

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO.No. 380-82/2005**

% *Reserved On: 22.03.2011*
Decided On: 31.03.2011

YOGESH DUGGAL AND ORS. Appellants
Through: Mr. K.R. Gupta, Adv.

Versus

STATE & ORS. Respondents
Through: None

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

- | | | |
|----|---|-----|
| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

: **MOOL CHAND GARG,J.**

1. This appeal arises out of an order dated 28.05.2005 passed by the learned Additional District Judge dismissing the probate petition filed by the appellants on the ground that the appellants had miserably failed to prove the due execution, attestation and registration of the Will in question . Also, they had not explained why the Will was registered after seven years of its alleged execution and further failed to explain the delay of more than nine years in filing the probate petition after the death of the testatrix . The appellants thus being aggrieved by the order has impugned it before us by way of the present appeal.

2. Briefly stating the facts of the case are; the appellants filed a petition under Section 276 of Indian Succession Act, 1925 in November, 1994 for grant of probate of a Will dated 12.08.1971 of their mother Late Smt. Puran Devi who expired on 20.02.1984. Her husband predeceased her. She was survived by five sons and three daughters. The property bequeathed under the Will in question comprises of a

house bearing No. 6-A/46, WEA, Karol Bagh, New Delhi. The said house is a 2 ½ storey built house.

3. The testatrix vide her Will dated 12.08.1971 had bequeathed the ground floor in favour of her son Mr. Om Prakash Duggal, appellant No.1 who has died and is now being represented by his legal heirs while the first floor including Barsati Floor had been bequeathed in favour of her other son appellant No.2, Mr. Vijay Prakash Duggal. The testatrix had not given any share to her other children. The Will in question was got registered by the testatrix in the office of Sub-Registrar, Asaf Ali Road New Delhi during her lifetime on 21.02.1978 vide document No. 269, Book No. 3, Volume No. III on pages 121-122. All the other children of the deceased testatrix except the legal heirs of her predeceased son Ved Prakash Duggal had filed their no objections to the grant of probate in respect of Will dated 12.08.1971 in favour of the appellants.

4. In the objections filed by the legal heirs of Mr. Ved Prakash Duggal, who are the respondents, it was alleged that the testatrix was not competent to execute the Will in respect of the property bequeathed under the said Will as it was a joint family property. It was further alleged that the Will in question was not executed by the testatrix in a sound and disposing mind as she was completely deaf in August 1971 and it was not possible for anybody to communicate with her as to make her understand the Will and its contents.

5. Further, the respondents also challenged the execution, validity, contents and due attestation of the alleged Will on the ground that the testatrix did not know English Language and, therefore, could not have understood the recitals contained in her said Will. Taking advantage of this fact, the appellants had procured the Will from the testatrix through misrepresentation as it was also evident from the recitals in the Will where it was mentioned that Shri Ved Prakash Duggal and Sh. Krishan Prakash Duggal had become owners of a plot in Safdarjung Enclave and as such were not in need of the house in question and on this ground her son Mr. Ved Prakash Duggal has been disinherited.

However, according to the respondents, the plot in Safdarjung Enclave did not stand in the name of Ved Prakash Duggal rather its lease by the Government was in the name of Mr. Krishan Prakash Duggal, hence the appellants had deliberately misrepresented this fact to the testatrix.

6. The appellants filed their reply to the objections filed on behalf of the legal heirs of the predeceased son of the testatrix, Mr. Ved Prakash Duggal. The appellants have denied all the allegations contained in the objections and in specific thereto they have reiterated, reasserted and reaffirmed the averments contained in their petition to be correct.

7. From the pleadings of the parties, following issues were framed on 12.03.1996

1. Whether Smt. Puran Devi executed a valid Will dated 12.08.1971 in respect of property bearing No 6A/46, WEA, Karol; Bagh, New Delhi in favour of the petitioners, as alleged?
2. Whether petition has not been filed in accordance with law for the reasons particularly disclosed in paras 2,3 and 4 of the preliminary objections of written statement filed on behalf of the objectors?
3. Whether Smt. PURAN devi was incompetent to execute the Will in question as alleged in para 3 of reply on merits of the objections?
4. Relief.

8. The Ld. ADJ also framed following additional issue on 20.12.2003

“Whether the petition is barred by limitation?”

9. In order to prove the Will in question, four witnesses had been examined on behalf of the appellants. They were PW-1, Mr Krishan Kumar Burman, one of the attesting witness of the Will in question, PW-2 Mr R.C Sharma, a UDC from Record Room (Civil), Tis Hazari Courts, PW-3 Mr Vijay Prakash Duggal appellant No 2 himself and PW-4 Mr Surinder Kumar a LDC from the office of Sub Registrar-III, Asaf Ali Road, New Delhi whose statement remained incomplete as he could not

produce the summoned record relating to the registration of the Will in question.

10. On the other hand, the respondents did not produce any evidence in support of their objections rather after they cross-examined the appellant's witnesses extensively, they stopped appearing in the matter and were proceeded ex-parte. As such there is no evidence in rebuttal and the only evidence is the cross-examination of the witnesses of the appellants while no evidences were led by the respondents in support of their objections.

11. On the basis of the evidence recorded by the appellants, the learned ADJ gave his findings regarding different issues. As far as issue No.2 is concerned, it is based upon the pleadings of the respondents/objector in preliminary objections No. 2, 3 and 4. Considering the amendment made in the petition with the permission of the Court and also the factum of property being located in Delhi and testatrix also being expired in Delhi, the said issue was decided against the objectors.

12. However, regarding limitation as the petition was filed by the appellants after more than 9 years of the death of the testatrix, the Ld ADJ had observed that:

"The testatrix had expired on 20.02.1984. The present petition for probate was filed by the petitioners on 31.03.1993 i.e after more than 9 years of her death. Article 137 of the Limitation Act which is residuary article prescribes a limitation of three years for filing of an application which is to be reckoned from the date the right to apply accrues to the person propounding the Will. While framing the additional issue of limitation, my Ld Predecessor Shri G.P Mittal , ADJ Delhi had observed that the limitation in the present case is a mixed question of fact and law and therefore gave an opportunity to the petitioners to lead evidence on this point. The petitioners have not led any evidence worth the name to show why they took more than 9 years after the death of the testatrix in filing the present probate petition particularly when as per testimony of PW-2 Mr. R.C. Sharma. There was a dispute between the parties with regard to the Will in question much prior to the death of the testatrix. This shows that the petitioners were well aware that there was a dispute regarding the authenticity of the

Will of their deceased mother propounded by them in this case immediately on the death of their mother on 20.02.1984. This case on the point of limitation is covered by a judgment of Hon'ble Delhi High Court in Pamela Man Mohan Singh Vs State & Ors., 83 (2000) DLT 469. Under the circumstances, I hold that the present petition is barred by limitation. This issue is accordingly decided in favour of the objectors and against the petitioners.

13. As per Issues No 1 & 3, since both were inter connected hence were dealt together and the relevant observations made by the Id ADJ were as follows:-

“In the present case the petitioners have examined PW-1 Mr Krishan Kumar Burman, one of the attesting witnesses of the Will in question. The statement of this witness was recorded in two installments, firstly on 19.02.1997 and again on 20.05.1998. There was a gap of about 15 months between the two dates of recording of his statement. PW-1 Mr. Krishan Kumar Burman is the son-in-law of the deceased testatrix. In his statement recorded before the Court on the first date i.e. 19.02.1997, he categorically deposed that the testatrix had not signed anywhere on her will in question in his presence. He had further deposed on that day that he had not inquired from the testatrix whether she had signed on the document purported to be her will or not. He also deposed on 19.02.1997 that the testatrix was of sound disposing mind at the time of registration of document before the Sub-Registrar but her mental condition was not sound 7-8 years prior to her death. He said that he was not in a position to identify the signatures of the testatrix on her will dated 12.08.1971.

16. The Id. counsel for the petitioners cross examined PW-1 Mr. Krishan Kumar Burman with the leave of the Court. PW-1 was cross-examined by him after about 15 months on 12.05.1998. The petitioners' Id. counsel put the entire case to this witness in the form of suggestions which he obviously admitted. I am of the view that the answers given by the witness namely PW-1 in reply to the leading suggestions are of no consequence and the same do not prove the due execution, attestation and registration of the will in question. I have gone through the contents of the will Ex.PW1/1 and at page 2 of the said will, there is a handwritten endorsement in portion between Learned counsel for the appellant to A2 in the hand of PW-1. There is no date below the signatures of PW-1 on the said endorsement. PW-1 has deposed before the Court on 19.02.1997 that he had not drafted the said will Ex.PW1/1 as mentioned in portion Learned counsel for the appellant to A2. This statement of

PW-1 runs contrary to the intrinsic evidence provided by the will regarding its drafting contained in Ex.PW1/1. Although the will Ex.PW1/1 is shown to have been executed by the deceased testatrix in presence of two attesting witnesses namely Smt. Kaushalya Devi and Mr. Krishan Kumar Burman but PW-1 Mr. Krishan Kumar Burman has nowhere whispered in the whole of his testimony recorded on 19.02.1997 and 20.05.1998 about the presence of Smt. Kaushalya Devi at the time of execution of the said will or her signing the said will as its attesting witness. This shows that PW-1 could not prove the due attestation of the will as required by Section 63(c) of the Indian Succession Act, 1925.

17. According to PW-1 Mr. Burman both the petitioners along with their other two brothers Mr. V.P. Duggal and Mr. K.P. Duggal were present at the time will in question was allegedly executed by the testatrix and according to him the will was prepared on suggestions given by him to the advocate through whom the will was got prepared. He has deposed in his statement recorded on 20.05.1998 that he did not remember the date when the will was written and he also did not know as to who had drafted the said will. He also could not tell as to who had typed the will in question. PW-1 Mr. Burman has admitted that the testatrix was hard of hearing and was undergoing treatment for that ailment from a Doctor whose name he could not tell. He also could not tell for how long prior to execution of the will in question she was undergoing treatment for her deafness. In his further cross-examination recorded on 20.05.1998, he has deposed that the writing contained in portion from point Learned counsel for the appellant to A2 on will Ex.PW1/1 was written by him in the office of Sub-Registrar, Asaf Ali Road, New Delhi. It is a matter of record that the will Ex.PW1/1, though it was allegedly executed by the testatrix on 12.08.1971 but it was got registered by her on 21.02.1978. The statement of PW-1 that he had written the writing contained in portion from Learned counsel for the appellant to A2 in will Ex.PW1/1 in the office of Sub-Registrar, Asaf Ali Road, New Delhi shows that the said writing was procured from him after about 7 years of the alleged execution of the Will. This also creates a doubt on its authenticity. PW-1 has admitted in his cross that the testatrix did not know English language. The will Ex.PW1/1 is couched in English language and there is absolutely no evidence on record to show as to whether anybody had explained the contents of her will to her before her signatures were obtained on the said will. This creates a strong suspicion about the genuineness of the will propounded by the petitioners particularly as the testatrix was hard of hearing. It was put to PW-1 Mr. Burman in his cross examination that the testatrix was not able to hear at all and could only

understand by signs and lip reading of her near and dear ones. He was asked what he had to say on this point. PW-1 Mr. Burman replied to this suggestion by stating that the testatrix could hear but she used to take some time and necessity of repetition also used to arise. PW-1 could not tell whether the testatrix had suffered a hip fracture in March/April, 1969 and he stated that this fact must be known to her family members. PW-1 Mr. Burman is a son-in-law of the testatrix and it is strange that he did not know that his mother-in-law had suffered a hip fracture in March/April, 1969 as admitted by petitioner No.2 (PW-3) in his evidence before the Court.

A careful scanning of the entire evidence of PW-1 Mr. Burman would show that his testimony hardly inspires confidence of the Court as it is full of contradictions on material points discussed hereinabove and the same casts a serious doubt on the genuineness of the will propounded by the petitioners. It is further evident from the testimony of Mr. Burman that the testatrix on account of her deafness/hard of hearing was not capable of understanding the nature and extent of disposition made by her in her will in question and therefore for that reason also the will propounded by the petitioners cannot be said to be a genuine document. As per testimony of petitioner No.2 (PW-3) both the petitioners had played an active role in the alleged execution of will propounded by them. The testimony of petitioner No.2 (PW-3) is hardly of any consequence after we ignore the testimony of PW-1 Mr. Burman, one of the attesting witnesses of the will in question.

18. In view of the above, I have no manner of doubt left in my mind except to hold that the petitioners have miserably failed to prove the due execution, attestation and registration of the will in question. They have not explained why the will was got registered after seven years of its alleged execution and they have further failed to explain delay of more than nine years after the death of the testatrix in filing of the present probate petition. By no means the will Ex.pW1/1 can be said to be a last will and testament of the testatrix late Smt. Puran Devi. Both these issues are decided accordingly against the petitioners.

14. Thus, the learned ADJ dismissed the probate petition both on the grounds of delay and lacuna in evidence regarding execution and attestation of the Will in question as per requirement of law and the Will being shrouded with suspicious circumstances. Hence the present appeal.

15. Before us, the appellants have submitted that the said Will dated 12.08.1971 was a genuine Will, as the father of the respondents and also one of the sons of the testatrix Late Shri Ved Prakash Duggal had filed a suit in February, 1974 against the other sons and the testatrix herself for cancellation of the Will in question for partition of properties No 6A/46, W.E.A Karol Bagh, New Delhi, and plot No B-4/67, Safdarjung Extension Residential Area, New Delhi claiming that the said Will was executed by way of family arrangement but it did not represent true state of affairs and therefore should be cancelled. The suit was compromised vide application dated 16.03.1974 under which Ved Prakash Duggal received Rs 25,000/and he relinquished all his rights, interests and share in the said two properties.

16. The appellants also submit that the Will was registered during the life time of testatrix. The attesting witnesses also appeared before the Sub-Registrar and none of the children objected except the legal heirs of Late Shri Ved Prakash Duggal who after the closure of the appellant's evidence were proceeded ex-parte. Hence in such facts and circumstances where the Will in question was in knowledge of all the heirs of the testatrix in her life time itself which was by way of family arrangement it could not be said that it was suspicious or not a genuine document.

17. As regards to the second attesting witness who was the son-in-law of the testatrix, Shri K.K.Burman PW-1, it is submitted by the appellants that his statement was recorded on 19.02.1997 and 20.05.1998/10.03.1999 and though he was a close relation of all the legal heirs of the late testatrix but he had neither any interest in the property nor was he interested in the appellants. Further whenever any family arrangement takes place, it was not uncommon that the relatives assemble and give suggestions about settlement, hence any suggestion given by the witness for drafting the Will which was adopted for settlement of disputes amongst the heirs of the testatrix would not be considered unnatural. Hence according to the appellants the witness PW-1 was natural and unbiased witness.

18. The appellants further submit that in his statement recorded on the second occasion, PW-1 K.K.Burman stated that the testatrix had signed on the Will at points X,X-1 and X-2 in his presence after understanding the contents of the same. On the first occasion, although he had identified signatures of the testatrix on the said points but had stated that she had not signed in his presence. Later he explained this contradiction by stating that the Will was written twenty five years back approximately and no lawyer had shown him the copy of the Will, The appellants also submit that PW-1 in his statement on the first occasion had stated that the testatrix was of sound disposing mind at the time of the registration of the document before the Sub-Registrar but her mental condition was not sound 7/8 years prior to her death. There was no evidence in rebuttal.

19. As regards to the requirement of the attesting witness signing the Will in the presence of the testatrix, the appellants submit that the witness PW-1 in his cross-examination stated that his signature at point A of the petition are his and that he signed it after going through its contents. The witness's signature is under head "verification by attesting witness" of the probate petition, reading: "I, KRISHAN Kumar Burman, one of the witnesses to the Will and testimonies of the testator, the late Smt. PURAN Devi mentioned in the above noted petition, declare that I was present and saw the testator affix her signature thereto and the witnesses also put signatures in her presence", there was no further cross-examination on this aspect. The contents of this verification, thus form part of statement of the witness. Moreover, in his entire cross-examination no question or suggestion was put to PW-1 that Smt. Kaushalya Devi, the other attesting witness, was not present at the time of execution of the Will. However, the appellant Vijay Prakash Duggal as PW-2 in his statement deposed that Smt. Kaushalya Devi had signed on the Will at point B and she had died in the year 1993. Thus appellants submit that the requirements of Section 63 of the Indian Succession Act 1925, were duly satisfied.

20. Further on the issue of limitation, the appellants submit that the testatrix died on 20.02.1984 and the probate petition was filed on 01.09.1993. The cause of action to apply for probate for the first time arose on 20.02.1984, the date of death of the testatrix and was a recurring one. Hence according to the appellants it arose on each day entitling the appellants to file probate petition during the ensuing three years continuously. Therefore the petition was filed within time.

21. The appellants have also relied upon following judgments :-

1. *Kunvarjeet Singh Khandpur Vs Kirandeep Kaur, (2008) 8 SCC 463*
2. *Krishan Kumar Sharma Vs Rajesh Kumar Sharma 2009 (5) Scale 286*
3. *S.S.Lal (Shri) Vs Shri Vishnu Mitter, 2004 V AD (Delhi) 509*
4. *Kale Vs Deputy Director, AIR 1976 SC 807*
5. *Shashi Kumar Banerjee Vs Subbodh Kumar Banerjee, AIR 1964 SC 807*
6. *Naresh Charan Vs Paresh Charan, AIR 1955 SC 363*
7. *Prithwis Kumar Mitra Vs Bibhuti Bhushan Mitra, (1966) ILR Calcutta 408(DB)*
8. *Sher Muhammad Khan & Ors Vs Depurt Comm. Of Bahraich, AIR 1920 Awadh 87 (DB)*
9. *Makhan Mal L. Ram Ditta Mal Vs Mst. Pritam Devi, AIR 1961 Punjab 411 (DB)*

22. I have heard the learned counsel for the appellant and have gone through the written submissions filed by them besides perusing the record of the trial Court. I have also gone through the judgments cited at the bar. At the very outset I would like to discuss the *Kunvarjeet Singh Khandpur (Supra)* case which has also been cited by the appellants. The appellants relying upon a part of the judgment have submitted that right to file the probate petition is a continuing right which can be exercised at any time after death of the testator/ testatrix. They have also submitted that the application merely seeks recognition from court to perform a duty. However, according to me the appellants have misconstrued the judgment inasmuch as the facts of the

abovementioned judgment were different from the facts of the case in hand. In the *Kunvarjeet Singh Khandpur (Supra)* case, the Testator had expired on 5.10.1995 and the petition under Section 278 of the Succession Act 1925 for grant of letters of administration was filed on 7.08.2002. It was claimed that the probate petition was barred by limitation. However both the Learned Additional District Judge as well as the High Court held which was later upheld by the Supreme Court that the cause of action arose when an earlier probate petition filed in respect of the Will dated 09.09.1991 was withdrawn on 09.08.1999. The probate petition filed on 07.08.2002 was within three years and therefore was within time. Thus Article 137 of the Limitation Act had clear application.

23. Though it is rightly been stated that an application is for the court's permission to perform a legal duty created by a Will and is a continuous right which can be exercised any time after the death of the deceased but this right can be exercised as long as it survives. It is also true that that the application can be filed beyond the period of 3 years but such delay must be clearly explained. In the instant case, the appellants had filed the probate petition after 9 years but had nowhere explained the reason behind such a huge delay even though opportunity was granted to the appellants. The relevant extract from *Kunvarjeet Singh Khandpur (Supra)* case dealing with the application of Article 137 of Limitation Act is quoted here under:-

“Two questions need to be addressed in this appeal. Firstly, about the applicability of Article 137 of the Limitation Act and secondly, even if it is applicable whether the petition was within time.

11. In *Kerala SEB v. T.P. Kunhaliumma*—it was inter alia observed as follows:

“18. The alteration of the division as well as the change in the collocation of words in Article 137 of the Limitation Act, 1963 compared with Article 181 of the 1908 Limitation Act shows that applications contemplated under Article 137 are not applications confined to the Code of Civil Procedure. In the 1908 Limitation Act there was no division between applications in specified cases and other applications as in the 1963 Limitation Act. The words ‘any other application’ under Article 137 cannot be said on the principle of *ejusdem generis* to be applications under the Civil

Procedure Code other than those mentioned in Part I of the third division. Any other application under Article 137 would be petition or any application under any Act. But it has to be an application to a court for the reason that Sections 4 and 5 of the 1963 Limitation Act speak of expiry of prescribed period when court is closed and extension of prescribed period if the applicant or the appellant satisfies the court that he had sufficient cause for not preferring the appeal or making the application during such period.

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*³ 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 the Judge of the Principal Civil Court.

12. Further in *S.S. Rathore v. State of M.P.*:-

“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 467 refer to those decisions as on the authority of the judgment of this Court in *Pierce Leslie & Co. Ltd. v. Violet Ouchterlony Wapshare*⁵ 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.”

13. Article 137 of the Limitation Act reads as follows:

*“Description of suit Period of limitation Time from which
period begins to run*

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 crucial expression in the petition (*sic* Article) 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 and 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 v. E. Ramiah*⁶. 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 letters 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 Article 137 of the Limitation Act, 1963

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 *Kerala SEB case*².

15. Similarly reference was made to a decision of the Bombay High Court in *Vasudev Daulatram Sadarangani v. Sajni Prem Lalwani*⁷. Para 16 reads as follows: (AIR p. 270)

"16. Rejecting Mr Dalpatrai'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."

Conclusion (b) is not correct while Conclusion (c) is the correct position of law.

16. 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.

24. In view of the aforesaid, the appellants were required to explain the delay of 9 years which they have filed today. Further the reproduction of the statement of the witnesses examined by the appellants to prove the attestation and execution of the Will goes to show that:

- i) The only attesting witness, namely, Sh. K.K. Burman firstly denied the signatures of the testatrix on the Will itself when his examination-in-chief was recorded and it is only on the suggestion given by the appellant during his cross-examination after about 2 years that he remembered the testatrix signing the Will in question.
- ii) The second attesting witness has not been examined by the appellant, the attestation of the Will by the second witness has not been even whispered by Sh. K.K. Burman in his examination-

in-chief or in cross-examination which is an essential requirement to prove attestation in terms of Section 63(c) of the Indian Succession Act.

- iii) The Will is in English. Admittedly, the testatrix was a deaf person and there is nothing on record to show as to whether she knew English language or not. Rather, Sh. K.K. Burman accepted that the deceased testatrix did not know English. In these circumstances, it was necessary for the appellant to prove that the deceased testatrix knew the contents of the Will and had signed the same after understanding the contents thereof.
- iv) There is some endorsement on the Will (portion A1 to A2) which admittedly has been done at the time of the registration of the Will i.e. 7 years after its execution. This also was required to be proved in the same manner as the Will is required to be proved. This again has not been done.

25. In these circumstances, even though the respondent/objector had not come in the witness box to support their objections though have cross-examined the witnesses of the appellant, the Court while granting the probate is obliged to see that there are no legal impediments in the grant of the probate. In this case, the delay in filing the probate petition as well as non-compliance of Section 63(c) of the Indian Succession Act are good reasons for refusal of the grant of probate petition and, thus, I do not find any reason to interfere with the decision taken by the learned ADJ. The appeal is accordingly dismissed with no orders as to costs.

26. TCR be sent back along with a copy of this order.

MOOL CHAND GARG,J

MARCH 31, 2011

'sg/anb'