

Form No. J(2)

In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side

Present: The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar

F.A. 15 of 2019
IA No: CAN 5 of 2024

Achin Ghosh and others
Vs.
Debashis Sengupta, in place of Jyotirmoyeee Sengupta
(since deceased) and another

For the appellant	:	Mr. Sourav Sen Mr. Diptomoy Talukder Mr. Triptimoy Talukdar Ms. Archita Chel Mr. Abhiraj Tarafder
For the respondent no.1(b)	:	Mr. Washim Akhtar Dafader
Heard on	:	20.03.2025
Judgment on	:	20.03.2025

Sabyasachi Bhattacharyya, J.:-

1. The present appeal has been preferred against a judgment whereby the letters of administration proceeding filed at the behest of the appellants was dismissed on the sole ground of limitation.

2. Mr. Sen, learned senior counsel appearing for the appellants, argues that the rigours of Article 137 of the Limitation Act are not applicable strictly in probate proceedings and in respect of proceedings for grant of letters of administration.
3. Learned senior counsel cites *Sameer Kapoor and another vs. State through Sub-Division Magistrate South, New Delhi and others* reported at (2020) 12 SCC 480 in support of the proposition that a testamentary application, either for probate or letters of administration, 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.
4. It was further held that the right to apply would accrue when it becomes necessary to apply, which may not necessarily be within three years from the date of the deceased's death.
5. Delay beyond three years after the deceased's death, it was observed by the Supreme Court, would arouse suspicion and the greater the delay, the greater would be the suspicion.
6. Such delay must be explained, but cannot be equated with the absolute bar of limitation.
7. Learned senior counsel further argues that upon a previous application for grant of probate filed by the executor in respect

of the self-same Will having been dismissed for default, the present appellants, the beneficiaries of the said Will, were in the dark as to the said proceedings.

8. Ultimately, upon conducting a search of the case records through a learned advocate, the appellants came to know that the said probate proceeding had been dismissed on April 26, 2006.
9. As such, having no other alternative, the appellants sent a registered letter at the address of the executor of the Will but the same returned with a postal endorsement on the envelope “deceased”.
10. Being thus compelled, the present appellants took out the application for letters of administration at the earliest thereafter and as such, for the purpose of the present application, the right to sue accrued in favour of the appellants as and when they learnt of the dismissal for default of the previous probate proceeding.
11. Learned senior counsel next contends that the dismissal of the previous probate proceeding under Order IX Rule 9 of the Code of Civil Procedure would not operate as a bar under the said provision, nor would it operate as a bar of *res judicata*.
12. In support of such contention, learned senior counsel cites a judgment of a learned Single Judge of this court in the matter of

In the Goods of Samarendra Nath Bal, deceased reported at (2010) 1 CHN 782.

13. The appellants next argue that the widow of the deceased testator had appeared in the probate proceeding and had expressed her consent to the grant of probate.
14. Subsequently, notice of the present proceedings for letters of administration were also served on the said widow of the deceased testator but she did not contest.
15. Upon the widow of the testator having later met her demise, the present respondents were substituted in her place and stead as her sole heirs and legal representatives.
16. As such, the present respondents stepped into the shoes of the widow of the deceased testator and thus, are bound by the consent given by the said widow.
17. Mr. Dafader, learned counsel appearing for respondent no.1(b), argues that in the application for grant of letters of administration, the appellants have not disclosed when the right to sue accrued in their favour, nor was it explained as to what was the source of knowledge of the said appellants, since they were in the dark, as per their own admission, about the dismissal for default of the previous probate case.
18. In the absence of disclosure of any specific date of knowledge, it is contended that the present application for letters of

administration was rightly held to be time-barred by the testamentary court.

- 19.** Mr. Dafader next argues that the registered letter purportedly sent to the executor Samir Das, as pleaded in paragraph no.5 of the letters of administration application, was never exhibited.
- 20.** As such, the case of the appellants regarding the cause of the delay was not substantiated at all.
- 21.** Upon hearing learned counsel for the parties, we find that, as rightly contended by the appellants, the rigours of Article 137 of the Schedule to the Limitation Act, 1963 are not applicable strictly to a letters of administration proceeding.
- 22.** In the cited report of *Sameer Kapoor and another (supra)*, the Supreme Court approved of the proposition that an application for probate or letters of administration 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.
- 23.** In the said case, the Supreme Court held that the application for letters of administration was not time-barred, since the right to sue accrued when the opponents therein started intermeddling with the properties-in-question.

- 24.** Hence, it is clear that as per the above report, the provisions of Article 137, although held to be applicable to applications for probate/letters of administration, were diluted insofar as the rigours of the same are concerned. An application for probate/letters of administration is not for assertion of a legal right as such but 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.
- 25.** To the above logic, we may also add that the right conferred by virtue of a Will is not dependent merely on a probate but flows from the Will itself.
- 26.** The grant of probate or letters of administration is a mere sanction on the part of the court, insofar as the devolution is concerned.
- 27.** Such sanction, by itself, does not create the right, which generates from the Will itself, but merely facilitates implantation of the same.
- 28.** We are also not unmindful of the legal position in that in some jurisdictions within India, for a Will to be considered to be valid, no further grant of probate is required at all.

- 29.** Hence, in a bid to harmonize the law on an equal footing throughout the country, we cannot but observe that the right asserted by a party on the strength of a Will flows from the Will itself and the grant of probate or letters of administration merely lends a *post facto* sanction to the same and has to be read in such context.
- 30.** In the said backdrop, if we delve into the ratio of the reported judgment as discussed above, we find that strict rigours of Article 137 are not applicable to a right flowing from a Will, when the testamentary trust continues in the applicants.
- 31.** In the present case, there is nothing to show that there was a pause or a terminus in the right to sue for letters of administration insofar as the appellants are concerned.
- 32.** What remains is that the appellants have to satisfy the court that the delay, by itself, did not give rise to a suspicious circumstance to vitiate the Will itself.
- 33.** In the present case, sufficient explanation for the delay has been furnished in the pleadings of the letters of administration application.
- 34.** The application for letters of administration is not the first attempt to vindicate the Will-in-question.
- 35.** Initially one Samir Das, since deceased, the executor named in the Will, had in fact applied for grant of probate, which proceeding was subsequently, however, dismissed for default.

- 36.** Sufficient explanation has been given in paragraph no.5 of the letters of administration application to give rise to the inference that although the appellants were aware of the filing of the probate application, since they were not conducting the litigation and were at the mercy of the executor Samir Das, the appellants were in the dark about the outcome of the said proceeding.
- 37.** Although no specific source of information has been disclosed in paragraph no.5 of the letters of administration application, it has been stated that upon growing suspicious due to the long period of lack of contact between the executor Samir Das and the appellants, the appellants conducted an independent search and only upon doing so learnt about the dismissal of the probate case.
- 38.** Thereafter, as per the case of the appellants, a registered letter was sent at the address of the said Samir Das wherefrom they learnt that the said Samir Das, the executor of the Will, had met his demise, which was evident from the endorsement "Deceased" on the postal envelope which returned upon a failed attempt to serve on the said executor.
- 39.** We find from the records that the said postal envelope containing the letter was marked as an exhibit in the letters of administration proceeding.

- 40.** It is evident from the said envelope that the date of the postal endorsements on the same corresponded with a period which is very near to the filing of the letters of administration proceeding, that is, of the year 2015 and also disclosed that the appellants learnt of the demise of Samir Das from the endorsement “Deceased” which found place on the said envelope.
- 41.** Hence, since it is well-settled that procedure is the handmaid of justice, we are not inclined to shut out the valuable rights of the appellants to obtain letters of administration in respect of the Will of the deceased testator merely on the technical ground of particular details of the date of knowledge having not been given.
- 42.** In line with the judgment of the Supreme Court and the above findings, we are inclined to take a lenient approach, more so since a judgment in a proceeding for grant of probate and/or letters of administration operates as a judgment *in rem* and affects and operates against the world at large.
- 43.** The rights determined in such a proceeding are not confined and binding only on the parties thereto but hold good as against the entire world.
- 44.** That apart, we are also aware of the fact that in a testamentary proceeding, it is the intention and last wish of a deceased person which is being looked into by the court and the testamentary court also acts as a court of conscience.

- 45.** Thus, merely because of certain technicalities, the rights of the beneficiaries under a Will, as per the last desire of a deceased person who is no longer there to espouse his or her cause, has to be taken into consideration and honoured.
- 46.** Thus, seen from such perspective, we are unable to agree with the finding of the learned testamentary Judge to the effect that the letters of administration application was to be dismissed on the ground of limitation alone.
- 47.** The next question which arises is whether the present respondents are precluded from challenging the Will-in-question, being bound by the consent given to the grant of probate by their predecessor-in-interest, the widow of the deceased testator.
- 48.** What falls for consideration first in that regard is whether the present respondents are actually bound by the consent given by the widow or were impleaded in the present proceeding in their independent capacity, not as heirs of the widow but as the heirs of the testator himself. There is a difference between the two, since in the latter case, they would not be claiming through the testator's widow, the initial citee in the probate proceeding, and hence would not be bound by her consent.
- 49.** As a matter of chance, in the present case, the surviving heirs of the testator himself on the date of death of his widow coincides with the heirs of the deceased widow, since as per the Hindu Succession Act, in the absence of any children, it is the heirs of

the husband who fall in line of succession of a female Hindu widow.

- 50.** However, it might have been different in a case where the heirs of the deceased contestant in a probate proceeding were not the same persons as the heirs of the testator.
- 51.** For example, it might very well have been that at the time of filing of the probate application, only a married daughter of the testator was his surviving heir.
- 52.** In such case, on the demise of such married daughter, and in the absence of any son and daughter of the said married daughter of the testator, it would be the heirs of her husband, and not the heirs of the testator, who would come in her place.
- 53.** However, such conflict can easily be resolved if we focus on the relevant date for consideration of the heirship.
- 54.** The premise of citation and caveatable interest in a testamentary proceeding is whether rights would accrue on the cited persons or the caveators, on the date of death of the testator, which rights would be displaced by the Will.
- 55.** The test is as to who would benefit in the event the Will was disbelieved or probate or letters of administration was not granted in respect of the same.
- 56.** Seen from such perspective, the natural line of succession of the testator on the date of his death would be the material date of consideration.

- 57.** If so, then the objector or caveator in respect of a probate proceeding has to be the heir of the testator on the date of the testator's demise.
- 58.** In the event no probate or letters of administration was granted, the subject property would vest in the testator's heir(s) as on the date of his death. In such case, it would be the heirs of the said initial objector who would come next in line after the said objector's demise insofar as devolution of intestate succession of the property was concerned.
- 59.** Thus, the present respondents were not substituted in the capacity of the heirs of the original testator but as the heirs of the widow of the testator who, in turn, had consented to the grant of probate in respect of the self-same Will.
- 60.** The widow of the testator, in the present case, not only consented to the grant of probate of the Will in the previous probate proceeding, she also did not contest the instant letters of administration proceeding despite having notice.
- 61.** Thus, the said widow, the sole initial objector and heir of the testator, all along was consistent on her consent to the grant of probate.
- 62.** As such, since the present respondents stepped into her shoes by being substituted in the letters of administration proceeding as her heirs, they are bound by the consent given by their predecessor-in-interest, the said widow, and cannot claim a

greater right than the said widow of the testator had. As such, the respondents are precluded from resiling from the consent given by the widow and turning around and challenging or disputing the grant of probate/letters of administration.

- 63.** The third issue which is involved in the present adjudication is whether by dint of the prior dismissal for default of the probate proceeding at the instance of the executor of the self-same Will, the present letters of administration proceeding is barred.
- 64.** With utmost respect, we are unable to agree with the relevant paragraph of the judgment in the *Goods of Samarendra Nath Bal*, that is, paragraph-19, where the learned Single Judge held that Order IX Rule 9 of the Civil Procedure Code would not come into play in a testamentary proceeding, by equating the said bar with *res judicata*, since *res judicata* stands on a different footing, where rights have already been decided, than a bar under Order IX Rule 9 of the Code, which precludes a party from re-agitating the self-same cause of action after his suit having been dismissed for default once, without restoring the said suit.
- 65.** However, such hurdle of Order IX Rule 9 of the Code of Civil Procedure does not operate against the present appellants, simply because the appellants are neither the executor of the Will, whose probate application was dismissed for default, nor claim through the said executor.

- 66.** The rights of the executor and the beneficiaries to a Will run parallelly, although both emanate from the same source, that is, the Will itself.
- 67.** The right of beneficiaries, who are vested and bequeathed with the property covered by the Will, is entirely an independent right arising out of the Will whereas the right of an executor is in the nature of the right of a trustee, for the protection of the testator's estate till it is distributed among the beneficiaries.
- 68.** The capacities of the executor on the one hand and the beneficiaries on the other, thus, stand on entirely different footings.
- 69.** Accordingly, it cannot be said that the present appellants, claiming as beneficiaries under the Will, claim on the same footing as the executor.
- 70.** Thus, the principle of Order IX Rule 9 of the Code of Civil Procedure is not applicable, since it is not the cause of action of the executor in the probate proceeding which is being espoused by the beneficiaries to the Will afresh.
- 71.** Hence, on all counts, we find that there was no scope for dismissal of the letters of administration proceeding on the ground of limitation.
- 72.** Hence, we do not find any reason to unnecessarily protract the litigation by relegating the matter back to the testamentary court for a further adjudication on merits on the other issues than

limitation since as per our above discussions, the present respondents are precluded from challenging the veracity of the Will.

- 73.** The only question which remains is whether the execution of the Will is further required to be proved in accordance with law.
- 74.** On such count, we find that the learned testamentary Judge held that the petitioner Achin Ghosh, as PW-1, proved the death certificate of late Jitendra Nath Sengupta, the testator and the same was marked as Exhibit-1, he had also filed a letter in an envelope along with postal receipt with AD card addressed to Mr. Samir Das, executor of the concerned Will, which was marked as Exhibit-2 collectively.
- 75.** One Mahesh Lahiri was the PW-2, who had proved due attestation and execution of the Will-in-question.
- 76.** Accordingly, the concerned Will was marked as Exhibit-3 and the signature of the attesting witness as Exhibit-3/A.
- 77.** Thus, we find that the testamentary Court had categorically found that the due execution and attestation of the Will was proved in accordance with law, but still dismissed the letters of administration proceeding only on the ground of limitation. The objection of limitation having been turned down by us, and the testamentary court having held that the execution and attestation of the Will-in-question was duly proved (in terms of

Section 63 of the Indian Succession Act), nothing further remains to be adjudicated by the testamentary court.

- 78.** Accordingly, as held above, there is no requirement to send the matter on remand.
- 79.** Hence, F.A. 15 of 2019 is allowed on contest against the respondent no. 1(a) and ex parte against the other respondent, thereby setting aside the impugned judgment and deemed decree dated September 28, 2016 passed by learned Civil Judge (Senior Division), First Court at Barasat, District-North 24-Parganas in Miscellaneous Case No.175 of 15(LA) and granting letters of administration of the last Will and testament of late Jatindra Nath Sengupta dated March 3, 1994 in favour of the petitioners/appellants.
- 80.** Necessary consequential and ministerial steps shall be taken by the appellants before the court below accordingly.
- 81.** CAN 5 of 2024 also stands disposed of in view of the appeal being allowed.
- 82.** There will be no order as to costs.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)