APPELLATE CIVIL.

Before Imam and Chapman JJ.

SAROJA SUNDARI BASAK

v.

ABHOY CHARAN BASAK.*

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Feb. 2.

Probate—Defendant—Limitation—Limitation Act (IX of 1908) s. 164—Its applicability to probate proceedings—Probate and Administration Act (V of 1881) s. 83.

S. 164 of the Limitation Act does not apply to the case of one who is not a defendant in a probate proceeding. Merely citing a person in a probate application does not make him a defendant. Under s. 83 of the Probate and Administration Act the case must be contentious and the person cited must appear to oppose the grant before he becomes a defendant. The limitation laid down in Art. 164 of the Limitation Act applies to the case of a defendant as understood by s. 83 of the Probate and Administration Act.

Bai Manekbai v. *Manekji Kavasji* (1) *Tiluck Singh* v. *Parsotein Proshad* (2), *Rahmat Karim* v. *Abdul Karim* (3) referred to.

The facts of the case are as follows. One Raj Kumar Basak, the alleged testator of a will, died on the 6th or 7th of March 1908 leaving him surviving a cousin, Abhoy Charan Basak; a widow, Sreemati Jamini Sundari; and a daughter, Sreemati Saroja Sundari.

On the 23rd of December 1908 Abhoy Charan Basak propounded a will of Raj Kumar Basak and applied for probate. In the application the names of Jamini Sundari and Saroja Sundari were cited as heirs of

*Appeal from Original Decree, No. 331 of 1911, against the decree of J. A. Dawson, Additional District Judge of Chittagong, dated July 24, 1911.

(1) (1880) I. L. R. 7 Bom. 213. (2) (1895) I. L. R. 22 Calc. 924.
(3) (1907) I. L. R. 34 Calc. 672.

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the testator. The application was granted and probate was obtained on the 12th of March 1909. About June 1910, the widow Jamini died, and three months after Saroja Sundari made an application for revocation of the probate granted to Abhoy. This application was dismissed for default on the 16th of December 1910. She, however, made a fresh application for revocation of the probate on the 21st of December 1910. The chief ground on which revocation was asked for was that no citation was served on the petitioner Sreemati Saroja Sundari. The learned Additional District Judge of Chittagong revoked the probate on the ground that notices were not served.

Against this order of the learned Judge the present appeal was preferred to the High Court.

Babu Prabodh Kumar Das (with him *Babu Mahendra Nath Roy*, *Babu Amulya Charan Banerjee* and *Babu Lalit Mohan Banerjee*), for the appellant. The application for revocation was on the ground that citation was not issued on the petitioner. As a matter of fact the applicant was cited in the petition for probate. Section 50 of the Probate and Administration Act does not apply to this case since there was citation here though, it must be conceded, that the evidence of service was not satisfactory. But that is not all. The application was barred by limitation. The petitioner was admittedly aware of the grant at least three months before the presentation of this application. Her previous application for revocation, which was dismissed for default, did make this matter contentious. Grant of probate was a decree. So far as the petitioner was concerned, the grant was an *ex parte* decree passed against her. Her application, therefore, is, for all intents and purposes, an application under Order IX, rule 13, of the Code of

Civil Procedure. That being the position of affairs, her application was barred by Art. 164 of the second Schedule of the Limitation Act. Section 55 of the Probate and Administration Act and section 141 of the Code of Civil Procedure referred to. Even assuming that notices were not served, the Judge was not right in revoking the probate already granted without affording Abhoy an opportunity to prove the will in solemn form. The mere absence of citation does not invalidate the grant.

Babu Khitish Chandra Sen, for the respondent. The Limitation Act does not apply to petitions for revocation: *Bai Manekbai* v. *Manekji Kavasji* (1), *Tiluck Singh* v. *Parsotein Proshad* (2), *Rahmat Karim* v. *Abdul Karim* (3).

It is clear from the illustration (*b*) to s. 50 of the Probate and Administration Act that want of citation is a just cause for revocation of the probate.

Babu Mahendra Nath Roy, in reply.

Cur. adv. vult.

IMAM AND CHAPMAN, JJ. This is an appeal against an order for revocation passed by the District Judge of Chittagong on an application, under section 50 of the Probate and Administration Act, in respect of a probate granted to Abhoy Charan Basak, the appellant, in terms of a will said to have been executed by his deceased cousin Raj Kumar Basak. The alleged testator died on the 6th or 7th March 1908, and Probate of the will was granted on the 20th February 1909. In the application for probate the appellant Abhoy Charan Basak cited Jamini Sundari and Saroja Sundari Basak, the widow and daughter respectively of the deceased, as his only heirs. Jamini Sundari died

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before the application, out of which this appeal has arisen, was made. On the 20th December 1910, Saroja Sundari Basak, the respondent, by her application of that date sought before the District Judge revocation of the probate under section 50 alleging that the will was forged and that no citation had been served on her. This application was resisted by the appellant who, while protesting the genuineness of the will, insisted that citation had been served on the respondent and further alleged that, apart from the citation, she had otherwise knowledge of the probate proceeding. At the hearing of the application before the Judge, a further contention was raised that the application was barred by limitation. In the lower Court the parties seem to have concentrated their attention on the question of the service of the citation though the respondent's knowledge of the probate proceeding and limitation were also urged. The genuineness or otherwise of the will does not appear to have been discussed in the lower Court, and whatever evidence touching it was adduced was of an incidental character.

The learned Judge has found that no citation was served on the respondent though one had been issued to her. As regards the respondent's knowledge of the probate proceeding, the learned Judge has expressed no finding but reading his judgment, as we do, we understand it to mean that his conclusion on the point is against the appellant. The plea of limitation has been rejected on the ground that the Limitation Act does not apply to applications for grant or revocation of probate.

In appeal we have been pressed to hold in favour of the appellant on all the three points stated above.

The evidence in the case leaves no room for doubt that no citation was served on the respondent, nor is

there any satisfactory evidence in this case on which we can hold that the respondent had knowledge otherwise of the probate proceeding.

On the question of limitation, it has been urged on us that an order granting probate being a decree, article 164 of the Limitation Act applies. That article restricts a defendant to thirty days within which it is open to him to apply for an order to set aside a decree passed *ex parte*, the thirty days to be calculated either from the date of the decree or, where summons was not duly served, from the date of the applicant's knowledge of the decree. On behalf of the respondent it has been urged that the Limitation Act does not apply to all applications but only to such as come under the Code of Civil Procedure, and in support of this contention we have been referred to the cases of *Bai Manekbai* v. *Manekji Kavasji*(1), *Tiluck Singh* v. *Parsotein Proshad* (2) and *Rahmat Karim* v. *Abdul Karim* (3). Those cases, however, bear on article 178 (article 181 of the present Act) and do not lay down the proposition in as general a form as it has been formulated to us from the Bar. But apart from the question of the applicability of the Limitation Act to the respondent's application for revocation, we are of the opinion that article 164 has no application to this case as the respondent cannot be construed to have been a defendant in the probate proceeding. Merely citing a person in a probate application does not make him a defendant. Under section 83 of the Probate and Administration Act, the case must be contentious and the person cited must appear to oppose the grant before he becomes a defendant. The limitation laid down in article 164 applies to the case of a defendant only.

(1) (1880) I. L. R. 7 Bom. 213. (2) (1895) I. L. R. 22 Calc. 924.
(3) (1907) I. L. R. 34 Calc. 672.

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While we uphold the findings of the learned Judge, we cannot support the order for revocation at this stage. Absence of citation or failure to serve the notice is not sufficient for revoking a probate granted *ex parte*. The proper course for the learned Judge was to give to the appellant an opportunity for proving the will in solemn form. The order revoking the probate is vacated, and the case is remitted to the lower Court for determining the genuineness or otherwise of the will. Should the will be found to be forged, an order for revocation will, as a matter of course, follow. The parties will be allowed to prove their respective contentions.

As to costs, the parties will bear their respective costs in the Court below. The costs of this appeal will abide the result. Further costs in the Court below will be dealt with by the Judge.

S.K.B. *Case remanded.*