

HIGH COURT OF GAUHATI**Bench: Justice Devashis Baruah****Date of Decision: 22nd May 2024**

CIVIL REVISION PETITION (CRP) NO. 180 OF 2023

SULATA PAUL ...PETITIONER**Versus****ASHIM PAUL ...RESPONDENT****Legislation:**

Article 227 of the Constitution of India

Section 5 of the Limitation Act, 1963

Sections 263, 276 of the Indian Succession Act, 1925

Article 137 of the Limitation Act, 1963

Subject: Application challenging the order allowing the condonation of delay for the grant of probate.**Headnotes:**

Limitation Law – Condonation of Delay – Probate Application – Petition under Article 227 of the Constitution challenging the legality of the order passed by the District Judge, Tinsukia allowing condonation of delay for 1443 days in filing a probate application – Petitioner argued that the delay was inordinate and not sufficiently explained – Respondent claimed the limitation period should be counted from the date of discovering the will – Held, the right to apply for probate is a continuous right exercisable at any time as long as the right survives and the object of the trust exists – Application for condonation of delay was unnecessary under the circumstances – Court observed that probate applications are actions in rem and not actions in law. Application allowed. [Paras 1-13]

Right to Apply for Probate – Analysis – The right to seek probate of a will is a continuous right which can be exercised any time after the death of the testator – Applications for grant of probate are not barred by limitation if made

within three years from the date of knowledge of the will's existence. [Para 7-11]

Decision – The impugned order by the District Judge allowing the condonation of delay was unnecessary as the application for probate itself was within the permissible period – Directions issued for further proceedings in the probate case without considering the delay condonation application. [Para 13]

Referred Cases:

- Kunvarjeet Singh Khandpur v. Kirandeep Kaur & Ors (2008) 8 SCC 463
- Ramesh Nivrutti Bhagwat v. Surendra Manohar Parakhe (2020) 17 SCC 284
- Sameer Kapoor v. State through Sub Division (2020) 12 SCC 480
- Kerala State Electricity Board v. T.P. Kunhaliumma (1976) 4 SCC 634
- Lynette Fernandes v. Gertie Mathias (2018) 1 SCC 271

Representing Advocates:

Mr. S. Chamaria for the petitioner

Mr. D. Kalita for the respondent

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JUDGMENT & ORDER(ORAL)

22.05.2024

Heard Mr. S Chamaria, the learned counsel appearing on behalf of the petitioner and Mr. D Kalita, the learned counsel appearing on behalf of the respondent.

2. This is an application under Article 227 of the Constitution challenging the legality and validity of the order dated 02.05.2023 passed by the learned District Judge, Tinsukia in Misc.(J) Case No.04/2023 whereby the application for condonation of delay of 1443 days was allowed.

3. Mr. S Chamaria, the learned counsel appearing on behalf of the petitioner drawing the attention of this Court to the application so filed under Section 5 of the Limitation Act 1963 (for short, the Act of 1963) by the respondent herein submitted that the said application is completely vague and does not explain as to why it has taken seven years for the purpose of filing the application seeking grant of probate. He further submits that there is nothing mentioned in the application as to from what reliable source, the respondent herein had got the information that his mother had executed a registered will. He submits that the said will on the face of it appears to be suspicious. The learned counsel by referring to the impugned order of the learned Trial Court submitted that the learned Trial Court completely failed to take into account the well settled principles as to when a delay can be condoned. The learned counsel for the petitioner submitted that the delay being inordinate, the negligence being self evident, and the laches on the part of the respondent being apparent even if there is a sufficient cause shown, the Court ought not to have condoned the delay. In that regard, the learned counsel has drawn the attention of this Court to the judgment of the Supreme Court rendered in the case of Kunvarjeet Singh Khandpur Vs. Kirandeep Kaur & Ors reported in (2008) 8 SCC 463 as well as recent judgment of the Supreme Court in the case of Ramesh Nivrutti Bhagwat Vs. Surendra Manohar Parakhe, reported in (2020) 17 SCC 284. The said judgments have been placed before this Court to support his submissions that the period of limitation in terms with Article 137 of the Act of 1963 for the purpose of filing an application for grant of a probate commences on the date of the death of the testator.

4. On the other hand, Mr. D Kalita, the learned counsel appearing on behalf of the respondent submits that this is a case where there was no necessity of filing an application for condonation of delay, inasmuch as, a reading of Article 137 of the Act of 1963 would show that the period of three years has to be reckoned from the date when the right to apply accrues upon

the applicant and in the instant case, it is only when the respondent herein got a copy of the registered will dated 21.11.2013 on 25.09.2020, the period of limitation at best could have been reckoned from there and as the application was filed on 15.03.2021, the same was within the period of limitation. He further submitted that an application for grant of a probate in respect of a will is not a case where a right is sought. It is a case where, a legal recognition is sought to be given to the registered will or the last will of the testator, which is nothing but a moral duty which is imposed upon the executor. The learned counsel, therefore, submitted that unless and until the right to seek the probate of the will survives, it is a continuous right. In that regard, Mr. D Kalita, the learned counsel appearing for the respondent refers to the judgment of the Supreme Court in the case of Sameer Kapoor Vs. the State through Sub Division reported in (2020) 12 SCC 480.

5. I have heard the learned counsels appearing on behalf of the parties and have given due consideration to the respective submissions.

6. From a perusal of the application being Misc.Probate Case No.04/2021 and reading the same with the application under Section 5 of the Act of 1963, it transpires that the respondent herein who is the applicant came to learn from some reliable sources that his Late mother had left a will. Thereupon, the respondent herein made an application to the Public Information Officer, Tinsukia under the Right to Information Act, 2005 and was informed vide the communication dated 11.02.2020 about the existence of the will of his mother which was registered on 21.11.2013 and was supplied a copy to his lawyer, who handed over the same to the respondent herein on 25.09.2020. Thereupon on 15.03.2021, the said application was filed being Misc.Probate Case No.04/2021 along with an application for condonation of delay.

7. This Court for the purpose of deciding the respective submissions finds it very relevant to take note of that Section 276 of the Indian Succession Act, 1925 relates to a petition for probate. Section 263 of the said Act relates to revocation or annulment for just cause, the grant of probate or letter of administration. It is seen that the Indian Succession Act, 1925 does not

prescribe a specific period of limitation for grant of probate or for moving an application for cancellation of probate or letter of administration. In the case of Kerala State Electricity Board v. T.P. Kunhaliumma, reported in (1976) 4 SCC 634, the Supreme Court while distinguishing Article 181 of the Limitation Act 1908 with Article 137 of the Limitation Act 1963 observed that the limitation prescribed in Article 137 of the Act of 1963 shall be applicable in respect to a petition for grant of letter of administration or for a grant of probate. Thereupon, the Supreme Court in the case of Kunvarjeet Singh Khandpur (supra), observed that the crucial expression in Article 137 is “Right to Apply”. It was further observed that an application for grant of letter of administration merely seeks recognition from the Court to perform a duty and because of the nature of the proceedings it is a continuing right.

8. This Court further finds it relevant to take note of another judgment of the Supreme Court in the case of Lynette Fernandes Vs. Gertie Mathias, since deceased by legal representatives, reported in (2018) 1 SCC 271 wherein a question arose as regards the limitation for filing an application for revocation of grant of a letter of administration. In the said judgment, the Supreme Court observed at paragraph 19 that one must keep in mind that the grant of probate by a competent court operates as a judgment in rem and once the probate to the will is granted, then such probate is good not only in respect of the parties to the proceedings, but against the world. It was further observed that if the probate is granted, the same operates from the date of the grant of the probate for the purpose of limitation under Article 137 of the Act of 1963 in proceedings for revocation of probate. In the said case taking into account that there was an unexplained delay of 31 years, the Supreme Court held that both the District Court as well as the High Court were justified in rejecting the application for revocation of the grant of probate.

9. The judgment of the Supreme Court in the case of Sameer Kapoor (supra) as has been relied upon by Mr. D Kalita, the learned counsel for the respondent seems to be more apposite to the point involved, wherein the case involved two questions. The first question is as to whether Article 137 of the Limitation Act shall be applicable for an application for grant of probate or letter of administration and the second question was whether the

application under Section 228 of the Succession Act shall be barred by the period of limitation prescribed under Article 137 of the Act of 1963 and whether the period of limitation for application under Section 228 of the Act would start to run from the date of grant of probate by Court of competent jurisdiction situated beyond the limits of the State, whether within or beyond the limits of India. In respect to the first question, the Supreme Court, taking into account the judgment in the case of Kunvarjeet Singh Khandpur (supra) had opined that Article 137 of the Limitation Act shall duly apply. In respect to the second question, the Supreme Court dealt in with details as regards Article 137 and observed at paragraph 14.1 and 17 as hereinunder:

“14.1. When an application under Section 276 of the Act is submitted for probate or for letters of administration with will, if any objection is raised by anybody with respect to execution of the will, in that case, the applicant is required to prove the will and thereafter the will shall be probated and the court may pass an order for letters of administration. However, in a case where a will has been proved or deposited in a court of competent jurisdiction situated beyond the limits of the State, whether within or beyond the limits of India, in that case, as provided under Section 228 of the Act, when a properly authenticated copy of the will is produced, the letters of administration may be granted in favour of such person. Meaning thereby, in such a situation, the will is not required to be proved again and it shall be conclusive. Therefore, Section 228 of the Act shall be an enabling provision and it confers an additional right to apply for letters of administration on the basis of such authenticated copy of the will. Therefore, as rightly observed by the learned Single Judge and the Division Bench that Section 228 is akin to Section 276 of the Act.”

“17. Therefore, considering the law laid down by this Court in Kunvarjeet Singh Khandpur, it can be said that 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. That the proceedings filed for grant of probate or letters of

administration is not an action in law but it is an action in rem. As held by this Court in *Kunvarjeet Singh Khandpur*: (SCC p. 468, para 15)

“15. ... ‘16. ... (c) ... an application [for grant of 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.”

(emphasis supplied)

Therefore, even if the will is probated by any court mentioned in Section 228 of the Act, right to get the letters of administration is a continuous right which can be exercised any time, 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.”

10. From the above paragraphs so quoted, it would be apparent that when an application for grant of a probate or letter of administration is filed no right is asserted or claimed by the applicant. The applicant only seeks recognition of the Court to perform a duty. It was further observed that a probate or letter of administration issued by a competent court is a conclusive proof of the legal character throughout the world. Further to that, the proceedings filed for grant of probate or letter of administration is not an action in law, but it is an action in rem. It is categorically observed that the right to get the letter of administration is a continuous right which can be exercised at any time 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. This judgment of the Supreme Court in the case of *Sameer Kapoor* (supra) which was rendered by Two Judges Bench was affirmed with approval by a Three Judges Bench in the case of *Ramesh Nivrutti Bhagwat* (supra) wherein the question involved was particularly as regards revocation of a grant of letter of administration.
11. Therefore, from the above settled position of law as it stands today, an application for grant of a probate or letter of administration is an application seeking Court’s recognition 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.

12. In the instant case, it would be seen that the respondent herein had claimed that only on 25.09.2020, the respondent had received a copy of the registered will. It would also be seen that on 11.02.2020, the respondent received an information about the existence of the will executed by his mother, which was registered on 21.11.2013. Therefore, the respondent herein who has been made the executor as per the will had a moral duty to see it that the legal recognition is received by filing an application for the grant of probate. The same was done by the respondent within a period of three years from the date of his knowledge about the existence of the registered will and as such in the opinion of this Court, the question of filing an application under Section 5 of the Act of 1963 was not at all necessary in the instant proceedings. In that view of the matter, when the Section 5 application was not necessary, the order which has been impugned in the instant proceedings rightly or wrongly was not at all required for the purpose of entertaining the application for the grant of probate.

13. Under such circumstances, this Court holds that the impugned order passed by the learned District Judge, Tinsukia dated 02.05.2023 was not at all required as per the provisions of the law and the Court of the learned District Judge, Tinsukia could have entertained the Misc.Probate Case No.04/2021, sans the application seeking condonation of delay.

14. Before parting, this Court, however, makes it very clear that the observations so made as regards the will executed by the mother of the respondent or as regards the date of the knowledge of the respondent in respect of the will are only for the purpose of adjudication of the instant proceedings and the same shall not influence the learned District Judge,

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Tinsukia while deciding the Misc. Probate Case No.04/2021. All defences available under law to the petitioners herein can be taken during the probate proceedings.

15. Registry to send back the LCR forthwith to the learned Court below.

16. The parties are directed to appear before the learned District Judge, Tinsukia on 22.07.2024 for further proceedings in the Misc. Probate Case No.04/2021.

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