

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1117 of 2018**

=====

Arun Kumar Agrawal son of Late Dr. Ram Swaroop Prasad Agrawal
permanent resident of T - 8 Eagleton Golf Resort, 30 Km. Bangalore Mysore
Highway, Bidadi, District - Ramnagra - 562109, Karnataka.

... .. Petitioner

Versus

Anil Agrawal son of Late Kedar Nath Agrawal Resident of Jawahar Lal Road,
Town & District - Muzaffarpur, Bihar.

... .. Respondent

=====

Appearance :

For the Petitioner : Mr. Amit Shrivastava, Advocate
For the Respondent : Mr. Raghib Ahsan, Senior Advocate

=====

**CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR JHA
ORAL JUDGMENT**

Date : 28-09-2018

Heard Mr. Amit Shrivastava, the learned counsel for the
petitioner and the learned counsel for the respondent.

2. The petitioner filed this civil miscellaneous petition
under Article 227 of the Constitution of India for quashing the
order dated 18.01.2018, passed by the learned 2nd Additional
District Judge, Muzaffarpur in Probate Case No.38 of 2013
whereby and whereunder the petition of the petitioner filed under
Order VII Rule 11(d) and under Article 137 of the Limitation Act
has been dismissed.

3. The facts, which are relevant for the decisions of this
case, can be summarized as follows:

Dr. Ram Swaroop Prasad Agrawal died leaving behind
his sons and daughters, namely, petitioner, Dr. Sunil Agrawal, Anil



Agrawal, Smt. Sarita Kedia (daughter), Smt. Pooja Rajharia (daughter of pre-deceased daughter) and Sri Nikhil Pansari (son of pre-deceased daughter). According to the case of the petitioner, Anil Agrawal, the sole respondent, was given in adoption by Dr. Ram Swaroop Prasad Agrawal to Sri Kedar Nath Agrawal, the eldest brother of Dr. Ram Swaroop Prasad Agrawal. Ram Swaroop Prasad Agrawal died on 16.06.2006 at Bangalore. Anil Agrawal filed a probate case being Probate Case No.38 of 2013 on 26.06.2013. When the petitioner came to know about the filing of the probate case, the petitioner filed petition under Order VII Rule 11 (d) of the CPC coupled with Article 137 of the Limitation Act on 10.06.2016. The learned 2nd Additional District Judge vide order dated 18.01.2018 dismissed the petition of the petitioner holding that the probate case is not barred under Order 7 Rule 11(d) of the CPC as the limitation shall not start from the date of death of the testator. Being aggrieved with the aforesaid order, the petitioner filed this civil miscellaneous petition.

4. One and only question arises in this case for determination whether the filing of probate case after three years from the date of the death of the testator is barred under Article 137 of the Limitation Act as the testator of the Will died on 16.06.2006 but the probate case was filed on 26.06.2013 and as



such the probate petition is fit to be dismissed at the preliminary stage under Order VII Rule 11 (d) of the CPC?

5. Mr. Amit Srivastava, the learned counsel appearing on behalf of the petitioner submits that Article 137 of the Limitation Act which contains residuary provision is applicable in presenting the probate case. For making application for probate or an application for letter of administration, the cause of action accrues on the death of the testator and, therefore, it is submitted that the probate case/application for probate of the Will of Dr. Ram Swaroop Prasad Agrawal which was filed on 26.06.2013 is barred by limitation as Dr. Ram Swaroop Prasad Agrawal died on 16.06.2006. It is further submitted that it has been held that the Limitation Act is not only applicable in the petition filed under the Code of Civil Procedure but the application of the limitation is also extended to the petition filed under the Succession Act of 1925. It is submitted that a Single Judge of the Gauhati High Court in the case of Kamakhya Prasad Gupta & Anr. vs. Jibon Lal Gupta, reported in 2011 (1) GLT 435 held that the limitation for filing application for probate or an application for letters of administration is three years under Article 137 of the Limitation Act and the cause of action arises after the death of the propounder of the Will and, therefore, the limitation shall start running from



the date of death of the testator. The learned counsel further submits that the same view has been reiterated by a Single Bench of this Court in the case of Rajeshwar Sharma vs. Most. Sitapati Kuar, reported in 2017 (1) PLJR 489. In paragraph-20 and 22 of the aforesaid judgment, it has been held that the probate case filed after three years of the death of the propounder of the Will and no explanation for such delay is given, the probate application is barred under Article 137 of the Limitation Act. The learned counsel for the petitioner further submits that the case of Kamakhya Prasad Gupta & Anr. vs. Jibon Lal Gupta (supra) has been affirmed by the Hon'ble Supreme Court in Special Leave to Appeal (Civil) No(s).34331 of 2010 vide order dated 28.07.2010. The learned counsel for the petitioner also placed reliance on the judgment of the Hon'ble Supreme Court rendered in the case of Mrs. Lynette Fernandes vs. Mrs. Gertie Mathias since Deceased by Lrs. Dated 08.11.2017 in which the petition for revocation of probate was filed after 31 years from the date of probate of the Will and it is held that the provision of Article 137 of the Limitation Act is applicable and the petition for revocation of probate should have been filed within three years and the application for revocation of the probate beyond the period of three years is barred by limitation.



6. Controverting the submissions of the learned counsel for the petitioner, Mr. Raghiv Ahsan, the learned Senior counsel for the respondent submits that there is no dispute with regard to the application of residuary provisions of the Limitation Act as contained in Article 137 of the Limitation Act and the same is applicable if the application is made under the Succession Act either for issuance of succession certificate or the application for probate of the Will or an application for letter of administration but Article 137 of the Limitation Act says about the date when the cause of action accrues. Article 137 of the Limitation Act says that the period for filing such petition is three years when the right to apply accrues. In the case of Kunvarjeet Singh Khandpur v. Kirandeep Kaur, reported in (2008) 8 SCC 463, the Hon'ble Supreme Court has elaborately after discussing the judgment of the Bombay High Court in Vasudev Daulatram Sadarangani v. Sajni Prem Lalwani, reported in AIR 1983 Bom 268 held that the limitation shall run from the date of right to apply accrues and not from the date of death of the deceased. The similar view has been reiterated by a Division Bench of this Court in the case of Ramanand Thakur v. Parmanand Thakur, reported in AIR 1982 Patna 87. Similar view has also been taken by the Hon'ble Supreme Court in the case of Krishna Kumar Sharma v. Rajesh



Kumar Sharma, reported in 2009 (3) PLJR 80(SC) and by a Single Bench of this Court in the case of Smt. Nalini Mishra v. Braj Kishore Mishra, reported in 2010 (4) PLJR 355 and held that the limitation shall run from the date when the cause of action accrues. When the cause of action accrues shall depend upon the facts and circumstances of each case and, therefore, the submissions of the learned counsel for the petitioner that the cause of action shall accrue immediately after the death of the propounder of the Will is fallacious and misconceived and the law laid down by the Hon'ble Single Judge of the Gauhati High Court in the case of Kamakhya Prasad Gupta & Anr. vs. Jibon Lal Gupta (supra) and the Patna High Court in the case of Rajeshwar Sharma vs. Most. Sitapati Kuar (supra) is bad law in view of the law laid down by the Hon'ble Supreme Court in the case of Kunvarjeet Singh Khandpur vs. Kirandeep Kaur & Ors, reported in (2008) 8 SCC 463 and Krishna Kumar Sharma v. Rajesh Kumar Sharma, reported in 2009 (3) PLJR 80 (SC) and a Division Bench of this Court in the case of Ramanand Thakur v. Parmanand Thakur, reported in AIR 1982 Patna 87.

7. On consideration of submissions of both sides and after perusal of the records and judgments, I find that now this point has been set at rest by a catena of judgment of this Court as



well as the Hon'ble Supreme Court that the residuary provision as contained in Article 137 of the Limitation Act shall be applicable if any petition under the Indian Succession Act, 1925 is made under Section 264 and other Sections of the Indian Succession Act for issuance of succession certificate, for probate of Will, and for issuance of letter of administration etc.

8. According to Article 137 of the Limitation Act, any other applications for which no period of limitation is provided elsewhere in this division, the period of limitation is three years from the date and the period of limitation begins to run when the right to apply accrues. The crucial expression in the aforesaid provision is when the right to apply accrues. Admittedly in an application for probate of Will, or for issuance of letter of administration or for issuance of succession certificate, the cause of action is continuing one because if by a Will trusteeship is created, the trustee under the Will has got right to manage the property unless the same is approved by the Court. Similarly in the petition for issuance of succession certificate the cause of action is continuing one unless the successor or the heirs of the deceased get the succession certificate with regard to the property left by the deceased. A Division Bench of this Court in the case of Ramanand Thakur v. Parmanand Thakur (supra) held that in a probate case



the right to apply accrues each and every day so long as the Will remains unprobated. A Single Bench of this Court in the case of Smt. Nalini Mishra v. Braj Kishore Mishra (supra) after judgments of the Hon'ble Supreme Court rendered in Kunvarjeet Singh Khandpur vs. Kirandeep Kaur & Ors. (supra) has held that the cause of action accrues when any hyndrance is put to the legatee in management of the property bequeathed by a Will and not immediately after the death of the propounder of the Will. In the case of Vasudev Daulatram Sadarangani v. Sajni Prem Lalwani (supra), the conclusion was summarized as follows:-

(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.

9. The Hon'ble Supreme Court in the case of Kunvarjeet Singh Khandpur vs. Kirandeep Kaur & Ors. (supra) after taking into consideration the conclusions summarized by the Bombay High Court in the case of Vasudev Daulatram Sadarangani v. Sajni Prem Lalwani (supra) held that conclusion (b) is not correct while conclusion (c) is correct position of law. It appears that the learned counsel for the petitioner laid emphasis on the conclusion of the Hon'ble Supreme Court that the conclusion arrived at by the Bombay High Court in conclusion (b) was found to be incorrect, therefore, it can safely be inferred that the limitation under Article 137 of the Limitation Act shall start running on the date of the death of the deceased but in my view this submission cannot be accepted as the Hon'ble Supreme Court has found the conclusion (c) is correct which says as "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”. From the perusal of the aforesaid conclusion no doubt remains as to when the cause of action accrues for filing the probate case. The Hon’ble Supreme Court on the basis of such conclusion held in the case of Kunvarjeet Singh Khandpur vs. Kirandeep Kaur & Ors. (supra) that the probate case was firstly filed but withdrawn on 09.08.1999. Thereafter another petition for probate was filed within three years from the date of the withdrawal of the probate case, i.e., 09.08.1999 and it was held that the petition was filed within three years, therefore, the same is within time. In the aforesaid case the Hon’ble Supreme Court also held that the limitation did not start running immediately after the death of the testator but the first petition of probate was filed and the same was withdrawn on 09.08.1999, therefore, the cause of action accrued on 09.08.1999 and the second petition for probate was filed within three years it was held that the same is within time. Similar view has been reiterated by the Hon’ble Supreme Court in the case of Krishna Kumar Sharma v. Rajesh Kumar Sharma (supra) and it has been held that in the probate case the date of action accrues not on the date of death of the testator but the right to apply accrues varies in each and every case. Thus, I find that in view of the law laid down by the Hon’ble Supreme Court as well as by the



Division Bench and the Single Bench of this Court discussed above, the learned 2nd Additional District Judge, Muzaffarpur has rightly held that the probate case is not liable to be dismissed under Order VII Rule 11(d) of the CPC read with Article 137 of the Limitation Act because the cause of action accrues not after the death of the testator but it depends on the facts of each and every case as to when cause of action accrues.

10. Having considered the facts aforesaid, I do not find any merit in this civil miscellaneous petition. Accordingly, the same is dismissed.

(Prabhat Kumar Jha, J)

S.KUMAR/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	12.10.2018
Transmission Date	NA

