



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

Case No. : FAO/1/2021

Tapak Tali
S/O LT. TAMER TALI,
RESIDENT OF VILLAGE BOGNE, P
O/PS KAYING,
DISTRICT SIANG, AP.

VERSUS

Yayi Tali
W/O LT. TAPIK TALIM,
VILLAGE BOGNE,
PO/PS KAYING,
DISTRICT SIANG, AP.

2:YARI TALI (JOMYANG)
Age: 0
Occupation :
VILLAGE BOGNE
PO/PS KAYING
DISTRICT SIANG
AP.

3:YABOM TALI(TAMUT)
Age: 0
Occupation :
VILLAGE BOGNE
PO/PS KAYING
DISTRICT SIANG
AP.

4:YAMING TALI (PABIN)
Age: 0
Occupation :
VILLAGE BOGNE
PO/PS KAYING
DISTRICT SIANG

AP.

5:YASAN TALI (PABIN)

Age: 0

Occupation :

VILLAGE BOGNE

PO/PS KAYING

DISTRICT SIANG

AP

Advocate for the Petitioner : Mr. P. Taffo
Ms. M. Karbak
V. Dolo
E. Menjo
S. Babang

Advocate for the Respondent : Muk Pertin, Senior Advocate
Mr. K. Dabi
D. Tatak
R. Ribam
Mukbom Pertin
T . Tallang
T. Y. Bhutia

**BEFORE
HONBLE MR. JUSTICE KARDAK ETE**

DATE OF HEARING : 20.03.2024

DATE OF JUDGMENT : 02.04.2024

Heard Mr. P. Taffo, learned Counsel for the appellant and Mr. M. Pertin, learned Senior Counsel assisted by Ms. T. Y. Bhutia, learned counsel for the respondents.

2. This is an appeal under Section 96 read with Order XLI, Rule 1 and Section 151 of the Code of Civil Procedure, 1908 read with Section 299 of the Indian Succession Act, 1925, assailing the judgment and order dated 14.10.2020, passed by the District Judge, Sessions Division, Aalo, West Siang District, in Aalo Probate Case No. 01/2019 whereby the probate petition has been allowed and

granted in favour of the petitioners /respondents herein.

3. The brief facts of the case projected by the appellant is that the appellant is an adopted son of Lt. Tapik Tali. He was adopted in the year 1981 as Lt. Tapik Tali had no male issue and having four daughters. The adoption of the appellant was done in presence of villagers as per the customary law known as "Rogum" which is prevalent in the community. Lt. Tapik Tali made a WILL on 22.08.1997 in favour of the respondents, the respondent No. 1 being the wife of Lt. Tapik Tali and respondents No. 2, 3, 4 & 5, the daughters. Lt. Tapik Tali died on 02.09.1999.

4. After the death of Lt. Tapik Tali, Testator, the respondent No. 1 being the wife filed a case before the Deputy Commissioner, West Siang District, Aalo being Misc. Case No. 02/2000 which was subsequently transferred to the Additional District Judge, Basar and re-numbered as BSR/SC No. 14 of 2016. The Deputy Commissioner, West Siang District Aalo passed an order on 08.06.2000 referring the matter to Kebang (village authority). The learned Additional District Judge, Basar decided the BSR/SC No. 14/2016 vide judgment and order dated 23.07.2018, with an observation that the petitioners (respondents herein) ought to have invoked the provisions of the Indian Succession Act, 1925 in order to seek probate of the WILL of Lt. Tapik Tali and they having not exhausted that remedy in right earnest are not precluded from raising the same in future. It has also been observed that since the case was never filed for obtaining probate of the WILL, the present decision does not debar the petitioners (respondents herein) from filing probate petition under the Indian Succession Act, 1925 in future. Finally, the learned Additional District Judge, Basar has held that the legality or probate of WILL of Lt. Tapik Tali ,Testator, cannot be decided by the village authority under the Assam Frontier (Administration of Justice) Regulation, 1945 as the village authority has no

jurisdiction under the Indian Succession Act, 1925. Consequently, the order dated 08.06.2000 passed by the Deputy Commissioner, Aalo, referring the matter to the village authority, has been declared as non-est. Liberty was also given to the petitioners (respondents herein) to approach the Court for probate of WILL.

5. It is to be taken note that the judgment and order, dated 23.07.2018, passed by the learned Additional District Judge, Basar has never been put to challenge by the appellant.

6. The respondent No. 1 along with respondents No. 2, 3, 4 & 5 have approached the Addl. District Court, Basar by filing a probate case on 17.08.2018 which was registered as Probate Case No. 01/2018. Subsequently, the Probate Case 01.2018 was transferred to District Judge, Sessions Division, Aalo and renumbered as Aalo Probate Case No. 01.2019. The appellant filed a written statement and issues were framed. After due consideration of the materials and evidences, the learned District Judge, vide its judgment and order dated 14.10.2020, allowed the probate petition in the following order:-

“Let a probate of the WILL dated 22.08.1997 being deed number Nil dated the same of the Office of the Deputy Commissioner, Aalo, West Siang District (A.P) be granted to the petitioner along with a copy of the said WILL annexed thereto. The original WILL (PEX-1) shall be preserved in the same custody of the office of the unrealistic Judge, Aalo. The probate shall be granted to the plaintiff after obtaining necessary valuation certificate, if any from the competent authority.

Hence, this present appeal on a limited ground of limitation.

7. Mr. P. Taffo, learned counsel for the appellant, submits that the probate petition filed by the respondents is an abuse of the process of the Court as the same has been filed after the lapse of about 20 years, after the death of the

Testator on the basis of death certificate procured after two decades, which is hopelessly barred by limitation.

8. Mr. P. Taffo, learned counsel, submits that the probate petition is barred by limitation as the WILL was executed on 22.08.1997 and the Testator died on 02.09.1999, therefore, the cause of action has arisen on 02.09.1999 and the probate petition should have been filed within three years from the date of the death of deceased Testator whereas the respondents filed the probate suit only on 17.08.2018.

9. Mr. Taffo, learned counsel, while referring to the provisions of the Limitation Act, 1963, more particularly Sections 2 & 3 and Article 137 submits that the same are applicable in the probate case as the respondents had never filed any petition for condonation of delay before the Court below for condonation of delay in filing the probate suit as the probate suit is barred by limitation.

10. Mr. Taffo, learned counsel, submits that the learned Trial Court has committed an error in law in deciding the probate suit as the learned Trial Court has not taken into consideration of the issue of Limitation which is clearly barred by the provision of the law, particularly Article 137 of the Indian Limitation Act, 1963 and there is no application for condonation of delay in filing the probate suit. He further submits that though three issues were framed by the learned Trial Court, the main issue No. 1 "as to whether the probate case is maintainable", which includes the issue of Limitation as applicable in the probate suit, the learned Trial Court has wrongly proceeded to decide the issue Nos. 1 & 2 together. The appellant has taken a specific plea of the probate suit having been barred under Article 137 of the Limitation Act, 1963, however, the learned Court below has erroneously decided the said plea.

11. Mr. Taffo, learned counsel, further submits that as per Section 2 (j) the "period of limitation" means the period of limitation prescribed for any suit,

appeal or application by the Schedule, and "prescribed period" means the period of limitation computed in accordance with the provisions of the Limitation Act. Under Section 3 of the Act, it is provided that subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence. According to Mr. Taffo, the learned counsel, on combine reading of both the provisions herein above, it is clearly provides that even if no defence is set up by defendant, the limitation provided in the act is applicable and the learned Trial Court ought to have considered the same. Mr. Taffo, learned counsel finally submits that cause of action arose in the year 1999 on the death of the Testator, Lt. Tapik Tali, and respondents ought to have filed the probate suit within a period of 3 (three) years thereafter. As the probate suit has been filed by the respondents on 17.08.2018, the probate suit is hopelessly barred by the Limitation and since this aspect has been considered erroneously by the learned Court below, the impugned judgment and order dated 14.10.2020, is bad in law and is liable to be set aside and quashed.

12. On the other hand, Mr. M. Pertin, learned senior counsel, submits that the WILL having been made on 22.08.1997 and the respondents have approached the then competent jurisdictional Court i.e. before the Deputy Commissioner, West Siang District, Aalo, for probate of the WILL in the year 2000 after the death of Lt. Tapik Tali, testator, who died on 02.09.1999, there is no question of delay in approaching the Court for probate of the WILL. Thereafter, the proceedings in the then competent Court i.e. the Deputy Commissioner, having referred the matter to the village authority, the respondents have filed an application against the said order of referring the matter to the village authority. On transfer of the case, the learned Additional District Judge, Basar, finally decided the matter by holding that the village authority does not have any

jurisdiction to decide the matter vide order dated 23.07.2018 with a clear finding and observation and a liberty was granted to the respondents to approach the Court for probate of WILL. Thereafter, the probate case being 01/2018 was filed on 17.08.2018. Therefore, he submits that question of delay does not arise as the probate petition has been filed within the limitation on being liberty granted by the competent jurisdictional Court of learned Additional District Judge, Basar.

13. Mr. Pertin, learned senior counsel, further submits that there is no plea with regard to the limitation before the learned Court below. However, the delay raised at the time of oral arguments by the learned counsel for the appellant before the learned Trial Court has been considered and appropriately decided, therefore, at the appellate stage, no plea can be taken.

14. Due consideration has been extended to the submissions of the learned counsel for the parties and I have also examined the materials available on record including the Trial Court Record.

15. In view of the limited point raised by the appellant in this appeal, the only question for consideration is as to whether the probate suit filed by the plaintiff/respondents herein is barred by limitation under Article 137 of the Limitation Act, 1963. The learned counsel for appellant has also categorically contended that the issue to be considered in this appeal is with regard to the question of limitation only and no other.

16. The appellant is stated to be an adopted son of Lt. Tapik Tali, who was adopted in the year 1981, as Lt. Tapik Tali had no male issue and only having four daughters, as per the customary law prevalent in the community. Lt. Tapik Tali made a will on 22.08.1997 in favour of the respondents and died on 02.09.1999. After the death of Lt. Tapik Tali, the respondent No. 1, being the wife and executor, filed an application before the then jurisdictional authority i.e. the Deputy Commissioner, West Siang District, Aalo, which was registered as

Misc. Case No. 02/2000. The Deputy Commissioner passed an order dated 08.06.2000, whereby, the matter was referred to Kebang (village authority). The Misc. Case No. 02/2000 filed by the respondents, was subsequently, transferred to the Court of learned Additional District Judge, Basar and re-numbered as BSR/SC No. 14/2016. The learned Additional District Judge, Basar vide judgment and order dated 27.03.2018, has disposed of the BSR/SC No. 14/2016 with an observation that the petitioner (respondents herein) ought to have invoked the provisions of the Indian Succession Act, 1925, in order to seek probate of the WILL of Lt. Tapik Tali and they having not exhausted that remedy in right earnest are not precluded from raising the same in the future. It has also been observed that since the case was never filed for obtaining probate of the WILL, the present decision does not debar the petitioners (respondents herein) from filing probate petition under the Law in future. The learned Additional District Judge, Basar has also held that the legality or probate of WILL of Lt. Tapik Tali (Testator) cannot be decided by the village authority under the Assam Frontier (Administration of Justice) Regulation, 1945 as the village authority has no jurisdiction under the Law. Consequently, the order dated 08.06.2000, passed by the Deputy Commissioner, Aalo, has been declared as *non est*. The learned Additional District Judge has also provided liberty to the petitioners (respondents herein) to approach the Court for probate of WILL. The judgment and order dated 23.07.2018 passed by the learned Additional District Judge, Basar has not been put to challenge by the appellant.

17. The respondent No. 1 along with respondents No. 2, 3, 4 & 5 have approached the learned District Court by filing a probate case before the learned Additional District Judge, Basar, on 17.08.2018, which was registered as Probate Case No. 01/2018 by seeking probate of the WILL by proceedings under Section 276 of the Indian Succession Act, 1925. The case was subsequently transferred

to the Court of District Judge, Sessions Division, Aalo and renumbered as Aalo Probate Case No. 01.2019. The appellant filed a written statement and issues were framed and evidences recorded. On conclusion of trial and after careful consideration of the materials and evidences, the learned District Judge, Sessions Division, Aalo, vide its judgment and order dated 14.10.2020, allowed the probate petition and granted probate of will to the respondents herein.

18. The case projected by the plaintiff/respondents herein, is that the Testator executed the last WILL in sound and disposing state of mind with full testamentary capacity in presence of two witnesses in accordance with the set procedure of Succession Act. It is the case of plaintiffs/respondents that during life time of the Testator, he desired his wife to be the sole beneficiary and universal legatee of the properties and further declared that after her death, the residue of the testamentary properties would absolutely go to his four daughters, who should take care of her with full devotion and honesty. Testator did not desire that family of Mr. Tamir Tali (the biological father of the respondent/appellant herein) and Tapak Tali, appellant, should get any of his properties and wished that they should be restrained from performing any part of rites and rituals or the funeral on his death.

19. The appellant/defendant contended in his written statement that the Testator had never executed any valid WILL whatsoever during his lifetime. The will sought to be probated was not duly attested by the witnesses as required under the Act. It is alleged that the plaintiffs/respondents herein have set up the WILL with intention to deprive the appellant/defendant of his rights in the ancestral properties particularly, the landed properties, which otherwise would have devolved fully onto him. It has been objected that plaintiff being made as an Executor of the purported WILL, she cannot be the witness in the same document. It is further contended that during the year of execution of purported

WILL, the Testator was suffering from some ailments until his death on 02.09.1999, hence, it is objected that the purported WILL has been executed under dubious circumstances.

20. The learned Court below framed three issues:- (i) Whether the Probate case is maintainable. (ii) Whether Testator validly executed the WILL on 22.08.1997 in sound health and disposing state of mind and (iii) Whether the petitioners are entitled to grant of Probate and any other relief.

21. The plaintiffs/respondents herein adduced evidences by way of an affidavit as PW No. 1 herself (Mrs. Yayi Tali) and PW No. 2 (Mr. Karba Ninu) and adduced two other documents, i.e. the WILL and the Death Certificate of the testator and exhibited them as Paper Exhibit (PEX-1 & 2) and the same was proved by way of PEX-1(A), PEX-1(B). Thereafter, the appellant/defendant has also filed evidence on affidavits including himself as DW-1 and one Shri Tarung Tali as DW-2 and DW-2 had been subjected to cross examination on behalf of the plaintiffs. It is to be noted that the issue No. 1 & 2 were taken up together by the learned Court below.

22. This Court considers it appropriate to analyse the findings of the learned Court below with regard to the issue in question i.e. question of limitation. On perusal of the same, it is noticed that the learned Court below has held that it is necessary to record reasons regarding the issue of limitation. The plaintiff/respondents herein have been approaching various lawful authorities since 2000, i.e. one year after the death of the Testator, which could not address her prayers sufficiently due to jurisdictional issues. Therefore, the probate petition is not barred by Article 137 of the Limitation Act. Accordingly, the issue of limitation and maintainability of the probate case was decided in favour of the plaintiff/respondents herein and against the appellant/defendant.

23. On careful consideration of the finding and conclusion of the learned Court

below, it transpires that the learned Court below has taken into account of the Misc. Case No. 02/2000 filed before the Deputy Commissioner, Aalo by the plaintiff/respondents herein as probate petition and in view of the filing of such applications before the lawful authority since 2000 i.e. one year after the death of Testator and the prayers which could not be sufficiently considered due to jurisdictional issue, there is no delay in filing the probate petition and the same is not barred by Article 137 of the Limitation Act, 1963.

24. It is to be taken note of the fact that other two issues have also been decided in favour of the plaintiff/respondents herein and against the appellant/defendant, which this Court refrains from consideration in view of the categorical statement of the appellant that the issue to be decided is only on the Limitation.

25. To appropriately analyse, it is apposite to refer to the relevant provisions of Limitation Act, 1963. Section 2 (j) provides that 'period of limitation' means the period of limitation prescribed for any suit, appeal or application by the Schedule, and 'prescribed period' means the period of limitation computed in accordance with the provisions of the Act. Section 3 provides that Subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.

26. Article 137 of the Limitation Act, provides 3 (three) years as a period of limitation, on an application for which no period of limitation is provided elsewhere in the division and the time for which period begins to run is when the right to apply accrues. It applies to the probate suit.

27. On reading of the above provisions, the limitation period for any other applications, which would also include probate suit, is 3 (three) years and period begins to run when the right to apply accrues. In the present case, the

plaintiffs/respondents herein have filed the application after the death of the Testator in the year 2000 and the said application was referred to the Kebang (village authority) by the Deputy Commissioner, West Siang District, Aalo. Thereafter, the said case being Misc. Case No. 02/2000 of the plaintiff/respondents herein, was transferred to the learned Additional District Judge, Basar which was re-numbered as BSR/SC No. 14/2016 and vide judgment and order, dated 27.03.2018, the order of referring the matter to the village authority was held to be *non est* and liberty was granted to the plaintiff/respondents herein to approach the Court for probate of WILL, under appropriate provisions of law before the appropriate forum. Accordingly, the plaintiff/respondents herein filed the probate case before the learned Additional District Judge, Basar on 17.08.2018 which was registered as Probate Case No. 01/2018 and subsequently transferred to District Judge, Sessions Division, Aalo and renumbered as Aalo Probate Case No. 01/2019. Having considered above, in my considered view the probate suit is within limitation as the plaintiffs/respondents were prosecuting the matter bonafide. That apart, the judgement and order dated 23.07.2023 passed by the learned Additional District Judge, Basar, granting liberty to file probate petition has not been put to challenge by the appellant.

28. Section 14 of the Limitation Act, 1963 provides for exclusion of time of proceedings bona fide in Court without jurisdiction. It provides that in computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. In computing the period of

limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

29. It is revealed from the record that the appellant has taken a plea before the learned Court below that the probate application is barred by operation of Section 68 of the Succession Act and Article 137 of the Limitation Act, 1963. Though the learned senior counsel appearing on behalf of the plaintiff/respondents herein has sought to project that no plea was taken before the learned Court below, record reveals otherwise.

30. It is true that as per Section 3 of the Limitation Act, every suit or appeal or application made after the prescribed period shall be dismissed, although, the limitation has not been set up as defence. If the issue of maintainability is framed, it includes the issue of limitation and even if no defence is set up, any suit or appeal or application shall be dismissed if it is filed after the prescribed period of limitation.

31. It is further revealed from the record that the learned Court below has taken the date of petition as that of 2000, when the application was made before the Deputy Commissioner, West Siang District, Aalo. In any case, the application filed in 2000 was subsequently transferred to the learned Additional District Judge, Basar and the learned Additional District Judge, Basar has disposed of the matter on 23.07.2018 holding that the plaintiff/respondents herein is not precluded from filing any probate petition under the appropriate provisions of law before the appropriate authority/competent Court. Not only that, the learned Additional District Judge, Basar has granted liberty to file

probate petition before the appropriate Court. Thereafter, the plaintiff/respondents herein filed probate case on 17.08.2018. Admittedly, the judgment and order, dated 23.07.2018, has not been put to challenge by the appellant, which has attained finality. Thus, in any event, if the petition filed in the year 2000 before the Deputy Commissioner is taken not as a probate petition which was pending and subsequently, transferred to the learned Additional District Judge, Basar and the same having been disposed of by granting liberty to the plaintiff/respondents herein to file probate petition before a competent Court and accordingly, the plaintiff/ respondents herein filed a probate petition before the learned Additional District Judge on 17.08.2018, the same, in my considered view, is not barred by limitation. The probate petition was filed on 17.08.2018 after the disposal of the application of 2000 by the learned Additional District Judge and on having been granted liberty, in my considered view, the Section 14 of the Limitation Act, otherwise would have applied inasmuch as, even if the application before the Deputy Commissioner is not a probate petition, the plaintiff/respondents herein were prosecuting the matter bona fide in the then jurisdictional authority.

32. It is trite that the law of Limitation is not meant to be an aid to unconscionable conduct, although, if a claim is clearly barred, the Court must unhesitatingly dismiss the suit. It is a law of repose, peace and justice which bars the remedy after lapse of a particular period by way of public policy and expediency without extinguishing the right in certain cases. Therefore, the Court must bar against limitation and in favour of the substance of the right to sue where two views are clearly possible. It is a settled position of law that the Limitation Act has not been enacted with the object of destroying parties' rights but to ensure that parties approach Court for indication of their rights without unreasonable delay.

33. In the case of **State of Orissa Vs. Mamata Mohanty**, reported in **(2011) 3 SSC 436**, the Hon'ble Supreme Court has held that by virtue of Section 3 of the Limitation Act, it is obligatory on the part of the Court to dismiss the suit or appeal if made after the prescribed period even though the limitation is not set up as defence, and there is no plea to raise the issue of limitation even at appellate stage because in some of the cases it may go to the root of the matter.

34. Reverting back to the present case, the learned Trial Court has come to a conclusion that the probate suit is not barred by limitation as the plaintiffs/respondents herein had approached lawful authority since 2000 i.e. within one year after the death of the Testator, which could not be addressed sufficiently due to jurisdictional issue. Though the plaintiff/respondents herein were prosecuting the matter with due diligent before the then jurisdictional authority, same cannot be said to be a probate petition filed within limitation as concluded by the learned court below herein above. However, in view of the judgement and order dated 23.07.2018 passed by the learned Additional District Judge, Basar in BSR/SC case No. 14/2016 whereby liberty was granted to file probate petition (which has not been put to challenge by appellant at any stage) and the Probate petition having been filed thereafter on 17.08.2018, in my view, the plaintiffs/respondents cannot be non-suited on the ground of limitation.

35. As noted above, since the issue raised is limited to the question of Limitation, this Court refrains from considering the other issues, which of course, the appellant has not urged at all.

36. In view of the discussions made hereinabove, I am of the considered view that the probate petition filed by the plaintiff/ respondents herein cannot be said to be barred by Limitation in view of the judgement and order dated 23.07.2018 passed by the learned Additional District Judge, Basar in BSR/SC case No.

14/2016 whereby liberty was granted to file probate petition (which has not been put to challenge by appellant at any stage) and the Probate petition having been filed thereafter on 17.08.2018. Thus, the issue is decided in favour of the respondents against the appellant on different ground as above other than the conclusion arrived at by the learned District Judge.

37. Consequently, the present appeal stands dismissed being devoid of merit. Send down the TCR.

JUDGE

Comparing Assistant