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K.K.K.M. CHETTYAR v. SELLAMI ACHI.

BAGULEY, J.

For these reasons I agree that the appeal must be dismissed.

FULL BENCH (CIVIL).

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Dunkley, and Mr. Justice Braund.

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Mar. 25.

ESOOF AHMED SEEMA
v.
ISMAIL AHMAD SEEMA AND OTHERS.*

Revocation of probate—Just cause—Absence of citations—Defect of substance—Citations not ordered—Establishment of prima facie *case for revocation—Citations ordered but not issued—Burden of proof on Executor—Burden of proof on person claiming to be cited—Succession Act, ss. 263, 283.*

The absence of citations in a case in which they are not ordered does not by itself constitute just cause for revocation of probate, though it may do so if the party claiming that citation should have been ordered and served upon him can show a *prima facie* case for revocation which the executor is unable to rebut.

The absence of citations in a case in which citations are ordered, but did not issue, does not necessarily constitute such a defect in substance as will involve revocation of the probate. But if such probate is challenged, the burden of proof is on the executor to show that there was no defect of substance in the proceedings in which probate was granted and that no just cause for revocation exists. In a case where citations have not been ordered the party impugning the will on the ground of his non-citation must first show that he ought to have been cited, before the burden of proof is shifted to the executor.

Nistariny v. *Brahmomoyi*, I.L.R. 18 Cal. 45 ; *Ramanandi Kuer* v. *Kalawati Kuer*, 55 I.A. 18, referred to.

Neogi v. *Neogi*, I.L.R. 14 Ran. 146, overruled.

The following order of reference with the concurrence of Spargo J. was made by

BAGULEY, J.—This appeal arises out of an application to revoke a probate issued by the Assistant District Judge of Mandalay.

One S. A. Seema died leaving a will, in which three executors were named. Two of these executors were his heirs under Mohamedan law. The three executors filed an application for probate. On the application the Assistant District Judge wrote an order " Issue special and general citations " ; but as a matter of fact no special citations were issued. General citations were

* Civil Reference No. 7 of 1937 arising out of Civil First Appeal No. 178 of 1936 of this Court.

issued, and no objections being raised, and the will being proved by the evidence of one of the three attesting witnesses, probate was issued as a matter of routine. The will itself was in Gujerati; and a true translation was proved by one I. M. C. Bawa, a merchant of Mandalay. The executors proceeded to deal with the estate. They filed the usual inventory, and afterwards applied for permission to sell the immovable properties. In the application for permission to sell, which was quite unnecessary, they furnished a list of the heirs who would be entitled to the estate. Notices were issued to these persons, and they filed a petition stating that they had no objection to the immovable properties being sold. One of these persons was E. A. Seema. E. A. Seema, when the properties were sold, bought some of them, setting off the purchase money against his share of the estate, and he also received some money in cash. Some while after this he filed the present application to revoke the probate.

Two main grounds are relied upon for the revocation of the probate, one being that proper citations were not issued, and the other being that the deceased was not of disposing mind at the time he made the will. With regard to the first ground reliance is placed on a Bench ruling of this Court [*A. B. Neogi* v *B. B. Neogi and others* (1)]. This ruling I do not find it very easy to follow, but if it goes as far as the head-note of the report appears to go, there would be no difficulty about disposing of this application to revoke the probate. The head-note runs as follows:

> "Where probate of a will has been granted without citing parties to whom notice ought to have been given, and one of such persons applies to the Court to have the probate revoked on that ground the probate will be revoked . . ."

In the present case the Court evidently thought that special citations should be issued to all the heirs, but these citations were not issued. Therefore, if this ruling is to be taken at its face value probate will automatically be revoked.

However we do not consider that this ruling can be accepted at its face value. It purports to follow a decision of the Privy Council [*Ramanandi Kuer* v. *Kalawati Kuer* (2)], a long quotation from the judgment in that case being embodied in the ruling itself; but, unfortunately, in that quotation there have been passages omitted, and it seems to me that had these passages been inserted a different view might have to be taken of the ruling.

(1) (1936) I.L.R. 14 Ran. 146. (2) (1927) 55 I.A. 18.

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It will, I think, be well at this stage to quote the relevant sections of the Succession Act. The first section is section 283, sub-section (*1*):

"In all cases the District Judge or District Delegate may, if he thinks proper,—

(*a*) . . .

(*b*) . . .

(*c*) issue 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 or letters of administration."

The next section for consideration is section 263:

"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*) . . .

(*c*) . . .

(*d*) . . .

(*e*) etc."

After these explanations occur illustrations, of which the relevant one is (ii) "The grant was made without citing parties who ought to have been cited."

Reverting now to *Ramanandi Kuer* v. *Kalawali Kuer* (1), we find first of all a statement of the facts and the law applicable, in which attention is drawn to the fact that Indian law only must be considered. On page 23 occurs the passage:

"It has often been pointed out by this Board that where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law—or of the English law upon which it may be founded."

The next passage which requires to be considered is on page 24, and this is a part of the quotation which has been omitted in *Neogi*'s case (*2*):

"Now so far as the present case is concerned, the law is to be found in the Probate and Administration Act of

(1) (1927) 55 I.A. 18. (2) (1936) I.L.R. 14 Ran. 146.

1881" (now superseded by the Succession Act of 1925.) "Section 50 of the Act, so far as it is relevant, runs as follows: 'The grant of probate . . . may be revoked or annulled for just cause.'

Explanation.—Just cause is: 1st That the proceedings to obtain the grant were defective in substance . . .

The relevant illustrations to the section are: (*b*) The grant was made without citing parties who ought to have been cited. . ."

The judgment then goes on to point out that the plaintiff in that case set up two grounds for revocation. The first issue as framed came under illustration (*b*).

Now, illustrations are not parts of the section to which they are attached. In this connection I would quote from *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (1): "The great usefulness of the illustrations, which have, although not part of the sections, been expressly furnished by the Legislature as helpful in the working and application of the statute, should not be thus impaired." They are, therefore, no part of the Act itself; so the addition of this illustration to the explanation in section 263 of the Succession Act is not equivalent to adding to the explanation so that it would run "Just cause shall be deemed to exist where the grant was made without citing parties who ought to have been cited." The illustration merely shows a state of affairs which may result in proceedings to obtain the grant being defective in substance, and it seems certain that importance must be attached to the words "in substance." A mere defect in form alone would clearly be insufficient. To take an extreme case, suppose the Court orders citations to issue to all the heirs, and these citations were not issued, but on the day fixed for the return of the citations all the heirs appeared in Court and heard what was going on. It would clearly be impossible to hold afterwards that the proceedings were defective in substance because citations were not issued or were not served. It must be remembered that decisions of Courts must always be read in view of the facts to which they relate. In *Ramanandi Kuer*'s case the facts were that the will in question was one which to a great extent disinherited the *purdanashin* wife of the testator and her infant daughter, and greatly benefited the people under whose care they were, and those same people were propounding the will in question. If citations were not

(1) (1916) 43 I.A. 256, 263.

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served on what I would term the victims of the will, and they failed to apprehend what was really going on, it is clear beyond all doubt that the proceedings in which probate issued were defective not only in form but in substance; whereas a very different state of affairs would exist when the heirs who were not cited were people perfectly able to look after their own interests, and who knew from some other source that applications for probate had been made and probate was being issued, and nevertheless took no steps to interfere or enter appearance and object to the probate being issued.

In this connection a further point might be put forward. As has been shown, section 283 puts it within of the discretion of the District Judge or District Delegate as to whether he issues citations to people claiming to have an interest in the estate of the deceased. This being the case, if probate has always got to be revoked because a grant has been made without citing parties, who in the opinion of some other Court or Judge ought to have been cited, the discretion given to the District Judge or District Delegate under section 283 would appear to be nugatory; for every probate which he issued in his discretion without the issue of citations would be liable to be revoked as a matter of course if anybody at a later date, possibly years afterwards, chose to show that some persons to whom citations should have been issued had not had them issued to them.

For these reasons I think that the case of *A. B. Neogi* (1) requires further examination, and I would refer to such Full Bench as the Hon'ble the Chief Justice may direct the following question:

> Does the absence of citations in a case in which citations are ordered, but did not issue, necessarily constitute such a defect in substance as will involve revocation of the probate; or is the Court at liberty to determine in the light of all the circumstances of the case whether the proceedings in which probate was granted were defective in substance?

Doctor for the appellant. The question is what is a just cause for revoking a probate which has been granted. In this case special citations were ordered to issue by the Court, but they were not issued through

(1) (1936) I.L.R. 14 Ran. 146.

some mistake. This entitles a party who ought to have received a citation, but did not, to come to Court and ask for revocation of the probate. It is immaterial that he delayed making the application or that he had knowledge of the proceedings subsequently. The person propounding the will can still prove the will, but the matter will have to be dealt with as a contested matter. If the citations ordered are not issued the grant becomes open to contest. Knowledge, delay or acquiescence of the party contending cannot be taken into account. The propounder must prove all facts entitling him to obtain probate.

[BRAUND, J. The question is, is there just cause for revoking the probate, not whether the will must be re-proved. You are contending for a second probate, but you are not considering whether there are grounds for revoking the first probate.]

No citation was issued to the appellant when the probate was granted. Supposing the will is a forgery or is made by an incompetent testator the person to whom citation ought to have been issued should be entitled to question it, although he had knowledge of the issue of the probate previously, or had acquiesced. In the absence of citations the whole matter becomes open and the propounder must prove the will in the presence of the appellant.

Ramanandi Kuer v. *Kalawati Kuer* (1); *Neogi* v. *Neogi* (2).

Ba Han for the 1st respondent. In spite of the fact that special citations were not served the executor must be given an opportunity to show that there is no just cause for revoking the probate.

(1) 55 I.A. 18. (2) I.L.R. 14 Ran. 146.

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ROBERTS, C.J.—The question referred for determination by a Full Bench is as follows :

"Does the absence of citations in a case in which citations are ordered, but did not issue, necessarily constitute such a defect in substance as will involve revocation of the probate ; or is the Court at liberty to determine in the light of all the circumstances of the case whether the proceedings in which probate was granted were defective in substance ? "

By section 263 of the Succession Act, the grant of probate or letters of administration may be revoked or annulled for just cause ; and just cause shall be deemed to exist where the proceedings to obtain the grant were defective in substance. The illustration to the section relevant to the present reference is :—" (ii) the grant was made without citing parties who ought to have been cited."

Section 283 of the Act empowers a District Judge, if he thinks proper, to issue 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 or administration. It has been pointed out that it is not only desirable but necessary for the ends of justice that this power should be exercised when the interest of any party is likely to be affected, and especially in the case of minors. There may well be cases in which neglect to issue the proper citations may constitute such a defect in substance as to render just cause for revocation of probate.

On the other hand it is clear that the Act gives a discretion to the District Judge. And if it is said that when probate in common form is granted without citations having been ordered to issue, any person can come forward at a much later date to challange the will upon the ground that he ought to have been cited and that revocation of probate should then follow as a

matter of course, no grant of probate unless in solemn form could ever be of any substantial value.

In *Nistariny Dabya* v. *Brahmomoyi Dabya* (1) it was held that the mere absence of a special citation did not necessarily amount to a just cause for revocation of probate as making the proceedings substantially defective. It was contended that a minor who was interested in the estate should have been specially cited but the Court held that the persons under whose care she had been living were aware of the previous proceedings and that the party who opposed the grant though nominally appearing on his own behalf really did so on behalf of the minor.

In the case of *Ramanandi Kuer* v. *Kalawati Kuer* (2) the plaintiff (appellant) set up as the first ground for revocation that the proceedings to obtain the grant were defective in substance in that the grant was made without citing parties who ought to have been cited. The plaintiff was an infant residing with her mother the widow of the testator. A general citation was affixed to the house of the deceased and another to the Court House ; notices were issued to the widow and to the plaintiff and a report was made by the serving officer showing that service of the notices was acknowledged on the widow's behalf "for self and guardian of Ramanandi Kuer" by one Awadh Bihari Singh. Probate was accordingly granted, but some years later proceedings were instituted on the appellant's behalf alleging that citations were not served either on her or on her mother. The District Judge found himself unable to come to any conclusion whether the notice was actually served or not. Their Lordships held that, even if some kind of formality were gone through on the occasion when service of notice was said to have been effected, it was not such as would give to the

(1) (1890) I.L.R. 18 Cal. 45. (2) (1927) 55 I.A. 18.

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person alleged to have been served an opportunity either to oppose the grant of probate or to require the will to be proved in her presence. In the peculiar circumstances of the case the service, if any, was of no greater effect in law than personal service on an infant of tender years. They therefore held that the first issue must be decided in favour of the plaintiff. There was a just cause for revoking probate, and the executrix would then have to prove the will, and if she had succeeded the probate would have stood.

If, on the other hand, plaintiff had failed on the first issue this would not have precluded her from proving as a second ground for revocation that the will was forged, but the burden of proof on that issue would rest upon her, and not upon the executrix.

It is clear from this case that where citations have been ordered and there is a subsequent complaint that the order was never complied with, proof of this fact may disclose a defect in substance in the proceedings to obtain the grant. I can conceive of cases where it might not do so ; as where in the absence of service of citations as ordered, the heirs directed to be cited nevertheless appeared in Court on the day fixed for their return : plainly this would be a defect in form merely and not in substance. All that can be said is that a *prima facie* case for revocation appears where it is shewn that persons ordered to be cited were not cited in fact.

Now in the case of *Neogi* v. *Neogi* (1) the learned Chief Justice observed that the exact questions which arose there had already been raised and determined in *Ramanandi*'s case.

With great respect I think there is this distinction that in *Ramanandi*'s case citations were ordered but

(1) (1936) I.L.R. 14 Ran. 146.

were shown not to have been properly served, and the onus thereafter lay on the executrix to show that this did not constitute a defect of substance in the proceedings to obtain a grant; she failed to do so and probate was accordingly revoked.

In *Neogi*'s case no citations were ordered to be issued but the appellant came forward and complained that he had not been cited. In these circumstances, in my opinion, the burden of proof lay upon him to show that he ought to have been cited, that is to say, that failure to cite him constituted in all the circumstances of the case a *prima facie* defect of substance in the proceedings to obtain a grant. I feel bound to say, with due deference to the judgment in the appellate Court, that I respectfully agree with the following statement of Leach J. who tried the case upon the Original Side :

> " When a will is proved in common form, as this will was, it is not necessary that the Court should order citations to issue, and I consider that the fact that no citations were issued in this case does not in itself constitute a ground for revoking the probate which had been granted."

Each case must be examined on its merits and the absence of citations in a case in which they are not ordered does not by itself constitute just cause for revocation of probate, though it may do so if the party claiming that citation should have been ordered and served upon him can show a *prima facie* case for revocation which the executor is unable to rebut. I am unable to agree with the observations to the contrary made by the appellate Court in *Neogi* v. *Neogi*.

Accordingly I would answer the first question propounded in the negative ; as to the second question (i) in cases where citations have been ordered but not served the burden of proof is then shifted to the

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executor to show that there was no defect of substance in the proceedings in which probate was granted, (ii) in cases where citations have not been ordered the party impugning the will on the ground of his non-citation must first show that he ought to have been cited, before the burden of proof is shifted to the executor to show that the defect in the proceedings was not one of substance and that no just cause for revocation exists.

We assess the advocate's fee in this reference at ten gold mohurs ; costs of the reference to be costs in the appeal.

DUNKLEY, J.—I agree.

BRAUND, J.—I agree.

I respectfully think that the case of *Neogi* v. *Neogi* (1), as decided in this Appellate Court, can no longer be taken to represent the law. For, the essential difference between a case [such as that of *Ramanandi Kuer* v. *Kalawati Kuer* (2)] in which special citations had been ordered but not served and a case [such as that of *Neogi* v. *Neogi* (1)] in which no special citations were ever ordered, appears to have been overlooked. The difference is vital. For, in the one case, there never came into existence a probate that was formally perfect, while in the other case there did. And, consequently, in the former case the onus lay upon the Executor to defend his imperfect probate ; while in the latter case the onus of showing grounds for revoking an apparently perfect probate lay upon the person challenging it.

But, in either case, the probate originall granted stands until it is revoked by an order of the Court. And no such order can, in my view, be properly made except as the result of a judicial proceeding in which,

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according to where the onus lies, either the executor has failed to defend, or the third party has failed to upset, the existing probate. It is, I think, desirable that that should be made clear, in view of the premature order of the Appellate Court in *Neogi* v. *Neogi* revoking the probate in that case before it had been determined whether there were in fact any grounds for its revocation or not.

I agree that the reference should be answered in the sense in which my Lord the Chief Justice suggests.

FULL BENCH (CIVIL).

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, Mr. Justice Dunkley, and Mr. Justice Braund.

1938

Mar. 25.

IN RE SOONIRAM RAMNIRANJANDAS
v.
JUNJILAL AND OTHERS.*

Partnership Act, ss. 69, 74—Firm not registered—Suit by firm to recover debt—Right to sue accruing before commencement of Act—Remedy not barred.

When a suit has been instituted after the 1st October 1933 for recovery of a debt accruing before that date by a firm not registered under the Partnership Act the suit is not barred by the provisions of s. 69 but is saved by the provisions of s. 74 of the Act.

A remedy is the legal means to recover a right and if a remedy exists in respect of a right accrued before the commencement of the Act s. 74 clearly says that it shall not be affected either by s. 69 or any other section.

Daumal v. *Baburam*, I.L.R. 58 All. 495 ; *Miller* v. *Salomons*, 21 L.J. Ex. 161, referred to.

Krishan Lal v. *Abdul Ghafur*, I.L.R. 17 Lah. 275, distinguished.

Ram Sundar v. *Madhu Sudhan*, 40 C.W.N. 1180 ; *Surendranath De* v. *Manohar De*, I.L.R. 62 Cal. 213, dissented from.

An order of reference in the following terms was made by

MOSELY, J.—In the suit, which is the subject of this second appeal, the plaintiff-appellants, the firm of Sooniram

* Civil Reference No. 8 of 1937 arising out of Civil 2nd Appeal No. 59 of 1937 of this Court.