

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

+ **FAO No. 402/2015**

% **12th October, 2017**

AMIT & ORS. Appellants

Through: Mr. Raj Kumar Bhartiya, Adv.
for A-1 to 5.

versus

STATE OF NCT OF DELHI & ORS. Respondents

Through: Mr. Atul Kumar Jain, Adv. for
R-2 to 5.

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 is filed under Section 299 of the Indian Succession Act, 1925 impugning the judgment of the trial court which has dismissed the petition filed by the appellants herein for grant of probate of the Will dated 8.5.2003 of late Smt. Savitri Devi. Smt. Savitri Devi had a son named Sh. Radhey Shyam, who had expired, and the appellants (petitioners in the court below) are the legal heirs of the deceased Sh. Radhey Shyam. By the impugned judgment the probate petition has been dismissed as being barred by limitation.

2. No doubt, in view of the judgment of the Supreme Court in the case of *Kunvarjeet Singh Khandpur Vs. Kirandeep Kaur and Others (2008) 8 SCC 463* limitation period for filing of a petition for probate is three years under Article 137 of the Limitation Act, 1963 however, the period of three years commences when the cause of action accrues or the right to apply accrues. The need to file the probate petition i.e the cause of action to file the probate petition arises when the subject Will is specifically denied by the objectors to the notice/knowledge of the appellants/petitioners or their predecessor-in-interest. It is only on the denial of the validity etc of the subject Will as brought to the knowledge of the appellants/petitioners or Sh. Radhey Shyam would then limitation would begin for filing of the probate petition.

3. In the facts of the present case, it is seen that the objectors being the respondent nos. 2 to 5 in the probate petition, though took up a defence of petition being barred by limitation, however, neither in the written statement/objections of all these respondent nos. 2 to 5 in the probate court below nor in the evidence by way of affidavit which is filed of Sh. Sohan Lal (respondent no.4 in the probate court), is

there any averment that the respondents in the probate petition had denied the validity of the Will of Smt. Savitri Devi on a particular date which is beyond three years of filing of the probate petition. The entire written statement of the respondent nos. 2 to 5 in the probate court, as also the evidence led, is conspicuously silent of any date on which the respondent nos. 2 to 5 in the probate petition had told the petitioners in the probate petition and or their predecessor-in-interest Sh. Radhey Shyam that the subject Will of Smt. Savitri Devi dated 8.5.2003 is illegal or invalid or forged or fabricated etc. Once that is so, then limitation did not commence as against the appellants/petitioners for filing of the probate petition.

4. Trial court has erred in taking the commencement of limitation from the date of death of Smt. Savitri Devi although the commencement of cause of action for the purpose of limitation is not the date of death of the deceased testator but is and can be the date of denial of the validity etc of the Will by the respondent nos. 2 to 5 in the probate petition.

5. In view of the aforesaid discussion, this appeal is allowed. The impugned judgment dismissing the probate petition as

barred by limitation is set aside. Since the trial court has not decided the merits of the matter, and only the issue of limitation is decided, this Court in view of the provision of Order XLI Rule 23 CPC has to remand the matter so that the decision is now given on the main issues of due execution and validity of the subject Will executed by Smt. Savitri Devi.

6. The appeal is accordingly allowed. The impugned judgment of the trial court/probate court dated 4.2.2015 is set aside. The trial court/probate court is now directed to decide other issues of merits in the probate petition by taking that the petition as not barred by limitation.

7. Parties to appear before the District and Sessions Judge, North East District Karkardooma Courts, Delhi on 28.11.2017 and the District and Session Judge will mark the probate petition for disposal to a competent court in accordance with law.

OCTOBER 12, 2017/ib

VALMIKI J. MEHTA, J