IN THE HIGH COURT AT CALCUTTA
Testamentary & Intestate Jurisdiction
ORIGINAL SIDE

Present:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

G.A. No. 990 of 2018

With

T.S. No. 7 of 2016

In the Goods of:

Hanuman Prasad Agarwal @ Hanuman Prosad Agarwal

And

Suresh Agarwal @ Suresh Kumar Agarwal

Vs.

Satyanarain Agarwal & Ors.

For the Plaintiff : Mr. Ranjan Bachawat, Sr. Adv.
Mr. Krishnaraj Thaker, Adv.
Mr. Avinash Kankani, Adv.
Mr. Suman Majumder

For the Defendant No.1 : Mr. Abhrajit Mitra, Sr. Adv.
Mr. Satadeep Bhattacharyya, Adv.
Mr. Niladri Bhattacharjee, Adv.
Ms. Deblina Chattaraj, Adv.

Last Heard on : 04.03.2020.

This matter was thereafter kept on 27.03.2020. Physical hearing of court matters was suspended from 23.03.2020.

Delivered on : 11.06.2020.

Moushumi Bhattacharya, J.

1. The defendant no.1 seeks rejection of the plaintiff's application for grant of probate which was converted to a contentious cause and consequently a testamentary suit by an order dated 20th April, 2016.

2. The application for probate; PLA No. 64 of 2015, was filed by one Suresh Agarwal, the executor of the last Will and Testament of Hanuman Prasad Agarwal, who died on 13th June 1993. The last Will and Testament was signed by the testator on 16th April 1989. The application for grant of probate sets out the heirs and legal representatives of Hanuman Prasad Agarwal (the testator) namely his 3 sons. The probate petition was filed on 8th September 2014. The present application for rejection of the probate proceedings was filed on 8th February 2018 by the defendant no.1, Satyanarain Agarwal, who is one of the sons of the testator.

3. The ground urged for rejection of the application for probate is that the application is barred by the laws of limitation.

4. Mr. Abhrajit Mitra, learned Senior Counsel appearing for the applicant/defendant No. 1, submits that the application for grant of probate should be dismissed on the ground that the application is barred by limitation. According to counsel, the application for grant of probate was filed after more than 22 years since the testator died on 13 June 1993. There is no explanation as to the reason for the delay in filing the application. Counsel relies on Article 137 of the Limitation Act, 1963 as being applicable for grant of probate and letters of administration. Counsel

relies on a number of decisions on this issue including *Kunvarjeet Singh Khandpur vs. Kirandeep Kaur* reported in *(2008) 8 SCC 463*; *Krishan Kumar Sharma vs. Rajesh Kumar Sharma (2009) 11 SCC 537* and *Paritosh Patra vs. Angur Bala Rana AIR 2014 Cal 133* and *Ramesh Nivrutti Bhagwat vs. Surendra Manohar Parakhe Manu/SC/1392/2019* for the proposition that the right to apply for probate accrues on the date of death of the testator. According to counsel, if Article 137 of the Limitation Act applies, then an application for grant of probate has to be filed within three years from the date when the right to make such application accrues. In the present case, since the deceased expired on 13th June 1993, the application for his last Will and testament dated 16th April 1989 should have been filed within three years from the date of death of the testator and also that there is no explanation for the delay or the grounds for seeking exemption from limitation as had been necessitated in *Church of Christ Charitable Trust And Educational Charitable Society vs. Ponniamman Educational Trust* reported in *(2012) 8 SCC 706*. Reliance is placed on *Harsh Vardhan Lodha vs. Ajay Kumar Newar* (2016) 120(2) CWN 673; *Umesh Chandra Saxena vs. Administrator General, U.P. Allahabad* AIR 1999 All 109 for the proposition that the principles of Order VII Rule 11 would apply to all proceedings which are governed by the laws of limitation.

5. Counsel further contends that the property forming the subject matter of the Will had been dealt with by a registered Deed of Gift dated 5th March 2011 by reason of which the plaintiff and the alleged beneficiaries of the Will were deemed to have knowledge of the said Deed of Gift as on the date of

execution and registration. [Ref: *Dilboo (Smt.) (Dead) by LRS. Vs. Dhanraji (Smt.) (Dead)* reported in *(2000) 7 SCC 702* and *GPT Healthcare Pvt Ltd vs Soorajmull Nagarmull* reported in *2018 SCC OnLine Cal 3800*]. It is also urged that a party cannot be expected to retain evidence as to the condition of the deceased or his mental and physical state as on the date of execution of the alleged Will and gross injustice would therefore be caused inasmuch as it may not be possible for the defendant no.1 to produce evidence as to the physical/mental condition of the deceased as on the date of execution of the Will in order to establish the invalidity thereof after a gap of 22 years. Counsel cites *State of Kerala vs. V.R. Kalliyanikutty AIR 1999 SC 1305* on the ground of application of *Doctrine of Repose*.

6. Mr. Ranjan Bachawat, learned Senior Counsel and Mr. K. Thakker, learned counsel appearing for the plaintiff/respondent seek to highlight the conduct of the defendant no.1 as would be evident from the relevant dates. The last Will and testament of Hanuman Prasad Agarwal dated 16th April 1989 was registered with the Registrar of Assurances on 21st June 1990. The probate application was filed on 8th September 2014 and was converted into a contentious cause due to the objection raised by the defendant no.1. The trial of the suit commenced on 25th January, 2018 with the examination of one of the witnesses of the Will, one Mr. Hariram Khiroria. Counsel relies on Article 137 of the Limitation Act, 1963 to urge that the right to apply accrues only when a challenge is made to the Will or the same is disputed, which constitutes a triable issue. In this connection, reliance is placed on *Arvind Garach vs. Pragna Garach* reported in *(2015) SCC OnLine Cal 6485*

where the decisions shown by the defendant no.1 namely *Kunvarjeet Singh Khandpur* and *Krishan Kumar Sharma* were considered and the Court held that the right to apply must be construed in the backdrop of a dispute having arisen for which it becomes necessary to apply for grant of probate to the Will. *Arvind Garach* was unsuccessfully challenged before the Supreme Court. Counsel further relies on section 276 of The Indian Succession Act, 1925 which does not require any particulars to be stated in an application for probate other than those mentioned in the section itself. Section 295 provides that only in cases of a contention/dispute, the proceedings shall take, as nearly as may be, the form of a regular suit; that is a suit in 'form' as held in *Jagdish D. Mehta vs. Suneel Anant Deshpande 2008 (5) Mh.L.J. 866*. Counsel relies on *Maharaj Indrajitsinghji Vijaysinghji vs H.H. Maharaja Rajendrasinghji Vijaysinghji* ILR (1955) Bom 912 where the Bombay High Court held that a probate proceeding which is treated as a suit on becoming contentious on the filing of a caveat is not a suit as contemplated under section 86 of The Code of Civil Procedure, 1908.

7. I have heard learned counsel for the parties and considered the case-laws relied upon. The controversy centres on the interpretation of the expression whether the 3 years commencing from '*when the right to apply accrues*' under Article 137 of the Limitation Act, 1963, implies the date of death of the testator or any other event which constrains a party to approach a court of law for taking the first step for implementing the Will (wish, interchangeably) of a testator. The words used in Article 137 are;

"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"*

It is clear from the above that although Article 137 applies in cases of grant of probate, the right to apply accrues not from the date of death of the testator but from which the dispute arises or when it becomes necessary to apply for grant of probate. In other words, a party may apply when a challenge is made to a Will or a dispute arises in relation thereto.It is also clear that there is no outer limit for filing an application for probate and the time starts running from the date when the right to apply accrues. The facts of *Arvind Garach* were almost identical to the present case where the petitioner in a revisional application had urged that the right of the executor to apply for probate accrues the moment the testator dies and limitation would therefore begin to run from the date of death. The Court considered both *Kunvarjeet Singh Khandpur* and *Krishan Kumar Sharma*– forming the sheet-anchor of the applicant's case- and held that the right to apply has to be interpreted in the perspective of the dispute which has arisen and which makes it necessary for grant of the probate to the Will and further that the 3 years under Article 137 would apply from the date on which the right to apply accrues. The Supreme Court's view in *Kunvarjeet Singh Khandpur, Krishan Kumar Sharma* and that of the Calcutta High Court in *Paritosh Patra* to the effect that Article 137 of the Limitation Act is applicable to probate proceedings cannot be called to question save that the right to apply

has to be construed in the light of the dispute which forces a party to apply for grant of probate. Neither of those decisions says that the 3 years must be counted from the date of death of the testator or that the right to apply would accrue as soon as the testator dies.

8. With regard to the second point raised by the applicant/defendant no.1 that the provisions of Order VII Rule 6 (Grounds of exemption from limitation law) and Order IV Rule 1 (Suits to be commenced by presentation of plaint) of the CPC have not been complied with, section 276 of The Indian Succession Act, 1925 – "Petition for Probate" is required to be considered and is set out below;

> ***"276.*** *Petition for probate.—*
>
> *(1) Application for probate or for letters of administration, with the Will annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the Will or, in the cases mentioned in sections 237, 238 and 239, a copy, draft, or statement of the contents thereof, annexed, and stating—*
>
> *(a) the time of the testator's death,*
>
> *(b) that the writing annexed is his last Will and testament,*
>
> *(c) that it was duly executed,*
>
> *(d) the amount of assets which are likely to come to the petitioner's hands, and*
>
> *(e) when the application is for probate, that the petitioner is the executor named in the Will.*
>
> *(2) In addition to these particulars, the petition shall further state,—*
>
> *(a) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and*
>
> *(b) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.*
>
> *(3) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another State, the petition shall further state the amount of such assets in each State and the District Judges within whose jurisdiction such assets are situate."*

It is clear from the above that besides the particulars stated in the section, there is no requirement of any further particulars or pleadings in an application for grant of probate. The procedural requirements of the CPC are to be followed only in contentious causes. Order IV Rule 1 of the CPC relates to institution of suits by presenting a plaint and that every plaint shall comply with Orders VI and VII as far as they are applicable (sub-Rule 2). Section 295 of The Indian Succession Act, 1925 which mandates proceedings to be in the form of a regular suit *only when there is a contentious cause*, is set out below;

> *"**295.** Procedure in contentious cases.—In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908 (5 of 1908) in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant."*

9. In *Jagdish D.Mehta,* the Bombay High Court held that a petition for probate is not a plaint and at no stage becomes a plaint as understood in the manner laid down in the CPC and cannot be treated as a suit by reason of the provisions of some other law. The reason for the view was succinctly expressed in paragraph 13 of the Report in the following words;

> *"It is true that a petition for probate is not a plaint and at no stage becomes the plaint as understood in the manner laid down in the Civil Procedure Code and in any case cannot be treated as a suit by reason of the provisions of some other law. In such proceedings though the caveator appears on the scene to oppose grant of probate or letters of administration to the petitioner, the plaintiff can never seek any relief against*

the caveator/defendant. He seeks from the Court only a probate of the last Will and Testament of the deceased. The petitioner in such proceedings, however, does not get this relief ex parte."

10. Relying on *Maharaj Indrajitsinghji*'s case and *Thrity Sam Shroff vs Shiraz Byramji Anklesaria* reported in *1970 Mh.L.J 324*, the Court placed emphasis on the words '*....take, as nearly as may be, the form of a regular suit...*' to hold that the Legislature never intended that the contentious proceedings should exactly be the same as a suit. Although in *Church of Christ Charitable Trust,* the Supreme Court held that a plaint has to conform to Order VI Rule 6 and specifically plead the ground upon which exemption from limitation is claimed, in that decision, the document on which the cause of action was based was not produced which led to rejection of the plaint. In the present case, the plaintiff has complied with all the requirements of section 276 of The Indian Succession Act.

11. The defendant no.1 has also brought in the factum of deemed notice on the part of the plaintiff by reason of the property being dealt with by the other sons of the testator contrary to the intention expressed in the Will. The deemed notice is the registration of the Deed of Gift. However, on perusing the written statement, this Court is inclined to accept the contention of counsel for the plaintiff that this case has not been pleaded by the defendant no.1 in the written statement. The contention now urged that the property has been dealt with cannot be used in an application for rejection of the probate proceedings if such fact is being urged for the first time and by way of an oral submission at that. The decision of the Supreme Court in

Dilboo (Smt.) (Dead) By LRS shown on behalf of the defendant no.1 in support of the argument that the plaintiff was deemed to have knowledge of the registered Deed of Gift, was rendered in a suit between a mortgagor and mortgagee. In *GPT Healthcare*, registered deeds of transfer of certain immovable properties were challenged where the Court upon considering the effect of Articles 58 and 59 of The Limitation Act, 1963, held that in a challenge to the execution of a deed, the date of registration has to be the date when the right to sue first accrues. The facts therefore were wholly different to that of the present case. In the judgment of the Allahabad High Court in *Umesh Chandra Saxena*, the Court did not elaborate on the reasons for the view that testamentary suits were suits for all purposes under the CPC which is also inconsistent with the view taken by the Bombay High Court in *Jagdish D.Mehta.* The ratio of *Ramesh Nivrutti Bhagwat* that the limitation for revocation of grant of probate is three years from the date of the original grant is wholly different from the present case which is for grant of probate. In any event,the Supreme Court in that decision referred to *Kerala State Electricity Board, Trivandrum v. T.P. Kunhaliumma* (1976) 4 SCC 634 and *Kunvarjeet Singh Khandpur* and reiterated that Article 137 would apply to grant of letters of administration for which proposition there is no dispute. The Court did not say that the three years would be counted from the date of death of the testator. *Harsh Vardhan Lodha vs Ajay Kumar Newar* was on a totally different factual premise where the Court considered the jurisdiction of a Probate Court to pass an interim order of injunction in appropriate cases in exercise of its inherent power where pending the appointment of an administrator *pendent lite* there was a likelihood of the

asset of the deceased being dissipated. The Court however reiterated the principle underlying Order VII Rule 11 that only the averments in the plaint must be seen for deciding on the issue of maintainability. This undisputed legal position has no relevance to the instant proceeding as the probate petition does not disclose any ground which would warrant its dismissal.

12. Therefore, none of the judgments cited on behalf of the defendant no.1 supports the contention that an application for grant of probate must be filed within three years from the date of the death of the testator.

13. The legality of the proposition which the defendant no.1 seeks to establish in this application needs to be examined a little bit further. The language of Article 137 of the Limitation Act is not 3 years from the date of death of the testator but when "*the right to apply accrues*" which means that the time envisaged will be activated once the right is denied, giving rise to a consequent need to assert the right. Further while section 293 of the Indian Succession Act provides for a cooling-off period of expiration of 7 clear days from the day of the testator's or intestate's death before a probate of a Will can be granted (and 14 clear days for a letter of administration), there is no outer limit within which an executor has to take out an application for grant of probate. The absence of an end-point within which such an application has to be filed is a deliberate legislative omission pointing to a larger rationale underlying cases involving grant of probate. First, the date of death of the testator cannot fix the executor with a simultaneous obligation to apply for probate as it may not be possible for the executor to know of the testator's death in every case. The implementation of the wishes of a testator

in terms of giving effect to the Will cannot be defeated merely on account of the delay on the part of the executor in applying for a probate. Second, in an application for grant of probate, no right is claimed by the applicant. The applicant only seeks recognition of the court to perform a duty, namely the duty cast by the author of the testament upon the executor with regard to administration of his estate. Third, except section 217 which regulates applications for probates/letters of Administration under Part IX of the 1925 Act, there is no provision in the Succession Act which compels the executor to file for grant of probate. Hence, if the right to apply for probate is seen as a continuing right, construing Article 137 as bringing down the curtain to such a right after 3 years cannot stand to reason and would frustrate the very object of the law preserving the wishes of a testator. Importing the provisions of the Limitation Act in a manner which would frustrate the last wish of the deceased cannot also be the intention of the Legislature since the decision of a Probate Court is a judgment in rem not only binding upon the parties to the probate proceeding but binding on the whole world. Till the order granted by the probate court remains in force it is conclusive as to the execution and validity of the Will till the grant of probate is revoked. Section 41 of the Evidence Act provides that an order of a competent court in exercise of probate jurisdiction is conclusive proof of the genuineness of the Will.

14. Although premised on the period of limitation contemplated for suits, a very recent decision of the Supreme Court may be referred to. In *Shakti Bhog Ford Industries Vs. Central Bank of India* (Civil Appeal No. 2514 and 2515 of 2020), pronounced on 5th June, 2020, the Supreme Court

considered the import of Article 113 of the Limitation Act- *"When the right to sue accrues"* as being a residuary provision which does not specify happening of a particular event as such but merely refers to the accrual of the cause of action on the basis of which the right to sue would accrue.

15. In *Kunvarjeet Singh Khandpur*, the issue before the Supreme Court was whether Article 137 of the Limitation Act was applicable to probate proceedings. Referring to *Kerala SEB v. T.P. Kunhaliumma,* the Court concluded that any application to a civil court under the Indian Succession Act would be covered by Article 137. However, the Court, in paragraph 15 of the Report, summarised its conclusions in the following manner;

> *"**15.** Similarly reference was made to a decision of the Bombay High Court in Vasudev Daulatram Sadarangani v Sajni Prem Lalwani. 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 the conclusion 'c' is the correct position of law."

Sub-paragraph (d) makes it clear that the right to apply is dictated by necessity and more important, may not arise within 3 years from the death of the testator. Sub-paragraph (b) specifically negates the contention of the defendant no.1 i.e. that the right to apply does *not* accrue on the date of death of the deceased.

16. Further, a combined reading of sections 211 and 213 of the Indian Succession Act makes it clear that an executor is the legal representative of a deceased person for all purposes and the property of a deceased person vests in the executor. Further, no right as executor or legatee can be established unless the Will is probated by a competent court. Hence, even if the executor does not apply for grant of probate, a beneficiary to a Will does not lose any valuable right bequeathed to him by the testator since the probate relates back to the date of death of the testator (section 227). If indeed there has been any delay in filing the application for grant of probate, the same is a triable issue and can be adjudicated at the time of trial of the suit, which had already commenced at the time of filing of the present application.

17. Since this Court is not inclined to accept that the application for probate is time-barred, the other objections with regard to compliance of Order VII Rule 6 and Order IV Rule 1 of the CPC are not relevant. The

Doctrine of Repose is also not relevant since the application for grant of probate was filed within time.

18. An application under Order VII Rule 11 of The Code of Civil Procedure for rejection of a plaint can only succeed if the applicant is able to make out a case of the plaint falling foul of any of the infirmities under Sub-Rules (a) to (f). The argument advanced on behalf of the defendant no.1 that the suit is barred by law (sub-rule (d)), namely Article 137 of the Limitation Act, cannot be accepted in view of the reasons stated above. Sub-Rule (d) makes it clear that the plaint must contain a statement which would give rise to the presumption of the suit being barred by law. In this case, the plaint does not disclose any statement which would attract Order VII Rule 11 (d) of the CPC.

19. In view of the above discussion, this Court does not find any merit in the present application for rejection of the Plaintiff's application for grant of probate.

G.A. 990 of 2018 is accordingly dismissed without any order as to costs.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(MOUSHUMI BHATTACHARYA, J.)