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IN THE HIGH COURT OF DELHI AT NEW DELHI

**RESERVED ON: 11.11.2009
PRONOUNCED ON: 04.12.2009**

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Test Case No. 5/2009

BASANT DAYAL

..... Petitioner

Through : Mr. Mohit Kumar, Advocate

versus

STATE AND OTHERS

..... Respondents

Through: Mr. H.L. Tikku, Sr. Advocate with Ms. Yashmeet Kaur,
Advocate

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be
reported in the Digest? | Yes |

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

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1. The Petitioner, under Section 278 of the Indian Succession Act (hereafter "the Act") seeks letters of administration in respect of the estate of the deceased, Shri Dayal Chand Kaith. He (the petitioner), one of the two sons of the deceased, relies on a Will dated 21.12.1995 executed by the said deceased.

2. The petitioner alleges that the Will propounded by him was the 'last and valid Will' executed by his father, who died in 1998. The case of the party seeking impleadment, i.e. the other brother is that the Will dated 21.12.1995 was not the last Will and that instead, another one, dated 04.02.1997 was the last and final Will made by the deceased. In 1999, two rival suits were instituted in Chandigarh Courts in which the petitioner and Shri Chetan Dayal, (the grand-son of late Shri Basant Dayal through his

second son Shri Rup Dayal) were contesting parties. The first suit CS 21 of 1999 was filed by the petitioner through his attorney Mrs. Aruna Malhotra, Respondent No. 4 herein, seeking a declaration that the Will dated. 04.02.1997 is not genuine etc. Shri Chetan Dayal filed another suit CS No. 38 of 1999 for declaration to the effect that the Will dated 04.02.1997 is the last and valid Will of late Shri D.C. Kaith. The two suits were disposed of together and it was decreed to the effect that the Will dated. 04.02.1997 is the last and final Will of the deceased Shri D.C. Kaith.

3. An application, I.A. No. 8352/2009 under Order 1 Rule 10 r/w Section 151 CPC seeks impleading Shri. Chetan Dayal, son of Shri. Rup Dayal, as respondent no 6 in this case. The applicant is beneficiary under the Will dated 04.02.1997, which it is contended, is the last Will of the deceased. It is contended that by the said Will, late Shri D.C. Kaith had bequeathed his half share in House no E-7/6, Vasant Vihar, New Delhi to the petitioner and the applicant in equal shares. The applicant has also filed a suit for partition and rendition of accounts i.e. CS 2318/2006 which is pending before this Hon'ble Court. In terms of the Will (dated. 21.12.1995, propounded by the petitioner) only the abovementioned immovable property was subject of testamentary succession. However, by the purported Will dated. 04.02.1997, the entire estate of the deceased was to be bequeathed through testamentary succession. It is clear, therefore, that the validity or otherwise of the either of the Wills as the last and final Will of the deceased will affect the rights of the applicant in the estate of the deceased. The petitioner opposes the application, contending that the applicant does not have any *locus standi*, not being a beneficiary in the Will (propounded in these proceedings) and therefore the application has to be rejected.

4. The question as to what should be the approach of a court when someone, not party to testamentary proceedings, claims that his participation is essential, and that refusal to implead him may result in likely prejudice was examined exhaustively, in the ruling reported as *Krishna Kumar Birla v. Rajendra Singh Lodha*, (2008) 4 SCC 300, where the tests that are to be applied by courts was indicated in the following terms:

“The propositions of law which in our considered view may be applied in a case of this nature are:

(i) To sustain a caveat, a caveatable interest must be shown.

(ii) The test required to be applied is: Does the claim of grant of probate prejudice his right because it defeats some other line of succession in terms whereof the caveator asserted his right?

(iii) It is a fundamental nature of a probate proceeding that whatever would be the interest of the testator, the same must be accepted and the rules laid down therein must be followed. The logical corollary whereof would be that any person questioning the existence of title in respect of the estate or capacity of the testator to dispose of the property by will on ground outside the law of succession would be a stranger to the probate proceeding inasmuch as none of such rights can effectively be adjudicated therein."

5. The petitioner does not dispute that the applicant was a party in the two rival suits contested in Chandigarh. The validity or otherwise of the Will of 1995 to be determined in the present petition, would certainly affect the applicant. Therefore, the applicant, who was a party to the cases in which the same issue was determined, is also a party entitled, within the tests laid down in *Krishna Kumar Birla's case* (supra) to be heard, as a party in the present petition as well. In these circumstances, the application for impleadment has to be, and is allowed.

6. The parties were heard on the question of maintainability of the present testamentary proceedings, particularly on the question of *res judicata*, on account of the decrees of the Chandigarh Civil court, (dated 30-7-2004) and the circumstance that a previous probate petition was rejected, in respect of the same Will, by this court.

7. It is pointed out by the party seeking impleadment that an earlier petition for grant of probate to the Will dated. 21.12.1995 was filed by Shri Arjun Raj Malhotra, the named executor in the Will, and the said Probate No. 46/2007 was dismissed by this Court by order dated 02.04.2008. That petition was dismissed on the ground that the petitioner had not approached the Court with clean hands and also that there was no evidence on record to prove the Will dated 21.12.1995.

8. The petitioner submits that the Shri Arjun Raj Malhotra, the executor of the Will dated. 21.12.1995, had failed to take proper steps to get the said alleged last Will of the deceased probated and thereby he (the petitioner) has also moved an application I.A. No. 3035/2009 under Section 301 of the Indian Succession Act for removal of the executor Shri Arjun Raj Malhotra from the Will, dated 21.12.1995 (of late Shri D.C. Kaith). The said application is opposed by the third Respondent.

9. The main contention of the petitioner, in the present case, is that the Chandigarh Court was not a court of competent jurisdiction to settle the issue of the true, last and valid Will of late Shri D.C. Kaith and therefore the doctrine of *res judicata*, embodied in Section 11 CPC, does not apply. The petitioner relies on the decision of the Supreme Court in *Chiranjilal Shrilal Goenka v. Jasjit Singh and Others*, (1993) 2 SCC 507, where it was held that

“The probate court alone has exclusive jurisdiction and the civil court on the original side or the arbitrator does not get jurisdiction, even if consented to by the parties, to adjudicate upon the proof or validity of the will propounded by the executor/executrix, the applicant”.

10. The petitioner next refers to *T. Venkata Narayana and Others v. Venkata Subbamma (Smt) (dead) and Others*, (1996) 4 SCC 457, where it was held that:

“If the Will is to be proved according to law, it has to be by way of a probate in the court having competency and jurisdiction according to the procedure provided under the Indian Succession Act, 1925.”

Reliance has also been placed upon the judgment of the Madhya Pradesh High Court in *Ram Shankar v. Balakdas*, AIR 1992 MP 224 wherein it has been held that in view of the provisions of Sections 213 (2), 227 and 70 of the Indian Succession Act, Probate Court alone has the exclusive jurisdiction to decide, in the case of contest between two Wills, if and which one of the two of them, is ‘duly proved’ or ‘established’ as the ‘last Will’ of the testator. It was further held that a Civil Court in a suit instituted by any party, claiming right, title and interest in any property on the basis of a Will, no issue can be struck to decide if such Will was the ‘last and valid Will’ and the other Will which is purported to have revoked had been duly and validly revoked by the subsequent Will. The counsel also refers to the decision in *Chinnaswami and Anr v. Hariharabadra & Anr*, I.L.R. 16 Mad. 380 where it was held that the question of the genuineness of the will was not *res judicata* for the purpose of the proceeding under the Probate and Administration Act even when the Will had been declared to have been forged while pursuing a matter under application under the Guardians and Wards Act, 1880

11. The petitioner contends that since the Chandigarh Court, which decreed to the effect that the, was not a Court of competent jurisdiction on the issue of validity of Will, therefore its decree that the Will dated 04.02.1997 was the last and valid Will of the

deceased, is a nullity. For this purpose, the counsel has placed reliance on the following judgments: *Sushil Kumar Mehta v. Govind Ram Bohra*, [1990] 1 SCC 193; *Chandrabhai K. Bhoir & Ors. v. Krishna Arjun Bhoir & Ors.*, (2009) 2 SCC 315; *Kiran Singh and Others v. Chaman Paswan and others*, AIR 1954 S.C. 340.

12. The third respondent has filed Reply/Written Statement to the petition; his position is that the Will dated 04.02.1997 was the last and valid Will of the deceased. He also contends that as the deceased died on 03.12.1997, the petition is barred by time and suffers from laches. It is contended that the petitioner was aware that a Will later than the one he has set up in this case, existed; that Will was impugned by him, as not being the last Will, in proceedings before the Chandigarh civil court; the suits were instituted in 1999. The decision in both cases were rendered on 30-7-2004. The present petition suffers from delay; it is time barred. The impleaded party also supports the submission of the third respondent, saying that the decree of the Chandigarh court constitute *res judicata*, and that they have achieved finality, in view of which the present petition has to be rejected, as it is a frivolous attempt to re-open decided issues, that have attained finality. It is also submitted that the previous probate proceedings in respect of the same Will of 1995 having been dismissed on various grounds, including the question of suppression of material facts, the present petition, for the same relief, but claiming letters of administration is not maintainable.

13. The above discussion reveals that the court has to decide whether the present proceeding, for letters of administration, in respect of a Will said to have been executed by the deceased in 1995, is maintainable. The petitioner concededly was party to two suits – in one, as the plaintiff, and in the other, as a defendant, where the relief sought was a declaration regarding the status of a will dated 4-2-1997. The court in that case, i.e. the Civil Court at Chandigarh, declared that the said Will was indeed the last Will and testament, and issued decrees which bind the petitioner. The decision of the Supreme Court, in *Chiranjilal Shrilal Goenka and T. Venkata Narayana and Ors* no doubt hold that a court, having jurisdiction under the Act, alone has jurisdiction to decide whether a document set up as a testamentary disposition, has that character or not. To that extent, the petitioner is correct in saying that the petition is maintainable. In this view of the

matter, the question as to whether the judgment of the Chandigarh court constitutes *res judicata* cannot detain the court at this stage.

14. The above conclusion, however, is not dispositive of the question of maintainability. The third respondent raises another substantial issue, about the petition being time barred. The Limitation Act, 1963 does not specifically provide for any period of limitation in respect of proceedings under the Indian Succession Act. There was some difference of opinion among High Courts about the applicability of the Limitation Act to proceedings for probate, or letters of administration. The issue was settled by the decision reported as *Kunvarjeet Singh Khandpur v. Kirandeep Kaur*, (2008) 8 SCC 463. The Court held that Article 137 of the Limitation Act applies, in the following terms:

"11. In the Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, (1977) 1 SCC 996, it was inter alia observed as follows :

22. The conclusion we reach is that Article 137 of the 1963 Limitation Act will apply to any petition or application filed under any Act to a civil court. With respect we differ from the view taken by the two-judge bench of this Court in Athani Municipal Council case 2 and hold that Article 137 of the 1963 Limitation Act is not confined to applications contemplated by or under the Code of Civil Procedure. The petition in the present case was to the District Judge as a court. The petition was one contemplated by the Telegraph Act for judicial decision. The petition is an application falling within the scope of Article 137 of the 1963 Limitation Act."

In terms of the aforesaid judgment any application to Civil Court under the Act is covered by Article 137.

The application is made in terms of Section 264 of the Act to the District Judge. Section 2(bb) of the Act defines the District Judge to be Judge of Principal Civil Court.

Further in S. S. Rathore v. State of M.P. [1989 (4) SCC 582] it was inter alia stated as follows :

"5. Appellant's counsel placed before us the residuary Article 113 and had referred to a few decisions of some High Courts where in a situation as here reliance was placed on that article. It is unnecessary to refer to those decisions as on the authority of the judgment of this Court in the case of Pierce Leslie & Co. Ltd. v. Violet Ouchterlony Wapshare it must be held

that Article 113 of the Act of 1963, corresponding to Article 120 of the old Act, is a general one and would apply to suits to which no other article in the schedule applies."

Article 137 of the Limitation Act reads as follows:

"137. Description of application: *Any other application for which no period of limitation is provided elsewhere in the Division.*

Period of Limitation: Three years Time from which period begins to run:

When the right to apply accrues."

The crucial expression in the petition is "right to apply". In view of what has been stated by this Court, Article 137 is clearly applicable to the petition for grant of Letters of Administration. As rightly observed by the High Court in such proceedings the application merely seeks recognition from the Court to perform a duty because of the nature of the proceedings it is a continuing right. The Division Bench of the Delhi High Court referred to several decisions. One of them was S. Krishnaswami and etc. etc. v. E. Ramiah (AIR 1991 Madras 214). In para 17 of the said judgment it was noted as follows :

"17. In a proceeding, or in other words, in an application filed for grant of probate or letters of administration, no right is asserted or claimed by the applicant. The applicant only seeks recognition of the Court to perform a duty. Probate or letter of Administration issued by a competent Court is conclusive proof of the legal character throughout the world. An assessment of the relevant provisions of the Indian Succession Act, 1925 does not convey a meaning that by the Proceedings filed for grant of probate or letters of administration, no rights of the applicant are settled or secured in the legal sense. The author of the testament has cast the duty with regard to the administration of his estate, and the applicant for probate or letters of administration only seeks the permission of the Court to perform that duty. There is only a seeking of recognition from the Court to perform the duty. That duty is only moral and it is not legal. There is no law which compels the applicant to file the proceedings for probate or letters of administration. With a view to discharge the moral duty, the applicant seeks recognition from the Court to perform the duty. It will be legitimate to conclude that the proceedings filed for grant of probate or letters of administration is not an action in law. Hence, it is very difficult to and it will not be in order to construe the proceedings for grant of probate or letters of administration as applications coming within the meaning of an 'application' under Art. 137 of the Limitation Act, 1963."

15. Though the nature of the petition has been rightly described by the High Court, it was not correct in observing that the application for grant

of probate or letters of Administration is not covered by Article 137 of the Limitation Act. Same is not correct in view of what has been stated in The Kerala State Electricity Board's case (supra).

16. Similarly reference was made to a decision of the Bombay High Court's case in *Vasudev Daulatram Sadarangani v. Sajni Prem Lalwani* (AIR 1983 Bom. 268).

Para 16 reads as follows :

"16. Rejecting Mr. Dalapatrai's contention, I summarise my conclusions thus :-

(a) under the Limitation Act no period is advisedly prescribed within which an application for probate, letters of administration or succession certificate must be made;

(b) the assumption that under Article 137 the right to apply necessarily accrues on the date of the death of the deceased, is unwarranted;

(c) such an application is for the Court's permission to perform a legal duty created by a Will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed;

(d) the right to apply would accrue when it becomes necessary to apply which may not necessarily be within 3 years from the date of the deceased's death.

(e) delay beyond 3 years after the deceased's death would arouse suspicion and greater the delay, greater would be the suspicion;

(f) such delay must be explained, but cannot be equated with the absolute bar of limitation; and

(g) once execution and attestation are proved, suspicion of delay no longer operates".

The conclusion 'b' is not correct while the conclusion 'c' is the correct position of law.

18. In view of the factual scenario, the right to apply actually arose on 9.8.1999 when the proceedings were withdrawn by Smt. Nirmal Jeet Kaur. Since the petition was filed within three years, the same was within time and therefore the appeal is without merit, deserves dismissal, which we

direct but in the circumstances without any order as to costs.”
(emphasis supplied)

15. The petitioner does not deny having filed a civil suit (CS No. 21/1999, on 28-1-1999) before the Chandigarh court. In that case, he sought a declaration that the Will dated 4-2-1997 was not the last Will and testament of the deceased. A common judgment, in that suit, and another suit, was rendered on 30-7-2004. The petitioner's case was rejected; the Will he seeks to propound here was held not to be the last Will, but that the Will dated 4-2-1997 was the last Will of the deceased. Here the question is not so much about *res judicata*, or issue estoppel, as much as the issue of delay. The petitioner clearly was aware that there was a cloud over the Will sought to be propounded by him (claimed to have been executed by the deceased in 1995) by reason of another Will dated 4-2-1997. It became necessary for him, then, to assert his rights emanating from the Will of 1995. He did so in 1999, by filing a suit. The suit was dismissed on 30-4-2004. The petitioner had, in the meanwhile, taken no steps to approach the court having exclusive jurisdiction for probate or letters of administration. Even if the petitioner's knowledge of a dispute in relation to the Will now propounded by him, were to be assumed only in 1999, on a proper application of the law declared by the Supreme Court in *Kunvarjeet Singh Khandpur*, the right to apply accrued then. The three year period prescribed in Article 137 (of the schedule to the Limitation Act) therefore, commenced in 1999, and ended sometime in 2002. Even if the petitioner were to be given benefit of doubt, for some reason, as the suits (one of which was filed by him) were pending till 30-4-2004, he ought to have approached this court, seeking the reliefs he now claims, within three years from that date. He has, however, filed the present petition on 3rd March, 2009, clearly beyond the period of limitation.

16. This court is also mindful of the fact that the executor nominated in the Will, propounded by the present petitioner had approached this court, seeking probate. That petition (No. 46/2007) was dismissed on 2-4-2008, by the court, holding that the petitioner there (Arjun Raj Malhotra) had concealed material facts. The present petition propounds the same Will. The present petitioner was a party to those proceedings.

17. In view of the above discussion, it is held that the present probate petition is not maintainable, as it is time barred. Probate case No. 5/2009 is, therefore, dismissed.

DATED: 4th December, 2009

S. RAVINDRA BHAT
(JUDGE)