(1955) 02 CAL CK 0023

Calcutta High Court

Case No: None

Southern Bank Ltd.	APPELLANT
Vs	
Keshardeo Ganeriwalla	RESPONDENT

Date of Decision: Feb. 7, 1955

Acts Referred:

- Succession Act, 1925 - Section 219, 234, 263, 283, 283(1)(c)

Citation: 59 CWN 580

Hon'ble Judges: P.B. Mukharji, J

Bench: Single Bench

Advocate: B.K. Ghose, for the Appellant;R.N. Sinha, for the Respondent

Final Decision: Dismissed

Judgement

P.B. Mukharji, J.

This is a creditor''s application to revoke the probate of the Will, not of the debtor, but of a testator from whom the debtor would have inherited, but for the Will. The testatrix in this case happens to be the adoptive mother of the debtor. The application is made by Southern Bank Ltd., for an order revoking the probate, dated the 15th July 1946, of the Will of Ram Bibi, dated the 11th April, 1946. The notice of motion also asks for an order for proof of the Will in solemn form and for liberty to the applicant to cross-examine the witness produced in support of the Will. The notice of motion was taken out by the applicant on the 22nd June, 1954, about eight years after the grant of Probate. The probate in this case was granted by Mr. Justice J.N. Majumdar in the common form on the sole executor''s petition affirming that the due execution of the Will was proved by the declaration of Mr. S.N. Chunder, Attorney-at-Law, who was one of the attesting witnesses to the Will. The declaration of the attesting witness appeared at the foot of that petition. The respondents to the application are Keshardeo Ganeriwalla, the executor to the Will of Rami Bibi, Pursottam Ganeriwalla, the other attesting witness and his sons Sankarlal. Nandalal, Sree Bhagwan, Monilal and Omprokash. Attesting witness S.N. Chunder, the

attorney, has since died.

2. The grounds on which revocation of the probate is sought are set out in paragraphs 11 and 12 of the petition of the applicant. These grounds are affirmed as submissions. The grounds are--(i) that the Probate was obtained by fraud on the creditors, (ii) that Purusottam Ganeriwalla being the person benefited by the Will is one of the attesting witnesses; (iii) that executor Keshardeo is a person in the employment of Purusottam; (iv) that the probate is obtained by defective procedure; and (v) that the Will is not genuine. Mr. B.K. Ghose, learned counsel for the applicant, did not press the last three grounds in his arguments before me. In paragraph 11 of the petition the applicant says, "The circumstances of the execution of the alleged Will are very suspicious and your petitioner apprehends that it has been brought into existence only to defraud your petitioner, who is the creditor of the said respondent Purusottam Ganeriwalla, the sole heir of the said Bibi." In support of these grounds and submissions, the applicant has relied on the affidavit of Santosh Kumar Roy Chowdhury, Manager of the Bank, affirmed on the 9th June, 1954. The substance of his affidavit is that since May, 1940, Purusottam represented to him that premises No. 166, Muktaram Babu Street, really belonged to Purusottam and that it only stood in the benami of Purusottam''s mother, Rami Bibi. The purchase of the said premises, according to this affidavit, was made in the benami of Rami Bibi by the firm of Satyanarayan Gulraj of which they were partners. Both in the petition and in the affidavit of Santosh Kumar Roy Chowdhury it is stated that Purusottamdas was and still is in actual possession of the said premises,

3. A brief statement of facts will be necessary to appreciate and determine the points urged in support of and against this application The Bank filed a suit being Suit No. 1245 of 1946, against Purusottam Ganeriwalla, on the 10th July, 1946, for the recovery of the sum of Rs. 78, 883-0-6p with interest and costs as being moneys lent to the defendant on overdraft account. Before filing that suit, the Bank had given a notice of demand to Purusottam on the 13th December, 1945. The Bank obtained a decree in that suit for Rs. 1, 06, 551-1-2p on the 16th June, 1952, against Purusottam. On the 8th September, 1953 the Bank executed that decree by attaching the said premises No. 166, Muktaram Babu Street, Calcutta. Thereupon respondents Nos. 3 to 7 being the sons of Purusottam, preferred a claim under Order 21, Rule 58 of the CPC to the said premises on the strength of the Will of Rami Bibi. This claim was made on the 3rd February, 1954. On the 8th April, 1954, the application was disposed of by an order removing the attachment, but the Bank was given leave to file a suit within one month from the date of the said order with an undertaking by the respondent sons of Purusottam not to deal with the property in the meantime till the disposal of that suit. The Bank then filed a suit on the 7th May. 1954, being Suit No. 1384 of 1954, for a declaration that respondent Purusottam is the owner of premises No. 166, Muktaram Babu Street and that the said property was liable to be attached under the decree obtained by the Bank in Suit No. 1245 of 1946. It will be necessary to refer to the allegations and the case made by the Bank

in this plaint in Suit No. 1384 of 1954, for declaration. It is the Bank''s case that in the claim proceedings in execution of the decree and attachment of the said premises, it came to know of the existence of this Will.

4. In Suit No. 1384 of 1954, against the Ganeriwalla, the Bank makes the allegation in paragraph 4 of the plaint, "The said premises was purchased by defendant Purusottam Ganeriwalla, the judgment-debtor, in the benami of Rami Bibi * * * * *. The consideration money for the said purchase belonged to the judgment-debtor Purusottam Ganeriwalla" and makes the further allegation in paragraph 7 of the plaint : "The defendant Purusottam Ganeriwalla was at all material times and still is the sole and absolute owner of the said premises and the said Rami Bibi was merely his benamdar." Although in paragraph 6 of that plaint the Bank referred to the fact of the Will of Rami Bibi, dated the 11th April, 1946, and the further fact that probate thereof was granted on the 17th July, 1946, whose effect was to disinherit the judgment-debtor Purusottam Ganeriwalla and to bequeath the said premises to Purusottam''s wife and the respondent sons, the Bank did not in that suit reserve leave under Order 2, Rule 2 of the CPC to apply for revocation of the probate on the ground that it alleges now. To emphasise the dates, it is necessary to repeat that this suit was filed on the 7th May, 1954, while this present application for revocation was made subsequently on the 22nd June, 1954. Paragraphs 4 and 7 of that plaint were verified by the Bank as based on information received from Santosh Roy Chowdhury and believed to be true. The plaint was signed and verified by Laxminarayan Nandy, the constituted attorney of the plaintiff Bank and its Law Officer. Now in paragraph 3 of the present affidavit-in-reply of the said Laxminarayan Nandy affirmed on the 20th December, 1954, he makes the allegation : "The said Rami Bibi was benamdar of the said premises" and he verifies this statement as true to his knowledge.

5. Two main defences have been urged against this application by the learned counsel. Mr. R.N. Sinha, who appeared for the opposing respondents Sankarlal, Nandalal and Sree Bhagwan Ganeriwallas. It is first urged that the applicant Bank as a judgment-creditor has no right to apply for revocation of probate. Secondly, it is urged that the Bank''s case being that the said premises did not belong to the Testatrix but to the judgment-debtor, the applicant should not be allowed to revoke the Will. The many implications of this second point will be clear, when I deal with the arguments advanced in support thereof.

6. The first point raises a very well-known, but I should have thought by now, well-settled controversy. A creditor''s right to apply for revocation of probate has been the subject of many decisions of many Courts. The decisions have not always been uniform. It will, however, be not necessary to wade through the multitude of decisions. It will be enough to consider the last two relevant Privy Council decisions and to state broadly the principle that I consider should govern these cases.

7. In the jurisprudence of the law of succession and inheritance whether under or without a Will, a creditor is always recognised to possess certain well-defined rights. The broad principle behind the recognition of a creditor''s right in this respect is that a creditor is entitled to be paid out of the estate of his debtor, as for instance, equal and rateable distribution of the assets of the deceased debtor among his creditors u/s 323 of the Indian Succession Act, with even such priorities as are specified in sections 320, 321 and 322 of that Act. It is also on this principle that a creditor may be given the right to prove the Will and obtain the administration of the estate of the debtor in the events mentioned in section 234 of the Indian Succession Act. Again it is on this principle, the creditor may be given right to obtain administration where there is no Will and the persons mentioned u/s 219 of the Indian Succession Act are not available. So much of the position of a creditor in the matter of administering the estate of the deceased debtor is well recognised under the law, although the question whether a simple creditor can be a caveator u/s 283 of the Indian Succession Act, has been the subject of legal uncertainty, some cases holding that a creditor is not a person "claiming to have any interest in the estate of the deceased", within the meaning of section 283 (1) (c) of the Succession Act while others saying that a creditor is such a person. It is unnecessary here to discuss this branch of the law.

8. This principle behind a creditor -intervention in the estate of the deceased debtor has been extended from the sphere of the debtor''s estate to the estate of the person from whom the debtor would inherit but for a will. But this extended doctrine is based on the same principle that the Will was obtained in fraud of the creditors. The basic test by which a creditor may be allowed to oppose or revoke the grant of a probate of a Will, whether of the debtor himself or even of the person from whom the debtor would have inherited but for the Will, is that the Will is or is likely to be in fraud of creditors. The principle as extended, therefore, is that a judgment-creditor of the heir of the deceased who would in execution of his decree have a right to seize the property which in the absence of the Will would descend to his debtor and who alleges that the Will has been set up for the purpose of defrauding the creditors, has a locus standi in opposing or revoking the grant of probate.

9. The Privy Council in Raja Nilmoni Singh v. Umanath Mukherjee (1) (L.R. 10 IndAp 80), left open the question whether a creditor of the testator''s heir, who has attached a portion of the testator''s estate in respect of his debtor''s right, title and interest therein could oppose the grant of probate or apply to have it revoked. Sir Richard Couch delivering judgment in the Privy Council in that case observed at page 87 of the Report :

Assuming that a purchaser can oppose the grant of probate or apply to have it revoked (which their Lordships do not decide) they entertain grave doubts whether the attaching creditor can do so at least in a case which is not founded on the

ground that the probate has been obtained in fraud of creditors.

10. More than 50 years after, the Privy Council in a subsequent case in Sarala Sundari Dasi v. Dinabandhu Roy (2) (L.R. 70 IndAp 1), decides that the creditor of an heir of an alleged testator whose rights against the heir are or are likely to be defeated by reason of the property which otherwise appeared to be in possession of the heir being withdrawn by the Will has a locus standi to apply for revocation of the grant of probate where he alleges that the Will was a forgery and probate accordingly obtained fraudulently within the meaning of section 263 of the Indian Succession Act. Lord Atkin who delivered the judgment of the Privy Council in this case says that the right to apply for such revocation is not limited to the persons, who u/s 283 of the Succession Act could be cited before the grant of probate. In other words this decision of the Privy Council in Swain Sundari''s case (2) finally settled a very controversial point. There were previously many conflicting judicial decisions on the question whether the persons, who had an "interest in the estate" as stated in section 283(1) (c) of the Succession Act for citation were the only persons, who could apply for revocation of the grant of probate u/s 263 of the Succession Act. Sarala Sundari''s case (2) decided that question in the negative, so that a person not having an interest in the estate of the deceased could also apply for revocation and a creditor without having an interest in the estate of the deceased could apply for revocation of the probate.

11. The confusion that usually occurs on this branch of the law is between the estate of the deceased debtor and the estate of the testator from whom the debtor could have inherited, but for the Will. The law as it has finally emerged from this multitude of decisions is that the creditor can not only intervene in the estate of the deceased on the main principle that I have just discussed, but also can intervene in the estate of the testator of whom the deceased would have been the heir, but for the Will, provided that such creditor''s rights are or are likely to be defeated by reason of the property which otherwise appeared to be in the possession of the debtor being withdrawn by the Will. It is therefore not an unqualified right but a very well-guarded right based on well-defined ground.

12. Reverting once again to the facts of this case, it appears to me that the legal principle in Sarala Sundari''s case (2), is attracted. Here the Will of Rami Bibi was executed on the 11th April, 1946 The probate was granted to the execute under the Will, on the 17th July, 1946. The Will, therefore, was before the Bank''s Suit No. 1245 of 1946, and the probate was therefore long before the Bank''s decree in that suit on the 16th June. 1952. But then these facts do not exclude from operation, the principle laid down by the Privy Council that a judgment-creditor of the heir of an alleged testator can apply for revocation of the grant. What is said here in the present application before me, is that Purusottam Ganeriwalla, the judgment-debtor was the adopted son of the testatrix in this case, and would have inherited the said premises No. 166. Muktaram Babu Street, Calcutta, if there was no Will. I, therefore,

hold that in respect of this point the applicant Bank has a right to apply for revocation of the probate and it has the necessary legal locus standi to present this petition.

13. The next more practical question, however, is whether in this application the Bank has made a sufficient case which would justify the revocation of probate already granted. This question has to be determined with reference first to the actual grounds made by the applicant in the present petition before me and secondly with reference to the course of action the applicant Bank has already taken in the suit which it has filed, being Suit No. 1384 of 1954.

14. I will examine first the case mad(c) in the petition. At the outset it must be stated that paragraph 12 of the petition of the applicant contains the main grounds and that paragraph is verified as only submission. The first submission is that the probate has been obtained by fraud on the creditor. Now this is hardly even a proper averment of fraud because it has no particulars and because it is put forward as a submission and not a fact. It is attempted to be supported by the affidavit of Santosh Kumar Rai Choudhury, who says that Pursottamdas represented to the Bank that the said premises belonged to him and not to the testatrix. Even then it seems to me impossible to conclude or even to infer that long before the decree was made in favour of the Bank in 1952, Purusottam thought of having a Will, made by Rami Bibi as early as 1946. To infer fraud from this fact is to postulate an incredibly remote foresight as early as April, 1946 in Purusottam or Rami Bibi, that there would be a suit and that there would be a decree six years later and that there would subsequently be an attachment of this property under such future decree Nothing appears circumstantially or otherwise, even to suggest this. It is stated that there was a letter of demand from the Bank on the overdraft account for the moneys lent and advanced to Purusottam on the 13th December, 1945 which was prior to the Will But then even a letter of demand in 1945 to activate and motivate Purusottam to have a Will made by his adoptive mother in April, 1916 with a view to exclude possible realisation of the Bank''s possible decree out of this particular property seven years later, when there is no allegation that this was the only property of Purusottam, is far too remote an inference of fraud, which in my opinion the Court will not be justified to draw.

15. The next ground on which the Will is attacked in paragraph 12 of the petition of the applicant is that Purusottam being the person benefited by the Will is one of the attesting witnesses. My first criticism of this ground is that assuming benefit to Purusottam, a beneficiary in law is not incompetent to attest a Will which gives him benefit That is not a suspicious circumstance by itself which can justify revocation of a probate. Mr. Ghose, who very ably argued this petition on behalf of the applicant submitted on this point that Purusottam was benefited by the Will in the sense that this property was being preserved from the hands of his creditors. This submission, however, begs the question. For what is to be established is that there has been

fraud of creditors and that cannot be assumed. The terms of the Will in fact disinherit Purusottam. The Will says:

I am the absolute owner of premises No. 166. Muktaram Babu Street, Calcutta. I am in failing health. My adopted son Purusottam '' Lal Ganeriwalla has squandered a good deal of money in business. I give all my movables to my daughter-in-law Sm. Parameswari Devi, wife of my said son Purusottamlal Ganeriwalla absolutely. I give, devise and bequeath my dwelling house No. 166, Muktaram Babu Street, to my said daughter-in-law Sm. Parameswari "Devi for her life and after her death to the sons of the said Purusottamlal Ganeriwalla.

16. Assuming for the purpose of this particular ground that the testatrix was disposing of her own property, I see nothing suspicious in the circumstance. The benefit given by this Will is not to Purusottam but to his wife and sons. To infer from the fact that the gift to the wife and the sons was in reality a gift to Purusottam with the advantage of putting the property beyond the reach of Purusottam''s creditor is to make an inference for which there is no prima facie proof.

17. Then Mr. Ghose very ingeniously argued that if the Will disinherited Purusottam which is what it does expressly, then it was unnatural for Purusottam to attest a Will disinheriting him. Ordinarily he would not have been allowed to make this submission because it was directly contrary to the ground 12(b) of the petition. But I allowed him to do so under the general plea of ''suspicious circumstance'' taken in paragraph 11 of the petition. According to Mr. Ghose''s submission a person, who was being disinherited by the Will was not likely to be an attesting witness to the Will and that situation itself was a suspicious circumstance. Normally, I would have been inclined to agree with his submission, but I do not think that the facts in this case are such that it can be called at all a suspicious circumstance. After all what was Purusottam attesting? His adoptive mother definitely says in the Will that he had squandered a good deal of money in business and therefore she did not wish her properties to go to that son. Nevertheless she tried to provide for the disinherited son''s sons and wife. For that purpose I do not think it is unnatural for the testatrix to have called her adopted son as an attesting witness to the Will and to be quite frank with him by saying that she was not going to give him anything because he had squandered money in business but she would not on that ground leave his family with wife and sons destitute but would leave her properties to his wife and sons. I will assume that the testatrix wanted to save the property from the hands of her son''s creditors and therefore she made such a disposition, but I see nothing suspicious in that act. A parent is perfectly entitled to say and think that it is no use leaving his or her property to the son who is a waster, because to do so would be to hand over the property to his creditors, and that the property should be left to the son''s wife and children. So long as the property really belongs to the testator or testatrix such a course, to my mind, is not a suspicious circumstance on the ground of which alone a probate of a Will can be revoked.

18. There is another important fact which should be noticed while dealing with the question of the case for fraud of creditors which the applicant wants this Court to accept. Now from the proceedings of the suits already referred to as well as the claim proceedings it appears that the agreement for purchase of the said premises No. 166, Muktaram Babu Street, Calcutta, was entered into the name of Rami Bibi as early as 14th June. 1927, and was followed by a registered Deed of Conveyance on the 13th February, 1928. Prima facie, therefore, this property stood in the name of Rami Bibi many years before any dispute arose between the Bank and Pursottam. The Bank, therefore, cannot be said to have been misled by any misrepresentation of Pursottam, when it lent the moneys on the overdraft account without any security. The Bank''s case, as I have already said, is that since May. 1010, Pursottam represented that this was a benami transaction. But then the point is that the fact of this benami assuming it was a benami transaction, had already taken place long before this alleged representation by Pursottam to the Bank. Prima facie, therefore, the Bank in lending the money without any security from Pursottam took its own risk. To say now, that although there was a formal deed of registered conveyance in 1928, showing Rami Bibi to be the owner of the said premises and the alleged representation, if any, by Pursottam to the Bank occurred 12 years after in 1940, the mere fact that Rami Bibi disposed of the said property obviously standing in her own name ever since 1928, as the formal owner is vitiated by fraud, because it defeated a subsequent simple money creditor like the Bank, is to draw an entirely untenable and unfounded conclusion on wholly insufficient premises. No inference of fraud of creditors or suspicious circumstance can be made from this fact. But then there is yet another consideration which has been strongly relied on by Mr. Sinha, Mr. Sinha''s argument is that the Bank''s whole case is that the property does not belong to the testatrix at all. That is the only case the Bank has made in the plaint in Suit No. 1384 of 1954. Not only has the Bank made that case in that suit, it has even in its affidavit-in-reply here repeated as true to its knowledge the fact that Rami Bibi was a mere benamidar. Now the law is that the creditor of the heir of a testator can apply to revoke the grant of a Probate of the Will of the testator, where the allegation is that the creditor''s rights are or are likely to be defeated by reason of the property being withdrawn from the heir by the testator. That was the law laid down by the Privy Council in Sarala Sundari''s case (2) (L.R. 70 IndAp 3). But that case did not have to consider the question, whether the situation of the creditor will remain the same if he makes the case that the title to the property over which the dispute arises never belonged to the testator at all but in fact and in law belonged always to the judgment-debtor. If the creditor claims de hors the Will, can he still have a locus standi to challenge the Will and revoke the grant of probate. If the Bank succeeds in the declaration that it has brought in Suit No. 1384 of 1954, that Rami Bibi was only a benamdar and that the real owner of the property was Pursottam, then no question of the revocation of the grant of probate arises nor can the grant of probate be a conclusive bar to such a declaration. Probate does not establish testator''s title to the property. In fact, Probate Court does not deal with title at all

while it grants Probate or Letters of Administration. It does not pronounce even on the validity of the provisions in the Will. All that it does pronounce is that the Will, as it is, is a genuine Will duly executed and attested by a person competent to execute a Will. If, therefore, the Bank has taken up that position in the declaratory suit that the testatrix in this case was a mere benamdar with no title to the property, her disposition of that property by a Will, however, genuine otherwise does not prejudice the Bank''s claim for declaration. Either the property belongs to the testatrix or it belongs to the judgment-debtor. It cannot belong to both. Can the Bank in such circumstances blow hot and cold by saying once in the declaratory suit that the property never belonged to the testatrix, she being only a benamdar, and then turn round by saying in this revocation proceeding that even if the property had belonged to the testatrix, the Will was in fraud of creditors. It may be contended, although it is not contended here before me that there may be instances where a creditor should be allowed to urge both these cases. In other words, the creditor should be left free to say that according to him the property purported to be disposed of by the testator did not belong to him, so that he is entitled to sue for the appropriate declaration regarding the title to the property in question, and if he fails in that contention, even in that case to urge also that even though the property belonged to the testator the Will was made in fraud of creditors. It is unnecessary for me to decide what should happen when both such cases are made. Here, as I have said, no right was reserved under Order 2, Rule 2 of the CPC to apply for revocation in the Probate Court. The creditor chose his remedy and that was to stand or fall by his exclusive case that the property did not belong to the testatrix who was a mere benamdar In such a case the creditor cannot come within the rule laid down by the Privy Council in Sarala Sundari''s case (2) for his entire claim is de hors the Will In my judgment, a creditor who claims entirely de hors the Will and does not make the case that the Will is in fraud of the creditors cannot be allowed to revoke the grant of probate of that Will.

19. To pursue this question a little further it is necessary to add that revocation of the, grant of probate is always a discretionary matter for the Court, the discretion no doubt being exercisable on judicial principle and is only granted when a ''just cause'' is shown. The statutory explanation of the ''just cause'' in section 263 of the Indian Succession Act has been held to be exhaustive and not merely illustrative, so that an application for revocation must come within the grounds mentioned there. There are five grounds mentioned in that section each of which separately constitutes a ''just cause''. First of such grounds is where the proceedings to obtain the grant were defective in substance. Although that ground was taken in paragraph 12 of the petition, it has been given up by Mr. Ghosh and in fact nothing is shown to suggest that there was any defect in substance in the proceedings for grant. The second ground is where ''the grant was obtained fraudulently by making a false suggestion or by concealing from the Court something material to the case''. From the language just quoted it will appear that the particular type of fraudulent grant that

is contemplated here is the one that is obtained by making a false suggestion or by concealing from the Court something material to the case Now I have already endeavoured to show that in my opinion no false suggestion or concealment was made before the grant was obtained. The fact that the testatrix in her Will described the property in question as her own is not, as I have shown, a fraudulent or a false suggestion, or a concealment That assertion in the Will is an assertion on the title to the property. The probate granted on that assertion does not determine any title and does not conclude the question of title that the Bank raises. Therefore the grant cannot be revoked on this allegation The third statutory ground is that ''the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant'' even if such allegation was mad, in ignorance or in inadvertence. Here the point of emphasis is that the untrue allegation of fact has to be not only an untrue allegation of fact but also that such allegation was essential in point of law to justify the grant. Neither of these tests is satisfied by the present case, made by the Bank on this petition. The fourth and the fifth grounds in that section relate to the grant becoming useless and inoperative or where the grantee of the probate has omitted to exhibit inventory These grounds do not arise in the facts of this application and I therefore do not deal with them. Going through these grounds mentioned in the statutory explanation to section 263 describing what a just cause is for revocation of a grant of probate it is therefore clear that the petition does not establish any of these statutory grounds.

20. Before I conclude a word further is necessary on some of the grounds abandoned by Mr. Ghose He abandoned the ground that the Will was not genuine. That ground was taken in paragraph 12 of the petition, but no particulars were given as to why that submission was made. The other ground was that Kesardeo Ganeriwalla was in the employment of Pursottam and yet he was appointed executor under the Will. I do not see any legal incapacity or disqualification in Keshardeo being made executor under the Will of Rami Bibi. In the Will Keshardeo is described as the testatrix''s husband''s brother, I should have thought that there was nothing unusual or fraudulent in appointing such a person as executor. That however also is a ground which is abandoned by Mr. Ghose At one stage of his argument, Mr. Ghose made an attempt to say that Rami Bibi who signed the Will in Debnagri did not know English although the original Will was in English. That again is a point of fact but it has not been taken specifically anywhere in the petition. But the original Will bears the endorsement of the solicitor, S.N. Chunder "explained by me to the executant". Nothing appears prima facie to arouse any suspicion that this was not so. Then MR. Ghose tried to suggest that none identified Rami Bibi, because there was no identification clause. That also is a point not taken in the petition, a then it is a point of no substance because the attestation clause reads :

Signed by the abovenamed Musst. Rami Bibi as her last Will in the presence of us, both being present, at the same time, who in her presence and in the presence of each other have scribed our names as witnesses:--S.N. Chunder, Solicitor. Calcutta,

Pursottamlal Ganeriwalla, 166, Muktaram Babu Street. Calcutta.

21. Now admittedly Pursottam was the adopted son of the testatrix. To uphold Mr. Ghose''s argument on this point would mean that the applicant Bank is trying to suggest that Pursottam identified some other woman as his adoptive mother. Such an allegation of fact cannot be entertained on mere argument, when there is no assertion to that effect in the whole of the petition or even in the affidavits filed before me.

22. From these considerations it is abundantly clear to me that the applicant has not only failed to establish any case of fraud, but also he has failed even to establish a prima facie ease of any suspicious circumstance. I would have been inclined in the absence of a prima facie case of fraud of creditors at least to call upon the executor to prove the Will in solemn form if I were satisfied that there exists even a vestige of suspicious circumstances attaching to this Will. But I find none It seems to me that the whole case made by the Bank is a very laboured attempt to come within the provisions of section 263 of the Indian Succession Act. This survey of the facts will show how different is this case from the case of overwhelming fraud with overwhelming prima facie proofs thereof in Sarala Sundari''s case, at page 6 of the Privy Council Report in 70 I.A. 1. I, therefore, hold that there is no suspicious circumstance which should justify this Court in ordering the executor to prove the Will in solemn form in the presence of the applicant, and there is also no case of fraud of creditors which should justify revocation of the grant of probate already granted. I will only record here the fact, not appearing in the affidavits, but stated to the Court by both Counsel, Mr. Ghosh and Mr. Sinha that the independent attesting witness Mr. S.N. Chunder, a solicitor of this Court, is no longer alive to give evidence, so that proving the Will in solemn form now can only mean calling the other attesting witness, namely, Purusottam; hut even then on the very contention of Mr. Ghosh, he is not a disinterested witness. That will not be the way by which the conscience of the Court can be satisfied for which object alone a Will is required to he proved in solemn form. I, however, repeat what I have said that the petitioner has failed to show in his petition any grounds which throw any doubt on the Court''s conscience to use the language of Barry v. Butlin (2 Moo. P.C. 480).

23. prevailing and persistent misconception is that proof of a Will in solemn form, after the grant of probate issued on proof in common form, can be called for as a matter of course That is not so. A probate whether granted after proof in common form or in solemn form, is an event in rem. The practice of the probate Court recognises two ways of proving a Will. One is proof in common form and the other is proof in solemn form. The legal proof in either case must be there and is the same and not different. It is as laid down by the Indian Evidence Act and the Indian Succession Act. What is different is the method of accepting these proofs. In common form, the Court accepts the proof on, affidavits or declarations regarding due execution of the Will and thereupon grants the probate. In solemn form, the

Court requires oral evidence with opportunity for cross-examination of such evidence regarding due execution and thereupon grants the probate. The English practice is, where an executor has proved the Will in common form, a party desirous of requiring him to prove it in solemn form, commence an action for revocation, having first cited the executor to bring in the probate. That is the English action for revocation of the grant. Here under the Indian Succession Act, there is no action or suit as such but an application u/s 263 of the Indian Succession Act for revocation of the grant which when treated as contentious cause, acquires the characteristics of a suit or action. Rules of this High Court also recognise proof in solemn form, even before use of any probate Rule 29 of Chapter 35 of the Original Side Rules provides that a party opposing a Will may give to the party propounding the Will a notice to prove the Will in solemn form and for cross-examination of witnesses produced in support of the Will. This is part of the Caveat, proceedings which require to be supported by affidavit. Reference to find the English practice may be made to William''s Law of Executors and Administrators, 12th Edition, Volume I, pages 75, 76 to 83. Reference to English practice is both relevant and material because Rule 33 of our Rules of Chapter VIII requires us to follow that practice where we have no guide under our Rules and Statutes. But the point that I wish to emphasise here is that where there has been a grant of probate even though it be no proof in common form, any creditor cannot just walk into Court and call for proof of the Will in solemn form, and treat the existing probate as though it is an incident of no consequence. A probate shifts the original burden that lay upon the propounder. Before probate, the us probandi lies in every case upon the party propounding the Will and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable able testator. Once that is done, than a party subsequently challenging the grant must at least show some case within the meaning of section 263 of the Succession Act to displace or even tend to displace the existing probate and he bears then the onus of showing it and not the grantee of the probate It is not the law, as I understand it, that because probate in a case granted on proof of the Will in common form, therefore, any interested person can call for its proof in solemn form without showing some ground that the proof in common form requires, in the facts of a particular ca to be tested by evidence and cross-examination and that ground must at least be such as to raise doubts in that conscience of the Court which was satisfied by the previous proof in common form for the reasons I have already discussed I am of the opinion that the present petition does not disclose such ground.

24. For these various considerations this application in my judgment fails. The application, is, therefore, dismissed. I will, however, make the costs of this application of the appearing parties before me costs in the pending declaratory Suit No. 1364 of 1954.