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

Date of Decision: - 25.01.2021

+ **FAO (OS) 59/2020 & CM APPL. 29633/2020**

ANUPAM MULLICK Appellant
Through Mr. Ved Prakash Sharma with Ms.
Amrit Kaur Oberoi Advs.

versus

RAJ MULLICK & ANR. Respondent
Through Ms. Nandni Sahni and Mr. Sachin
Bandooni Advs for R-1.
Ms.Madhu Sudan Bhagana, Adv for R-2.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MS. JUSTICE REKHA PALLI

VIPIN SANGHI, J (ORAL)

1. The present appeal assails the order dated 02.03.2020 passed in TEST.CAS 74/2017, wherein the learned Single Judge has rejected the submission of the objector/appellant herein on issue no.1 regarding the petition being barred by limitation, by holding that the said issue could not be decided as a preliminary issue.
2. The appellant's plea before the learned Single Judge—that the petition preferred by the respondent, Ms. Raj Mullick seeking probate of the will dated 24.05.1996 of her deceased sister Mrs. Rani Mullick was barred by limitation, was premised on his claim that the said will had already been

disputed by the appellant way back in the year 1998. According to the appellant, since the said will has been disputed in the year 1998 itself, the period of limitation of 3 years—as prescribed under Article 137 of the Limitation Act, had started to run against the respondent in 1998 and, therefore, the testamentary case filed in the year 2017 was well beyond the period of limitation. In support of this plea, the appellant/objector had placed reliance on a Division Bench judgment of this Court in ***Pratap Singh & Anr. vs. State & Anr. 2010 (118) DRJ 534 (DB)***

3. The learned Single Judge while rejecting this preliminary objection, firstly placed reliance on a decision of the Supreme Court in ***Kunvarjeet Singh Khandpur vs. Kirandeep Kaur & Ors., 2008 (8) SCC 463***, and secondly on the facts of the case. She observed that the question as to whether the said issue could be decided at the preliminary stage, when evidence had yet to be led by the parties, had to be examined with reference to the pleadings in the petition. By referring to Paras 2 and 13 of the petition preferred by respondent no.1, which *inter alia* refer to the holographic will of the testatrix, and that she was compelled to file the probate petition before the High Court to be able to deal with the debentures, shares and bonds etc. of certain companies, which were held by the testatrix Ms.Rani Mullick, the learned Single Judge held that at this stage, without the parties having led their evidence, it could not be determined whether the pleas taken by the petitioner were unwarranted and therefore, opined that the parties would have to lead their evidence in relation to the said issue.

4. It is thus evident that the learned Single Judge had left the determination of the issue of limitation open, to be decided after recording of evidence of the parties.

5. In support of the appeal, Mr. Ved Prakash Sharma, learned counsel for the appellant submits that in the present case, there was no disputed question of fact, since the appellant/objector had disputed the will in 1998 itself. The same is evident from the order dated 12.02.1998 passed by this Court in Suit No. 56/1985 and FAO(OS) 194/1996, wherein the fact that the will in question (set up by the respondent no.1) was disputed, was recorded and on that basis, not only the respondent no.1 but the other heirs of Ms. Rani Mullick were also impleaded as her legal heirs.

6. Mr.Sharma has relied upon, firstly the decision of a learned Single Judge of this Court in ***Amit & Ors. V. State of NCT of Delhi & Ors. [2017 (244) DLT 202]*** and in particular on para 2 thereof, which reads as under:-

“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.”

7. Mr. Sharma has also placed reliance upon a Division Bench Judgment in ***Pratap Singh & Anr. (supra)*** and in particular on para 5 thereof, which reads as under :-

“5. As regards when the right to apply accrues, one of us (Vikramajit Sen, J.) in Pamela Manmohan Singh v. State and others, 83 (2000) DLT 469 held that the period of three years would surely commence at least

from the date on which the legatee to a Will could be justifiably ascribed with the knowledge that the Will on which his claim is founded is likely to be disputed by other persons, especially the natural heirs of the testator. The relevant extract from the decision are as under:-

“3. I have taken this view after considering the decision in Ramanand Thakur Vs Permanand Thakur : AIR 1982 Pat 87, where it was observed that the "right to apply for a probate accrues from day to day so long as the Will remains unprofaned. In other words, the right to apply accrues every day and the cause of action for an application for probate arises every moment so long as the will remains unprofaned and, therefore, for such an application there is no period of limitation and for taking this view we find full support from the Calcutta case which also finds support from the view taken by the Madras High Court in the case of Gnanmuthu Upadesi Vs. Vana Koipillai Nadan, (1894) 2nd 17 Mad. 379). Therefore, while holding that the Art. 137 of the new Limitation Act applies to any petition or application filed under any Act, we do not feel any difficulty to come to the conclusion that so far as the application for grant of a Probate or Letters of Administration is concerned, they are not governed by any Article of the Limitation Act. The application accordingly fails and, is hereby dismissed but in the circumstances, we shall leave the parties to bear their own costs.”

4. It appears to me, with due deference to the Learned Judges, that while correctly appreciating in paragraph 4, that the Apex Court had overruled its earlier view that Article 137 of the Limitation Act applied only to applications made under the Civil Procedure Code, they were influenced by decision rendered on the basis of the old Limitation Act.

5. In Kerala State Electricity Board, Trivandrum Vs T.P. Kunhaliumma: [1977] 1 SCR 996, Article 137 of the Limitation Act, 1963 was held to "apply to any petition”

"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 case: (1969)II LLJ 651SC (supra) 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."

6. The decision in Shobha Kshirsagar Vs Smt. Janki Kshirsagar & Anr. : AIR 1987 MP 145, in which a Learned Single Judge held that Art. 137 cannot apply to an application for probate, with respect, cannot be reconciled with the decision of the Apex Court in the Kerala State Electricity Board's case (supra). The Learned Judge proceeded on the foundation of the decisions rendered by some High Court, which decisions were predicated on the old Limitation Act. Therefore, reliance on precedents prior to the rendering of the decision in the Kerala State Electricity Board's case (supra) would be inappropriate. For these very reasons I feel constrained not to follow the ratio in Balwant Vs Mainabai : AIR 1991 MP 11.

7. In a decision of a Division Bench rendered in Hari Narain Vs. Subhash Chander MANU/PH/0163/1985, the argument that no limitation had been prescribed in filing of an application for revocation of a probate granted under the Succession Act was referred to as an "astounding proposition of law put forth by the learned counsel for the Applicant". After discussing the law as enunciated by the Supreme Court, it was held by the learned Division Bench that Article 137 of the Limitation Act, 1963 would apply to any petition or application filed in a Court where no other period of limitation had been prescribed. After careful consideration I would extend the ratio of this decision mutates mutans to also cover cases pertaining to the grant of probate, where it can be fairly assumed that the Petitioner had knowledge that the Will was likely to be disputed. Article 137 of the Limitation Act, 1963 reads as under:

Description of suit Period of Limitation

Time from which period begins to run

when the right to apply accrues.

137. Any other no period three years of limitation is provided elsewhere in this Division.

When the right to apply accrues.

The period of three years would surely commence atleast from the date on which a legatee under a Will could be justifiably ascribed with the knowledge that the Will on which his claim is founded is likely to be disputed by other persons especially the natural heirs of the Testatrix. By way of adumbration, hypothetically, a Will may have been executed in Delhi in 1950. The bequests made and dealt with therein may not have come into any dispute for several decades. It could be that some legatees were in possession of the properties with the tacit permission or approval of the other legatees, which approval was subsequently withdrawn. So long as the rights of any particular legatee are to emanate and flow from the Will, probate proceedings ought to be filed atleast within three years from this conjectured withdrawal of permission. That would then be the latest date on which "the right to apply accrues". This would be the most appropriate and meaningful interpretation given to the words "when the right to apply occurs". The applicant in the present case must surely have been well aware that the Will would be indefatigably contested. His right to apply surely accrued on the death of the alleged Testatrix Dr. Raseel Kohil on 11.10.1987. Yet he chose not to initiate probate proceedings, and over a decade has passed thereafter."

8. Mr.Sharma submits that there is no disputed question of fact, since the fact with regard to the will being disputed is a matter of record, and thus the period of limitation certainly started from the said dispute being raised in the year 1998.

9. On the other hand, Ms. Nandni Sahni, learned counsel for the

respondent no.1 has defended the impugned order by submitting that while passing the said order on 12.02.1998, the Court did not go into the issue regarding the genuineness and correctness of the said will. She further relies on ***Kunvarjeet Singh Khandpur (supra)*** taken note of by the learned Single Judge in para 4 of the impugned order, as well as ***Krishan Kumar Sharma vs. Rajesh Kumar Sharma 2009 (11) SCC 537*** taken note of by the learned Single Judge in para 5 of the impugned order.

10. She submits that the Supreme Court in ***Kunvarjeet Singh Khandpur (supra)*** referred to the decision of the Bombay High Court in ***Vasudev Daulatram Sadarangani v. Sajni Prem Lalwani AIR 1983 Bom 268*** and in para 15 of its judgment, held as under:

15. Similarly reference was made to a decision of the Bombay High Court in Vasudev Daulatram Sadarangani v. Sajni Prem Lalwani [AIR 1983 Bom 268]. Para 16 reads as follows: (AIR p. 270)

“16. Rejecting Mr Dalpatrai's contention, I summarise my conclusions thus—

(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.”*

Conclusion (b) is not correct while Conclusion (c) is the correct position of law.”(emphasis supplied)

11. After noting the aforesaid extract from the decision of the Bombay High Court in *Vasudev Daulatram Sadarangani (supra)*, the Supreme Court observed that conclusion (b) arrived at is not correct, while conclusion (c) laid down the correct position of law. Thus, the legal position affirmed by the Supreme Court was that an application to seek probate of a will, or letters of administration in respect of the will, is an application to seek the Court’s permission to perform a legal duty created by a will or for recognition of the testamentary trustee and is a continuous right that 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.

12. The submission of Mr.Sharma is that the Supreme Court did not approve the conclusion drawn by the Bombay High Court in sub paras (d) to (g) of its decision, and the only conclusion approved by the Supreme Court was the one drawn in sub para (c). This submission of Mr.Sharma does not appear to be correct and cannot be accepted. The conclusion drawn in clauses (d) to (g) flow from the conclusion drawn in clause (c) aforesaid. In fact, in *Krishan Kumar Sharma (supra)*, the Supreme Court had, in its conclusion, reiterated those very conclusions drawn by the Bombay High Court in *Vasudev Daulatram Sadarangani (supra)* without observing that the conclusion drawn in sub para (d) to (g) are incorrect.

13. It is well-settled legal position that succession opens immediately

upon the death of the person, and the rights in the property held by the deceased— whether he/she dies intestate, or after making a will, devolve upon the heirs/legatees immediately upon the occurrence of the death of the person. Devolution of rights takes place by operation of law, and is not dependent on any act of any person—whether the heir/beneficiary, or the executor of the will—if there is one left by the deceased. If the plea of Mr.Sharma were to be accepted, it would mean that non-filing of a probate petition by a legatee/executor for the recognition of the right which has already vested in the legatee, would result in the said right getting destroyed on the ground of limitation, despite the estate having already vested in the legatee. In our view, this position cannot be accepted, and it is precisely for this reason that the Supreme Court affirmed the decision of the Bombay High Court, that an application to seek Letters of Administration in respect of a will is only to seek 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 its right to do so survives, and the object of the trust exists or any part of the trust if created, remains to be executed. No doubt, where such an application is moved beyond a period of three years after the death of the testator, the said delay may arouse suspicion and greater the delay, greater would be the suspicion, but the mere delay in approaching the Court cannot be treated as an absolute bar on limitation. The decisions relied upon by Mr.Sharma do not appear to have noticed these aspects, including the ratio of the Supreme Court decisions in ***Kunvarjeet Singh Khandpur (supra)*** and ***Krishan Kumar Sharma (supra)***.

14. That apart, limitation is a mixed question of fact and law and while

examining the issue of limitation at the preliminary stage, it is only the averments made in the petition which have to be looked into and therefore, in our view, the effect of order dated 12.02.1998, vehemently relied upon by Mr. Sharma, could not have been gone into at the preliminary stage.

15. For the aforesaid reasons, we do not find any merit in the appeal and the same is, accordingly, dismissed along with the pending application.

VIPIN SANGHI, J

REKHA PALLI, J

JANUARY 25, 2021

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