

March, 1983 allegedly executed by late Shri Karan Singh was dismissed.

2. The brief facts giving rise to the present Appeal are that Respondent No.2 is the eldest son of late Shri Karan Singh whereas Appellant Nos.1 and 2 are the other sons. The Appellants and the Respondent No. 2 have three more siblings i.e. two brothers and a sister who are not parties to the probate petition. The alleged Will dated 11th March, 1983 executed by late Shri Karan Singh is a registered Will and on a Probate Petition being filed by the Appellants, objections were filed by the eldest son that is the Respondent No.2 herein. By way of the alleged Will late Shri Karan Singh had bequeathed all his properties to his wife and his four sons excluding the Respondent No.2/Objector. The objections raised by the Respondent No.2 were that the alleged Will came into existence in March, 1983 however the Probate Petition was filed in September, 1997 that is more than 14 years after the execution of the Will and thus was barred by limitation. The second material objection was that the Will was executed under the influence and pressure of the Appellants as admittedly Shri Karan Singh was suffering from mouth cancer and thus was not in a position to talk, walk or consult any one or take independent decisions. It is further stated that late Shri Karan Singh died within 15 days of the execution of the alleged Will because of mouth cancer. As Shri Karan Singh was admittedly suffering from

mouth cancer, he was not in a position to dictate the Will which is typed in English and thus he was not in sound disposing mind at the time of the alleged execution of the Will. The third objection is that Shri Karan Singh had no authority to execute the Will in respect of joint family properties since the same were purchased from the earnings when the Objector was helping him in the business and having been purchased from joint family earnings, no Will could have been executed in respect of these properties. In view of the objections of the Respondent No.2 the following issues were framed by the learned Single Judge:-

- “1. Whether the petition is barred by limitation? - OPD
2. Whether the Will dated 11.3.1983 is signed and executed by deceased Karan Singh? - OPP
3. Whether late Karan Singh was mentally and physically sound to execute the Will? - OPP
4. Whether Karan Singh had power to execute the Will in respect to the properties in question? - OPP
5. Whether the suit has been correctly valued for the purpose of Court fee and jurisdiction?
6. Relief.”

3. Issue Nos.1 and 4 were decided against the Respondent No.2 whereas the Issue Nos. 2 and 3 were decided against the Appellants and with regard to Issue No.5 it was held that the same was unnecessarily framed and was not required to be answered. Before us the parties have urged Issue Nos.1, 2 and 3. With regard to Issue No.4 it may be noted that the Respondent No.2 had filed a separate civil suit

for partition and rendition of accounts being CS (OS) No.1179/1997 which was dismissed on 4th July, 2008 as the Respondent No.2 had failed to prove that the properties in question were joint family properties. An appeal against the said decision filed by the Respondent No.2 being RFA (OS) No.61/2008 was withdrawn vide order dated 12th July, 2010. Thus, the Issues that fall for determination before this Court relate to limitation and the valid execution of the Will with a sound disposition of the testator to execute the Will.

Issue qua Limitation

4. The learned Single Judge by the impugned order relying on the decision of a Division Bench of this Court in ***S.S. Lal vs. Vishnu Mitter Govil 112 (2004) DLT 877***, held that the right to apply for a Probate or a letter of administration was a recurring one and thus the petition was not barred by limitation. The decision rendered in ***S.S. Lal vs. Vishnu Mitter Govil (Supra)***, has been overruled by the Hon'ble Supreme Court in ***Kunvarjeet Singh Khandpur v. Kirandeep Kaur and Ors. (2008) 8 SCC 463*** and is, thus, no more a good law. The Hon'ble Supreme Court in ***Kunvarjeet Singh Khandpur v. Kirandeep Kaur and Ors. (Supra)*** and ***Krishan Kumar Sharma v. Rajesh Kumar Sharma (2009) 11 SCC 537***, has held that Article 137 of the Limitation Act, 1963 applies to a petition for grant of probate and letters of administration as well.

5. As regards when the right to apply accrues, one of us (Vikramajit Sen, J.) in ***Pamela Manmohan Singh v. State and others, 83 (2000) DLT 469*** held that the period of three years would surely commence at least from the date on which the legatee to a Will could be justifiably ascribed with the knowledge that the Will on which his claim is founded is likely to be disputed by other persons, especially the natural heirs of the testator. The relevant extract from the decision are as under:-

“3. I have taken this view after considering the decision in Ramanand Thakur Vs Permanand Thakur : AIR 1982 Pat 87, where it was observed that the "right to apply for a probate accrues from day to day so long as the Will remains unprofaned. In other words, the right to apply accrues every day and the cause of action for an application for probate arises every moment so long as the will remains unprofaned and, therefore, for such an application there is no period of limitation and for taking this view we find full support from the Calcutta case which also finds support from the view taken by the Madras High Court in the case of Gnanmuthu Upadesi Vs. Vana Koipillai Nadan, (1894) 2nd 17 Mad. 379). Therefore, while holding that the Art. 137 of the new Limitation Act applies to any petition or application filed under any Act, we do not feel any difficulty to come to the conclusion that so far as the application for grant of a Probate or Letters of Administration is concerned, they are not governed by any Article of the Limitation Act. The application accordingly fails and, is hereby dismissed but in the circumstances, we shall leave the parties to bear their own costs."

4. It appears to me, with due deference to the Learned Judges, that while correctly appreciating in paragraph 4, that the Apex Court had overruled its earlier view that Article 137 of the Limitation Act applied only to applications made under the Civil Procedure Code, they were influenced by decision rendered on the basis of the old Limitation Act.

5. In Kerala State Electricity Board, Trivandrum Vs T.P. Kunhaliumma: [1977] 1 SCR 996, Article 137 of the Limitation Act, 1963 was held to "apply to any petition"

"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: (1969)II LLJ 651SC (supra) 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."

6. The decision in Shobha Kshirsagar Vs Smt. Janki Kshirsagar & Anr. : AIR 1987 MP 145, in which a Learned Single Judge held that Art. 137 cannot apply to an application for probate, with respect, cannot be reconciled with the decision of the Apex Court in the Kerala State Electricity Board's case (supra). The Learned Judge proceeded on the foundation of the decisions rendered by some High Court, which decisions were predicated on the old Limitation Act. Therefore, reliance on precedents prior to the rendering of the decision in the Kerala State Electricity Board's case (supra) would be inappropriate. For these very reasons I feel constrained not to follow the ratio in Balwant Vs Mainabai : AIR 1991 MP 11.

7. In a decision of a Division Bench rendered in Hari Narain Vs. Subhash Chander MANU/PH/0163/1985, the argument that no limitation had been prescribed in filing of an application for revocation of a probate granted under the Succession Act was referred to as an "astounding proposition of law put forth by the learned counsel for the Applicant". After discussing the law as enunciated by the Supreme Court, it was held by the learned Division Bench that Article 137 of the Limitation Act, 1963 would apply to any petition or application filed in a Court where no other period of limitation had been prescribed. After careful consideration I would extend the ratio of this decision mutates mutans to also cover cases pertaining to the grant of probate, where it can be fairly assumed that the Petitioner had knowledge that the Will was likely to be

disputed. Article 137 of the Limitation Act, 1963 reads as under:

Description of suit	Period of Limitation	Time from which period begins to run when the right to apply accrues.
137. Any other application for which no period of limitation is provided elsewhere in this Division.	three years	When the right to apply accrues.

The period of three years would surely commence atleast from the date on which a legatee under a Will could be justifiably ascribed with the knowledge that the Will on which his claim is founded is likely to be disputed by other persons especially the natural heirs of the Testatrix. By way of adumbration, hypothetically, a Will may have been executed in Delhi in 1950. The bequests made and dealt with therein may not have come into any dispute for several decades. It could be that some legatees were in possession of the properties with the tacit permission or approval of the other legatees, which approval was subsequently withdrawn. So long as the rights of any particular legatee are to emanate and flow from the Will, probate proceedings ought to be filed atleast within three years from this conjectured withdrawal of permission. That would then be the latest date on which "the right to apply accrues". This would be the most appropriate and meaningful interpretation given to the words "when the right to apply occurs". The applicant in the present case must surely have been well aware that the Will would be indefatigably contested. His right to apply surely accrued on the death of the alleged Testatrix Dr. Raseel Kohil on 11.10.1987. Yet he chose not to initiate probate proceedings, and over a decade has passed thereafter."

In the present case, this Probate Petition No. 33/1997 was filed on 5th September, 1997. It may be noted that Respondent No.2 had filed a civil suit for partition and rendition of accounts being CS (OS)

No. 1179/1997 on 28th May, 1997 inter alia alleging that the properties were Joint Family Properties as they were purchased from joint funds. Prior to the said suit, Respondent No.2 had filed a civil suit bearing No. 1355/84 for declaration that the alleged Will dated 11.3.1983 executed by late Sh. Karan Singh was null and void with no effect on the property of the plaintiff therein and by order dated 19th March, 1996, the said suit was disposed of with the observations that unless and until Defendant Nos. 1 to 2 therein obtained letter of administration or probate, they shall not produce the Will before any authority with respect to the property being subject matter of the Will and the contention of the Appellants herein that there was no need of any probate in respect of the Will executed in Delhi, was rejected by this Court.

Thus, in our view, the right to apply for probate clearly accrued on knowledge of the suit No. 1355/1984 being filed by Respondent No.2. The probate petition having been filed much beyond the three years' period of limitation, was barred by limitation.

While, dealing with this issue we may also deal with the Objection of learned counsel for the Appellants that in the absence of cross Appeal/cross Objection by the Respondent No.2 qua this finding of the learned Single Judge, the same cannot be raised in the present Appeal. We negate this contention being fortified by a decision of the Hon'ble

Supreme Court in ***Banarsi and others v. Ram Phal***, AIR 2003 SC 1989 wherein it was held :-

“9. Any respondent though he may not have filed an appeal from any part of the decree may still support *the decree* to the extent to which it is already in his favour by laying challenge to a *finding* recorded in the impugned judgment against him. Where a plaintiff seeks a decree against the defendant on grounds (A) and (B), any one of the two grounds being enough to entitle the plaintiff to a decree and the Court has passed a decree on ground (A) deciding it for the plaintiff while ground (B) has been decided against the plaintiff, in an appeal preferred by the defendant, in spite of the finding on ground (A) being reversed the plaintiff as a respondent can still seek to support the decree by challenging finding on ground (B) and persuade the appellate court to form an opinion that in spite of the finding on ground (A) being reversed to the benefit of defendant-appellant the decree could still be sustained by reversing the finding on ground (B) though the plaintiff-respondent has neither preferred an appeal of his own nor taken any cross objection. A right to file cross objection is the exercise of right to appeal though in a different form. It was observed in ***Sahadu Gangaram Bhagade v. Special Deputy Collector, Ahmednagar and Anr.*** -: [1971] 1 SCR 146 that the right given to a respondent in an appeal to file cross objection is a right given to the same extent as is a right of appeal to lay challenge to the impugned decree if he can be said to be aggrieved thereby. Taking any cross objection is the exercise of right of appeal and takes the place of cross-appeal though the form differs. Thus it is clear that just as an appeal is preferred by a person aggrieved by the decree so also a cross objection is preferred by one who can be said to be aggrieved by the decree. A party who has fully succeeded in the suit can and needs to neither prefer an appeal nor take any cross objection though certain finding may be against him. Appeal and cross-objection - both are filed against decree and not against judgment and certainly not against any finding recorded in a judgment. This was well-settled position of law under the unamended CPC.

10. CPC Amendment of 1976 has not materially or substantially altered the law except for a marginal difference. Even under the amended Order 41 Rule 22 Sub-rule (1) a party in whose favour the decree stands in its entirety is neither entitled nor obliged to prefer any cross objection. However, the insertion made in the text of Sub-rule (1) makes it permissible to file a cross objection against a finding. The difference which has resulted we will shortly state. A respondent may defend himself without filing any cross objection to the extent to which decree is in his favour, however, if he proposes to attack any part of the decree he must take cross objection. The amendment inserted by 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:

(i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent;

(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent;

(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.”

“11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross objection. The law remains so post amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross objection; the amendment made in the text of Sub-rule (1), read with the explanation newly inserted, gives him a right to take cross objection to a finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring

such cross objection is spelled out by Sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent."

Issue qua valid execution of the Will

6. The principles to be applied by a Court for grant of probate have been succinctly laid down by the Hon'ble Supreme Court in ***Shashi Kumar Banerjee & Others v. Subodh Kumar Banerjee AIR 1964 SC 529*** wherein their Lordships held:-

"4. The principles which govern the proving of a will are well settled; (see H. Venkatachala Iyengar v. B. N. Thimmajamma, AIR 1959 SC 443 and Rani Purnima Devi v. Khagendra Narayan Dev, : (1962) 3 SCR 195 : (AIR 1962 SC 567). The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the

testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. It is in the light of these settled principles that we have to consider whether the appellants have succeeded in establishing that the will was duly executed and attested."

7. It is not for the Court to consider whether the disposition of the property was good or bad. The duty of the Probate Court is to see whether prima facie, the document constitutes a Will and if so whether the propounder has been able to satisfy the conscience of the Court that the Will was a validly executed and genuine document, signed out of free will, propounded in a sound disposition of mind, after having understood the nature and effect thereof. The Privy Council in ***Motibai Hormusjee Kanga v. Jamsetjee Hormusjee Kanga***, AIR 1924 PC 28 observed "a man may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing the Court will not interfere with the exercise of his volition."

8. Much emphasis has been laid that the alleged Will is a registered Will but registration of a Will is not mandatory. The Appellant No. 1 who had appeared in the witness box has stated that their father executed the Will dated 11th March, 1983 which was duly registered with the Sub-Registrar, Delhi as document No. 686 in Additional Book No.3, Volume No.272 on pages 103 to 104. It is well settled, merely because the Will is a “registered Will”, it is no assurance that the same is genuine and validly executed document with a sound disposition of mind and free Will.

9. The attesting witness has stated that he had witnessed the Will dated 11th March, 1983 executed by Shri Karan Singh who had signed the Will after the same was signed by Shri Karan Singh. He states that the Will was drafted in his presence and he put his signatures in the presence of late Shri Karan Singh and other witnesses and Shri Karan Singh also signed in his presence. It may be noted that the factum of signing of the Will has not been disputed by the Objector because he himself has suggested to the witness that the Will was signed by his father at the office of the lawyer. But what is materially overlooked is that the Will is in English whereas the signatures of late Shri Karan Singh appear in Urdu. There is no evidence on record to show that the Will was prepared on the dictation of the testator and that contents of the Will signed by Shri Karan Singh were read over and explained to him in Urdu or in a language known to him. Even as per PW2 Ajit Singh

on a question as to whether his father knew how to read and write English, it is stated that he knew a small bit of reading and writing in English, however he used to sign in Urdu.

10. Yet another circumstance castigates the genuineness of the Will, the medical condition of the testator. None of the witnesses stated that the Will was prepared on the dictation of the testator. The evidence is with regard to the registration of the Will and not the preparation thereof. It is an admitted position that the testator was suffering from mouth cancer and was under treatment. He died on 26th March, 1993 that is 15 days after the execution of the Will. Once this is the admitted fact situation a suspicion is caused on the soundness of disposition of mind of the testator and the onus was on the Appellants to prove that he was in a sound disposing mind and the Will was prepared on his directions/dictation. No cogent evidence of the doctor who treated the testator or the lawyer who prepared the Will is brought on record. The Appellants are not even aware of the lawyer who prepared the Will. The onus to prove that the Will was validly propounded was on the Appellants which had to be discharged by leading cogent and convincing evidence, in view of the Medical condition of the testator to remove all suspicions from the alleged Will. Merely because it is stated by the Objector that his father continued with his business till his death did not discharge the onus of the Appellants to prove the medically fit disposition of the testator, specially due to the objection that because of

mouth cancer he was not in a position to speak. In our view the Appellants have not discharged the onus to prove that the Will is free from suspicion.

12. We don't find any merit in the Appeal. The same is dismissed. No order as to costs.

(MUKTA GUPTA)
JUDGE

(VIKRAMAJIT SEN)
JUDGE

AUGUST 12, 2010
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