

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

+ **FAO No.369/2004**

% **15th January, 2014**

SMT. VEENA

.....Appellant

Through: Mr. Kumar Mukesh, Advocate.

VERSUS

STATE AND ORS.

..... Respondent

Through: Mr. Kuldeep Kumar, Advocate for
respondent No.2.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal has been filed against the judgment of the probate Court dated 4.8.2004 by which the probate petition has been dismissed as being barred by limitation.

2. The petition was dismissed after framing of preliminary issue of limitation. The relevant observations of the Court below holding the petition

as barred by limitation are contained in paras 10 to 14 of the impugned judgment and which read as under:-

“10. Statement of the petitioner was recorded under Order X CPC on 30.1.2004 before settlement of issues. It would be fruitful to reproduce the same hereunder for ready reference:

“Late Dewan Ram Gopal died in the year 1980. I am illiterate. I discovered the Will dated 28.4.80 of Dewan Ram Gopal after 1/1-1/2 years of his death. I had received some notice from the DDA and I had gone to Shri Nand Lal to make enquiries about the said notice when Shri Nand Lal had told me that late Shri Ram Gopal had left a Will which was in his possession. He searched out the Will from his paper and handed over the same to me.

I do not know if Shri Nand Lal at that time was aware of the death of Shri Ram Gopal or not.

I might have come to know that Chandra Prabha Gupta had obtained probate of some Will of Dewan Ram Gopal about 10 years back from today. I had filed this petition for grant of probate only in the year 1998 as I was advised by the Presiding Officer of the court in other litigations between me and Smt. Chandra Prabha Gupta.”

11. There are certain admitted facts. The Will propounded by the petitioner is alleged to be executed on 28.4.1980. Late Dewan Ram Gopal expired within 15 days of the making of the alleged Will i.e., on 13.5.1980. Respondent No.13 Smt. Chander Prabha Gupta had obtained probate of the Will dated 15.4.1980 and petitioner herein has filed a petition for revocation of the said probate on 19.5.1989, which is pending adjudication in this court and is fixed for 10.8.2004. A perusal of the statement under Order X CPC dated 30.1.2004 would also show that the petitioner was aware at least 10 years back from January, 2004 i.e in January, 1994 about obtaining of the probate of the Will by said Smt. Chander Prabha Gupta though from the application for revocation under Section 263 of the Act filed by the petitioner, it is evident that the said petition being instituted on 19.5.1989, the petitioner was very much aware that the Will contrary to the one propounded by the petitioner had already

been got probated by Smt. Chander Prabha Gupta. Admittedly the petition for grant of probate has been filed on 27.11.1998 i.e more than 9 years of filing the application for revocation by the petitioner herein.

12.The question for consideration is whether an application for grant of probate of a Will is governed by the provisions of Article 137 of the Limitation Act.

13.The question of applicability of Article 137 came up for consideration before the Hon'ble Delhi High Court in **Pamela Manmohan Singh Vs. State** 2000 RLR 137 = 83 (2000) DLT 469. Relying upon the *Kerala State Electricity Board, Trivandrum v. T.P. Kunliallumna*, (AIR 1987 SC 288) and after considering various authorities, it was held by the Hon'ble Delhi High Court that the provisions of Article 137 of the Limitation Act were applicable to the petition for grant of probate of a Will. The Hon'ble Delhi High Court considered *Shobha Kshirsagar v. Smt. Janki Kshirsagar & Anr* (AIR 1987 MP 145) and *Hari Narain v. Subhash Chander* (AIR 1985 Punjab & Haryana 211) and disagreed with the view that there was no limitation for obtaining probate of a Will. It was, however, clarified by the Hon'ble Delhi High Court that the period of 3 years may not necessarily commence from the date of the death of the deceased/testator as the Will propounded by a person may not be in dispute for several years or the persons claiming interest adverse to the beneficiaries, may be in possession of the property with the tacit consent of the beneficiaries. It was however held that the right to apply will immediately accrue when the such consent is withdrawn.

14.In the instant case, Diwan Ram Gopal had expired on 13.5.1980 and therefore, it may not be necessary that the right to apply may have accrued immediately on the death of the testator. Yet the petitioner had become aware at least beore 19.5.1989 when a Will contrary to the one in her favour, had been probated and had been challenged by the petitioner. The petitioner, however, preferred to wait for another 9 years to file this petition under Section 276 of the Act." (underlining added)

3. It is therefore clear that the Will which is set up by the appellant/petitioner of the deceased late Dewan Ram Gopal is dated 28.4.1980. This Will was in substance disputed by Chandra Prabha Gupta because a probate petition with respect to one of the properties of late Dewan Ram Gopal was allowed in her favour and with respect to which a revocation petition was filed by the present petitioner/applicant on 19.5.1989. As per the statement recorded under Order 10 CPC, the appellant/petitioner knew at least 10 years back from 1994 of the Will in favour of Smt. Chandra Prabha who had obtained the probate of which revocation was sought by the appellant/petitioner on 19.5.1989.

4. The present petition has been filed in the year 1998 after nine years of arising of the cause of action in 1989, and in any case even when revocation was filed in 1994 it would surely be beyond three years which is the period of limitation as per Article 137 of the Limitation Act, 1963. It has been held by the Supreme Court in the case of *Krishna Kumar Sharma Vs. Rajesh Kumar Sharma IV (2009) SLT 72: (2009) 11 SCC 537*. that limitation for filing of a probate petition is three years from arising of the cause of action.

5. I must state that I put it to the counsel for the appellant that it would be better that if instead of seeking a judgment in the present appeal,
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he might take this issue as defence in the petition for revocation of probate, however, counsel for the petitioner argued the case on merits and hence the present judgment.

6. In view of the above, I do not find any error of the Court below in dismissing the probate petition as being barred by time. The present appeal is therefore dismissed, leaving the parties to bear their own costs.

JANUARY 15, 2014
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VALMIKI J. MEHTA, J.