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

Reserved on 19.04.2018

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Judgment delivered on: 01.06.2018

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FAO 263/2008

ANIL KAKKAR & ORS.

..... Appellant

Through: Mr. Anunaya Mehta and Mr. Akshay Deep
S., Advs.

Versus

HANS RAJ KAKKAR & ANR.

..... Respondents

Through: Mr. Praveen Kumar and Mr. Sameer Rai,
Advs. for R-1

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J.

1. This appeal impugns the order dated 06.05.2008 granting probate to respondent no.1 on a Will propounded dated 31.12.1997 purportedly executed by his late mother – Smt. Bhagwanti Kakkar. The appellant is a sibling of the beneficiary of the said Will. He has challenged the said order on the ground that it has erred primarily on the following grounds:

- a) the probate petition sought by limitation hence it was not maintainable; and

b) the will propounded by respondent number one was steeped in suspicious circumstances, an issue which was not thoroughly examined by the trial court.

2. The issues to be adjudicated in this appeal are:

- i) whether the probate petition was barred by limitation? and
- ii) whether the plea of limitation can be raised at the appellate stage, even if not raised in the probate proceedings?

The facts:

3. In a pending claim of the late mother of the petitioner and respondent no.1 (R1) the government recommended to Delhi Development Authority (DDA) to allot an alternate plot of land to her on 31.03.1997. The draw of lots for this purpose was to be held on 17.04.2000. The mother – Smt. Bhagwanti Kakkar had passed away on 20.05.1998. According to the appellant for 2 ½ years the aforesaid Will propounded by the R1 found no whisper between the siblings or their families nor was it mentioned before the DDA or any other statutory authority sticking claim of R1 on its basis. Interestingly, it was registered on 16.06.2000 after the draw of lots for the plot of land DDA, was held on 17 April 2000. The witnesses to the registration of the Will were two sisters of the appellant and R1, namely Mrs Vimla Marwah and Mrs Naveen Dhawan. The appellant contends that the witnesses to the Will dated 31.12.1997 and the witnesses to its registration are different persons; that their mother was about 95 years old at the time of execution of the aforesaid Will; interestingly, a fortnight prior thereto a Will had already been allegedly executed in favour of son of R1, yet the latter

Will does not find any reference to the earlier Will dated 15.12.1997. Both the Wills purport to transfer all rights and benefits in the mother's estate to R1 or to his family, therefore there was neither any need nor any justification for the second Will without even referring to the Will made 2 weeks ago. The appellant has disputed both the Wills and contends that they were made in suspicious circumstances; that they were forged and fabricated and hence the probate ought not to have been granted. On 11.07.2000, a plot of land was allotted by DDA in the name of the mother. The appellant's wrote to the DDA on 21.08.2000, 02.11.2000, and 22.11.2000 that Smt Bhagwanti Kakkar had died intestate and the Wills propounded by R1 were forged and fabricated. DDA informed R1 by letter dated 16.02.2001 that since the appellant's had objected to the Will propounded by him, he should obtain an appropriate order from a court of law. On 17.04.2001 a notice was sent on behalf of R1, categorically recording that he was aware of the objections raised by the appellants to the legality and validity of the Will. On 28.12.2001 DDA cancelled the allotment of plot of land. On 11.04.2002 DDA again informed R1 that had raised objection to the Will hence R1 should obtain a probate of the Will. On 4.07.2003 an alternate plot of land was allotted in the name of the mother. A petition for probate was filed by R1 on 29.04.2005.

Appellant's Arguments:

4. The appellant argues that the aforesaid probate petition was filed after four years, two months and fourteen days from the date of the "right to sue" or "right to apply". The permissible time for filing the probate petition was three years, hence there is an unexplained delay of one year two months and

fourteen days from the time the right to sue or right to apply for probate accrued. He relies upon the dicta of the Supreme Court in ***Kunvarjeet Singh Khandpur vs Kirandeep Kaur & Ors.*** (2008) 8 SCC 463 which had held as under:

“..... 10. 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 The Kerala State Electricity Board, Trivandrum v. T.P. Kunhaliumma [1976 (4) SCC 634] 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 applicant or the appellant satisfies the court that he had sufficient cause for not preferring the appeal or making the application during such period.

22. 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 case² 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 Judge of Principal Civil Court.

12. Further in *S.S. Rathore v. State of M.P.* [1989(4) SCC 582] it was inter-alia stated as follows:

"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 refer to those decisions as on the authority of the judgment of this Court in the case of *Pierce Leslie & Co. Ltd. v. Violet Ouchterlony Wapshare*³ 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:

<i>Description of Suit</i>	<i>Period of</i>	<i>Time from which period begins to</i>
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	<i>limitat ion</i>	<i>run</i>
<i>137. Any other application for which no period of limitation is provided elsewhere in this Division</i>	<i>Three years</i>	<i>When the right to apply accrues.</i>

The crucial expression in the petition 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 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 and etc. etc. v. E. Ramiah (AIR 1991 Madras 214). 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 letter 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 Art. 137 of the Limitation Act, 1963."

14. 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 The Kerala State Electricity Board's case (supra)...."

(emphasis supplied).

5. Also on the judgment of the Division Bench of this Court in ***Pratap Singh vs State 173 (2010) DLT 132*** which held that the computation of limitation will begin, at least, from the date on which the legatee under the Will would be ascribed with the knowledge, that the Will is likely to be disputed/objected by other persons. This view was upheld in ***Rajindra Motwani vs State 208 (2014) DLT 373***. The petitioner contends that the issue is no longer *res integra* about i) the applicability of limitation of three years period to probate proceedings or ii) that such limitation would commence at least from the moment the beneficiary under the Will obtained knowledge that the Will is likely to be or would be challenged.

6. The second contention of the appellant is that the plea of limitation can be raised at any time and it is the duty of the Court to dismiss an application or petition or decline a motion moved by a party if the same is barred by limitation. He relies upon the dicta of the Division Bench of this Court in ***Jammu & Kashmir Bank Ltd. vs Shree Digvijay Cement 154 (2008) DLT 80***, which held that the plea of limitation can be taken for the first time even at the appellate stage. The same view was held in another Division Bench decision in ***Rakesh Sharma vs Lakshmi Sharma 2002 (7) AD (Del.) 333***. Indeed in ***Shiela Enterprises vs UCO Bank 177 (2011) DLT 785*** it was held that issue of limitation could be raised even at the stage of the second appeal. In ***Jammu & Kashmir*** (Supra) it was held inter alia

“.... 23. In the instant appeal, the appellant impugns the judgement of the Learned Single Judge, inter alia, on the ground that the suit was barred by limitation. The same was however not raised before the Single Judge. Considering that this ground was not agitated before the Single Judge, a crucial question arises for this court to answer: whether the plea of limitation can be raised for the first time at the appellate stage?”

24. Under the Indian law, the bar by limitation arises as a consequence of the Limitation Act, 1963. Further, Section 3 which bars the institution of a suit after the limitation period is mandatory in nature. It enjoins an obligation on the court to dismiss a suit if the prohibition of Section 3 is properly attracted. The obligation operates independently and irrespective of the right of the defendant to challenge the maintainability of the suit on that ground...”

7. With reference to Order 41 Rule 2 of the CPC, the appellant further contends that an argument which has not been raised in the grounds of

appeal, can be raised at the time of argument with the leave of the Court. With reference to ***Jammu & Kashmir*** (supra) he further contends that the issue of limitation can be decided on the basis of records and there may not be requirement for remand of the matter for its decision before the Trial Court or the Probate Court.

8. He further contends that the circumstances in which the Will propounded by respondent no.1 makes it extremely suspicious and this issue ought to have been examined by the learned Trial Court, but it was not done; that the impugned order has erred in not addressing the arguments relating to suspicious circumstances, as has been specifically raised in Ground 'F', of the appeal. He relies upon the decision of the Guahati High Court in ***Kamakhya Prasad Gupta vs Jibonlal Gupta 2010 (6) Guahati Law Reports 467***. He submits that the appellant had knowledge of objection to the Will, therefore, the right to sue arose from the date of such communication of the DDA i.e. 16.02.2001 and 11.02.2002. Indeed there is an admission in his own letter dated 17.04.2001 that the Will has been objected to and had otherwise been challenged before the DDA by the appellant. Indeed, the probate petition itself admits in para 6, 7, 8 & 9 that respondent no.1 had knowledge of the objections; in para 14 thereof R-1 admits that "*it was not considered necessary to file this petition i.e. the probate petition*". The probate petition dealt only with the genuineness of the Will. The petitioner contends that the "suspicious circumstances" include the fact that the Will was sought to be probated only when the DDA intimated that it was likely to allot land apropos their deceased mother's claim; that on the disputed Will the signature of their mother erroneously shows an additional 'aa' syllable in the *Devnagri* script which is different from her ITR signatures; her name

was Bhagwanti and not Bhaagwanti, as inscribed on the Will; furthermore, there is a confusion about the date of the actual execution of the alleged Will; in the cross-examination the witnesses were not *ad idem* about the date on which the Will was signed. Mrs. Naveen Dhawan had deposed that it was signed on 31.12.1997, whereas Mrs. Bimla Marwah stated that it was signed on 01.01.1998. Furthermore, both of them were not present together at the time of signing of the propounded Will i.e. they were not the witnesses to it being signed by the mother. It is contended that these and other issues ought to have been examined by the Trial Court, and not doing so is an incurable error which ought not to be sustained in these proceedings.

Respondents' Arguments:

9. The aforesaid arguments are refuted by the respondents. With reference to the Original Side Rules of the Delhi High Court, he submits that the said Rules do not prescribe a statutory limit for initiating testamentary motions; that the Rules have been formulated on the basis of a Special Enactment apropos the establishment of the High Court, therefore, the said special enactment will prevail over the general rule. Reference is made to Chapter 6 of the Delhi High Court Original Side Rules which deals with Probate, Administration and Succession Certificates. It is argued that the issue of bar of limitation has been raised for the first time and without leave of the Court, therefore, the same cannot be considered in this appeal.

He further argues that assuming the provisions of Limitation Act applies, Explanation appended to Section 5 of the Limitation Act would come to his aid, which reads as under:-

“Explanation.—The fact that the appellant or the applicant was missed by any order, practice or judgment of the High Court in

ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.”

10. He submits that in any case, between 2001 and 2005 the general understanding was that article 137 of the Limitation Act will not be applicable and that the right to seek probate of a Will is a continued right till such time that the probate was obtained; that this was settled by this Court in ***Santosh Kakkar & Ors. Vs Ram Prasad & Ors. (1998) 71 DLT 147*** which observed, inter alia:

“8. The relevant provisions of law as contained in [Section 213](#) and [Section 57](#) of the Indian Succession Act, 1925 read as under:

*"[Section 213](#). Right as executor or legatee when established
(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted Letters of Administration with the Will or with a copy of an authenticated copy of the Will annexed.*

(2) This section shall not apply in the case of Wills made in by Muhammadans, and shall only apply:

(i) in case of Wills made by an Hindu, Budhist, Sikh or Jaina where such Wills are of the classes specified in Clauses (a) and (b) of [Section 57](#); and

(ii) xxxxxxxxx "[Section 57](#). The provisions of this part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply-

(a) to all Wills and codicils made by any Hindu, Budhist, Sikh or jaina, on or after the first day of September, 1870,

within the territories which at the said date were subject to the Lieutenant Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras, and Bombay; and

(b) to all such Wills and codicils made outside those territories and limits so far as relate to immovable property situated within those territories or limits; and

(c) to all Wills and codicils made by any Hindu, Buddhist, Sikh and Jain on or after the first day of January, 1927, to which these provisions are not applied by Clauses (a) and (b);

Provided that marriage shall not revoke any such Will or codicil."

*A reading of these provisions make it clear that [Section 213\(1\)](#) requiring probate does not apply to Wills made outside Bengal and the local limits of the ordinary original jurisdiction of the High Courts of Madras and Bombay except where such Wills relate to immovable properties situated within those territories. This has also been so held by this Court in the case of *Arjun Dass (supra)*, by the Punjab High Court in *Ram Chand Vs. Sardara Singh AIR 1982 Pun. 382* and *M/s. Bihari Lal Ram Charan (supra)* and by Allahabad High Court in *Bhaiji (supra)*.*

11. He also relies upon the judgment of **S.S. Lal Vs. Vishnu Mitter Govil, 2004 (76) DRJ 116 (DB)**, wherein the Supreme Court in para 4 observed that:-

*"4. In our considered opinion the approach of learned Single Judge in impugned order is correct. In *E. Devarajan v. E. Ramiah*, , a Division Bench of the Madras High Court held :*

"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 letter 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](#)."

12. He submits that on the basis of these two judgments, the general impression and practice in Delhi was that the Wills did not need to be probated and that there was no limitation. Accordingly, this position continues till the year 2008 when the Supreme Court in ***Kunwarjeet Singh Khandpur*** (*supra*).

13. The respondent further contends that even though there was no specific requirement of a probate and assuming that the provisions of the

Limitation Act will be applicable, the explanation to Section 5 thereof will cover the present case insofar as there was confusion regarding the applicability of the Act itself. In support of his contentions, he relies upon the judgment in *M/s Prem Chand Bansal & Sons Vs. Income-Tax Officer, 76 (1998) DLT 193 (DB)*, wherein it was observed that:-

*"7. The first question for consideration is whether the applicability of Section 5 of the Limitation Act, 1963, is at all attracted. It is true that the period of limitation for filing an application under Section 256(2) of the Income Tax Act is provided in Section 256 itself and not by the Schedule appended to the Limitation Act. Here, the change in law brought by the introduction of the Limitation Act, 1963, over its predecessor enactment assumes significance. Under the Limitation Act, 1908, Section 5 could not be applied to a period of limitation prescribed by special or local law unless its applicability was specifically attracted. Under Section 29(2) of the Limitation Act, 1963, Section 5 of the Limitation Act would apply to the periods of limitation prescribed by any special or local law unless such applicability is expressly excluded. It is not disputed that the applicability of the Limitation Act Section 5 has not been excluded by Section 256 of the Income Tax Act. This controversy stands resolved by the Supreme Court in *Mukri Gopalan v. Cheppilat Puthanpurayil Aboobacker*,: AIR1995SC2272 . Their Lordships have held (headnote) :*

"Section 29(2) would apply even to a case where a difference between the special law and Limitation Act arose by the omission to provide for limitation to a particular proceeding under the Limitation Act.

There is no express exclusion anywhere in the Rent Act taking out the applicability of Section 5 of the Limitation Act to appeals

filed before appellate authority under Section 18 of the Act. Consequently all the legal requirements for applicability of Section 5 of the Limitation Act to such appeals in the light of Section 29(2) of the Limitation Act can be said to have been satisfied,"

8. For the foregoing reasons, we are of the opinion that Section 5 of the Limitation Act, 1963, applies to petitions under Section 256(2) of the Income-tax Act, 1961. Such is the view taken by a Division Bench of the Delhi High Court in CIT v. Taylor Instrument Co. (India) Ltd. [1992] 64 Taxman 6.

9. The second question is whether change in the view of the law can be a sufficient cause for condoning the delay in preferring a petition within the meaning of Section 5 of the Limitation Act.

10. Learned counsel for the petitioner-assessee has brought to our notice two Full Bench decisions. In Bhagwan Swarup v. Municipal Board, Ujhani, AIR1970All652 and in State of Bihar v. Md. Ismail, AIR1966Pat1 , it has been held that delay in filing any appeal due to conflicting decisions misleading the parties in filing an appeal is a good ground for condoning the delay.

11. In the matter of pursuing a legal battle based purely on legal issues the litigants are generally advised by lawyers of their confidence and their opinion is accepted more or less conclusive in determining or guiding their course of action. In Mata Din v. A. Narayanan, [1970]2SCR90 , their Lordships of the Supreme Court have held that a delay occasioned by mistaken advice of counsel may be accepted by the court as a justification in extending time unless the error of counsel was tainted by any mala fide motive though the mistake of counsel cannot be treated as sufficient ground to condone delay by way of a rule of universal application. It is all a question of determining the bona fides of the litigant. We are of the opinion that decision shall have to be taken in the facts of each individual case whether such

circumstance constitutes a sufficient cause for condoning the delay within the meaning of Section 5 of the Limitation Act.”

14. The respondents also contend that the appeal is without basis because whatever objections had been raised in the probate proceedings were given up by the petitioner and a subsequent view has been raised in this Court to the effect that the proceedings were time barred. This point of law was never agitated by them and no issue was raised about the entire property having come to the share of Bal Mukand Kakkar and there were relinquishment deeds executed by other legal heirs, duly mutated and recorded in favour of the testatrix. In this regard, he refers to the following issues framed on 11.11.2005 by the Trial Court:-

“1. Whether late Bhagwanti Kakkar executed a valid and enforceable will dated 31.12.1997 as claimed by the petitioner? OPP

2. Whether the petitioner is entitled for grant of probate in respect of aforesaid will? OPP

3. Whether the petition is liable to be dismissed for the objections, raised by the respondents? OPR

4. Relief.”

It is argued that Issue No.3 was rightly returned in the negative.

15. The objections raised by the respondents were that the property in dispute was the ancestral property and the testatrix was not competent to bequeath it by way of this Will. The onus was on the respondents to prove it but no evidence is lead by them to prove that the property in village Mandoli, Delhi was allotted to Bal Mukand Kakkar in lieu of the ancestral property left by him in Peshwar. On the other hand positive statement was

made by the petitioner that his father left his own property in Peshawar and in lieu thereof he was allotted agricultural land in Village Mandoli, Delhi. There is no cross examination on this point. Rather it is admitted by all the respondents that the properties were allotted in the name of Bal Mukand Kakkar and after his death on the basis of relinquishment deeds executed by other legal heir's mutation was recorded in favour of the testatrix. So she was competent to execute the will. Even during the course of arguments this issue was not pressed by the respondents.”

16. The learned counsel for the respondent further contends that this being the general understanding and the then prevalent view that the limitation would not apply to probate petitions, was perhaps the reason that the objector i.e. the present appellant did not raise the objection of limitation in the probate proceedings filed by R-1; in the present case, the probate petition was filed in 2005 on the basis of a judgment delivered by this Court in ***Kunvarjeet Singh Khandpur vs Kirandeep Kaur & Ors. (2004) 112 DLT 77.*** However, the Supreme Court’s decision in the aforesaid matter came about in the year 2008 but by that time the probate petition had already been decided. Therefore, respondent No.1 contends that till the year 2005, the settled position was that Article 137 of the Limitation Act did not apply to probate petitions. The said respondent submits that the allotment of plot of land was cancelled on 18.12.2001 but was restored on 14.07.2003, therefore, the period spent in ensuring the restoration of the plot ought to be excluded. The Court is unable to see how or why this period can be excluded as it has nothing to do with the filing of a probate petition. The right to the mother’s estate would flow from the testamentary document and it would have been

prudent to pursue the recognition. He further relies upon the dicta of a Division Bench of Madras High Court in *S. Vatsala vs K.S. Mohan & Ors.* **2016-1-L.W. 577**, which held that probate is governed by the High Court Rules and the same being a Special Enactment under the Letters Patent Act would prevail over the general law of limitation, therefore, the limitation as mentioned in the Limitation Act would not apply for filing a probate petition. The said judgment has taken into consideration the view of Supreme Court in *Khandpal* (supra). *S. Vatsala* (supra) held, inter alia:

“..... 28. That apart, the probate proceedings are initiated under Succession Act, which itself is a self-contained Code, does not prescribe limitation. More significantly, the Limitation Act also does not have specific provision to deal with probate petitions. According to Article 137, the three year limitation period is provided from when the right to apply accrues. If one applies this bar of three years to an application for obtaining probate, it would mean that the right to apply accrues immediately from the date of the death of the testator.

29. No doubt, Article 137 does not warrant for the assumption that the right to apply accrues on the date of death of the deceased. An application for probate is only to seek the Court's imprimatur to perform a legal obligation created by a Will or for recognition as a testamentary trustee. Basically, the right being a continuous right can be exercised at any point after the death of the testator.

30. In Ramanand Takur v. Paramanad Takur [AIR 1982 Pat 87], following the decision of this Court in Ganamuthi Upadasi (cited supra), the Patna High Court held that it would be difficult to find out as to when the right to apply accrues in the absence of any date fixed. Hence, it was decided that right to apply remains until the Will remains unprobated.

31. The aforesaid discussion shows the line of judgments propounding that Limitation Act would not have any application in the proceedings for grant of Letters of Administration, but then

there is the view in Kunvarjeet Singh Khandpur's case (supra), where while appreciating that proceedings for Letters of Administration in relation to a Will are in respect of continuous rights, Article 137 of the Limitation Act was held applicable. It is our humble view that possibly this divergence of view may require to be reconciled by the Honourable Supreme Court, but fortunately, this aspect would not trouble us in the present case on account of the Letters Patent jurisdiction read with the Original Side Rules....

.....

.... 44. As regards the last aspect of continuous cause of action, rule of law is clear that no limitation will apply in cases where the cause of action continues. Speaking accurately, continuous cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought. If once a cause of action arises and the acts complained of are continuously repeated, the cause of action continues and goes on *de die in diem*.

45. While dealing with a service matter in *Basic Shiksha Parishad and another vs. Sugna Devi* [(2004) 9 SCC 68], the Hon'ble Apex Court held that in a case of continuing cause of action, question of limitation would not arise and in this context, in paragraph 6, it has been held as follows:-

.... Once no order of termination or dismissal is produced, her service has to be treated as stood transferred to the Basic Education Board by operation of law. In that event she has to be treated as continuing in service and salary was accruing every month that accorded her a continuing cause of action. Therefore the question of limitation also won't arise in this case."

46. Now, applying the aforesaid principles to the facts of the present case, we find that there is an assertion of the claim of execution of the Will by the testator. Indisputably, subsequent to the filing of the suit in the year 2007 by the one of the appellants, the matter was referred to Lok Adalat and since the settlement

did not fructify, the respondents herein proceeded to apply for probate of the Last Will and Testament of S.M.Subramaniam Chettiar. Admittedly, the Will was read out to the family members on the eleventh day of the ceremony of the deceased testator, ie., on 26.12.1996. A legal notice was issued for partition in the year 2003 followed by suit in 2007 in which judgment was reserved in 2011. Pending suit, the Original Petition was filed in 2011

....

49. In the light of the ratio laid in the above decisions, it cannot be stated that Letters Patent and Rules made thereunder by the High Court for regulating the procedure on the original side, are subordinate legislation and, therefore, only Limitation Act which is a superior legislation will prevail. On a conspectus of the above legal scenario, we conclude that the probate Court has been conferred with exclusive jurisdiction and particularly, the conspicuous absence of any period of limitation in applying for issuance of probate / Letters of Administration makes it clear that the law of limitation will not apply to Sections 232 and 278 of the Indian Succession Act in respect of proceedings initiated before this Court as per the Original Side Rules. In such view of the matter, the finding of the learned single Judge holding that Article 137 of the Limitation Act is not applicable to probate proceedings and dismissal of the Original Applications, in our considered opinion, require no interference

(emphasis supplied).

17. The respondent further contends that no such suspicious circumstances are made out as contended by the objectors/appellants because the testimony of the appellant Mr. Anil Kakkar himself, show that in 1977 their mother Bhagwanti Kakkar shifted to Prasad Nagar along with Mr. Hansraj Kakkar – respondent No.1 and continued to live with the latter till her demise in 1998. That she was not suffering from any ailment except age-related physical disability. The respondent argues that the mother's

longevity itself is testimony to her good health. Furthermore, the reference of change in her signatures over a period of forty years, in comparison to ITR returns, is of no consequence because the ITR documents were of 1950, whereas the Will was made about fifty years later in December, 1997; that with the passage of time there was likely to be some change in the signatures and such minor variations cannot be minutely scrutinized so as to suspect the testamentary document. He argues that instead a positive evidence has not been led by the appellant/ objector to disprove the veracity of the Will, hence the probate rightly has been granted. He further submits that in any case ITR Returns referred to was not admitted documents, hence it was merely marked as 'Mark A' and that to his knowledge his mother was not an income tax assessee in 1950.

18. It is argued that, effectively the only issue to be determined in the probate proceedings was issue No.3: "Whether the petition is liable to be dismissed for the objections raised by the respondent?" These objections were primarily that Will relates to ancestral properties and Bhagwanti Kakkar was not competent to execute a Will in favour of the petitioner with regard to those properties; that she was bed ridden for about ten years prior to her death and was not in a sound disposing mind, on the day of the execution of the alleged Will; that the Will was a forged and fabricated document and there is no independent witness to its being inscribed by the mother. According to the respondent all these issues were duly considered and the impugned order does not suffer from any infirmity, therefore, the petition should be dismissed. It is further argued that apropos the question whether the testatrix was of sound disposing mind at the time when she signed the Will, the respondent has shown photographs of the year 1997 and

1998 when the mother could be seen to be healthy in a family function. He submits that admittedly since his mother was living with the respondent, and was under his constant care, it cannot be said that his presence at the time of execution of the said Will would constitute “suspicious circumstances”. Relying upon the dicta of the Supreme Court in ***Pentakota Satyanarayana & Ors. Vs Pentakota Seetharatnam & Ors. AIR 2005 SC 4362***, he contends that mere allegation of suspicious circumstances is not sufficient. The challenge on such grounds has to be led by positive evidence. The judgment, *inter alia*, held as under:

“.....26. It is settled by a catena of decisions that any and every circumstance is not a suspicious circumstance. Even in a case where active participation and execution of the Will by the propounders/beneficiaries was there, it has been held that that by itself is not sufficient to create any doubt either about the testamentary capacity or the genuineness of the Will. It has been held that the mere presence of the beneficiary at the time of execution would not prove that the beneficiary had taken prominent part in the execution of the Will. This is the view taken by this Court in [Sridevi & Ors vs. Jayaraja Shetty & Ors](#), (2005) 2 SCC 784. In the said case, it has been held that the onus to prove the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will proof of testamentary capacity and the proof of signature of the testator as required by law not be sufficient to discharge the onus. In case, the person attesting the Will alleges undue influence, fraud or coercion, the onus will be on him to prove the same and that as to what suspicious circumstances which have to be judged in the facts and circumstances of each particular case....”

19. The respondent further argues that the recording of evidence of the two sisters, namely, Smt. Bimla Marwah and Mrs. Naveen Dhawan was done after nine years of the execution of the Will by which time Mrs. Bimla

Marwah was about 69 years of age and Mrs. Naveen Dhawan was about 55 years old and minor discrepancy would have to be over -looked. The petitioner relies upon the dicta of the Division Bench of this Court in FAO(OS) 279/2013 decided on 07.12.2015 titled: ***Ms. Sita Kashyap (since deceased) Thr. LR Ms. Benu Puri vs Harbans Kashyap & Ors.***, which held that:

“...While the Court has the duty to satisfy itself that the technical requirements with regard to the validity of a Will are duly proved and that no suspicious circumstances attended its making, at the same time, the Court is not expected to exaggerate small errors or discrepancies in description given by witnesses, keeping in mind the fact that the memories fade and the witnesses also grow old. In the present case, the Will was made in 2004, the testatrix passed away in 2009. The application claiming benefit of the Will and the substitution to the extent it granted testatrix’s share to the applicant was made on 06.10.2009. In these circumstances, the deposition as to the making of the Will took place almost seven years after its preparation. Quite naturally, some inaccuracies were bound to occur. Considering these facts, the Court ought to have undoubtedly gone into the matter with some care but not exaggerated the discrepancies and elevated it to the level of “suspicious circumstances” to discard what, in our opinion, was a validly executed Will...”

20. With reference to Section 63 of the Succession Act, 1956, the respondent contends that the requirement is for only one witness to be present at the time of execution of the Will, while the other can be a witness if the testator gives such acknowledgement of his executing the Will. With respect to requirement of registration of the Will after demise of the testator the respondent relies upon the judgment of the Allahabad High Court in

Krishna Kumar & Ors. Vs The Court of District Registrar/ ADM (F&R) Raebareli & Ors. AIR 2010 All 165 to contend that the Registering Authority under Section 41 of the Indian Registration Act, has to decide about the following three conditions: (i) that the Will has been executed by testator; (ii) that the testator is dead; and (iii) that the person presenting the Will is, under Section 40, is entitled to present the same. It is argued that witnesses who have supported the Will and have not been cross-examined that the Will was fraudulently registered.

21. The respondent further argues that the application under Section 278/279 of the Succession Act is not a suit as held by the Bombay High Court in ***Khairunnissa A K Siddiki vs Municipal Corporation of City of Bombay 1965 LawSuit (Bom) 134***, which held: “... the word “suit” should have the same meaning that it has in the Limitation Act. As decided in *Hansraj Gupta*, the ordinary meaning of the word “suit” as commonly understood is a proceeding which is commenced by the present of a plaint. There is nothing in the Act to suggest that the word “suit” should have a wider meaning..” . The Court is unable to see how this judgment is relevant or of assistance to the respondent especially in view of the decision of the Supreme Court in ***Khandpur*** (supra).

Discussion:

22. Essentially what, Mr. Anunaya Mehta, the learned counsel for the appellants argues, is that the legatee must seek probate of a Will from the date he receives intimation or knowledge of any objection to such likely legacy.

23. In the present case, the respondent had not only been intimated but had also acquired knowledge from the DDA by a letter dated 16.02.2001 that there was an objection to the Will by the other legal representatives, and hence, they should seek mutation. Indeed, by a letter dated 17.04.2001, the respondent sent a legal notice acknowledging the challenge to the Will. Therefore, in terms of the precedents of this Court as well as of the Supreme Court in the judgment of *Krishna Kumar Sharma vs. Rajesh Kumar Sharma (2009) 11 SCC 537*, it was imperative that the Will had to be probated within three years from the date of such knowledge if not from the date of 16.02.2001, then surely from the date of the legal notice i.e. 17.04.2001. Accordingly, since the probate petition was not filed by 16.04.2004, it is time barred. It was filed on 29.04.2005.

24. This Court would not go into the details of the signatures of late mother of the parties having an additional syllable in her Devnagri signature i.e. Bhaagwanti instead of Bhagwanti or that it was in suspicious circumstances. What needs to be examined is whether the probate petition was maintainable in the first place after four years two months and fourteen days from the date of “right to apply”/”right to sue”. What emerges with respect to the decisions cited above is that the law of limitation would apply. The issue has been clearly settled by the Supreme court in *Khandpur* (supra). Thereafter, a Division Bench of this Court has held that period of limitation of three years would apply to a probate petition, the issue is no more *res integra*. Therefore, in so far as respondent no.1 became aware that the Will, on which he propounded for grant of probate and had relied upon before the DDA, had been objected to by the appellant on 16.02.2001 and

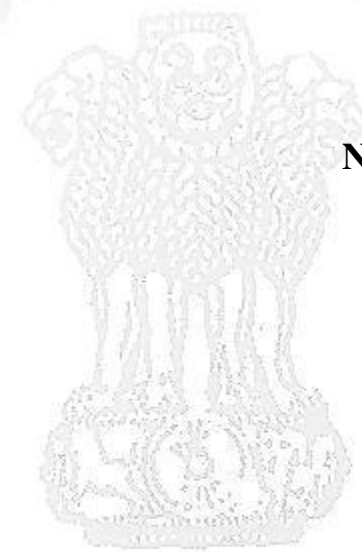
again on 11.02.2002, and was informed by the DDA through its letters, the right to sue occurred on the said dates. Admittedly, the probate petition was filed beyond the period of three years from either of the two dates. There was neither any application for condonation of the delay nor any reason proffered for it. Therefore, it would be barred by limitation, and hence the probate petition was not maintainable, in the first instance.

25. In view of the above discussion, it is evident that the impugned order dated 06.05.2008 has erred in granting probate of the Will dated 31.12.1997. It is set aside. The appeal is allowed.

NAJMI WAZIRI, J.

JUNE 01, 2018

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