

**(1980) 04 CAL CK 0026****Calcutta High Court****Case No:** M.A. No. 174 of 1979

Benode Behari Sur Roy

APPELLANT

Vs

Bijoy Laxmi Roy and Others

RESPONDENT

**Date of Decision:** April 2, 1980**Acts Referred:**

- Succession Act, 1925 - Section 265, 299, 383, 384, 388

**Citation:** 85 CWN 1**Hon'ble Judges:** B.C. Chakrabarti, J; A.K. Sen, J**Bench:** Division Bench**Advocate:** Manindra Nath Ghose, Ganga Narayan Chandra and Suboth Chandra Bhattacharya, for the Appellant; Padmabindu Chatterjee and Abja Keshab Chatterjee for Respondent Nos. 1 and 3 and S.M. Sanyal, for the Respondent**Judgement**

B.C. Chakrabarti, J.

This is an appeal from an order allowing an application u/s 383 of the Indian Succession Act. The appellant Benode Behari Sur Roy had earlier applied for the grant of a succession certificate. The application was allowed ex parte to a limited extent by an order dated 23-11-77 in Act XXXIX Case No. 206 of 1977 of the court of the District Delegate, Alipore. Thereafter the respondent Sm. Bijoy Laxmi Roy filed an application for revocation of the succession certificate granted in favour of Benode Behari Sur Roy which was registered as Revocation Case No. 492 of 1978. This case was eventually allowed on contest by the order impugned in this appeal. Benode Behari has preferred the present appeal. The respondent took a preliminary objection that the appeal presented directly to this court is clearly barred under the proviso to section 388(2) of the Indian Succession Act. Since we have heard learned advocates on the preliminary objection and since for reasons hereinafter stated we felt that the objection should prevail, it is clearly unnecessary to enter into the facts of the case nor is it necessary for us to consider the merits of the claim for revocation.

2. Mr. Chatterjee for the respondent by drawing our attention to the provisions of section 388, contended that the appeal lies to the District Judge, Alipore and not to this court. Section 388 in its material part reads as follows:

388. Investiture of inferior courts with jurisdiction of District Court for purposes of this Act. (1) The State Government may by notification in the Official Gazette, invest any court inferior in grade to a District Judge with power to exercise the functions of a District Judge under this part.

(2) Any inferior court so invested shall, within the local limits of its jurisdiction, have concurrent jurisdiction with the District Judge in the exercise of all the powers conferred by this part upon the District Judge, and the provisions of this part relating to the District Judge shall apply to such an inferior court as if it were a District Judge :

Provided that an appeal from any such order of an inferior court as is mentioned in sub-section (1) of section 384 shall lie to the District Judge, and not to the High Court, and that the District Judge may, if he thinks fit by his order on the appeal, make any such declaration and direction as that sub-section authorises the High Court to make by this order on an appeal from an order of a District Judge.

3. Mr. Ghosh on the other hand contended that the application for the grant of succession certificate as also the application for revocation thereof were filed before and disposed of by the District Delegate within the meaning of section 265 and consequently section 388 would have no application, he argued that section 299 of the said Act provides for appeal to the High Court. This last contention of Mr. Ghosh is without any substance for section 299 is attracted only when an order is made by the District Judge. The order appealed against is not an order made by a District Judge and, therefore, section 299 can have no application. In view of this apparent difficulty Mr. Ghosh argued that since there is no clear provision for an appeal from an order of a District Delegate, the memorandum of appeal may be treated as an application for revision and disposed of as such.

4. This contention at once takes us to a consideration of the question whether the impugned order was passed by the District Delegate in his capacity as such or as an officer invested with powers u/s 388(1) of the Act. The expression District Delegate appears in section 265 which is worded as follows :--

265. Power to appoint Delegate of District Judge to deal with non-contentious cases. (1) The High Court may appoint such judicial officers within any district as it thinks fit to act for the District Judge as Delegates to grant probate and letters of administration in non-contentious cases, within such local limits as it may prescribe ;

Provided that, in the case of High Courts not established by Royal Charter, such appointments shall not be without the previous sanction of the State Government. (2) Persons so appointed shall be called "District Delegates".

5. It is thus clear that the aforesaid sections 265 and 388 both contemplate delegation of powers but in one case the authorisation is by the High Court and in the other by the State Government. Rule 317(1) of the Civil Rules and orders issued by the authority of the High Court enumerate a list of officers invested with the functions of a District Judge u/s 388(1) of the Indian Succession Act. Two senior Subordinate Judges of Alipore, it appears were so invested by notification No. 62244J dated the 13th July, 1927.

6. Sub-rule (2) of the 317 gives the list of officers appointed ex-officio as District Delegates u/s 265 of the Act. By High Court Notification No. 5721A dated the 10th August, 1949 the two senior Subordinate Judges of Alipore were so appointed. We have ascertained upon enquiry from the office that the Notifications are still in force.

7. It thus appears that the same officers, namely, two senior Subordinate Judges have been appointed both u/s 265 as also u/s 388. Such being the state of things Mr. Ghosh argued that since the application was presented, in the court of the District Delegate and entertained as such, it should be held that the order was passed by a District Delegate as such and not by an officer invested with powers u/s 388(1). It is true that the application was filed in the court of the District Delegate and almost all the orders printed in the Paper Book show as if they were passed by the District Delegate. The last order which is the order under appeal, however, was signed not as District Delegate but as "Subordinate Judge, 10th Court, Alipore." It is not the contention of any body that the Subordinate Judge who passed the order was not one of the two senior Subordinate Judges. The point of difference between the parties is whether he is a District Delegate or an officer appointed u/s 388(1).

8. To us it seems that whatever be the nomenclature used in the previous orders, the order impugned could not have been passed by him in his capacity as a District Delegate. It may be recalled that the powers of a District Delegate are confined to non-contentious matters only relating to grant of probate and letters of administration. An application for revocation of a grant already made is by its very nature a contentious proceeding and factually the application was heard and disposed of on contest. When a particular officer is both a District Delegate and an officer appointed u/s 388 (1) and when the order passed is to all intents and purposes, an order passed u/s 388(2) the mere misdescription of the officer as a District Delegate is inconsequential. There should be no presumption, by reason of such of misdescription merely because the officer had passed the order as a District Delegate. He could pass the order, rightly or wrongly. Only u/s 388(2) and being an officer duly appointed u/s 388(1) he alone and not the District Delegate had the competence to pass such an order. It may be mentioned here that an application for revocation of a certificate as provided for in section 383 relates to Part X of the Act, The power exercised by the Subordinate Judge in this case was under Part X and he could exercise powers only u/s 388(2) by virtue of the power invested in him under sub-section (1). Consequently in spite of the nomenclature used, we find that the

order passed by the Subordinate Judge was on the authority of the powers invested in him u/s 388(1). The view we have so taken finds support from an earlier decision of this court in the case of Radheshyam Basak Vs. Santosh Kumar Basak and Others,

9. Such being the position in law, it must necessarily follow that an appeal directly to this court is barred under the proviso to section 388(2). The appeal lies to the District Judge. The Memorandum of appeal accordingly is liable to be returned to the filing lawyer for presentation to the proper court. Before parting with the case, we would suggest that necessary instructions should be issued so that officers acting whether as District Delegates u/s 265 or as officers appointed u/s 388(1) may properly specify the capacity in which the order is passed instead of blindly designating themselves as District Delegates in every case. Instances of such misdescription, we were told, are not infrequent. They are apt to lead to confusion and unnecessary complications. The Administrative Department of the court may, therefore, issue necessary instructions in this behalf to all District Judges.

The memorandum of appeal be returned.

There will be no order for costs.

Let the records be sent down forthwith.

Anil K. Sen, J.

I agree.