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

+ TEST.CAS. 74/2017

MS. RAJ MULLICK

..... Petitioner

Represented by: Ms.Nandini Sahni, Advocate.

versus

STATE

..... Respondent

Represented by: Mr.Madhu Sudhan Bhayana,
Advocate for respondent No.1.
Mr.Ved Prakash Sharma, Ms.Amrit
Kaur Oberoi and Ms.Abha Sharma,
Advocates for respondent
No.2/objector.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

ORDER

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02.03.2020

1. Learned counsel for the objector has sought hearing on the issue No.1, that is, whether the petition is barred by limitation, which it was prayed be treated as a preliminary issue.
2. Case of the objector is that the objector having objected to the execution of the Will in the earlier proceedings way back in the year 1998, the present testamentary case filed in the year 2017 is beyond the period of limitation and is thus liable to be dismissed on this count. Reliance is placed on the decision of the Division Bench of this Court reported as 2010 (118) DRJ 534 (DB) Pratap Singh & Anr. vs. State & Anr.

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3. Learned counsel for the petitioner on the other hand contends that the said decision was rendered after the parties had led their respective evidence and the issue of limitation being a mixed question of law and fact, the present petition cannot be held to be barred by limitation merely on the basis of some documents filed by the objector. Learned counsel relies upon the decisions reported as 2008 (8) SCC 463 Kunvarjeet Singh Khandpur vs. Kirandeep Kaur & Ors., 2009 (11) SCC 537 Krishan Kumar Sharma vs. Rajesh Kumar Sharma, 2017 (244) DLT 202 Amit & Ors. vs. State of NCT of Delhi & Ors. and 2019 (2) RLR 440 Asha Mongia & Ors. vs. State & Ors. Learned counsel also relies upon the decision of the Supreme Court reported as 2018 (14) SCC 187 Hareendran & Ors. vs. Sukumaran & Ors. wherein the Supreme Court laid down that the issue of limitation being a mixed question of law and fact cannot be determined as a preliminary issue.

4. Supreme Court in Kunvarjeet Singh Khandpur (supra) partially approved the tests laid down by the Bombay High Court in the decision reported as AIR 1983 Bom 268 Vasudev Daulatram Sadarangani vs. Sajni Prem Lalwani and in para-15 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.

5. This decision was further clarified by the Supreme Court in Krishan Kumar Sharma (supra) as under:

6. “11. In *Kerala SEB v. T.P. Kunhaliumma* [(1976) 4 SCC 634] it was *inter alia* observed as follows: (SCC pp. 638-39, paras 18 & 22)

‘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 case [Town Municipal Council, Athani v. Labour Court, (1969) 1 SCC 873] 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 the Judge of the Principal Civil Court.

12. Further in *S.S. Rathore v. State of M.P.* [(1989) 4 SCC 582 : 1990 SCC (L&S) 50 : (1989) 11 ATC 913] it was *inter alia* stated as follows: (SCC p. 585, para 5)

‘5. The 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 *Pierce Leslie & Co. Ltd. v. Violet Ouchterlony Wapshare* [AIR 1969 SC 843] 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:

‘Description of suit	Period of limitation	Time from which period begins to run
*	*	*
137. Any other application for which no period of limitation is provided elsewhere in this division.	Three years	When the right to apply accrues.’

The crucial expression in the petition (sic Article) 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 and 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, Re* [AIR 1991 Mad 214] . In para 17 of the said judgment it was noted as follows: (AIR p. 222)

'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 letters 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 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.'

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 Kerala SEB case [(1976) 4 SCC 634].

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.’ ”

These aspects were highlighted in *Kunvarjeet Singh Khandpur v. Kirandeep Kaur* [(2008) 8 SCC 463], at SCC pp. 466-68, paras 11-15.

6. The issue when the need arose to the petitioner to seek probate/letter of administration of the Will of the deceased is a question based on facts whereupon the law will be applicable as to whether the petition is within the period of limitation or not.

7. At this stage when no evidence has been led by the parties, averments in the petition have to be read by way of demurrer and in the petition in para-2 and para-13 the petitioner has pleaded as under:

“2. That the deceased Ms.Rani Mullick was a Hindu by religion and she died on 24.2.1997. The deceased was aged about 70 years of age at the time of her death and was suffering from heart trouble, B.P. etc. and had died a natural death at ESI Hospital, Basai Darapur, Delhi.

The petitioner herself is also aged about 87 years of age and is not keeping good health and is applying for present petition in order to discharge all of her responsibilities during petitioner’s life time only, given to the petitioner by her deceased sister by executing her will dated 24.5.1996 whereby petitioner is the named executor in will dated 24.5.1996.

*The original will dated 24.5.1996 of Late Ms.Rani Mullick is being placed on record as **Annexure A-1** along with original death certificate which is annexed as **Annexure A-2** issued by the appropriate authority under the Registrar of (Birth & Death), MCD, West Zone, Delhi bearing No.160823 and some other relevant documents.*

The will dated 24.5.1996 is a holographic will and is in the handwriting of deceased Ms.Rani Mullick and she was in sound disposing state of mind at the time of execution of will dated 24.5.1996 and had full testamentary capacity to execute her will.

13. *On the basis of will dated 24.5.1996, the petitioner is the only beneficiary who is going to inherit the estate of Late Ms. Rani Mullick and therefore the petitioner is entitled to file the present petition before this Hon'ble Court seeking probate of her will dated 24.5.1996.*

Considering the old age of petitioner and on the demand of some stock/debenture/bond companies etc. from whom the deceased Ms. Rani Mullick had taken Debentures, shares and bonds etc. and on their insistence for obtaining probate in respect of moveable assets of deceased Ms. Rani Mullick, the petitioner has been compelled to file the present petition before this Hon'ble Court."

8. Considering the fact that at this stage, it cannot be determined whether the pleas taken by the petitioner are unwarranted without the parties having led their evidence, the issue whether the present petition is barred by limitation, cannot be decided as preliminary issue and the parties would lead their respective evidence in this regard.

9. Consequently, the parties would now lead the evidence.

10. List of witnesses and evidence by way of affidavit of the petitioner's witnesses be filed within four weeks.

11. List of witnesses and evidence by way of affidavit of the respondent No.2's witnesses be filed within four weeks thereafter.

12. List before learned Joint Registrar for fixing the dates of trial on 28th April, 2020.

13. List before Court for monitoring the recording of the evidence on 17th August, 2020.

MUKTA GUPTA, J.

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