisfied, it cannot grant the

probate. Equally, it is to be borne in mind that while exercising the conscionable jurisdiction, the Probate Court must remember that it is dealing with the case where the testator have made his last wish and desire and is no longer in this world.

There is no statutory provision contained in the Act stipulating what should be the language used in the said Will except what is provided under Section 63 of the said Act. It admits no ambiguity that no technical words are necessary for a Will except that the same embodies the legal declaration of the intention of the testator with regard to his property which he desires to be carried into the effect. What is *sine qua non* is that the testator shall sign or affix his mark to the Will or by some other person in his presence and by his direction, such signature or mark should be placed to convey a clear intention of giving effect to the writing as a Will and lastly to be attested by two or more witnesses each of them have seen the testator signing or affixing his mark to the Will in their presence and who put their signature on the direction of the testator. We do not find any embargo having created in any of the statutory provisions contained in the said Act requiring the signature or the mark to be affixed on each pages of the Will nor the conventional system prevalent in the England of signing the document at the end of each pages to be applied in the Indian System or an Indian culture/custom. It is within the domain of the Probate Court to satisfy its conscience while granting the probate whether the execution of the Will is shrouded by any suspicious circumstances or there is a reasonable doubt as to its due execution by the testator with free mind and the capacity, testamentary or otherwise, to make such dispositions. The

moment the Court arrive at the decision that there appears to be a suspicious circumstances or a doubt in the capacity of the testator, it is imperative to record a reason therefor, more particularly, when the probate proceeding is decided *ex parte*. The reason being there is no contesting party appearing before the Court and producing a cogent evidence in this regard. In absence of any such evidence it would not be proper for the Judge to raise a doubt or the suspicion more particularly, when the Will is stated to have been written by the testator in his own handwriting. Mere absence of signature on each pages of the holograph Will or a different ink being used when the entire contents are written in a symmetrical manner may give rise to a doubt on its genuinity. The observation of the Division Bench of this Court in ***Ajit Chandra Mazumdar (supra)*** can be gainfully applied in this regard wherein it is held:

“22. The very first reason is that the Will is a holograph Will. The whole of this Will was written in the hand by the testator himself in English. The handwriting is clear and firm. The law makes a great presumption in favour of the genuineness of a holograph Will for the very good reason that the mind of the testator in physically writing out his own Will is more apparent in a holograph Will than where his signature alone appears to either a typed script or to a script written by somebody else. The learned trial Judge has not drawn this presumption in this case on what he says to be the ground that the testator was an old man at the time and was living under the shadow of the aggressive personality of Ajit. The testator was certainly an old man of 74 years while he was at Puri but it is nobody's case that he was physically or mentally in any way incapable of making a Will, for

in fact he went to Puri and lived there all by himself, without even his wife accompanying him and he had only a servant with him and he lived up to the good old age of about 90 years. I have already given my reason why I hold that Ajit's aggressive personality has not been established. Therefore, the learned trial Judge was in error in failing to give due consideration to the holograph character of the Will.

35. A Court of Probate does not make a Will of its own. The Court is not the testator. Its function is to see if the Will proposed by the propounder was duly made and executed by a capable testator. In order to do that if the Court of Probate has to sit in the armchair of the testator, he has also to sit there with the mind of the testator and with the surrounding circumstances and context of the testator's family and other environment very much in the forefront of its deliberations.

*39. It is necessary to emphasise that the standard of proof to establish a Will is not an absolute or a perfect one but such as will satisfy a prudent man. That will be clear from the observations of the Judicial Committee of the Privy Council in *Shunmugaroya v. Manikka*, (3) 36 I.A. 185 : 32 Mad. 400. The burden of proving undue influence is not discharged by merely establishing that the person had power unduly to overbear the Will of the testator. It must be shown that in any particular case that power was, in fact, exercised and that it was by means of exercise of that power that the Will was obtained as laid down by the decision of the House of Lords in *Craig v. Lamoureu*, (4) 1920 A.C. 349 and of the Privy Council in *Gomtibi v. Kanchhedella*, (5) A.I.R. 1949 P.C. 272. We have already held that it has not been established on evidence that the propounder Ajit, in this case had even*

the power to overbear unduly the Will of the testator. We are also of the opinion that in this case the place, time and manner of the execution of the Will and the subsequent facts of the testator outliving the Will by 16 years and making corrections in the draft Will recording events and happenings since the execution of the Will but before his death, are so compelling that the Will, in fact, could not possibly have been obtained by means of the exercise of that power, even if Ajit had that power.

40. The Court's duty to exercise vigilance in cases coming within (1) Barry v. Butlin and (2) Tyrrell v. Painton has been misconceived and overdone in many cases to the point of actually holding that the fact that a propounder gets the major benefit under the Will is by itself a legal proof that the Will is invalid. Neither (1) Barry v. Butlin nor (2) Tyrrell v. Painton said that; nor is there any authority to support that proposition. That circumstance is only a circumstance which should make the Court vigilant to examine the evidence with great suspicion but no more. It provides no legal bar and is no authority for saying that the very fact that the propounder gets the largest benefit under the Will, that by itself makes a Will invalid in law.

43. In the recent decision of the Supreme Court in H. Venkatachala Iyengar v. B.N. Thimmajamma, (i) A.I.R. 1959 S.C. 443, after reviewing many authorities the law has been clearly expounded and summarised by Gajendragadkar, J. in the following terms:—

“It is obvious that for deciding material questions of fact which arises in applications for probate or in actions on Wills, no hard and fast or inflexible rules can be laid down for the appreciation of the

*evidence. It may however be stated generally that a propounder of the Will has to prove the due and valid execution of the Will and that if there are any suspicious circumstances surrounding the execution of the Will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would also depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord du Parc in *Harmes v. Hinkson* —“Where a Will is charged with suspicion, the Rules enjoin a reasonable scepticism and not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, resolute impenetrable incredulity. He is never required to close his mind to truth.” “It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect.”*

48. *The Will has been challenged on the ground that it is an unnatural Will, because the testator prefers one son to others. On the question of unnatural and officious Will a Court of Probate has to act with great caution. The testator who has full testamentary powers and a disposing mind cannot be dictated by the Court as to what is a fair and unjust disposition. The Will is the Will of the testator and he has, under the law, the freedom to give his property to whomsoever he likes. What strikes the Court as an eccentric or an unjust or an unnatural disposition can certainly be taken as a consideration on the main question of finding out whether the testator was acting as a*

free agent and with a sound disposing and understanding mind. But once it is established that the testator was free and had a sound disposing mind, then it is no longer the duty of the Court to go further to inject its own ethics of what is or is not a moral or a fair disposition according to the Court's own standards. Judged by that test, many a Will by a father depriving his sons would be unjust and indeed many a Will exhibits man's iniquity against his nearest and dearest relations and yet not on that ground alone have those Wills been declared by this Court invalid. Such wrongs, however grievous, are not for the temporal courts of justice to correct and are better left to Him Who adjusts all wrongs and non-justiciable iniquities, and under Whose munificence the testator and the disinherited alike live and die.”

Even the Madras High Court in ***Ammu Balachandran vs. Mrs. U.T. Joseph (dies) & Ors., reported in AIR 1996 Mad 442*** held that the absence of signature in all the pages of the Will cannot *ipso facto* raises a suspicious circumstances as the Will is only a declaration of the last Will of the testator. It is further held that there is no rule or the provisions contained in the Indian Succession Act prescribing a mandatory provision of signing all pages of the Will in the following:

“61. The other suspicious circumstances are, that there is no signature in pages 1 and 2 and those pages are also not numbered in the Will. The argument that is taken is that pages 1 and 2 must have been subsequently substituted, and that is why page number is not found in those pages. If pages 1 and 9 have been subsequently substituted, in that attempt, the numbering of pages 1 and 2 would

not have been forgotten as it is an obvious thing. Again, pages 1 and 2 are appearing on a single sheet of paper, and as such, there is no necessity for numbering the first sheet and there was only one more sheet and since it was a separate sheet, the page number was given. We must also remember that P.W. 2 has stated that when he signed in the Will, there were two sheets pinned together. In the absence of any other positive evidence, no inference can be drawn that pages 1 and 2 were subsequently substituted. The other suspicious circumstance alleged is that the Will is not signed in all the pages. That also cannot be said to be a suspicious circumstance since the Will is only a declaration of the last Will of the testator. Law does not say that every page should be signed. In paruck on The Indian Succession Act, Eighth Edition, 1993, the learned Author has commented on this point, at pages 118 and 119 of that book. The learned Author says that if a Will is written on several sheets of paper, it is not necessary that all the pages should be severally signed. One signature on the last sheet, made with the intention of executing the Will is sufficient. Section 63 of the Indian Succession Act only says that the signature or mark of the testator or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as Will. The signature or mark of the testator can be either at the commencement or at the end, but it must be so placed that it shall appear that it was intended to give effect to the instrument as a Will, Under the English Law, there is a slight difference. At pages 118 and 119 of the said book, the learned Author has said thus:—

“... In England the Law is different. The Will Act, 1837, Sec. 9, enacted that no Will was valid unless it was signed “at the foot or end thereof”. The Will Act Amendment Act, 1852, Section 1, provided that “every Will shall, so far as regards the position of the signature of the testator be deemed to be valid if the signature shall be so placed at or after or following or under or beside or opposite to the end of the Will, that it shall be apparent on the fact of the Will that the testator intended to give effect by such his signature to the writing signed as his Will... but no signature shall be operative to give effect to any disposition or direction which is underneath or which follows it”. The signature on the top right - hand corner of the Will is not valid according to English law.”

Section 63 of the Act expositis the procedure or the formalities to be observed in execution and attestation of the Will which is distinct and different from the mode of its proof under Section 68 of the Indian Evidence Act. What is *sine qua non* is that the testator must sign or affix his mark on the Will or put it sign by some other persons in his presence as per his direction with an intent to give effect to writing of such document as a Will which is to be attested by two or more witnesses each of them has seen the testator signing or affixing his mark to the Will. The moment the said document which is styled as a Will is regular in form and the testator has put his signature in presence of the witnesses it raises a presumption of genuinity, regularity of due execution and attestation; such presumption is more strong in case of a holograph Will which is written by the testator himself having a sound mind and disposable capacity. We are not convinced with the findings of the Court that each pages of the Will were not signed by

the testator except few of them creates a doubt as to its due execution. A distinction has to be borne in mind between the execution and attestation of the document at one hand and the proof as to its genuinity and authenticity which largely depend upon the capacity of a person making a Will having a sound mind and does not suffer from the vices of insanity or a like nature impeding upon a fair and just disposition of its assets. The latter part requires a sound proof more particularly when the challenge is made by a person having caveatable interest. It must be remembered that the Judges is not writing a Will for a person but is required to give sanction to the genuinity and authenticity to the Will bearing in mind that the testator is no more in this world. Ordinarily, the last wish or the words of the testator is required to be upheld except on a strong proof leading to execution and attestation of the Will shrouded with suspicion. Therefore, the finding of the Trial Court that the absence of signature in some of the pages of the Will raises a doubt over its genuinity is not acceptable to us, more particularly, when nobody entered into a caveat or file affidavit in support thereof raising a question in this regard.

We are not oblivion of the fact that the Probate Court is a Court of conscience and there is no fetter on the part of the Court in refusing the grant of probate based upon a strong and cogent evidence surfaced in the course of the proceedings. The aforesaid observations may receive impetus from the observation of the Apex Court in case of ***Krishna Kumar Birla vs. Rajendra Singh Lodha & Ors. reported in (2008) 4 SCC 300*** wherein it is held:

“57. The 1925 Act in this case has nothing to do with the law of inheritance or succession which is otherwise governed by statutory laws or the custom, as the case may be. It makes detailed provisions as to how and in what manner an application for grant of probate is to be filed, considered and granted or refused. Rights and obligations of the parties as also the executors and administrators appointed by the court are laid down therein. Removal of the existing executors and administrators and appointment of subsequent executors are within the exclusive domain of the court. The jurisdiction of the Probate Court is limited being confined only to consider the genuineness of the Will. A question of title arising under the Act cannot be gone into the (sic probate) proceedings. Construction of a will relating to the right, title and interest of any other person is beyond the domain of the Probate Court.”

The Constitution Bench in case of ***Shashi Kumar Banerjee & Ors. vs. Subodh Kumar Banerjee since deceased and after him his legal representatives & Ors. reported in AIR 1964 SC 529*** was considering a case where a lawyer of repute executed a holograph Will at the age of 93 containing certain corrections at the various places but the signature appended therein could not be disputed by the objectors. The Apex Court held that the moment the testator has indicated that he signed the Will in presence of the witnesses and the witnesses also signed in his presence, it raises a strong presumption of its legality with regard to the due execution and attestation thereof and, therefore, cannot raise a suspicious circumstances in the following:-

“Further the fact that the will is a holograph will and admittedly in the hand of the testator and in the last paragraph of the will the testator

had stated that he had signed the will in the presence of the witnesses and the witnesses had signed it in his presence and in the presence of each other raised strong presumption of its regularity and of its being duly executed and attested. On these facts there is hardly any suspicious circumstance attached to this will and it will in our opinion require very little evidence to prove due execution and attestation of the will. There is no doubt about the genuineness of the signature of the testator, for it is admitted that the signature at the foot of the will is his. The condition of the testator's mind is also not in doubt and he apparently had full testamentary capacity right upto March 1947, even though he was an oldman of about 97 when he died on April 1, 1947."

Several arguments are advanced at the behest of the contesting respondents who are admittedly the sons of the testator that there is a fatal and incurable defect in the probate proceedings which has not been proved in the solemn form. All such arguments are relatable to the revocation of the grant founded upon the provisions contained under Section 263 of the said Act. Mr. Mitra, the learned Senior Advocate is very much vocal in his contention that the lack of citation to the heirs who could succeed the estate of the testator in case of intestacy is defective in substance. Obviously the reliance was placed upon Illustration (ii) appended to the said Section which postulates that the grant if made without citing parties, ought to have been cited may constitute an expression "defective in substance". The Apex Court in **Anil Behari Ghosh (supra)** in unequivocal terms held that the omission to issue a citation to a person entitled in this regard made in ordinary sense is a ground for revocation of a grant but the same may not constitute an absolute right but depends upon other considerations emerged in course of

the said proceedings. It is further held that in order to give a clear meaning to the expression “defective in substance” the Court must bear in mind the defect must be of such character which substantially affects the regularity and correctness of the proceedings.

What can be culled out therefrom is that it may be a ground of revocation of probate if the Court finds that the grant is defective in substance yet it is not inchoate or indefeasible right that in other circumstances the revocation is a normal rule. It depends upon the facts of the instant case, the credibility of the witnesses and the evidence adduced in this regard for the simple reason that the Court must take into account the expression “just cause” appearing in Section 263 of the said Act. Mere non-citation is not an inflexible incident in bringing the proceeding within the bracket of “defective in substance” unless ill motive or fraud or undue influence is proved in the said case. In this regard the Single Bench of this Court in case of ***Nand Bherumal Advani alias Nandu Advani (Deceased), reported in (2017) 1 CLT 201*** may be taken note of wherein it is held:

“34. It is true that the grant of probate may be revoked even if no wrongdoing on the part of the propounder is found; but for such revocation a substantive defect has to be established. An example may help explain the point better. It is possible that Will surfaces a few years after the death of the testator, wherein an executor is named but the executor was not aware of the Will. If, say, such Will were to provide for a bequest directly to the grandson by bypassing the son of the testator and the executor applies; for the grant of probate without harbouring any misgivings as to the genuineness of the Will upon the attesting witnesses named therein

testifying to their presence at the time of the execution of such will. It is possible that a creditor of the disinherited son of the testator may apply for revocation without blaming the executor for the executor may not have known that the son had any creditor. The unnatural bequest of bypassing the son and providing for the grandson as legatee would be an implied ground questioning the genuineness of the Will in the creditor's application for revocation of the grant, though no ill-motive may be attributed to the executor for obtaining the grant. Equally, it is possible that the knowledge aliunde of such creditor of the existence of the Will is established and such creditor is also demonstrated to have been aware of the petition for grant prior to probate being granted. Merely because he was not cited would not entitle him to obtain revocation in such circumstances. ”

Prior to the above noted judgment the Apex Court in case of ***Manibhai Amaldas Patel & Anr. vs. Dayabhai Amaldas, reported in (2005) 12 SCC 154*** was considering a case where an application for revocation of probate granted in favour of the respondent therein was filed before the Probate Court which resulted into its dismissal. An application for probate was taken out mentioning that the testators have left no other heirs which are found to be incorrect. In such perspective the Apex Court held that it is imperative to cite the parties who would otherwise succeed to the estate of the testator in case of intestacy and the deliberate omission in the application is held to be good ground for revocation in the following:

“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.”

What can be culled out from the aforesaid decisions that the persons who would or are likely to inherit the estate in case of a intestacy or otherwise having not cited renders the proceeding as defective in substance but the same cannot be said to be an absolute right in all conceivable situations but depends upon quality of the evidence to be adduced in this regard. The suppression of the facts which are required to be disclosed in an application for probate may bring within itself the proceeding to be defective in substance and is regarded as “just cause” envisaged under Section 263

of the Act. Since the non-citation does not *ipso facto* render the proceeding defective in substance though recognised as a ground for revocation thereof. According to Mr. Mukherjee it further depends upon another notion that is the notion of prejudice having caused to the objector as recognised in case of ***Lynette Fernandes (supra)*** wherein it is held:

“14. In the absence of any evidence on record showing prejudice because of the non-issuance of citation at Chikmagalur, and in the absence of any evidence- much less cogent evidence- to prove fraud and undue influence, we conclude that the trial court as well as the High Court is justified in concluding that there is not just cause for revocation of grant of probate under Section 263 of the Succession Act.”

We must record that the nuances of law in relation to a revocation of grant has no manner of application in the instant case for the simple reason that the Probate Court did not grant the application for probate; rather rejected the said application. The provision contained under Section 263 is activated on a grant of probate or letters of administration which can be revoked or annulled for “just cause”. This Court is bound to consider the aforesaid proposition of law as the arguments were advanced by the Respondent no. 5 and it would be inappropriate if those submissions are not considered by us. The stage has not reached for revocation or annulment of the grant of probate or letters of administration as the application for probate was dismissed by the Probate Court. However, those points have been taken into consideration in the event this Court interferes with the order of the Probate Court but while embarking the said journey, the Court may take into account the aforesaid points on the premise that the objectors

have raised an issue on the grant of probate or letters of administration as the case may be.

Interestingly, a point is raised by Mr. Mitra, learned Senior Advocate appearing for the Respondent no. 5 that right of cross-examination is inviolable right and is an important facet of the principle of natural justice. Any judicial action in violation of such right which is indefeasible would render the decision liable to be struck down. Several judgments have been cited in this regard to which we do not feel to deal with separately as there is no quarrel to the proposition of law in this regard that any proceeding which is decided in violation of the principle of natural justice is liable to be quashed and set aside. The question of providing an opportunity to cross examine the witness will only arise when a party enters appearance and participated in the proceeding yet denied of an opportunity to cross examine the witness. The decision cited in this regard is not apt and applicable to the facts of the instant case as the application for probate was dismissed by the Trial Court at an *ex parte* stage. The Probate Court has recorded in the orders passed in the said probate proceeding that despite the special or the general citations having issued upon the respondents, no caveat or an affidavit in a support of caveat was filed. The party who did not appear and participate in the proceeding cannot take a plea that his right to examine the witnesses offends the principle of natural justice and therefore, in our opinion, the aforesaid point is misplaced in the facts of the instant proceeding and it would be a mere academic exercise to deal with the intricacies of law propagated in this regard.

We, however, consider it apposite to take inspiration in this regard from decision of the Apex Court in the case of ***H.P. Transport Corporation vs. K.C. Rahi Reported in (2008)11 SCC 502***. The Apex Court in the said case while considering the plea taken by the delinquent complaining non-compliance of principles of Natural justice has observed as follows:

“7. The principle of natural justice cannot be put in a straitjacket formula. Its application depends upon the facts and circumstances of each case. To sustain a complaint of non-compliance with the principle of natural justice, one must establish that he has been prejudiced thereby for non-compliance with principle of natural justice.

8. In the instant case we have been taken through various documents and also from the representation dated 19-10-1993 filed by the respondent himself it would clearly show that he know that a departmental enquiry was initiated against him yet he chose not to participate in the enquiry proceedings at his own risk. In such event plea of principle of natural justice is deemed to have been waived and he is stopped from raising the question of non-compliance with principles of natural justice. In the representation submitted by him on 19-10-1993 the subject itself reads “DEPARTMENTAL ENQUIRIES”. It is stated at the Bar that the respondent is a law graduate, therefore, he cannot take a plea of ignorance of law is no excuse much less by a person who is a law graduate himself.”

The seminal point urged before us is whether the special citation issued in the probate proceedings followed by the general citation by way of publication are sufficient enough to proceed with the application for grant of probate. The record would reveal that the special citation was sought to be

served upon the respondents but the same was received and/or accepted by the Respondent no. 4 by putting a signature without making any endorsement in his handwriting that such notice is received by him on his behalf and on behalf of the other respondents. The endorsement of the process server without any corroboration from the Respondent no. 4 indicates that he received the same not only on his behalf but on behalf of the other respondents. All the sons including the Respondent no. 4 have taken a categorical stand that Respondent no. 4 was not authorised to receive the summon on behalf of the other respondents. Though the Court has declared in its order that the citations have been effected both in special and the general form but in absence of any corroboration by the Respondent no. 4 with regard to the endorsement of the process server, it appears that there is an irregularity in the proceedings. There is no signature appended by the Respondent no. 4 below the endorsement of the process server certifying that such endorsement is true and correct state of facts nor the signature appended on such endorsement of the Respondent no. 4 is suggestive of the fact that the notices were received by him on behalf of the other respondents.

We are conscious that irregularity in the citation or non citation is not fatal though a ground for revocation of a grant yet the Court while embarking his journey in granting the probate of a Will must ensure that the citation has been effected in a proper manner by recording reasons in this regard. Furthermore, the process server should be called upon to prove such endorsement as true and correct state of the facts when the Court noticed that such endorsement has not been corroborated by the

Respondent no. 4 by putting a signature and/or certifying the same to be true and correct. We are conscious that even if an application for revocation of a grant of probate is allowed by the Court it does not *ipso facto* makes the Will as a dead letter but an opportunity is to be given to propounder to prove the same in accordance with the provisions contained in the Act; as a corollary effect the moment the Court set aside the order of the Probate Court dismissing the probate application on the ground that the citation has not been effected in a proper manner, the Court should revert the parties to the Probate Court to remedy the said defect which is not fatal or inflexible.

The manner in which the Court proceeded to dismiss the application for probate suffers from infirmity and/or illegality and, therefore, is liable to be set aside. The impugned judgment is thus set aside.

Since the respondents have entered the appearance in the instant appeal and the stand so taken is indicative of the fact that they wanted to contest the said proceedings, it would be proper that the matter is reverted to the Probate Court to decide the same in presence of other respondents. Furthermore, the respondents have entered appearance in the instant appeal and, therefore, have a knowledge that the application for probate to Will annexed thereto is filed, there is no necessity of further citations to be made in this regard and it would be deemed that the citations have been made upon the respondents. The respondents are at liberty to lodge a caveat within 15 days from the date of this judgment and if they choose, may file an affidavit in support of the caveat within a month from date. The Trial Court shall proceed with the probate application *de novo* permitting the

parties including the propounder to lead an evidence and it is expected that the Probate Court would arrive at the logical conclusion within 4 months from the date of communication of this order. With these observations the appeal and all the connected applications are disposed of.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with the requisites formalities.

(Harish Tandon, J.)

I agree.

(Madhuresh Prasad, J.)